Comment—

A. J. SMITH, JR.*

Our panel subject is a large and important one; it is good to have the analysis and dimensions, for our present session, which have been so ably offered by the speaker, Mr. Black. My own comments, of course, are purely personal and will, I sincerely hope, shed some additional illumination on this most critical subject: surveillance and due process.

President Kingman Brewster of Yale University said recently, "Nothing is more tedious than to have to go around the block to get next door, just because some pedant wants to exhibit his erudition." You may relax. I have little erudition to display and I propose only to go down the street a rather short distance to look at a few pertinent things.

I will begin by citing, from *Black's Law Dictionary,* these synonyms for *surveillance:* oversight, superintendence, supervision. A definition of *due process* which I find trenchant is quoted in Black from Daniel Webster: "It is a law which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial."

History, unfortunately, records that this felicitous concept of Daniel Webster was often honored in the breach, as far as industrial relations are concerned. The kinds of surveillances at times carried on by some men in industry, particularly in the nineteenth century, were not always cloaked in the mantle of due process, by any reasonable definition.

Who doesn't recall reading of industrialists who sought to inculcate their own subjective moral standards, for example, in their employees? Sometimes spies would pry into personal lives to separate the "good guys" from the "bad guys." Which employees attended church regularly, for example, and which employees frequented pool halls and other places of presumed iniquity—these were matters of surveillance at times.

Surveillance in connection with anti-union activities became so rampant in some sections of industry that Congress was

* Area Representative, Labor Relations Department, Reynolds Metals Co., Richmond, Va.

constrained to deal with the problem in the various labor laws of the land. The National Labor Relations Board has had a long record of distinguished activity in this area. The general rule, of course, is that any real check or guard maintained by management over union meetings or other union activities constitutes illegal interference "whether frankly open or carefully concealed." [1] It has been held unlawful, in fact, merely to foster the impression that union activity is under surveillance, regardless of any basis in fact.[2] The Labor-Management Reporting and Disclosure Act of 1959 deals expressly with expenditures made by employers for purposes of so-called industrial espionage. Section 203 (a) (3) prescribes that any such expenditure must be reported.

Obviously the matter of surveillance involving union activities of employees is carefully regulated by federal law. Due process, in instances of alleged violation of the law, clearly appears to be recourse to the Board and the courts. As for surveillance which is not in violation of law and which is justifiable on its merits, management people generally are highly sensitive to their moral, legal, and contractual obligations to observe due process in its application.

Let us consider a few common examples of surveillance in industry. Surveillance at times becomes a needed tool in dealing with various problems of absence of employees. Validation of absences of employees who are on protracted sick leave has long been a widespread form of surveillance. Many plants in industry have nurses or other representatives who visit the homes of the employees to validate absence due to illness.

Plant absenteeism, per se, often generates need for surveillance in the form of visits to employee homes to investigate absence under a plant rule that a specified number of unreported consecutive days of absence is ground for considering an employee to have terminated. Surprising situations occasionally arise. For example, after one of our supervisors encountered an employee in town at midday in a state of apparent intoxication, on the final day of a series of unreported absences of this employee, he processed his termination. When I reversed this ac-

[1] *NLRB* v. *Collins & Aikman Corp.*, 146 F.2d 454, 15 LRRM 826 (CA 4, 1044).
[2] 89 NLRB 1103, 26 LRRM 1065 (1950).

tion later in the grievance procedure, the supervisor was reluctant to concede that his surveillance had a flaw: The midday encounter had occurred in a doctor's waiting room. Whereas other evidence verified that the employee was indubitably far under the influence, he was also sick and was admitted to the hospital forthwith, and duly notified the company—all on the same day.

