

Re Cargill Foods and United Food and Commercial Workers International Union, Local 633

[Indexed as: Cargill Foods and U.F.C.W., Local 633 (Re)]

File No. A/Y301824

Ontario
P. Craven

*Heard: February 8, and October 6, 2005, January 12 and 13,
March 28, April 11 and 19, May 9 and 30, July 5, August 18 and 31,
and November 21, 23 and 28, 2006, May 29, and July 24, 2007,
April 8, 10, 15 and 17, 2008*
Decision rendered: July 4, 2008

Technological change — Notice requirements — Expansion of existing video surveillance system constituting improvement in methods of operations — Significant change requiring advance notice and discussion with union — Employer not complying with notice requirements.

Privacy — Surveillance evidence — Expansion of existing video surveillance system — System not used to monitor employees in real time — Use of surveillance to investigate incidents relating to food safety, plant security and discipline constitutes legitimate exercise of management rights.

Privacy — General — Freedom from observation not workplace right — Employees' interest in personal privacy may be infringed by intrusive means of observation or inappropriate uses of surveillance product.

Remedies — Compliance orders — Employer expanded video surveillance system without notifying union — Appropriate remedy to restore lost opportunity for discussion.

[See *Brown & Beatty*, 2:1450; 4:2310; 4:2326; 5:2210; 7:3625]

Cases referred to

B.C. Institute of Technology and B.C.I.T. Faculty and Staff Assn. (Staff Seniority) (Re) (2000), 87 L.A.C. (4th) 423, 59 C.L.A.S. 461
Cargill Foods and U.F.C.W., Local 633 (Re) (2004), 133 L.A.C. (4th) 306, 79 C.L.A.S. 127
IKO Industries Ltd. and U.S.W.A., Local 8580 (Re) (2005), 140 L.A.C. (4th) 393, 81 C.L.A.S. 346 [aff'd 155 L.A.C. (4th) 225, 153 A.C.W.S. (3d) 872]
La-Z-Boy Canada Ltd. and Communications Workers of America, Local 80400 I.U.E. (Re) (2005), 143 L.A.C. (4th) 88, 82 C.L.A.S. 316
Leon's Mfg. Co. and R.W.D.S.U., Local 955 (Re) (2006), 153 L.A.C. (4th) 155, 86 C.L.A.S. 297
Phillips Cables Ltd. and U.E. (Re) (1974), 7 L.A.C. (2d) 218

- Puretex Knitting Co. and Canadian Textile & Chemical Union (Re)* (1979), 23 L.A.C. (2d) 14
- QBD Cooling Systems Inc. and C.U.O.E., Loc. 101 (CCTV Monitoring) (Re)* (1996), 57 L.A.C. (4th) 263, 45 C.L.A.S. 46
- Securicor Cash Services and Teamsters, Local 419 (Mehta) (Re)* (2004), 125 L.A.C. (4th) 129, 76 C.L.A.S. 133
- Sobey's Milton Distribution Centre and U.F.C.W., Local 175 (Re)* (2003), 74 C.L.A.S. 203, [2003] O.L.A.A. No. 498 (QL)
- St. Mary's Hospital and H.E.U. (Re)* (1997), 64 L.A.C. (4th) 382, 48 C.L.A.S. 519
- Thibodeau-Finch Express Inc. and Teamsters Union, Local 880 (Re)* (1988), 32 L.A.C. (3d) 271, 8 C.L.A.S. 12
- Toronto (City) and C.U.P.E., Local 79 (Re)* (2004), 128 L.A.C. (4th) 217, 77 C.L.A.S. 267
- Toronto Transit Commission and A.T.U., Loc. 113 (Belsito) (Re)* (1999), 95 L.A.C. (4th) 402, 63 C.L.A.S. 351
- Tri-Krete Ltd. and L.I.U.N.A., Local 506 (Re)* (2005), 142 L.A.C. (4th) 289, 82 C.L.A.S. 318
- Unisource Canada and C.E.P., Local 433 (Re)* (2003), 121 L.A.C. (4th) 437, 75 C.L.A.S. 214 [aff'd 130 L.A.C. (4th) 1, 242 D.L.R. (4th) 540, 2004 C.L.L.C. ¶220-058, 326 W.A.C. 153, 31 B.C.L.R. (4th) 230, 131 A.C.W.S. (3d) 864, 2004 BCCA 351]
- University of British Columbia and C.U.P.E., Loc. 116 (Ascencio) (Re)* (1996), 43 C.L.A.S. 350, [1996] B.C.C.A.A. No. 186 (QL)
- York University and Y.U.S.A. (Re)* (1999), 57 C.L.A.S. 462, [1999] O.L.A.A. No. 468 (QL)

Statutes referred to

- Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38
- Occupational Health and Safety Act*, R.S.O. 1990, c. O.1
- Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5

POLICY GRIEVANCE concerning video surveillance system.
Grievance allowed in part.

J. Evans and others, for the union.

D. Jarvis and others, for the employer.

AWARD

I was appointed by the Office of Arbitration, Ontario Ministry of Labour, to hear and determine a policy grievance dated June 17, 2003, wherein the Union alleged, 'Invasion of employee privacy; video stalking; alteration of an operational practice.' At the outset of the hearing, the Employer objected that the grievance was inarbitrable. After hearing the submissions of the parties, I issued an interim award on September 15, 2004, allowing the objection in part, reserving decision in part, and denying the objection in part

[133 L.A.C. (4th) 306]. The effect of the interim award was to narrow the scope of the factual and legal dispute between the parties. Nevertheless, the hearing of the merits required seventeen days of evidence, four days of argument, and a view of the Employer's premises. By agreement of the parties, the Employer led its evidence first while the Union made its closing submissions first and had the right of final reply. The ultimate onus of persuasion remains with the Union.

The grievance was filed in response to the Employer's installation of video surveillance cameras in its large meat packaging plant in 2003. The new cameras are listed in boldface type in Table 1 at page 220, below. The Employer had been using video surveillance in and around the plant since 1989. It had expanded and updated the technology at intervals since then. A central factual issue to be determined is whether the changes made in 2003 amounted to 'new or improved methods of operations, handling methods or facilities' or 'significant changes' within the meaning of article 3.03 of the collective agreement (set out below), as the Union alleges, or the mere incremental refinement and expansion of a pre-existing practice, as the Employer maintains.

There are two main branches to the Union's grievance. The first is that the Employer violated its collective agreement obligations to the Union by installing and activating the cameras in 2003 without the required advance notice and discussion. The second is that the 2003 changes were improper because they offend the privacy interest of employees in the bargaining unit.

Notwithstanding that the grievance was filed in response to the installation of the new cameras, and before they were activated, the parties agreed to lead evidence about how the cameras have been used in the period up to the commencement of the hearing of the merits in February 2005.

Collective agreement provisions

The collective agreement provides, in pertinent part:

Article III: Management Rights

- 3.01 The Union agrees that: the Employer has the exclusive right and power to manage its business, to control the direction of the staff including the right to plan, direct and control the operations, hire, suspend, or discharge for good and sufficient cause and to relieve

employees from duty because of lack of work. The right to establish and maintain reasonable rules and regulations covering the operation of the plant, a violation of which shall be among the reasons for disciplinary action including discharge, is vested in the Employer. The Employer will discuss the rules and regulations with the Union prior to their implementation. The above rights shall be exercised subject to the applicable provisions of the Collective Agreement including the grievance procedure.

- 3.02 The direction and supervision of the working force shall, at all times, be the responsibility of the Employer only.
- 3.03 The Employer has the right to introduce new or improved methods of operations, handling methods or facilities; the Union will be given advance notice of any significant changes and discussion will take place between the parties before the introduction of any change. Changes made in accordance with the above will be subject to the grievance procedure.
- 3.04 The parties agree that the foregoing enumeration of management's rights shall not be deemed to exclude other recognized functions of management not specifically covered in this Agreement. The Employer, therefore, retains all the rights not otherwise specifically covered in this Agreement.

The interim award

In brief summary, I found in the interim award:

1. There is no provision in the collective agreement that expressly addresses the installation or operation of surveillance cameras in the workplace.
2. The Union's claim that the implementation of video surveillance constituted the tort of invasion of privacy at common law (and was therefore arbitrable because it arose within the ambit of the collective agreement) was not arguable in the circumstances.
3. Having regard to the specific language of this collective agreement, the installation and operation of surveillance cameras is not a 'rule' or a 'regulation' within the meaning of article 3.01.
4. The Union's claim that the installation and operation of surveillance cameras violated the requirements for notice and discussion in article 3.03 is arbitrable. I reserved my determination as to whether the last sentence of article 3.03 affords a separate ground of complaint.

5. The question whether the installation and operation of surveillance cameras is a 'recognized function of management' within the meaning of article 3.04 should not be determined without an evidentiary foundation.
6. The Union's claim that the Employer was estopped by conduct and/or by express undertaking from installing and operating the surveillance cameras is arbitrable.
7. I reserved my determination of the Employer's claim that the Union was estopped from objecting to the installation and operation of the surveillance cameras.
8. The Union's position that the installation and operation of surveillance cameras amounts to a breach of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, is inarbitrable in the circumstances.
9. The Union is not precluded from arguing that the installation and operation of surveillance cameras was in breach of implied restrictions on management rights.

The position originally advanced by the Union and addressed in the preliminary award that the installation and operation of surveillance cameras discriminates against members of the bargaining unit need not be considered further as the Union has since abandoned that claim. With the Employer's consent, the Union waived on a 'without prejudice' basis any claim based on the federal *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, in relation to the present grievance.

Context

Video surveillance and related privacy concerns have been the subject of numerous recent awards. Arbitrator Kelleher's observation, flowing from his review of the jurisprudence in *Re Unisource Canada and C.E.P., Local 433* (2003), 121 L.A.C. (4th) 437 at p. 445, is apposite:

The difficulty with the decided cases is that they arise in a variety of contexts. The outcome of the case must take into account that context.

The context of the case before me is distinguishable in several important respects.

