

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2733

Heard in Calgary, Wednesday, 15 May 1996

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Discipline assessed to Mr. W. Harris (10-298).

BROTHERHOOD'S STATEMENT OF ISSUE:

The grievor was assessed 40 demerits for allegedly being the aggressor in a physical altercation with a fellow employee and for allegedly uttering threats to the same employee.

The Union contends that: 1) the grievor neither was the aggressor nor did he utter threats during the altercation in question; 2) the discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that the 40 demerits assessed be rescinded and removed from the grievor's record.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. M. Andrews – Labour Relations Officer, Vancouver
D. T. Cooke – Manager, Labour Relations, Montreal

And on behalf of the Brotherhood:

D. W. Brown – Sr. Counsel, Ottawa
P. Davidson – Counsel, Ottawa
J. J. Kruk – System Federation General Chairman, Ottawa
D. B. McCracken – Federation General Chairman, Ottawa
W. Brehl – Local Chairman, Revelstoke
W. Harris – Grievor

AWARD OF THE ARBITRATOR

It is not disputed that the grievor was involved in a physical altercation with another employee, Labourer P. Nuthall, in the early morning hours of June 11, 1995. It appears that Mr. Harris was arguing with another employee, Mr. W. Gilmar, about whether Mr. Gilmar had stolen his cigarettes. While there is some doubt as to the precise words, it would seem that Mr. Nuthall then told Mr. Harris to "cool it" and "shut up" or words to that effect. Mr. Harris then grabbed Mr. Nuthall, which caused him to fall to the ground, and punched him once. It is not disputed that Mr. Nuthall then stood up and called Mr. Harris a "fucking nigger", which provoked another black employee, Mr. V. Gordon, to again punch Mr. Nuthall. It seems that shortly after that the confrontation was broken up.

The Company assessed thirty-five demerits against Mr. Gordon, a measure of discipline which was not grieved. The Brotherhood asserts that the assessment of forty demerits against Mr. Harris in the instant case is unfair, stressing that he should be no more deserving of discipline than Mr. Gordon, or other employees who had been involved in similar altercations, and in respect of whom thirty demerits have been assessed.

The Company seeks to distinguish Mr. Harris' circumstances from the others on two grounds. Firstly, it submits that there was no provocation of the grievor. Secondly, it submits that shortly thereafter, Mr. Harris directed threats towards Mr. Nuthall, indicating that if he should get into trouble or lose his job he would get a gun and come back and shoot Mr. Nuthall.

The Arbitrator agrees that the alleged threat, if proved, would justify the more serious measure of discipline. However, upon a review of the various statements of the employees tendered in evidence, I cannot find that that very serious allegation has been proved on the balance of probabilities. There are, to say the least, inconsistencies between the accounts of what was said by Mr. Harris to Mr. Nuthall at the end of their tour of duty on June 11, 1995. The grievor states that he approached Mr. Harris for the purpose of apologizing to him, indicating that he, the grievor, would find himself in a lot of trouble if he lost his job. That account is partially reflected in the initial statement of Foreman Smith who confirmed that he overheard Mr. Harris speaking to Mr. Nuthall, wanting to apologize to him, and saying that if he should lose his job a lot of trouble would happen.

The allegation of threats appear to have emerged from the statement of Mr. Nuthall who states that he was in the shower car when he was approached by Mr. Harris who said that if he lost his job "... I'll be back with a gun and start shooting." There are substantial reasons to doubt the credibility of Mr. Nuthall in this matter. In his recounting of the first incident he stated that the grievor hit him five times. That, however, is not sustained by the grievor's testimony, the testimony of Mr. Gordon or the testimony of a number of other employees, including D. Frost. Mr. J. Bernard states that Mr. Harris only hit Mr. Nuthall one time. When asked to relate the nature of any threat that he might have heard, however, Mr. Bernard did not make any reference to a threat of shooting. The Arbitrator is left in some doubt as to Mr. Bernard's explanation, during a later statement, confirming Mr. Nuthall's account of the threat, on the basis that he was "trying to be subtle" in his first statement. In the Arbitrator's view the first account given by Mr. Bernard, which appears to conform to that Foreman R. Smith, should be given greater weight, as it appears to have been uninfluenced by any understanding of Mr. Nuthall's own statement.

In considering the credibility of Mr. Nuthall, it should also be noted that employee R. Walsh also confirmed that the grievor hit Mr. Nuthall only once, on the back of the head. Mr. Walsh also indicated that there was bad blood between Mr. Nuthall and Mr. Harris, as they "had been harassing each other for quite some time".

The grievor's own evidence gives considerable substance to the suggestion that he and Mr. Nuthall had long been antagonistic toward each other. He states that there were a number of petty encounters between them, the detail of which need not be examined. More significantly, however, Mr. Harris indicated that on a number of occasions Mr. Nuthall referred to African-Canadians as "niggers" in his presence, requiring him to tell Mr. Nuthall repeatedly that he found his language offensive. Indeed, a review of Mr. Nuthall's own statement during the course of the Company's investigation would suggest that he has a less than thorough appreciation of the offensive nature of the word "nigger".

The evidence further discloses that during prior periods of his employment, in both Saskatchewan and Manitoba, Mr. Harris had been the subject of harassment on the basis of his race. It seems that certain of those incidents gave rise to complaints filed with the **Canadian Human Rights Commission** which, it seems, were eventually resolved by a settlement satisfactory to Mr. Harris. The Arbitrator accepts the submission of the Brotherhood, however, that Mr. Harris remained extremely sensitive to racial slurs, whether they were made generally or to him in particular.

When regard is had to the totality of the evidence the Arbitrator cannot dispute the submission of the Company that the grievor was deserving of a substantial degree of discipline for his physical attack upon Mr. Nuthall. I cannot accept, however, that there was not a degree of provocation, at least insofar as Mr. Harris' own perception of Mr. Nuthall is concerned. The evidence establishes, on the balance of probabilities, that Mr. Harris was offended by what he perceived as Mr. Nuthall's officious intervention into his own discussion about his cigarettes with another employee. Coupled with their prior relationship, including racial slurs by Mr. Nuthall, that intervention triggered the grievor's outburst. I am further satisfied that the attack by the grievor was limited to grabbing or pushing Mr. Nuthall to the ground and striking him with one punch to the head.

The record also discloses that Mr. Harris did attempt to apologize to Mr. Nuthall. I cannot find, on the material before me, that the suggestion of a death threat to Mr. Nuthall is proved, on the balance of probabilities. Little weight can be given to that allegation, which appears to have found its origins in the mouth of Mr. Nuthall, whose credibility on other matters is not sustained by the testimony of a number of employees. Further, during the course of his disciplinary investigation Mr. Harris clearly acknowledged the error of his action, and stated that he wished to apologize to all concerned, including Mr. Nuthall.

In light of the foregoing, the Arbitrator is satisfied that the grievor was deserving of a substantial measure of discipline for his altercation with Mr. Nuthall. I agree with the Brotherhood, however, that the assessment of forty demerits was excessive in the circumstances, and that thirty demerits would have been the appropriate measure of discipline in the circumstances.

The grievance is therefore allowed, in part. The Arbitrator directs that thirty demerits be substituted for the forty demerits assessed against Mr. Harris, with his record to stand at forty-five demerits.

May 17, 1996

(signed) MICHEL G. PICHER
ARBITRATOR