Other situations of visits bring out sidelights. Once, I recall, there was occasion to investigate reports that an employee was engaging in outside work while on authorized sick leave, without the approval of the company and the union as mandated by the particular agreement. He was a flagrant moonlighter—"daylighter" would be more appropriate in this instance because he owned and operated a full-blown business. Plant representatives visited his premises and observed him conducting affairs pertaining to his business. On the basis of their later report, the man was terminated. Before final disposition, various questions, of course, arose which can always be troublesome in this kind of situation: Since the employee was working for himself, was this proscribed? Would the result have been the same if he had been painting his house, or the like? The act of surveillance itself was not, however, questioned.

There seems to be little doubt that the employer *is* within his rights when, for reasonable business cause, he conducts such outside surveillance of employees. There is no apparent more effective means of acquiring probative evidence.

An interesting reported case of Arbitrator Whitley P. McCoy deals with an instance where a company attempted to transfer its burden of proof of alleged moonlighting, in violation of a plant rule in point, to the employee himself, by the expedient of asking him to assert that he had not violated the rule or, if he had, of telling him that his promise to stop doing so would suffice in his case to foreclose action under the rule.[3] The employee balked. He was fired for his refusal to admit or deny violation of the rule. Arbitrator McCoy, in reinstating him, wrote:

> "I know of no principle, or decided case, upholding a Company's right to compel an employee, under pain of discharge, to admit or

[3] 50 LA 8 (1968).

> deny a rule violation or other offense. Such a principle would contradict all our Anglo-American principles, particularly the one that a man is presumed innocent until he is proved guilty, and that the burden of proof is on the one alleging an offense."

There is illustrated here, in my opinion, the clear need for the company to go out and obtain the proofs it must rely on to back up its charge of violation of the rule in question. Proper surveillance surely would be reasonable in these circumstances and would not appear to present insuperable difficulties for the employer.

Theft cases also seem to involve forms of surveillance at some point. Absurd fiascoes have occurred throughout industry where reason existed for surveillance—of a scrap yard, for example, from which metal or other valuable materials was unaccountably disappearing. However, often the stakeouts are so clumsily arranged, or so obvious, that the surveillance is self-defeating: a warning, not a watching action.

It must be admitted that we in management sometimes seem to invite theft by human lapses in judgment. I recall a junk dealer who was scheduled to bring his truck into a small plant on a holiday (so he wouldn't interfere with production) to haul out some used bricks he had contracted for. There was only one guard at the gatehouse; except for him, the place was deserted. Weeks later this contractor was remembered during a frantic investigation to determine what happened to many bars of expensive zinc compound which had disappeared.

There are extremely interesting published cases which exemplify situations where companies have justly resorted to surveillance to investigate theft. Many of these cases present facets of due process for the arbitrator to deal with.

A very illuminating case was reported by Arbitrator Sylvester Garrett where overpowering evidence, including a surveillance episode by members of supervision, led to sustaining the discharge of an employee for violation of the plant rule against stealing of the property of other employees.[4] The crucial surveillance was carried out by the turn foreman from a prepared concealed position in the repair shop, adjacent to the locker

[4] 49 LA 101 (1967).

room where the theft occurred. The foreman directly observed, through a window, the grievant going to the locker where marked money had been placed. The foreman saw the locker door open while the grievant stood there. A mechanical apparatus had been attached to the door, and when it was opened as much as two inches, it could not be reclosed because of a drop-pin. The foreman and another supervisor immediately confronted the grievant at the locker, and the security department representatives joined them shortly thereafter. A full-scale investigation was launched, as a result of which the man was suspended and discharged. The evidence supplied by the surveillant—that he saw the grievant at the locker when it opened and immediately thereafter confronted the man, upon whose person the money turned up—this eyewitness account manifestly was the linchpin in the company's case. Surveillance, as successfully implemented in that case, appears to be a reasonable instance of its proper application.