First, this is not a grievance about the admissibility of surveillance evidence in an arbitration proceeding. The question whether

the Company has breached its collective agreement obligations by installing and operating the impugned cameras is separate and distinct from the question whether the product of surveillance would be admissible at arbitration in particular circumstances. In any event, the uncontested evidence is that despite the presence of video cameras in the plant for more than a decade, the Company has never sought to introduce in-plant video evidence at arbitration (although it may on occasion have sought to introduce video evidence obtained away from the workplace).

Second, this is not a grievance about the introduction of video surveillance into ‘a workplace free from camera surveillance,’ as for example in *Re Tri-Krete Ltd. and L.I.U.N.A., Local 506* (2005), 142 L.A.C. (4th) 289 (Whitehead) at page 312; see also *Re Leon’s Mfg. Co. and R.W.D.S.U., Local 955* (2006), 153 L.A.C. (4th) 155 (Pelton) at page 162. Video cameras had been present in the plant for many years and had never before been the subject of a grievance.

This grievance does not concern video surveillance of employees outside of the workplace or in non-working areas of the plant. The Union does not object to camera coverage of the employee parking lot, lunchroom, or outside patio area.

Nor does this grievance concern surreptitious video recording within the employer’s premises, as for example in *Re St. Mary’s Hospital and H.E.U.* (1997), 64 L.A.C. (4th) 382 (Larson). The impugned cameras are readily observable, fixed in position, and mounted in a manner that does not conceal the direction in which they are ‘pointing’.

The Union does not object to the presence of ‘security’ cameras covering entrances and exits to the plant or specific pieces of equipment. Nor does it object to the fact that in the course of their duties members of the bargaining unit may be recorded as they pass through, or remain for a brief period within, the area covered by such cameras. This commonly happens in the warehouse, where distribution employees routinely pass within camera range as they move product and equipment around. The Union’s main objection is to those newly-introduced cameras that cover areas of the plant where members of the bargaining unit work all day at fixed workstations, and to the newly-introduced cameras in the main hallway through the plant.

Camera locations

The Company led evidence concerning each of the cameras in the plant, and supplied still images representing the field of view of each camera. The evidence about the area of the plant in which each camera is located and the year in which it became operational is summarized in the table below; the cameras newly introduced in 2003 are indicated in bold type. Cameras are identified here by their still image numbers in exhibits 6 and 11. In the balance of this award, individual cameras will be referred to by these image numbers.

In addition to the cameras listed in the table, two cameras were removed from the plant in or before 2003. One, installed in 1994, had covered the hallway outside the tote wash area. It was removed in 2003, ostensibly because the asset it had been installed to protect (boxed beef) is no longer shipped from this facility. The other had been mounted on a wall in the sausage room in 1997 and was removed along with the wall when the room was reconfigured sometime before 2003. Some of the cameras installed before 2003 have been relocated within the same general area, often as a result of room reconfigurations. One of the cameras in the warehouse or distribution area (camera 55) is not in working order and no image could be obtained.

The video surveillance system

Apart from the addition of 34 new cameras, other changes were made to the video surveillance system in 2003. The computer hardware and software that manages the system was updated and new equipment added. Recording is now switched on and off by motion detectors at each camera. The cameras record in colour and at high resolution. (This was made apparent by a view of the monitors in the security office; the printed images supplied in evidence lack the clarity and definition of the images displayed on the monitors.) The system records images from each camera digitally to hard disks, so that the capacity to retain images is limited by the amount of hard disk storage available, which can readily be increased. (At present, recordings are retained for about six weeks, simply as a function of disk capacity.)

#	Area	Year	Disputed	#	Area	Year	Disputed
1	Beef cooler	By 1990		33	Hallway	2003	•
2	Beef cooler	1997		34	Hallway	2003	•
3	Beef cooler	1997		35	Hallway	2003	•
4	Beef doors	2003		36	Hallway	2003	•
5	Beef receiving	1994		37	Maintenance	By 1990	
6	Beef room	2003	•	38	Maintenance	2003	•
7	Beef room	2003	•	39	Exterior	1994	
8	Beef room	2003	•	40	Exterior	1994	
9	Beef room	2003	•	41	Exterior	1994	
10	Beef room	2003	•	42	Exterior	By 1990	
11	Grind room	1997		43	Exterior	2003	
12	Grind room	1997		44	Exterior	2003	
13	Grind room	2003	•	45	Exterior	2003	
14	Grind room	2003	•	46	Exterior	By 1990	
15	Grind room	2003	•	47	Tote wash	2003	•
16	Sausage room	1997		48	Tote wash	1997	
17	Sausage room	2003	•	49	Tote wash	By 1990	
18	Sausage room	2003	•	50	Warehouse	1997	
19	Sausage room	2003	•	51	Warehouse	1997	
20	Sausage room	2003	•	52	Warehouse	1997	
21	Sausage doors	2003		53	Warehouse	1997	
22	Value added	2003	•	54	Warehouse	1997	
23	Pork doors	2003		55	Warehouse	By 1990	
24	Pork room	2003	•	56	Warehouse	By 1990	
25	Pork room	2003	•	57	Warehouse	1994	
26	Pork room	2003	•	58	Warehouse	2003	•
27	Pork room	2003	•	59	Inedible room	By 1990	
28	Poultry room	By 1990		60	Cafeteria	1994	
29	Poultry room	2003	•	61	EHS trailer	2000	
30	Poultry room	2003	•	62	Foyer	By 1990	
31	Poultry room	2003	•	63	Compactor room	By 1990	
32	Hallway	1994		64	Purchasing	2003	

Table 1: Camera locations and year of installation

There is the technical capacity to copy recordings to offline media such as compact disks or DVD's for indefinite retention, although this has not been done to date. The current system allows the user to view images recorded previously while the camera that made those images continues to record in real time. The software interface provides ready access to display current or recorded images from any camera for any date and time currently retained. Displayed images can be enhanced for viewing.

Images are displayed on video screens located in the security office. They are not continuously monitored in real time. No-one is assigned to sit in front of the displays and watch the video images on a regular basis. In the course of their duties, security officers will glance at the displays from time to time, but it does not appear that

they turn their attention to the monitors except to respond to an alarm (all external doors are equipped with alarms) or when specifically requested to do so by a supervisor. Production supervisors and managers review recorded video for particular purposes, described later in this award, essentially in response to incidents that come to their attention by other means.

Purposes of the system

A substantial proportion of the evidence at this arbitration addressed the purposes of the video surveillance system. It quickly became apparent that the purposes underlying decisions to purchase and install cameras, and the purposes for which cameras, once installed and activated, were used, were not identical although they could easily be confused. Much of what witnesses told me about why cameras were purchased and installed before 2003 was based on either vague hearsay or personal inferences drawn from how the product of surveillance was actually used after the fact. Despite the production of documents relating to the purchase of the new cameras in 2003, and the *viva voce* evidence of some of the managers who participated in meetings where this purchase was discussed, some aspects of that decision remain unclear, probably (in part) because different individuals saw the decision in different lights. Part of the rationale for the new cameras in 2003, at least in some managers' eyes, was concern about 'inventory adjustments,' that is, unaccountable product shortages, which might be attributed to theft, wastage, or accounting discrepancies of various kinds. There is no evidence before me, however, to indicate that any particular camera was located with a view to addressing this concern, or that the video surveillance system as a whole has been used, or even could be used, for this purpose.

In broad summary, and with some specific exceptions to be detailed later in this award, the main impetus behind the acquisition and installation of video surveillance cameras before 2003 was to secure plant entrances and exits, and the parking lot. Similarly, the main impetus behind the acquisition and installation of additional video surveillance cameras in 2003, and in particular most of those in dispute in this arbitration, was the 'food safety' function, described in detail below, which combines a concern with identifying and addressing contamination incidents of various kinds with a

concern to reduce the cost of such incidents by limiting the amount of product that has to be reworked or discarded as a result.

Once a camera had been installed to secure an exterior doorway, other incidental uses for the surveillance product arose. For example, I heard evidence about an incident involving two bargaining unit employees who locked a third employee inside a trailer at a loading dock. The loading door was covered by a security camera. The recording was reviewed in the course of investigating the incident and supported the Company's decision to impose discipline. Although the camera had been installed to secure an entrance into the facility, and arguably to deter unauthorized access and theft, it was used in the investigation of an incident unrelated to these concerns. Similarly, I heard evidence about the use of the camera at the main entrance to the plant to determine whether employees who had failed to respond to a supervisor's page had in fact left the plant and, if so, for how long. The image from this camera was not being monitored in real time, but when a supervisor was unable to locate an employee he might ask the security officer to review the recent recording to see whether the employee had left the plant and to pinpoint the times at which he or she left and returned. Once again, the camera, which had originally been installed for plant security purposes, was being used in the investigation of suspected unauthorized absences and to support the imposition of discipline. I heard about one such incident in which the Union asked the Company to review the video recording to support its claim that the individual employee facing discipline was being singled out unfairly because others were also leaving the plant at the same time. On this occasion the Company's review of the recording sustained the Union's position and the discipline was withdrawn. Before 2003, some of the plant security cameras were also used for incidental food safety purposes, as will appear below.

Similarly, cameras installed for food safety purposes in 2003 yield a surveillance product with other incidental uses, including plant security as well as employee discipline unrelated to contamination incidents. In an exhibit jointly prepared by Loganathan Duraisamy, a security guard, and Joanne Sandford, the food safety supervisor, for use at this arbitration, the purpose of all the cameras which the food safety supervisor had requested and located for food

safety purposes (described in detail below) was indicated to be “Security/FS.” Ms Sandford testified that the security purpose was inserted in the exhibit at Mr. Duraisamy’s urging. She had no first hand knowledge of any security-related reason for the installation of these cameras. It was evident from Mr. Duraisamy’s testimony about these cameras that in ascribing a security function to all of them he was relying on his understanding of how they might be used rather than on any particular knowledge of why they were acquired and installed, or (in most cases) any specific security concern relating, for example, to prior security incidents in a particular location. Any camera, installed for any purpose, may serve a security function should a security incident happen to take place within its field of view. The fact that the presence of a camera might prove useful in investigating a security incident should one arise does not necessarily mean that the camera was installed for security reasons. Taken altogether, the evidence before me is persuasive that the cameras identified on exhibit 10 as being installed for “Security/FS” reasons were acquired at the particular request of the quality assurance department for food safety purposes and were placed in specific locations as directed by the food safety supervisor. The potential use of such cameras for security or employee discipline purposes, should the occasion arise, is incidental to the food safety purpose for which the camera was acquired and located.

