CHAPTER 10

PERFORMANCE MONITORING AND ARBITRATION

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"There are more things in heaven and earth, Horatio,
than are dreamt of in your philosophy."[1]

One of the truisms of the study of man and technology is that our ability to create new technology exceeds our ability to control it, or even think about it clearly. This observation is most commonly made about major scientific developments like nuclear power, but it is equally true of lesser developments. Consider the latest developments in the technology used by employers to monitor their employees. Employee identification badges (generally referred to as active badges) are now available which emit a constant, low-level electrical signal, similar to that of a radio. By using a special receiver, the employer can continuously track the movement and location of every employee in the facility. Individual employees can be distinguished by variations in the frequency of their signal. The weak signal emitted by a transmitter small enough to be contained in an identification badge can be detected for only a few hundred yards, effectively limiting its use to the employer's facility. The same general technology, however, can give employers virtually unlimited ability to track employees. A larger transmitter can be mounted in a truck or other employer vehicle. Receivers mounted in satellites allow the employer to track the vehicle anywhere in the world.

Another recent development is the marriage of the computerized keystroke monitoring technology commonly used in the data entry field and the conventional electronic cash register. The employer can now easily obtain a record of virtually every action taken by the cashier throughout the day (or an entire career). The

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[1]Shakespeare, *Hamlet*, act 1, scene 5.

exact number of seconds taken for each transaction, the total number of keystrokes made during the shift, the exact number of mistakes made, and when, how often, and how long the employee was away from the register—all can be recorded and reported. These technical advances are taking us rapidly toward the day when an employer will have the ability to "watch" all employees every minute of every day. While this has potential benefits in increasing productivity, it also brings an enormous threat to employee privacy and autonomy and a danger of creating electronic sweatshops.

Unfortunately, our labor laws have generally failed to provide protection from potential abuses, or even an intellectual framework to address the issue. For example, one way to ensure that monitoring is used to increase productivity without turning employees into robots is to determine monitoring systems through collective bargaining. At first glance, this seems to be mandated by the National Labor Relations Act's requirement of bargaining over "conditions of employment." Employees who go from traditional intermittent human supervision to continuous tracking certainly feel that their working conditions have changed dramatically. Certain forms of employee monitoring have been held mandatory subjects of bargaining. In *Johnson Bateman*,[2] for example, the National Labor Relations Board held that urine-testing programs are subject to bargaining. But the union, of course, can waive its right to demand bargaining over changes in conditions of employment. Most collective bargaining agreements contain a management rights clause, giving the employer the right to direct the work force as it sees fit except as modified by the agreement. A strong argument can be made that knowing where employees are is a fundamental management right. "How can we exercise any meaningful control over the workplace," management asserts, "if we don't even know where our employees are?" If we accept this argument, management is free to unilaterally institute electronic surveillance.

The difficulty of this issue is illustrated by the contrasting decisions in *Cooper Carton Corp.*[3] and *Super Market Service Corp.*[4] In *Cooper Carton*, Arbitrator Kelliher ruled that the installation of video cameras was within the scope of the management rights clause. In *Super Market Service*, Arbitrator DiLauro ruled that the installation of such cameras was beyond the scope of the management rights

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[2] *Johnson-Bateman Co.*, 295 NLRB 180, 131 LRRM 1393 (1989).
[3] 61 LA 697 (Kelliher, 1973).
[4] 89 LA 538 (DiLauro, 1987).

clause. These conflicting results are not the product of differences in the scope of the management rights clause in the respective contracts. In fact, neither arbitrator bases his decision on an analysis of the precise wording of the management rights clause. Other arbitration decisions on electronic surveillance reflect this same confusion, although most of them support the Kelliher approach.[5]

These inconsistent results are not the fault of the arbitrators. Rather, they are the inevitable result of the limitations of our conceptual framework. Arbitrators are supposed to interpret the intention of the parties to the collective bargaining agreement by examining its language, the past practices of the employer, the customs of the industry, and other relevant factors. This analytical method, however, yields very little insight when applied to the new world of electronic surveillance. Most collective bargaining agreements are totally silent on this subject. And, since the practices are new and substantially different from what has gone before, there is little to be learned from looking to past company or industry practice. In truth, the parties in most cases never considered the emerging forms of monitoring when they wrote the collective bargaining agreement or, if they did, never discussed the subject.