This case also illustrates the relationship of surveillance to due process, because part of the union's case was that the surveillant did not actually see the grievant physically handle the door as it opened, nor did he actually see the grievant physically take the bills. These and other considerations led the union to aver reasonable doubt and, additionally, to raise a question of whether the company afforded the grievant equivalent to his constitutional right to legal counsel during the events of the day of the incident, despite his request for union representation. The arbitrator said:

> "This claim is not based on any particular provision in the Agreement, but rather on an analogy drawn between an accused's rights in criminal law, and the Union's view that a discharge amounts to an industrial death sentence. Grievant's rights must be determined under the Agreement and the Union notes no specific portion of the Agreement that was violated in this particular instance."

We have noted many similar expositions of this analogy aspect of due process in theft cases. For example, Arbitrator Burton B. Turkus, in a case where the constitutional right against self-incrimination was invoked, said:

> "As broad and comprehensive as it so properly is in the protection of the innocent as well as the guilty when the privilege against self-incrimination is invoked, the Constitution, however, neither guarantees to a grievant, exercising the privilege, the right to his job nor

his reinstatement to employment, when evidence sufficient to satisfy a reasonable mind of guilt of *proven dishonesty* is *independently* established."[5]

Arbitrator John P. McGury, in a case where an employee was terminated for refusal to cooperate in the investigation of a theft of company property, the grievant having "taken the Fifth Amendment," pointed out:

"The grievant, out of confusion, or over-zealous protective measure against criminal prosecution, or reluctance to involve co-workers, took a position which went beyond the need of his own security and unreasonably infringed upon the right of the Company to make a thorough investigation of the incident, to the substantial disadvantage of the Company. The grievant had a right to make himself 200 percent secure against criminal involvement, but he cannot simultaneously protect his rights to future employment when his position frustrated the legitimate right and interest of the company."[6]

Another kind of industrial surveillance lies in the observations made by members of supervision of production and maintenance operations in their normal course of work. It is only by personally circulating about his area of responsibility that a supervisor can effectively witness what is going on. It seems to me that difficulties which arise over surveillance in this context are most frequently allegations that the supervisor has taken wrongful action on the basis of his observations rather than disputes over his right to see what is going on.

Thus, an over-zealous "pusher" or "crowder" of the employees whom he supervises may very well at times generate ill-feeling and criticism, some of it perhaps justified if poor employer image or an impression of lack of management dignity and decorum results. Nevertheless, Arbitrator Nathan Cayton makes an interesting and perceptive point about the complaint of an employee that his foreman was excessively supervising him and that this triggered a disputed discipline. Arbitrator Cayton said:

"The basic position stated in the Union's brief is that the Company discriminated against [the grievant] by giving orders through [the foreman] to observe [the grievant] and make notes on him, while no such orders had been given with reference to six or seven other

[5] 45 LA 1050 (1965).
[6] 44 LA 658 (1964).

men under the same supervisor. The short answer to this is that the other men had not given reason for criticism or complaint."[7]

The arbitrator, of course, then summarized the supporting history in detail.

One also thinks of the professional "spotter" in connection with necessary supervisory surveillance of decentralized operations, such as bus transportation, where it is impossible directly to supervise the operators. The agreement may regulate usage of spotters. The Elkouris cite the case reported by Arbitrator George H. Hildebrand, which treats of the matter of admissibility as evidence of reports of a spotter in the case of a bus driver who was discharged for allegedly violating company rules governing collection of fares.[8] Pointing out that a spotter's report should meet the requirements of the Uniform Business Records as Evidence Act, Dr. Hildebrand added that beyond this

"(1) it must be shown that the reports were prepared before the decision to discharge had been taken and the issue joined between the parties. . . . (2) There must be no tangible basis for believing that the company is biased against the employee and has set out to get him."

Security guards in a plant doubtless deal in surveillance per se more than any other representatives of management, due to their prime responsibility to secure property and to be continuously alert for wrongful acts in violation of plant rules.