Three points are particularly noteworthy in this regard. The Union does not object to the Company’s incidental use of the product of surveillance in investigating employee discipline incidents unrelated to plant security. The Company has not relied on the product of surveillance at arbitration over discipline (or other) grievances. In every incident in evidence before me, the Company reviewed the surveillance video as part of the investigation of an incident that came to its attention by other means; there was no case in which an investigation or discipline was triggered by a review of the surveillance product in the first instance.

The tote wash incident

The sole occasion on which the Union is said to have objected to the use of video surveillance before the 2003 grievance is the so-called ‘tote wash incident,’ upon which the Union relies for its claim that the Company is estopped from operating the disputed cameras.

The evidence before me is persuasive that there was an incident (or incidents) involving one of the cameras in the tote wash area, but which camera was involved, when, who participated, what was at issue, and how it was resolved are all far from clear. No grievance was filed and there is no other documentation of the incident.

The tote wash area receives used totes — large trays in which packaged meat is distributed to the retail supermarkets to stock their meat cases — and processes them for reuse. There is a large machine into which dirty totes are fed and from which clean totes are taken. This machine has had a history of malfunctions. Various component parts, and at least once the entire machine, have been replaced from time to time. A crew of six bargaining unit employees is assigned to the tote wash. They rotate among various positions at the feed and output ends of the machine during the course of their shift.

Camera 49 was installed in the tote wash area in or before 1990. It covers the south or receiving end of the room where there are two loading bay doors and an exit door. The tote wash machine is not within the coverage of camera 49. Tote wash employees are visible intermittently as they pass through the field of view of this camera to move totes from pallets stacked near the receiving doors to the infeed area of the tote wash line. ('Visible' in this context means that the employee's image is recorded by the camera and can be viewed on a display.)

Camera 48 was installed in the tote wash area in 1997, at the request of the Company's distribution manager, Rick Heywood. Although its coverage includes one of the receiving doors also covered by camera 49, camera 48 was positioned to provide coverage of the infeed portion of the tote wash machine. Employees on the tote wash crew are visible throughout their stint at the infeed end of the machine. Mr. Heywood testified that the feed end is a critical part of the machine in that it controls production flow. There had been recurring problems with equipment damage at the feed end. His sole reason for requesting this camera was to monitor how that damage, if it continued, was happening. He had been unsure whether the damage was being caused by employees or by faulty equipment; he subsequently satisfied himself that, as he put it, ninety-eight per cent of the problem was with the equipment, which was subsequently replaced. To the best of his recollection,

no employee was counselled or disciplined as a result of viewing the recordings made by camera 48.

Camera 47 was installed in the tote wash area in 2003, again at Mr. Heywood's request. This camera covered the automatic tote stacker located in the north end of the room. The stacker was decommissioned in 2005. While it was in operation, a tote wash crew member was visible throughout his stint as machine attendant. Other members of the crew were visible intermittently when they entered the camera's field of view to communicate with the attendant. Mr. Heywood testified that his sole reason for requesting this camera was to monitor equipment jams in the automatic tote stacker.

Turning now to the evidence about the tote wash 'incident,' Mr. Heywood testified that several times — perhaps as many as fifteen times — he was notified by security staff that a totewash camera had been moved in its mount so that it pointed straight up at the ceiling. Each time this happened, he arranged to have the camera returned to its normal position. Mr. Heywood said he 'chalked it up to the employees working in the area.' The cameras involved were 48 and 49, most often 48. On at least one occasion, and probably two or three, he met with the tote wash crew and spoke to them about not moving the cameras. Mr. Heywood could not recall when these incidents began, or whether any Union officer had been involved in the discussions.

The Union's evidence, in brief, is that at some point camera 49 was moved in its mount so that instead of pointing towards the receiving doors it pointed towards the infeed portion of the tote wash machine where employees were working. Members of the tote wash crew objected to this, a meeting was held, and management agreed to return the camera to its former position. I heard the testimony of two Union witnesses in this regard.

Anthony DiMaio is currently the Union's business agent responsible for this local; from 1985 to 2001 he had been a member of the bargaining unit and, starting in 1992, a union steward. Mr. DiMaio recalled attending a meeting with members of the tote wash crew who were concerned about camera 49 being moved to cover the infeed during the day shift. He recalled them saying that they felt uncomfortable working in view of the camera for their entire shift, and that they felt they were being accused of sabotage. Mr. DiMaio

said the Union took the position that the cameras should not be focussed on bargaining unit members at their workstations. His understanding was that this position was brought to the Company's attention at the time (although he did not do so himself and was not present for any such discussion), and that as a result camera 49 was restored to its original position pointing at the receiving doors. Mr. DiMaio could not recall specifically who had been present at the meeting he attended, whether anyone from management was there, or when the incident took place.

Mike DiMarco has been a member of the bargaining unit since 1983 and has served continuously as union health and safety representative since 1994 or 1995. One day he and Mr. DiMaio, who was steward at the time, were paged to go to the tote wash area, where they attended a meeting with the tote wash crew and Mr. Heywood concerning camera 49 having been moved to cover the infeed end of the tote wash. In Mr. DiMarco's recollection, the tote wash crew had stopped work because they were upset about the camera. He recalled one member of the crew complaining that the camera had been moved to point at the workers because management was blaming them for putting totes into the machine upside down. The matter was resolved when Mr. Heywood said he would have the camera restored to its original position. Mr. DiMarco thought this incident happened in 1995 or 1996, but did not have a specific recollection of the date.

Both Mr. DiMaio and Mr. DiMarco rejected suggestions by counsel for the Company that they were misremembering a meeting about the camera having been pointed at the ceiling. Neither of them recalled having heard about any of the cameras being pointed at the ceiling before the arbitration hearing. Mr. Heywood had no recollection of a meeting about camera 49 being moved to cover the totes wash infeed, although he acknowledged that it was possible that such a meeting might have taken place.

I have also reviewed the testimony of security guard Logan Duraisamy, who insisted that the tote room cameras had never been moved except for one incident a month before the hearing when 'an employee moved the camera with a stick.' Mr. Duraisamy's certainty is inconsistent not only with the Union evidence but also with Mr. Heywood's recollection that security had brought it to his attention on as many as fifteen occasions that camera 48 or 49 had been moved to point towards the ceiling.

Weighing all the evidence on the balance of probabilities, I find that a meeting was held at which tote wash employees expressed concern about camera 49 having been repositioned in its mount so that it pointed towards the tote wash infeed instead of the receiving doors. This meeting most likely took place in 1995 or 1996, before the installation of camera 48. Mr. DiMaio's and Mr. DiMarco's understanding about the basis of the crew's objection — that they felt they were being accused of sabotage — is consistent with Mr. Heywood's acknowledgment that he was uncertain at the time as to whether the recurrent problems at the front end of the machine were caused by the employees or by defective equipment. I am also satisfied that the upshot of this meeting was that camera 49 was returned to its former position.

Nevertheless, given the vagueness with which the incident was recalled and the lack of cogent evidence that on this occasion the Union specifically objected to having cameras pointed at employee workstations or that the Employer undertook to cease that practice, this incident is insufficient foundation for an estoppel. I am strengthened in that view by the fact that within a year or two of the incident, when the Employer installed camera 48, covering essentially the same view of the infeed end of the tote wash and the employees working there as had been objected to when camera 49 was moved from its regular position, the Union made no objection, although it appears likely that one or more members of the tote wash crew continued to resist surveillance by pointing the camera towards the ceiling from time to time.

In any event, as it appears to me, the tote wash incident does not illustrate the broad proposition that bargaining unit members are unwilling to work within view of the cameras, but rather suggests the narrower truth that people are likely to resent implicit accusations of negligence or sabotage and to resist accordingly.

Other equipment cameras

Along with camera 48, installed in 1997 to cover the infeed end of the tote wash machine, a few other cameras were installed in the same year to cover specific pieces of equipment, in particular the large frozen meat grinders or primary grindery then in use in the grind room (cameras 11 and 12) and the sausage room (camera 16 and another camera, since removed). Like the tote room camera, these cameras imaged equipment operators as they worked around

the particular machine. Their purpose was to assist in investigating and accounting for equipment malfunctions, for the presence of contaminants (for example, paper and gloves) in the infeed hopper, and perhaps also to discourage suspected sabotage or product tampering (none was proven). As Ms Sandford's evidence (discussed in the next section) made clear, the grind and sausage room cameras continued to be used in the food safety system to investigate contamination events in these rooms even after the equipment in question was retired and the Employer began to rely on outside suppliers for ground meat.

Food safety

Most of the new cameras to which the Union takes exception are justified by the Employer as part of its food safety program. I heard evidence about this program from Joanne Sandford, who holds the position of Quality Assurance Supervisor, Food Safety. She has been employed by the Employer in this capacity since January 1998. She is responsible for the Employer's compliance with the food safety requirements of the Canadian Food Inspection Agency (CFIA), and in particular the Hazard Analysis Critical Control Point (HACCP) program, described below. She is also responsible for the Employer's compliance with the product labelling requirements of the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38. In addition to Ms Sandford, the Employer employs two other Quality Assurance supervisors, one in charge of the laboratory which performs microbiological testing of incoming raw materials and of finished product and manages the plant sanitation program, and the other in charge of product auditing, which monitors raw materials and finished products for compliance with Employer and customer specifications.

HACCP is an international standard mandated by CFIA for federally-regulated establishments, of which the Employer is one. It covers equipment, building maintenance, transportation, storage, training and other aspects of the food production process, including provision for product recalls in the event of contamination or mislabelling. As implemented by the Employer, HACCP involves establishing a series of critical control points in the production process at which a range of food safety factors — for example, the temperature and age of the meat — are monitored and recorded by production employees and quality

assurance technicians. There are specifications for each factor at each stage of the production process (critical limits). The program includes procedures for monitoring compliance with critical limits, dealing with deviations, and verifying the accuracy of the data collection and recording.