One can attempt to circumnavigate this difficulty through the presence or absence of zipper clauses and/or maintenance of working conditions clauses. While this approach can clearly lend some support to either side of the argument (depending upon the circumstances), it is hard to see how these general clauses can provide a definitive conclusion regarding the intent of the parties concerning a subject they never discussed. Perhaps this is the reason that arbitrators and courts have been unable to evolve a consistent rationale for applying these clauses.

How, then, is an arbitrator to render an intelligent decision as to whether a form of electronic surveillance is within the scope of the management rights clause? We must grant the truth of Kelliher's underlying assumption that management has a right to know where its employees are and what they are doing. The real question is whether that right is unlimited. If management rights are held unlimited in the absence of a specific limiting clause in the agreement, the consequences for workplace privacy are very grave. Management surely has the right to prevent employee theft. If that right is unlimited, employers can strip-search their employees,

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[5]Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA Books, 1981).

even in the absence of any suspicion of wrongdoing. Employers have the right to prevent vandalism, even the comparatively minor form of writing on bathroom walls. If that right is unlimited, employers can install hidden video cameras in employee restrooms.

Is it possible to avoid such results without exceeding the limits of the role of arbitrator? Arbitrators who reject the residual rights theory and adopt the view of Arthur Goldberg (prior to his appointment to the Supreme Court), that both employers and employees had rights prior to the collective bargaining agreement and that employees retain some rights not called out in the agreement (so long as they are not specifically ceded),[6] will have no difficulty at least accepting the legitimacy of the existence of these limits.

Those who are uncomfortable with Goldberg's approach can look for justification on limitation of management rights in the concept of reasonableness. Some management rights clauses give management only the right to make "reasonable" decisions. Even in the absence of this language, however, a reasonableness requirement can be found. There are many situations in collective bargaining law where arbitrators have required employer actions to be reasonable, even in the absence of specific authorizing language. Elkouri and Elkouri especially mention this concept in the context of management rights.[7]

But even the most devoted advocate of residual rights must accept the concept of reasonableness as a limitation on management's rights in the context of discipline. Virtually every collective bargaining agreement includes a clause requiring just cause for discipline. It is undisputed that, to constitute just cause, management's action must be reasonable. If it is unreasonable for management to install a particular system of electronic surveillance, it cannot be reasonable for an employee to be fired because of information the employer obtained from its use. Technically, refusal to sustain a discharge cannot prevent the employer from installing an unjustified surveillance system, but employers will have little incentive to install unreasonably invasive systems under these circumstances.

But where is the arbitrator to find standards of reasonableness to apply? One place they will not be found is in substantive law. Our law typically responds to new developments slowly, especially when

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[6]Goldberg, Management's Reserved Rights and the Arbitration Process (BNA Books, 1956), 122–23.

[7]Elkouri & Elkouri, *supra* note 5, at 417.

they involve new technology. The federal government did not pass an antiwiretapping statute until 1968.[8] The only federal law currently on the books relating to electronic surveillance by employers is the Electronic Communications Privacy Act (ECPA) of 1986.[9] The ECPA prohibits employers from deliberately intercepting purely personal communications of an employee at work. But Congress has never balanced the competing rights of employers and employees in the brave new world of electronic mail, active badges, and miniature video cameras. Comprehensive legislation that undertakes this balancing is currently under consideration by both houses of Congress,[10] but its future is uncertain. Nor will the arbitrator find standards of reasonableness in state law. There are virtually no state statutes in the area of electronic surveillance by employers. There is a common law right to privacy in most states. While the words used to describe this right vary greatly with jurisdiction, it functions as a safety net to prevent abuses that are so shocking as to be indefensible. Such laws are necessary but offer no guidance in situations where the balancing of competing legitimate interests is involved.