The ubiquitous industrial practice of gate checks of employee lunch boxes for tools or other contraband is rarely challenged. Arbitrator Carroll R. Daugherty reported a case, however, when an employee questioned the company's right to inspect the contents of his lunch bucket on an occasion when the employees were entering rather than leaving the plant.[9] The company successfully maintained its right in that instance because "the Company has long had an unprotested practice at the ends of shifts of searching outgoing employees' lunch baskets for possible pilfered property"; its other defenses included overt indication that bottles of liquor might be introduced into the plant, it being a holiday eve. Arbitrator Daugherty pointed out, "The Union does not allege any contract violation. And the Arbi-

[7] 70-1 ARB 8278.
[8] 25 LA 740 (1955).
[9] 49 LA 89 (1967).

trator can find in the Agreement no prohibition of or restriction on the company's right to insist on searching the lunch buckets of incoming employees."

In another interesting case, Arbitrator Ralph Roger Williams sustained the grievance of an employee who was discharged for refusing to submit to a search of his person or to disclose the contents of his pockets when instructed to do so by his supervisor or the plant guards, who suspected he was armed with a pistol—although its Mill Rule 12 allowed the company to examine the contents of any and all packages and bundles being taken into or out of the plant by any employee.[10] Arbitrator Williams said:

> ". . . But Rule 12 does not give the Company the right to search an employee, other than when he enters or leaves the plant. Therefore, the order given to the Grievant in the Company office that he empty his pockets, was an improper order, and the Grievant was within his rights in refusing to comply with it. . . . In the absence of a clear plant rule requiring it, an employee may not be forced to give evidence against himself, or to submit to a search of his person, or to disclose the contents of his pockets, to the Company or its representatives. Plant Rule No. 12 does require this, when an employee is entering or leaving the plant, but the Grievant was not stopped at the gate and no request was made of him there that he submit to a Company examination of the contents of his pockets."

In another case involving surveillance by security guards, Arbitrator Douglas B. Maggs held that "the evidence that there was a bottle of whiskey in x's automobile [in the plant parking lot] was not illegally procured" when guards walking by the car shone a flashlight into it and saw the unwrapped bottle of whiskey lying on the back seat.[11] They picked it up and looked at it, and previously had reason to suspect its presence. On the constitutional question of search, Arbitrator Maggs stated:

> ". . . Furthermore, the Constitution forbids only those unreasonable searches which are conducted by agents of the Government, and it is held to forbid the use in evidence only of the fruits of such illegal government searches. . . ."

Security guards clearly should be carefully trained in the limitations of their authority in making searches, which so frequently are part of, or an off-shoot of, surveillance. Entrapment or other violation of personal rights cannot be condoned.[12]

---

[10] 69-2 ARB 8470.
[11] 27 LA 709 (1956).
[12] 1 LA 350 (1945); 2 LA 27 (1946).

Arbitrator Burton B. Turkus, in commenting on the "excellent discharge of duty" of a police officer who observed and apprehended the grievant in the act of stealing goods of his employer, said that were it not for this performance of duty,

> ". . . the disappearance by theft of these . . . goods . . . would have had the double-barreled effect of making his [the grievant's] unwitting co-workers, employed, as they are, in a business which critically commands honesty and integrity in its personnel, actually suspect of theft while the grievant miscreant remained wholly free and aloof from the slightest suspicion." [13]

Thus, surveillance by security officials, when correctly performed, benefits all employees as well as the employer; there can be no doubt of this.

I next suggest sleeping on the job as an area of frequent occasion of surveillance. The sleep situation is so banal and has been so exhaustively referenced in all arbitration case literature that I will not pursue this facet other than to point out that industry generally attempts to train supervision in correct surveillance techniques in establishing proof of this violation of a seemingly universal plant rule against sleeping on the job.