Food safety or contamination incidents have many causes. While on a few occasions intentional tampering has been suspected (and other possible causes ruled out), no such incident has been confirmed during Ms Sandford's tenure. Among the common causes of food safety incidents at the plant are foreign objects in ground beef and other materials supplied by contractors; chemical contaminants such as cleaning fluids, grease and oil leaking from equipment; biological contaminants such as manure and blood; mechanical contaminants such as pieces of production equipment that fall into the meat; and errors in labelling. Some incidents are brought to the Employer's attention by the customer, but most are observed by employees and reported during the production process. When incidents are reported before the contaminated or mislabelled product leaves the plant, the first step is to halt production. All potentially affected product is brought back and contained. The incident is investigated and documented. Corrective and protective measures are designed and implemented, and compliance is monitored.

Before 2003, the video cameras were useful in investigating food safety incidents that occurred in areas covered by the surveillance system. Some of the critical control points established under the HACCP system were within camera coverage. Cameras covering the receiving doors in the distribution department could be used to confirm when and where materials arrived and how they were handled, which in turn could help to determine whether suppliers were responsible for contaminants. The cameras covering the large pieces of equipment in the grind and sausage rooms were important tools in investigations of incidents that arose there. There were nearly two hundred incidents between June 2000 and May 2003. Ms Sandford said that video recordings were viewed during the investigation of approximately half of them. None of the incidents came to the Employer's attention as a result of monitoring or viewing video surveillance in the first instance; all of them were initially identified and reported by production or distribution employees, supervisors,

or quality assurance staff. The video recordings were useful investigative tools for confirming employee reports, establishing timelines, and allocating responsibility. In several cases, the video record made it possible to pinpoint the time of contamination or the extent of the contaminated area, thereby limiting the amount of product that needed to be contained and either condemned or reworked, which reduced the costs of those incidents accordingly. In other cases, the video record helped to confirm that outside suppliers or cleaning contractors were responsible for the contamination and its associated costs. The video record was also used to verify that appropriate corrective action had been taken by employees upon observing an incident.

Starting in 2002 the quality assurance department asked for additional cameras to be installed in areas where food safety incidents had occurred but video surveillance was unavailable. Once senior management had approved the expense, Ms Sandford was asked where the new cameras should be located. Her specific requests for cameras at previously unmonitored HACCP critical control points resulted in the installation of cameras 6, 7, 8, 9, 10, 13, 14, 15, 17, 18, 19, 20, 22, 24, 25, 26, 27, 29, 30, 31 and 58. All these new cameras are in dispute in this arbitration. Many of them survey broad swaths of the production process, imaging large numbers of bargaining unit employees at fixed locations where they remain throughout their working time. The new cameras have played the same role in investigations of food safety incidents as the pre-existing cameras discussed above. Ms Sandford described several investigations between July 2003 and February 2005 during which she reviewed video recorded by some of the new cameras. There is no significant distinction to be drawn between the old and the new cameras in respect of their food safety application. However, the large number of new cameras overseeing HACCP stations has markedly improved the quality assurance department's ability to track the movement of product through the facility, with implications for limiting the costs of food safety incidents by restricting the quantity of product that must be quarantined or condemned in such incidents.

Hallway cameras and 'TAWs'

Visitors and employees enter the plant through a single main entrance, controlled by a security guard, and pass south through the

foyer to an east-west corridor, referred to as 'the main hallway'. The main office area is at the west end of this corridor; the locker rooms and cafeteria are on the north side of it east of the foyer. Three alcoves on the south side give access to doorways into the pork, sausage, and beef production rooms. Another corridor, referred to as the 'tote wash hallway,' runs east to west on the north side of the battery and tote wash rooms, linking the finished product warehouse (which lies to the south of the production rooms) to the supply storage and receiving areas. Cameras were installed in the foyer (camera 62), the east end of the main hallway (camera 32) and the tote wash hallway (removed in 2003) in the early 1990s. Camera 62, in the foyer, covers the doors leading to the main hallway. Camera 32 covers the main hallway looking west, including a bank of pay telephones and entrances to the cafeteria and washrooms. New cameras were installed in 2003, one at the west end of the main hallway looking east (camera 33), and one in each of the three alcoves, covering the entrances to the production rooms (cameras 34, 35 and 36).

The function of these hallway cameras is described as 'security' on the camera list exhibits prepared for the arbitration hearing by Mr. Duraisamy and Ms Sandford. The camera formerly in the tote wash hallway is said to have protected an asset (boxed beef) which is no longer shipped from this facility. The cameras in the main hallway do not cover entrances to or exits from the plant, or large pieces of equipment with a history of intractable breakdowns, or portable assets. The Union alleges that the new cameras were installed to monitor employee conduct as part of the Employer's efforts to regulate employees' 'time away from work stations,' referred to by the parties as 'TAWS'. The Union bases this allegation on two main observations. First, it says, shortly after the new cameras were activated the Employer discontinued its former practice of posting supervisors with stopwatches and clipboards in the main corridor to monitor employees away from their work stations. Second, it points out that the Employer abandoned the project of installing swipe card sensors at entrances to the production rooms when it installed the new cameras there.

The Union's allegation about the purpose of these cameras invites the inference that the Employer is using video surveillance to gather data about the frequency and duration of individual employees' washroom visits, pay phone use, and so forth. The Employer rejects

the Union's allegation, largely by rebutting its observations. The Employer says it has not stopped using supervisors to monitor the main hallway, and that the abandonment of the swipe card project is unrelated to the installation of the new cameras and its concerns about TAWS. The Employer also points out that camera 32, at the east end of the main hallway, has been there since 1994 without objection from the Union.

Describing the view from camera 32, Mr. Duraisamy said that security guards watching the video display could see employees in the main hallway coming and going to the cafeteria and washrooms, and leaving after work. Asked why this camera was installed, he gave it as his understanding that glass-covered showcases and notice boards on the wall were being damaged by employees pushing each other during breaks, and that during their working hours employees were hiding in the change room and cafeteria watching television and playing games. He said that these kinds of things are recorded, and whenever supervisors need to check on these people they come and review the video recording. As explained earlier in this award, Mr. Duraisamy's testimony may not be a reliable guide to the original purpose for which this or any camera (except camera 61 in the EHS trailer, which he specifically requested to have installed) was acquired and located. There is sufficient particularity in his discussion of camera 32, however, to warrant the conclusion that it has been used for the (possibly incidental) purposes he described.

Dana McKechnie was the Employer's human resources manager at this facility from January 2000 until November 2001, and plant manager from August 2002 until December 2005. In the latter capacity he was involved in decision-making about the expansion of the video surveillance system. He said the rationale for the new cameras included unexplained inventory losses, property damage and food safety concerns. Mr. McKechnie acknowledged in cross-examination that during this process there were discussions about using video cameras in combination with the swipe card door access system to monitor TAWS, and that one aspect of the financial justification for the system was anticipated savings through the reduction of TAWS. He agreed that Employer-generated documents produced to the Union indicated that the new cameras were expected to generate significant cost savings with regard to TAWS. Mr. McKechnie

maintained, however, that the TAWS objective depended on completion of the swipe card system, which the Employer abandoned at about the same time as the new cameras were installed. Without the card system, Mr. McKechnie did not consider the cameras to be useful for addressing TAWS: 'I don't know how you could use them, I don't think it is an effective tool to sit and watch the cameras all day.' In his opinion, the cameras were not introduced with a view to monitoring TAWS.

Darren Whipp began working at the facility as a management trainee in May 1998. He worked in the human resources department from 1999, becoming acting human resources manager when Mr. McKechnie left in 2001 and human resources manager shortly thereafter, remaining in that position until he left the facility for another Cargill operation in October 2005. As a member of the business management team he participated in meetings at which the expansion of the video surveillance system was discussed. He recalled that the rationale included food safety and deterring theft, and that the cameras could be useful in investigating property damage incidents. Mr. Whipp acknowledged that TAWS figured in these discussions, but said that it came up in connection with the swipe card system rather than expanded video surveillance. As part of the same project that financed the new cameras, magnetic locks and the associated wiring for swipe card terminals were installed at the three sets of doors leading from the main hallway to the production areas. Shortly thereafter, however, the management team decided not to go ahead with the installation of swipe card stations; the magnetic locks and wiring were removed. In Mr. Whipp's opinion, TAWS concerns played no part in the decision to install additional cameras. The management team decided to continue dealing with TAWS by having supervisors monitor the hallway. Mr. Whipp believed that this process continued after the activation of the new cameras as it had before. He recalled having had a discussion about it with another manager, and said that many TAWS-related disciplines were issued, although he could not specifically recall having seen a supervisor with stopwatch and clipboard in the corridor after July 2003. Mr. Whipp acknowledged that the video cameras may have been used to investigate TAWS in isolated cases, but maintained that they were not installed for that purpose, nor were they the principal means of dealing with TAWS.

Mr. DiMaio testified about a grievance over discipline for taking too long in the washroom, in which the Employer relied on hallway video evidence. The incident took place after the activation of the new cameras; Mr. DiMaio was unable to say whether it occurred before February 2005, the parties' agreed cut-off date for evidence of how the cameras have been used. In cross-examination he agreed that the Employer had relied on video evidence in at least one TAWS investigation prior to 2003, although he disagreed that the employee in that case had actually been away from his workstation improperly.

Mr. DiMaio testified about the Employer's practice of stationing supervisors in the main hallway to 'stopwatch' employees outside of regular break times. He said that after the cameras were activated in 2003 he no longer saw supervisors with stopwatches in the hallways when he had occasion to visit the plant in his capacity as Union representative. Mr. DiMaio formed the impression that supervisors were now keeping track of employees' movements from inside the production room.