Ultimately, arbitrators will have to determine standards of reasonableness using their own judgment and knowledge of the industry. Fortunately, this is precisely the kind of determination that they are uniquely well qualified to make and have often made in the past. Most of the accepted rules for determining whether an employer has just cause to discharge an employee come, not from any agreement between the parties, but from the collective judgment of arbitrators. Before they can develop workable standards, however, arbitrators must get past one doctrinal obstacle, namely, the concept that using technology to perform a function previously performed by human supervision is automatically reasonable and does not violate the rights of employees. This idea runs deeply through arbitral thought. No less an arbitrator than Richard Mittenthal has written:

> All the company has done is to add a different method of supervision to the receiving room—an electric eye (i.e. the television camera) in addition to the human eye. Regardless of the type of supervision, the employee works with the knowledge that a supervisor may be watching him at any time.[11]

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[8]Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510–25 (1987).
[9]Electronic Communications Privacy Act of 1986, 18 U.S.C. §2510–3126 (1987).
[10]H.R. 1218, S. 516, 102d Cong., 2d Sess. (1992).
[11]*FMC Corp.*, 46 LA 335, 338 (Mittenthal, 1966).

Such changes may be, as Mittenthal characterized them, "differences of degree rather than differences in kind."[12] But a difference in degree of sufficient magnitude becomes a difference in kind. Parents who are generally kind and considerate to their children do not become abusive because they occasionally lose their temper. But if the losses of temper occur often enough, they eventually cease to be good parents and become abusers.

Differences in degree also become differences in kind in the workplace. An employer does not cease treating its employees with dignity and respect by occasionally observing them as they go about their work. But an employer who videotapes employees from the moment they walk in the door in the morning until they go home in the evening has transformed the nature of the employment relationship. Its employees have ceased to function as mature, responsible adults. They are now treated as irresponsible children who must be constantly watched or, worse yet, as automatons without human feelings. Such a transformation dwarfs many other changes in the workplace with which arbitrators have been justifiably concerned.

This brings us to the ultimate question of the standards an arbitrator should use to determine whether a particular system of monitoring is a reasonable means of implementing management's rights. It will take the collective efforts of a generation of arbitrators to completely develop these standards, but here are a few preliminary considerations, taken in large part from the proposed federal legislation:

1. *Monitoring should be confined to an employee's work.* What employees do in the cafeteria, break room, hallways, and parking garage should generally be off-limits to monitoring. This is not because an employer has no legitimate interest in what occurs in these areas, but rather because it is oppressive to be watched constantly. Furthermore, what occurs in these areas is of little legitimate interest to employers and does not justify the imposition.

2. *Monitoring should be conducted openly, not in secret.* Often it is not the monitoring itself that is objectionable but the manner in which it is carried out. Few employees would object if their boss wanted to sit in on an important meeting. But many would object to having the meeting videotaped without their knowledge. The employer has the right to the information but not the right to acquire it by deceit and manipulation. Openness should extend not only to the fact of monitoring but also to the timing. It may not be dishonest

[12] *Id.*

to eavesdrop randomly on telephone calls after issuing a general notice that the company engages in this practice, but it is still distrustful and manipulative. Employees ought generally to know when they are being watched.

3. The degree of monitoring should be consistent with the need. The fact that an employer needs to monitor certain behavior does not justify continuous monitoring. For example, a telephone company may need to listen to calls taken by directory assistance operators to ensure that they are dispensing correct information and treating the customers courteously. The company does not need to listen to every call an operator takes to verify this. The requirements of handling one call are virtually identical to any other. Listening to a statistically determined sample of an operator's calls will protect the employer's interests without unduly intruding on the employee. The amount of monitoring needed is not the same for all employees. It may be necessary to monitor new employees more frequently because they have not completely mastered the job and need the feedback. Experienced employees may need less monitoring or no monitoring at all.