Due process was a key factor in a sleeping-on-the-job discipline case heard by Arbitrator Israel Ben Scheiber.[14] An employee was reprimanded for sleeping on the job, among other items, the sole evidence therefor being "based upon a confidential telephone call received by the Company from one of its conscientious employees that he had seen [the grievant] sleeping in an isolated location of the Shipping Department. . . ." Arbitrator Scheiber said:

> "Likewise, under our American System of Jurisprudence where [the grievant] could not be convicted of even such minor charges as spitting on the sidewalk or of passing through a red light, without having the chance to face and cross examine the witness to these acts, 'confidential telephone calls' are certainly less than sufficient evidence, on which to base reprimands which might at a later date contribute to his discharge, and to his difficulty in getting future employment. The livelihood of a worker should certainly not be placed at the mercy of an informer, who, because of his personal dislike of the man whom he accuses . . . makes a 'confidential telephone call' secure in the knowledge that he will not have to face the man whom he accuses. . . ."

[13] 41 LA 377 (1963).
[14] 24 LA 538 (1955).

The only word to add to this is "amen."

Another familiar occasion for surveillance is in gathering evidence of participation and leadership in work stoppages which allegedly are violative of "no strike" provisions of the agreement. Since the company must meet its burden of proof if it chooses to exercise discipline of participants and leaders, it is essential that supervisory observations, commonly supplemented by photographs, be made. Evidentiary material of this nature has generally been accepted in arbitration hearings, but its probative worth must remain a matter of the facts and circumstances and quality of the evidence of each situation.

I have held up a few representative occasions in industrial life where surveillance and due process are central to the situation. The list could be expanded at length because management must know what is going on in order to operate, and to know, it must first see.

Our corporate industrial security people point out that in these technological times much gadgetry and increasingly sophisticated devices are available and in use to assist employers in surveillance. I refer to the closed-circuit television systems, for example, which, when installed for gate control with two-way voice radio, marvelously expand the efficiency of a single security guard who, when so equipped, can operate several widely spaced gates by himself, thus demonstrably saving in payroll costs. Detection mirrors (convex reflectors), video tape recordings, electronic metal detectors, and a variety of other hardware are used as aids to surveillance. Their propriety, of course, is conditioned upon the facts and circumstances of any given application.

To conclude my comments, I should like to restate the obvious: Proper surveillance frequently is an essential and justifiable task of management people, particularly at plant levels. Conduct of surveillance should and must be such that the rights of employees to due process are always fully respected and observed. The continuing training task implicit here is apparent. It is a fact that proper surveillance can be an effective means of acquiring necessary evidence for the employer to meet his burden of proof to justify disciplinary actions taken in enforcement of plant rules. It is apparent that in many instances

surveillance is the only realistic means of effectively gathering such proofs. In this context, surveillance is not just a function that walks in lockstep with due process; it truly is a part of it.

Comment—

RICHARD LIPSITZ *

First of all, I understand that I will be reacting to the principal presentation, and that is what I am going to do. Unfortunately, what Mr. Black had to say is so unexceptional, from my view, that there is very little I can do except to say that I agree with what he has said.

He said in the beginning that "due process" should not be in his title. I would like to point out, however, that I don't think he really meant that because the very nature of the collective bargaining process is in itself a reflection of the idea of due process. One has only to look to the period before the Wagner Act when we had such violent industrial upheavals. In the absence of a relationship between an employer and a union representing his employees, there is really no body of experience which indicates that anybody was able to get due process.

I do not suggest that there is not a sole employer, even preceding the Wagner Act or since then, who would not like to extend such rights to his employees, but normally it is done only under compulsion. Under the provisions of law, due process becomes something more.

One is tempted to act as a devil's advocate in responding to Mr. Black or my counterpart on the panel. There is no one here on the panel who is going to justify the use of the surveillance system that Mr. Black addressed himself to.

The temptation is to say something positive about wiretapping or psychological testing or polygraph testing because some of the literature does indicate that in industrial establishments where it is known that an employee may be subject to surveillance of one kind or another—not the kind Mr. Smith referred to, which is open rather than surreptitious, or the kind that occurs in plants where, in the absence of any bar in a collective bargaining

* Partner, Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N. Y.