With regard to the production door alcove cameras (34, 35, 36), it is apparent that they were originally intended to complement the swipe stations planned for each of those doors. I accept Mr. McKechnie's evidence that the swipe stations and cameras in combination were intended to help control TAWS. I heard no evidence about the purpose or utility of these three cameras in any other context. It appears to me that the sole purpose of cameras 34, 35 and 36 was to complement the swipe card system. The Employer activated these cameras even though it had abandoned the swipe card system. In theory they could be used to monitor TAWS, but as Mr. McKechnie pointed out this would involve having someone sit and watch the video display all day, which he considered ineffective, and which in any event would mean continuous real-time monitoring of the video surveillance system, which is a practice that the Employer has specifically denied. I conclude, therefore, that these three cameras are a redundant vestige of an abandoned project.

Camera 33, on the other hand, complements camera 32 inasmuch as it covers the same main hallway from the opposite end. The Union does not object to camera 32 and accepts its stated security function.

Other new cameras in dispute

Camera 38, installed in 2003 to cover the maintenance department parts cage, is in dispute in this arbitration. Apart from the

notation on the camera list exhibit that this was a 'security' camera, no evidence was tendered relating to its specific purpose or why it was objected to.

As already noted, camera 47 was installed in 2003 at Mr. Heywood's request exclusively to monitor equipment jams in the automatic tote stacker. Whether or not this was an appropriate use of video surveillance at the time, the camera became redundant in 2005 when the automatic tote stacker was removed.

Notification issue

Article 3.03 provides that the Union will be given advance notice of any significant changes and discussion will take place between the parties before the introduction of any change. The Union complains that the Employer did not give advance notice of the installation of the new cameras in 2003 and that they were introduced before discussion took place between the parties, in violation of this provision. The Employer responds that the installation and activation of the additional cameras in 2003 was not a 'change' in the sense intended by article 3.03, and that in any event there was notice and discussion before the cameras were activated. In this section I review and summarize the evidence about communications between the Employer and the Union on the topic of the new cameras.

Mr. Whipp recalled receiving a telephone call from Mr. DiMaio on June 16, 2003, after installation of the new cameras had begun but before they were activated. Mr. DiMaio expressed concern about the new cameras and indicated he was receiving complaints from members about them. Mr. Whipp told him that additional cameras were being installed for food safety, product recall, security, protection of assets and loss prevention. He did not go into details. Later that day, he prepared and faxed a letter to Mr. DiMaio:

As you are aware we have had video surveillance camera's throughout the workplace for over 14 years for the purposes of food safety, loss prevention and protection of assets. The Company is planning on expanding our current system to include more camera's throughout the facility. Prior to activating any additional camera's I will discuss these additions with you further. If you have any questions, please feel free to contact me to discuss.

Asked why he had included the invitation to discuss the matter further. Mr. Whipp said that it was out of courtesy because Mr. DiMaio had said that he was really concerned about the issue. The following day Mr. DiMaio attended at the plant for a grievance meeting, and while there he filed the grievance that is the subject of this arbitration.

Mr. Whipp says that he had a brief discussion with Mr. DiMaio reiterating the substance of their telephone conversation the previous day. At this point Mr. DiMaio filled out a grievance form and handed it to him. Mr. Whipp looked it over and asked what ‘video stalking’ meant. He understood Mr. DiMaio’s concern to be that the Employer would be actively watching employees as they moved around the facility.

The same day, Mr. Whipp prepared and posted a notice to employees. He said that he did so because Mr. DiMaio had told him that the new cameras were of great concern to a number of employees. The posting, dated June 17, 2003 and directed to all employees, stated:

As many of you are aware, we have been upgrading our video surveillance system recently. This has included the installation of additional cameras throughout the workplace. The Company has operated a video surveillance system for over 14 years for the purposes of food safety, loss prevention and protection of assets. It is our intention to continue using the existing system and additional cameras for the same purpose. We will inform you when we intend on activating the additional cameras, as they are currently not yet in operation.

Subsequently, on July 14, Mr. Whipp wrote to Mr. DiMaio denying the grievance, making reference to discussions they had had during the grievance procedure on July 9 (which the Employer does not rely upon to show compliance with article 3.03), and giving notice that the new cameras were to be activated on July 28. Also on July 14, Mr. Whipp posted another notice to employees:

As indicated in the June 16, 2003 posting, we have been upgrading our video surveillance system recently for the purposes of food safety, loss prevention and protection of assets. The additional cameras will be activated throughout the facility on July 28, 2003.

In cross-examination, Mr. Whipp acknowledged that the decision to purchase and install the cameras had been made before any discussion was held with the Union, and that some if not all of the cameras had already been installed in the plant, although not yet activated, at the point that Mr. DiMaio first raised the issue. He acknowledged that Mr. DiMaio’s enquiry, the subsequent discussion, and the filing of the grievance did not delay or otherwise interfere with installing and activating the new cameras. From the Employer’s point of view there was no need to seek the Union’s approval for the expanded video surveillance system. Mr. Whipp

said that if Mr. DiMaio had not first raised the issue, he would not have communicated with the Union about the new cameras.

Mr. Whipp acknowledged that despite what he put in his June 16 letter to Mr. DiMaio, the Employer was not merely ‘planning’ to expand the surveillance system, but was already implementing its firm decision to do so. Mr. Whipp recalled that the fact that the Union had raised concerns was discussed by the management team, as was the activation date for the new cameras, but he did not have a specific recollection of the substance of those discussions. They did not include a consideration of the collective agreement or of article 3.03 specifically. Mr. Whipp had not turned his mind to that provision before the arbitration hearing commenced.

Mr. DiMaio’s evidence coincides with Mr. Whipp’s in most respects. He says he learned from the chief steward that the Employer was installing new cameras in various areas of the plant, including the production rooms, and that members were concerned about it. He initiated contact with the Employer by telephoning Mr. Whipp on June 16. Mr. DiMaio recalls mentioning the toteswash incident during that conversation; Mr. Whipp did not recall the details of what Mr. DiMaio told him beyond the fact that the Union was concerned about the new cameras.

Mr. DiMaio’s evidence about the June 17 meeting was that he had begun to fill out the grievance form beforehand, possibly on June 16, and completed it in Mr. Whipp’s presence during the meeting. Counsel for the Employer objected to the reception of this evidence as it tended to contradict Mr. Whipp’s testimony that Mr. DiMaio had filled out the form in his presence following a brief discussion that reiterated the substance of their telephone conversation, but Mr. DiMaio’s version had not been put to Mr. Whipp in cross-examination. In my opinion, Mr. DiMaio’s evidence does not undermine Mr. Whipp’s credibility, as he had no way of knowing, as he watched Mr. DiMaio writing on the grievance form, whether any part of it had already been filled in beforehand. Nor does it transform any conversation that may have taken place between them before Mr. DiMaio handed the grievance form to Mr. Whipp into a privileged communication during the grievance procedure. In any event, neither party maintains that anything of substance was said during the discussion on June 17 that had not already been said during their telephone conversation the previous day.

Mr. DiMaio testified that he had been unaware that the Employer was considering expanding the video surveillance system before the Union's chief steward told him that additional cameras were being installed. No-one in management had said anything to him about changes to the surveillance system. He had never had any discussion with any representative of the Employer on the topic of video surveillance in the workplace except in the context of specific grievances. He had not been aware of the precise locations of the various cameras or of the details of the pre-existing or expanded surveillance system before the commencement of the hearing in this arbitration.

Was article 3.03 triggered?

The provision for advance notice and discussion in article 3.03 arises in the context of 'new or improved methods of operations, handling methods or facilities.' There is an issue between the parties as to whether the installation and activation of additional cameras and associated changes to the video surveillance system in 2003 came within the scope of this provision. If it does, there is a further issue as to whether it amounted to a 'change' and, if so, whether the change was a 'significant' one.

For the Union, Mr. Evans maintained that the introduction of the disputed cameras amounted to a new or improved method of operations within the meaning of the provision. The purpose of the provision was to ensure that discussion take place between the parties before changes are introduced into the workplace. In support of its position, the Union cited *Re Thibodeau-Finch Express Inc. and Teamsters Union, Local 880* (1988), 32 L.A.C. (3d) 271 (Burkett), interpreting maintenance of conditions language relating to 'area or operational practices' in light of the introduction of video surveillance; similarly, *Tri-Krete Ltd.*, above.

For the Employer, Mr. Jarvis argued that the evidence shows the video surveillance system to be a tool used in the company's operations, rather than a method of operations in itself. He suggested, for example, that the company's entire security system can be seen as a method of operations, while the cameras are just tools integrated into that method. Similarly, the entire food safety enhancement program could be viewed as a method of operations in which the cameras are tools. The fact that the same cameras are used in both security and food safety underscores that they are not a 'method of operations' in

themselves. In support of this analysis, Mr. Jarvis referred to a passage in *Re La-Z-Boy Canada Ltd. and Communications Workers of America, Local 80400 I.U.E.* (2005), 143 L.A.C. (4th) 88 at page 97, where arbitrator Surdykowski notes that ‘surveillance can be a management technique or tool, but it is not a “rule”.’ In the same way, the Employer urges, it is not a method of operations. Mr. Surdykowski went on to observe that, ‘an employer can conduct surveillance as a matter of procedure or “policy” (i.e. as a course or general plan of action).’ On this analysis; if the parties had intended to include the cameras within the scope of article 3.03 they would have referred to policies or procedures rather than methods of operation. The collective agreement in *Re Phillips Cables Ltd. and U.E.* (1974), 7 L.A.C. (2d) 218 (O’Shea), addressed ‘a change in operating methods, conditions and designs and tools for making parts,’ suggesting a distinction between operating methods and tools.

Mr. Jarvis argued that a ‘method of operations’ is something that broadly affects the way employees engage in the production process, involving a direct and tangible impact on the way people do their jobs. In *Phillips Cables*, above, at pages 222-3, arbitrator O’Shea distinguished between minor changes like adding another set of controls, which minimally affected ‘an operator’s method or condition of operating,’ and a change from a three-man crew to a two-man crew, which ‘clearly constitutes a change in the *operating* methods and conditions’ within the meaning of that provision. In the Employer’s submission, the presence of the video surveillance system does not affect the way bargaining unit employees do their jobs, so it is not a method of operations.