4. Electronic monitoring should be used only when traditional supervisory techniques are inadequate. Being watched by a machine is not the same as being watched by another person. The intervention of the video camera between supervisor and employee allows the supervisor to see without being seen. It takes away the ability of the employee to communicate with or question the supervisor. This profoundly alters the psychological dynamic of supervision. It is no longer a person-to-person process. Instead, the supervisor is transformed into a distant, invisible force, totally beyond the employee's knowledge or influence. This not only dehumanizes the relationship but dramatically increases the supervisor's power. All good negotiators know that their power increases with their knowledge of their opponent and decreases with their opponent's knowledge of them. Supervision via machine takes this to an extreme. Machine supervision should not be banned, but its use is unreasonable where direct human supervision would work.

There are obvious exceptions to the above rules. If an employer has reason to believe that employees are defrauding the company by making personal long distance telephone calls, it would be senseless to tell them when calls are going to be monitored to catch them in the act. But the existence of isolated exceptions does not negate the general validity of the principle.

In an ideal world the parties could work out rules for when and how monitoring is allowed. Perhaps as the technology becomes

more widespread and intrusive, the need for such agreements will become so acute that arbitrators will no longer be forced to decide what is reasonable. In the meantime, these guidelines may be of some help to arbitrators who must create a "common law" of electronic surveillance.

MANAGEMENT PERSPECTIVE

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On November 3, 1990, Tracy Mayberry died at the feet of some half-dozen Los Angeles police officers. After Mayberry was handcuffed, one witness stated that police officers had beaten Mayberry for some seven minutes before he died. The autopsy showed extensive bruising and abrasions. No criminal or disciplinary action was taken against the officers.[1] Four months later, another individual was beaten by Los Angeles police officers. His name was Rodney King. He did not die—he was merely injured. His suffering, however, attracted worldwide attention. The officers were internally disciplined and several were criminally prosecuted.[2] Why the difference? What differentiates the beating of King from the slaying of Mayberry? The answer is simple. George Holliday videotaped the beating of King. No one videotaped Mayberry's beating.[3] As one juror in the King case stated, "I think the tape basically speaks for itself... I would have to say that's basically what convicted them."[4] Holliday gave no notice that he was videotaping the King beating. Nevertheless, this surreptitiously made videotape served to convict two officers and subject a number of them to discipline by their employer, the Los Angeles Police Department.[5] Where

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[1]Harris, *City Found Negligent in Death of Suspect; Courts: Family of Man Who Was Hogtied While in LAPD Custody Is Awarded $1.1-Million Judgment*, L.A. Times, Oct. 21, 1992, at B3; Cockburn, *Sudden Death, With Police at the Scene; When Tracy Mayberry Died, There Were No Cameras*, L.A. Times, Mar. 28, 1991, at B7.

[2]Newton, *2 Officers Guilty, 2 Acquitted; Guarded Calm Follows Verdicts in King Case; Trial: Federal Jury Finds That Stacey Koon and Laurence Powell Violated Beating Victim's Civil Rights. Sentencing Is Set for Aug. 4*, L.A. Times, Apr. 18, 1993, at A1.

[3]*Jury Foreman Says Video Was Crucial in Convictions; Trial: Sgt. Koon Had a Duty to Stop the Beating After King Had Surrendered, He Says*, L.A. Times, Apr. 20, 1993, at B4; Weinstein, *Jury Relied Heavily on Tape of King Beating*, L.A. Times, Apr. 18, 1993, at A1; Cockburn, *supra* note 1; Stroberg & Wood, *Grand Jury to Probe Beating of Motorist; Police: Indictments Will Be Sought Against More Than Three Officers. One Has Been Disciplined Before for Using Excessive Force*, L.A. Times, Mar. 9, 1991, at B1.

[4]Weinstein, *supra* note 3; Newton, *supra* note 2.

[5]Newton, *supra* note 2.