In reply, Mr. Evans pointed out that the provision refers to ‘methods’ and ‘operations’ in the plural, suggesting specific methods rather than the broad general systems described by the Employer. As for its operational impact on employees, the introduction of the new cameras directly affected the way production employees were required to do their work.

Having considered these submissions, in my opinion the phrase ‘methods of operations’ is broad enough to comprehend the use of continuous video surveillance throughout the workplace in support of the plant security and food safety functions. An isolated camera installed for a limited purpose or in response to a particular incident might be considered a ‘tool.’ Here, however, the Employer

has chosen to install a large number of cameras integrated into a sophisticated surveillance system that, in its current configuration, has the capacity to follow the flow of production through the majority of stages from receiving materials to warehousing and shipping final products. As to whether the presence of this system impinges on how bargaining unit employees do their jobs, I agree with the Employer that it does not require them to perform different tasks, or the same tasks in different ways, than if the cameras were not in place. I also accept the Union's view that having to perform under continuous video surveillance can alter the experience of work. There will be more on this topic below. Suffice it to say for now that the idea of 'how people do their jobs' is broad enough to include such environmental and existential conditions as the presence or absence of electronic surveillance, as well as the purely mechanical functions of task performance. I find, therefore, that the video surveillance system constitutes one of the Employer's 'methods of operations' within the meaning of article 3.03.

As to whether the expansion and upgrading of the video surveillance system in 2003 amounted to a 'new' or 'improved' method of operations, the Employer argues that for many years before 2003 it had used cameras in support of plant security, industrial discipline, and food safety. There was nothing new about the use of cameras for these purposes in 2003. The expansion of the system in 2003 was just one in a series of incremental changes in the number of cameras and the technology used. Nor did the expansion amount to an 'improved method,' although it may have involved improvements in method. Moreover, the cameras had always imaged employees in the performance of their work. Many of the security cameras covering exterior docks and doorways routinely imaged bargaining unit employees as they worked in the area or passed through the field of view. Cameras installed to cover fixed equipment like the tote washer or the primary grinder routinely imaged employees assigned to operate that equipment. The fact that more cameras covered more employees after the 2003 expansion than before did not make it a 'new' method or an 'improved' one. Notwithstanding the Union's contention that the company had never before used cameras to monitor employees in the performance of production, there was no evidence before me that the cameras were being used for this purpose. The only suggestion to the contrary is with respect to the

cameras covering the tote wash infeed and the primary grinders, which were installed in 1997 without objection by the Union. The Employer's position is that it does not use the video surveillance system to monitor employee performance.

While it is difficult on the evidence before me to say whether the expansion of the video surveillance system noticeably improved its contribution to plant security or (given the Employer evidence about TAWS) industrial discipline, there can be no doubt that it substantially improved its contribution to the food safety function. Ms Sandford testified in chief that the new cameras really improved her ability to investigate food safety incidents. Asked in cross-examination to elaborate on this comment, she responded enthusiastically: there are more cameras in strategic locations; the quality of the images means we can see much better; we can see everything within the room; there is so much that we are able to see; the cameras are great; you can see down to the box, the type of box, the timing; being able to get to the camera and the information right away while it continues to record; I am able to go back and see what happened earlier in the incident, whether there was corrective action; before the cameras weren't there to do this. Perhaps any one of these improvements taken alone might be dismissed as mere incremental change, but taken together they clearly amount to a substantial improvement, from the Employer's point of view, in meeting its operational requirements of protecting the ultimate consumer from exposure to contaminated or mislabelled food and, as we have seen, controlling its costs by limiting the amount of product that requires to be quarantined, rapidly identifying the scope and origin of an incident and monitoring appropriate corrective action, and demonstrating to third party suppliers and contractors their liability for the cost of some incidents.

It is precisely those features of the expanded system which made for such marked improvement in the food safety function that most alarm the Union. In his testimony, Mr. DiMaio acknowledged that the Union had long been aware of the video surveillance system as it had existed before 2003, and had not objected to it. He explained the Union's concern about the expansion of the system in 2003 as twofold. First, there was a concern about the scale of the expansion, which roughly doubled the number of cameras in the plant. He said the Union was given no explanation by the Employer as to why this

was necessary. The second concern was that many of the new cameras were being focussed on employees at work, rather than on entry and exit doors or specific pieces of equipment. In the Union's view, this was a new and different way of using cameras, and one that it had not accepted in the past. Again, the Employer did not provide a satisfactory explanation. The presence of so many new cameras in production areas gave rise to speculation and concern about the Employer 'monitoring' employee conduct and productivity or, as Mr. DiMaio more colourfully put it in the written grievance, 'video stalking.'

Notwithstanding the Union's tolerance or acceptance of the pre-existing surveillance system — aside from the murky episode of the tote wash work stoppage — the Employer must or ought to have known that the introduction of so many new cameras into production areas would be controversial in light of current trends in Canadian labour relations and human rights. This in itself was enough to make the change a significant one.

In my considered opinion, then, the expansion of the video surveillance system in 2003 constituted an improvement in methods of operations from the Employer's standpoint, and I accept that the change was a 'significant' one within the meaning of article 3.03. The provision requires that the Union be notified of any such change before it occurs and that it have the opportunity to discuss the Employer's intentions before they are put into effect. The purpose of such a provision is not to prevent the Employer from making rational changes to the way it runs its business. The real purpose, as I see it, is threefold. First, it is intended to provide the Union with information about forthcoming changes, which will assist Union officers in dealing with members' questions and concerns. It seems to me, for example, that had the Employer communicated clearly to the Union at the first opportunity that it did not intend to use the cameras to monitor bargaining unit members' conduct and productivity in real time, or to gather data about individual employees over time, at least some of the Union's concerns about 'video stalking' would have been allayed at the outset. As it is, the Union heard these assurances for the first time at the arbitration hearing. Second, the provision is intended to enable the Union to identify potential consequences of the forthcoming change for its collective agreement rights and those

of its members before the change is implemented. Third, the provision is intended to provide for discussion between the parties about any such consequences with a view to ameliorating or eliminating them as the change is implemented. The significance of this opportunity for prior discussion is underscored by the last sentence of the provision, which preserves the Union's right to grieve the change even where the Employer has complied with the prior notice and discussion requirements.

Similar collective agreement language was considered by arbitrator Newman in *United Food and Commercial Workers International Union, Local 175 and Sobey's Milton Distribution Centre*, [2003] O.L.A.A. No. 498 (QL), 74 C.L.A.S. 203, at paragraphs 63 and 64 of that award:

The Union has argued that the provisions of Article 3.03 limit management authority and require 'advance notice' of significant changes. It requires that 'discussion will take place before the introduction of any change.'

Article 3.03 is a significant limitation upon the exclusive right of management to control the direction of the staff. The provision recognizes the value of the bargaining partner and its need to not only be notified of change, but to have a meaningful role in its introduction. I accept the Union's view that, as expressed in the two British Columbia University awards referred to above,* the requirement for 'discussion' is a requirement for genuine substantive discussion, in which the Union (and not just the Local Committee) is given information, explanation, and the opportunity to express its views and concerns, potentially influencing the form and impact of the change. To the extent that the instant change has potential impact upon the rights that accrue with seniority, I also accept the contention that a strict construction of the provision is appropriate.

I have considered the Employer's submissions with respect to the rest of article 3 of the collective agreement. It is clearly the case that plant security and food safety are among the recognized functions of management intended by article 3.04. That they are management functions does not insulate them from the requirements of article 3.03. Industrial discipline is also a recognized function of management, referable to article 3.01 and expressly provided for elsewhere in the collective agreement. The Employer was entitled to make improvements in the video surveillance system in support of these functions, subject to limitations expressed and implied in the collective agreement generally. The notice and discussion requirements of article 3.03 do not expressly preclude it from introducing new or improved methods of operation. Noncompliance with those requirements is a

breach of the collective agreement and attracts an appropriate remedy, but stronger language would be required for such a breach to have the effect of nullifying or rolling back the operational change here, where seniority rights are not at issue.

Turning to the facts recited in the preceding section, it is clear that the Employer did not give the Union advance notice of this significant change. This is so whether 'the introduction of any change' means the decision to acquire the new cameras, their physical installation in the plant, or their activation. No-one in management contacted anyone in the Union about the cameras at any time before they were installed. During installation, the Union became aware of the cameras due to the observations and reports of members and local officers. The Union initiated contact with the Employer. It is clear from Mr. Whipp's testimony that it had not occurred to him to notify the Union before hearing from Mr. DiMaio, and I am satisfied that the two notices he posted in the plant and the notice of activation that he supplied to Mr. DiMaio along with the step 3 grievance response were all occasioned by the Union's inquiries and the filing of the grievance. He essentially acknowledged that had Mr. DiMaio not raised the matter with him, he would not have given any notice or information to the Union with respect to the new cameras.

Perhaps the notice of activation would have satisfied the prior notice requirement, if genuine substantive discussion had taken place in the interim. But even after Mr. DiMaio raised the issue, the Employer failed to provide the Union with the information it required in order that meaningful discussion could take place. I have already referred to the question of monitoring employees. Apart from this, the Employer provided no information to the Union about the nature and capacity of the changes to the surveillance system, the manner in which it was to be used, who was to have access to it, and other relevant considerations. The Employer simply said it was upgrading the system to address food safety, loss prevention and protection of assets. This was not a meaningful response to the concerns raised by the Union. While in other circumstances the breach of a notice and discussion requirement might be, if not cured, at least mitigated in the grievance procedure (see *Sobey's*, above, at paragraph 75), there is nothing in the evidence before me to suggest that this happened here, while Mr. DiMaio's testimony that he first learned of many significant aspects of the surveillance system during the arbitration hearing clearly indicates otherwise.

For all these reasons, I find that the Employer failed to comply with its obligations to the Union in article 3.03 of the collective agreement.

Was the Union estopped from grieving this matter?

The same considerations which lead me to the conclusion that the expansion of the video surveillance system amounted to a significant change in the Employer's methods of operations, despite the Union's acceptance of the former video surveillance system, require that I reject the Employer's submission that the Union was estopped from proceeding in this matter.

Employee privacy

The second branch of the Union's grievance is that the Employer's implementation of the expanded video surveillance system improperly infringes upon employees' privacy and is thereby in breach of an implied term of the collective agreement.

It is difficult to see how, in the absence of express collective agreement or statutory protection, employees can claim an unfettered right to privacy with respect to their conduct in the workplace, in circumstances where they are subject to supervision. For the purposes of this discussion, it is not necessary to consider the propriety of bodily searches; searches of personal property of various kinds; biometric imaging; drug, alcohol or medical testing; or other facets of an acknowledged broad interest in personal privacy. The narrow question in the present context is whether the employee is subject to observation by the Employer (as also perhaps by other employees in and outside the bargaining unit, Union officers and staff, and such third parties as customers and suppliers who happen to be visiting the workplace) while engaged in — or supposed to be engaged in — the work process. We can further restrict the scope of this enquiry, then, by leaving aside the propriety of surveillance of employees in the workplace during non-working hours, during break times, or while excused from work for personal reasons such as using the washroom or the telephone. It is fair to say that employees in an industrial plant do not have a reasonable expectation of privacy, in this sense of freedom from observation, while they are performing work and subject to supervision. If they were so entitled, there could be no direct supervision.

But this is not to say that employees are devoid of a privacy interest when they are performing work and subject to supervision. While

that interest might not be engaged by the mere fact of observation, it seems clear, for example, that some intrusive forms of observation might be so unwelcome as to amount to harassment, thereby engaging the privacy interest. It also seems clear that even passive nonintrusive observation might engage the privacy interest through the unacceptable use of the information obtained, for example by improperly divulging inferences about a person's medical condition, or attempting to entertain one's associates by presenting humiliating impressions of a person's observed behavioural traits. There is a thin line between observation and voyeurism. So if we are to analogize video surveillance of the workplace to observation by a supervisor, as is suggested in some of the cases, we shall have to be concerned about the manner of the surveillance (its intrusiveness) and about the uses to which it is put (its legitimacy).

Before considering the intrusiveness and legitimacy of the surveillance in the case before me, however, it is worth examining more closely the analogy between the human supervisor and the video camera. The comparison is further limited in the present case by the fact that the camera is not being substituted for the supervisor; employees are not being monitored in real time, but they are being recorded; the recordings are not being viewed continuously or randomly sampled to collect data or identify incidents of potential interest to the Employer, but are being viewed only for purposes of investigating incidents that have come to the Employer's attention by other means. As it seems to me, the analogy in these circumstances is not a very strong one. Both the supervisor and the video recording have in common the authority of the Employer. Beyond this, they are quite different. One significant difference is the presence of interactivity in the relation of supervisor and employee, and its complete absence in the relation of employee and video recording. The supervisor is able to respond immediately to employee conduct and the employee to the directions of the supervisor. The employee is also able to communicate with the supervisor to correct, or at least express, any disagreement with the supervisor's observation, and vice versa. There is no counterpart to this interactivity of employee and supervisor in the creation or use of the video recording. Even where the employee is permitted to view the recording at some later date in the context of discipline, he or she is not in a position to engage with the recording itself, but only with the interpretation of it advanced by someone in authority who has

selected for this use the particular snippet shown to the employee. So it is necessary to be quite careful about how far the analogy between observation by a supervisor and observation by a camera can take us as we consider the manner and use of the surveillance.

Indeed, it is a misnomer to describe what the camera system does as 'observation' at all. It merely optically, mechanically and electronically collects, transmits and records digital information which does not constitute 'observation' until a human observer views the displayed or recorded images. If the cameras continued to operate but no-one viewed the images, we might still describe what was happening as 'surveillance,' but surely not as 'observation.' It is the potential for observation, not its inevitable realization, that underlies the weak analogy between camera and supervisor. (Compare the characterization of electronic surveillance as 'inhuman' (page 30) and indeed 'fundamentally anti-human' (page 29) in *Re Puretex Knitting Co. and Canadian Textile & Chemical Union* (1979), 23 L.A.C. (2d) 14 (Ellis).)

As the Union presents its case, the main argument to the intrusiveness of the video surveillance system is its capacity for monitoring employees, whether in real time or by systematic subsequent review of the recordings. I accept the Employer's evidence that it does not monitor employees. The Employer did not convey this information to the Union either upon initial enquiry nor during the grievance procedure, but only through its evidence and submissions at the arbitration hearing. Even then, the Employer has not said that it will not use the video surveillance system to monitor employees in future, but only that it has not done so, at least not before the February 2005 cut-off date for evidence about how it has used the system. The conclusions that I have reached in formulating this award are predicated on the Employer's position that it does not monitor employees. In view of this stipulation, any future decision to use the system to monitor employees (in either of the senses described) would clearly amount to a significant change in its methods of operations and therefore trigger the advance notice and discussion provisions of article 3.03 (and possibly other provisions and entitlements as well).

The Union's main argument to the legitimacy of the video surveillance system in the present arbitration has concerned TAWS; that is, it has suggested that the purpose of the new cameras in production

areas and hallways has been to monitor employee conduct to control time away from workstations, and thereby to substitute cameras for supervisors. I have found against this suggestion both because I have accepted the Employer's position that it does not monitor employees (although the potential for doing so, particularly in the context of TAWS, seems to have been considered by members of the management team in the lead up to the 2003 changes), and also because I have found that the primary purpose of the new cameras in the production areas has been to support the food safety function. It is therefore unnecessary to determine whether controlling TAWS would be a legitimate use of the video surveillance system.

Food safety is clearly a legitimate management function (in both its product quality and cost containment aspects) and the contribution of the video surveillance system to enhanced food safety is made out in the evidence. I do not agree with the Union's suggestion that cameras are unnecessary to food safety because contamination incidents are always reported before recourse to the video recordings is made. First, this is a consequence of the fact that the surveillance is not monitored. Second, the benefits of the video surveillance system for following up reports of contamination, assessing the scope and extent of the problem, determining its origin, and confirming the adequacy of corrective measures are amply demonstrated by the evidence, although admittedly a good deal of it relates to incidents at the grinders, which were already partly covered by cameras installed in 1997. The evidence about the use of the new cameras installed for food safety purposes from their activation in June 2003 until the evidentiary cut-off date in February 2005 indicates that relatively few of the new cameras figured in food safety investigations in that period. I do not agree that this demonstrates that it was not a legitimate exercise of management's rights to install those cameras. Ms Sandford's evidence establishes a rational relationship between camera locations and critical control points in the HACCP system. If no food safety incident occurred at a particular point in that system, so that no investigation was required, the video recording made by that particular camera would not have been accessed and viewed.

Other aspects of the legitimacy of the video surveillance system (that is, how it is or might be used) remain in question. All the evidence suggests that the beneficial uses of the system are in the short term. Ms Sandford stressed the necessity of resolving food safety

incidents by completing the investigation as quickly as possible, certainly on the same day they are reported. She had never found it necessary to have a video segment copied and retained for later use or to print still images (except in preparing exhibits for this arbitration). Mr. Duraisamy's unparticularized comments about the use, or potential use, of the cameras in responding to unauthorized access (when a door alarm is set off), or fire, or property damage, all suggest a compressed time frame. In none of the incidents described in the evidence was it necessary to review recordings made long before. Nevertheless the system has the capacity to retain recordings to the extent of disk space, which is in principle indefinitely expandable, and also to archive recordings to permanent media for storage, although this has not been done to date. It is self-evident that the potential for misuse of or improper access to recordings increases over time. The Employer does not appear to have a clear policy about retention of video recordings. This has a bearing on employee privacy interests.

Similarly, there are a number of issues relating to access to the video recordings. I heard evidence about circumstances in which Union representatives had been permitted to view the video and others in which they had requested access and been denied. Where these issues arise in the context of industrial discipline, the employee and Union may have an interest in access to the video recordings for exculpatory purposes or as part of the Union's investigation of a grievance. In article 4.03 of the collective agreement, the parties have provided for access to documents in the employee's personnel file in certain circumstances, but whether this extends to any relevant video recordings is not clear. A related issue is whether and when the Employer is bound to disclose its use of video recordings in investigating a disciplinary incident to the Union and the employee concerned. In the nondisciplinary context the Employer has apparently been reluctant to share the product of surveillance with the Union. An example referred to several times in the evidence was Union complaints about supervisors performing bargaining unit work. In general, questions about who is entitled to review the video recordings, for what purposes, and in what circumstances also have a bearing on employee privacy interests as well as other collective agreement rights.

These examples are not intended to be exhaustive of the various ways in which the use of the video surveillance system can impinge

on the privacy interests of employees. It remains to be considered whether those interests are protected by the collective agreement.

The collective agreement and privacy interests

For the Union, Mr. Evans argued that arbitrators have long recognized that collective agreements afford implied protection against invasive or unreasonable employer interference with employee privacy. Employer actions that impinge on employee privacy are subjected to the test of reasonableness. Where such actions are reasonable, arbitrators seek to balance the interests of the parties. In support of these submissions, Mr. Evans cited a number of authorities already considered in the preliminary award, as well as these more recently reported awards: *Re Toronto Transit Commission and A.T.U., Loc. 113 (Belsito)* (1999), 95 L.A.C. (4th) 402 (Chapman); *Unisource Canada Inc.*, above; *Re Securicor Cash Services and Teamsters, Local 419 (Mehta)* (2004), 125 L.A.C. (4th) 129 (Whitaker); *Re Toronto (City) and C.U.P.E., Local 79* (2004), 128 L.A.C. (4th) 217 (Kirkwood); *Re IKO Industries Ltd. and U.S.W.A., Local 8580* (2005), 140 L.A.C. (4th) 393 (Tims); *Re La-Z-Boy Canada Ltd. and Communications Workers of America, Local 80400 I.U.E.* (2005), 143 L.A.C. (4th) 88 (Surdykowski); *Leon's Mfg. Co. Ltd.*, above. The theory of the implied term is aptly summarized by arbitrator Whitaker at page 138 of the *Securicor* award:

The theory then is that it is part of management's residual rights under the collective agreement to undertake investigations that might impinge on the privacy of employees if such investigations are reasonable in the circumstances. In this way it can be said that the test of reasonableness arises from the collective agreement itself. The test of reasonableness is an implicit term of the agreement. The other side of the implicit term however is that unreasonable investigations that trench on the privacy of employees are contrary to the collective agreement.

After considering and rejecting the opinion that surveillance, as a form of observation, cannot be considered intrusive, arbitrator Whitaker continues, at page 139 of the award:

For these reasons, the same type of analysis which applies to searches or medical examinations should apply to the issue of surveillance — which is that a collective agreement should be read to include an implicit term that such intrusive inquiries are only permitted if reasonable in the circumstances. In other words, the exercise of management's rights to undertake inquiries that intrude into the sphere of what would in the normal course be considered to be an employee's private affairs, are constrained to only those inquiries which are reasonable.

For the Employer, Mr. Jarvis argued that the parties have expressly rejected any implied restriction on management's right to engage in surveillance by providing in article 3.02 that, 'The direction and supervision of the working force shall, at all times, be the responsibility of the Employer only.' In any event, and in the alternative, the Employer submits that the surveillance at issue here meets the reasonableness test.

In the preliminary award in this matter, I considered arbitrator Newman's award in *Re QBD Cooling Systems Inc. and C.U.O.E., Loc. 101 (CCTV Monitoring)* (1996), 57 L.A.C. (4th) 263, and decided, at page 16 [p. 327 L.A.C.], that, '*QBD* does not stand for the proposition that video surveillance is a "recognized function of management." Rather, it was decided on the basis that when parties expressly provide that the only limitations on management's rights are those set out in express terms in the collective agreement, an arbitrator will not import implied restrictions on those rights.' The collective agreement in *QBD* provided that, 'the express provisions of this Agreement constitute the only limitations upon the Employer's rights'. In my opinion article 3.02 of the present agreement does not have the same effect. It does not preclude the importation of implied limitations on management's rights. While it confirms that the Employer bears sole responsibility for the direction and supervision of the working force, it does not go on to say that the Employer's exercise of this responsibility is unfettered. In fact, it is not unfettered. Many of the substantive provisions of the collective agreement limit the Employer's exercise of its responsibility for the direction and supervision of the working force. There is nothing in the words of article 3.02 to say that its responsibility is not limited by the implied as well as the express terms of the collective agreement.

I agree with and adopt arbitrator Whitaker's conclusion quoted above, that the collective agreement should be read to include an implied term that intrusive Employer inquiries, including the in-plant video surveillance at issue here, are only permitted if reasonable in the circumstances.

The significant hurdle which the Union faces in endeavouring to persuade me that the Employer's actions are unreasonable in the case before me is its long history of acquiescence in video surveillance in the workplace before 2003. This is not a case to be decided

on general principles or on an ‘instinctive’ aversion to cameras in the workplace as described in *Puretex*, *Thibodeau-Finch*, and other decisions. I have to begin with the presumption that the pre-existing surveillance system and its uses, to the extent that the Union was or ought to have been aware of them, met the standard of reasonableness at least in the context of these parties’ well-established and mature collective bargaining relationship. The question to be determined is whether the new features of the expanded surveillance system, to the extent that they are objected to by the Union, also meet that standard.

I have already found that it is a legitimate use of the surveillance system to investigate plant security, industrial discipline, and food safety incidents that come to the Employer’s attention by other means than monitoring the video in real time or viewing or sampling the recordings. In the context of the pre-established uses of video surveillance in this workplace, these are reasonable uses.

I have also pointed out that the expanded video surveillance system has the potential for unreasonable or inappropriate impingement on employees’ privacy interests and collective agreement rights, for example in regard to the unnecessary or excessive retention of recorded images and in regard to access to the recordings. A concern about unreasonable or inappropriate impingement on employee privacy interests might also arise should the Employer decide in future to have the video monitored in real time or to review or sample the recordings on some systematic basis, or to view it for reasons other than investigating some particular incident that has come to its attention by other means. Moreover, I have identified certain of the new cameras as not having been shown to relate specifically to the reasonable uses of the surveillance system.

Absent other considerations, the concern that a surveillance system which is currently being used reasonably could in other circumstances be used unreasonably, or in a way that might be challenged as unreasonable, would not, normally attract more than a passing comment about the necessity for appropriate safeguards. Rights arbitration is not usually concerned with prospective remedies for hypothetical future breaches. Here, however, the parties have expressly provided for advance notice

and discussion of significant changes in operating methods, which, to my mind, is intended to ensure that efforts are made to identify and mitigate prospective difficulties in advance of implementation. They have also agreed, in the last sentence of article 3.03, that the substance of the change may be the subject of a grievance notwithstanding compliance with the procedural requirements of the provision.

It was submitted for the Employer that the last sentence of article 3.03 means that such a difference might be dealt with as a grievance, but it was not arbitrable. In my opinion, having regard to the collective agreement as a whole, in making the changes ‘subject to the grievance procedure’ the parties contemplated the final and binding settlement of such a difference at arbitration.

Summary of findings

1. The expansion of the video surveillance system in 2003 was an improvement in methods of operations and a significant change.
2. The Employer failed to comply with its obligations under article 3.03 to provide the Union with advance notice of this change and to engage in meaningful discussions prior to implementing the change.
3. The Employer’s video surveillance system has not been used to systematically collect information about employees or to identify occasions for discipline. It has been used as an aid to investigation of specific incidents that have come to the Employer’s attention by other means.
4. The use of the surveillance system to investigate incidents relating to food safety, plant security and industrial discipline is a legitimate exercise of management rights. This finding is predicated on the Employer’s position that it does not use the video surveillance system to monitor employees in real time or otherwise.
5. Most of the individual cameras in dispute have been justified by the evidence about the uses to which they are put. The exceptions are cameras 34, 35, 36, 38 and 47.
6. Employees at work in industrial plants, where they are subject to supervision, do not have a reasonable expectation of privacy

in the sense of freedom from observation. Nevertheless they do have an interest in personal privacy which may be infringed by intrusive means of observation or inappropriate uses of the product of observation.

7. This privacy interest is protected by the collective agreement.
8. The purpose of the advance notice and discussion requirements in article 3.03 is to afford the Union the opportunity to represent its members' interests when the Employer decides to make a significant change in its methods of operation. In the grievance before me, that included the opportunity to seek assurances that the implementation of the expanded video surveillance system would not unnecessarily or unreasonably impinge upon employee privacy.

Remedial considerations

As noted previously, the grievance has two branches. First, it alleges a violation of the Union's right to advance notice and discussion of the expanded video surveillance system. I have found that the Employer did not comply with these requirements of article 3.03. Second, it alleges that the introduction and use of the disputed cameras is an unreasonable infringement of employee privacy. I have found that the Employer's use of the expanded surveillance system as a whole to investigate incidents related to plant security, industrial discipline and food safety is reasonable, on the understanding that it does not involve continuous monitoring or systematic review of the images. This finding is subject to some concerns about actual or potential intrusiveness or illegitimacy, and to reservations about five specific cameras.

In respect of the Employer's breach of the notice and discussion requirements of article 3.03, the Union submits that the appropriate remedy is to order the removal of the disputed cameras, on the theory that compliance with those requirements was a precondition for the introduction of the change. I have already explained why I cannot agree with this theory. The Employer submits that if any remedy is called for, it should be purely declaratory, on the theory that its extensive disclosures during the arbitration hearing far exceed what the Union would have been entitled to by virtue of the notice and discussion provision in article 3.03. I think this point may be well

taken as regards the production of information needed for discussion to take place, but it neglects the discussion itself.

It is trite to say that remedies at arbitration should be fashioned as much as possible to put the parties in the position they would have been in but for the breach of the agreement. With respect to the notice and discussion requirements of article 3.03, the harm the Union has suffered is the lost opportunity to engage in informed discussion with the Employer with a view to identify and mitigate anticipated difficulties arising from the introduction of the new or improved methods of operations. (See, by way of analogy, *Re York University and York University Faculty Association*, [1999] O.L.A.A. No. 468 (QL), 57 C.L.A.S. 462 (Knopf).) During the course of this arbitration, the Union has been provided with a great deal of information about the expanded video surveillance system and the ways in which the Employer uses it. It has also now had several years of experience with the practical working of that system. The appropriate remedy, as it seems to me, is to restore the lost opportunity for discussion, with a view to achieving, whether by unilateral undertaking, mutual letter of understanding; or otherwise, a protocol or set of safeguards to protect the privacy interest of employees in the Employer's reasonable use of the surveillance system.

In addition to requiring the parties to engage in such a discussion, I consider that I also have the remedial authority to order modifications to the surveillance system, for example in respect of cameras 34, 35, 36, 38 and 47, and also with regard to some aspects of retention and access. However it is appropriate to reserve the exercise of this authority pending the outcome of the parties' discussions. These are experienced parties in a mature collective bargaining relationship, and the Union does not oppose on principle or in practice all use of video surveillance in this workplace. In these circumstances, the practicalities of a solution are best left to the parties themselves in the first instance.

Accordingly, I direct the Employer to meet with the Union at their earliest mutual convenience to discuss the implementation of the expanded video surveillance system, having regard to the findings and conclusions set out in this award. I remain seized, as requested,

to deal with any outstanding issues in the event the parties do not achieve a mutually satisfactory resolution of the matter, and to deal with any difficulty in implementing this award. The grievance is upheld in part.

ENDNOTE

- * At paragraph 35 of her award, setting out the Union's argument, arbitrator Newman cites the awards in *Re B.C. Institute of Technology and B.C.I.T. Faculty and Staff Assn. (Staff Seniority)* (2000), 87 L.A.C. (4th) 423 (Ready), and *Re University of British Columbia and C.U.P.E., Local 116*, [1996] B.C.C.A.A.A. No. 186 (QL), 43 C.L.A.S. 350 (Hope).