

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3315

Heard in Montreal, Thursday, 12 December 2002 and Wednesday, 15 January 2003

concerning

VIA RAIL CANADA INC.

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL
WORKERS UNION OF CANADA (CAW-CANADA)**

EX PARTE

DISPUTE:

Discipline assessed Mr. Nourr Nasraoui, and his resultant discharge for accumulation of demerits.

UNION'S STATEMENT OF ISSUE:

Mr. Nasraoui was disciplined twice for two separate incidents involving altercations with fellow employee Mr. Patrick Zembski. He was assessed 45 demerits for an "alleged physical assault" on Mr. Zembski, November 28, 2001; and was dismissed for an "alleged physical assault" on Mr. Zembski on January 5, 2002.

It is the Union's position that the Corporation has no evidence that the incident of January 5, 2002 actually took place, except that the Corporation took the word of Mr. Zembski over that of the grievor. Furthermore, Mr. Nasraoui was truthful throughout both investigative statements and he readily admitted the first altercation. The Union contends that Mr. Nasraoui was subjected to harassment by Mr. Zembski since at least 1996 and that the Corporation allowed a poisoned work environment to flourish, contrary to its own harassment policy, resulting in the aforementioned incidents. It is the Union's position that the discipline was excessive, and unwarranted given the mitigating circumstances.

The Union requests the discipline be expunged from Mr. Nasraoui's record and that he be reinstated with full compensation for all wages and benefits lost.

The Corporation denies the Union's request.

CORPORATION'S STATEMENT OF ISSUE:

On Wednesday, November 28, 2001, Mr. Nasraoui was assigned as the Station Service Agent in the baggage room at Toronto Union Station. Mr. Nasraoui overheard some inappropriate remarks personal remarks spoken by his fellow employee, Senior Baggage Attendant Mr. Patrick Zembski. Mr. Nasraoui took offence and physically assaulted Mr. Zembski.

The Union submits that there were mitigating circumstances the Corporation should have considered before issuing the 45 demerits to Mr. Nasraoui. The Corporation maintained that the discipline imposed was warranted and Mr. Nasraoui had been previously counselled on inappropriate behaviour in the workplace.

The Union grieved the assessment of discipline. The Corporation denied the grievance at all steps of the grievance procedure.

On Saturday, January 5, 2002, Mr. Nasraoui was assigned as a red cap at Toronto Union Station. That morning Mr. Patrick Zembski, a fellow employee, stopped at the baggage area of Union Station on his day off. In front of approximately 20 VIA customers Mr. Nasraoui and Mr. Zembski engaged in a verbal confrontation which appeared to be escalating into a physical fight, yet again. The Senior Baggage Attendant, Mr. Darcy Duschêne, placed himself between the two assailants to prevent any physical violence.

For his conduct unbecoming a VIA employee Mr. Nasraoui was assessed 60 demerits which resulted in his dismissal for accumulation of demerit marks.

The Union submits that the discipline was excessive and unwarranted given the circumstances and asks that the discipline be expunged from Mr. Nasraoui's record and he be reinstated with full compensation for all wages and benefits lost. The Corporation maintained the discipline imposed was warranted and Mr. Nasraoui had been involved in a similar altercation on November 28, 2001.

The Union grieved the assessment of discipline and subsequent dismissal. The Corporation denied the grievance at all steps of the grievance procedure.

FOR THE UNION:
(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

FOR THE CORPORATION:
(SGD.) L. HELLER
FOR: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

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| L. Heller | – Sr. Advisor, Labour Relations, Montreal |
| E. J. Houlihan | – Sr. Manager, Labour Relations |
| M. Bastien | – Sr. Officer, Labour Relations, Montreal |
| C. Watson | – Customer Service Manager |

And on behalf of the Union:

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| R. Massé | – Bargaining Representative, Montreal |
| D. Olszewski | – National Representative, Winnipeg |
| D. Andru | – Bargaining Representative, Toronto |
| T. Blanchard | – Local Chairperson, |
| P. Zembski | – Witness |
| N. Nasraoui | – Grievor |

At the request of the parties the hearing was adjourned *sine dies*.

On Wednesday, 15 January 2003, there appeared on behalf of the Corporation:

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| L. Heller | – Sr. Advisor, Labour Relations, Montreal |
| E. J. Houlihan | – Sr. Manager, Labour Relations |
| M. Bastien | – Sr. Officer, Labour Relations, Montreal |

And on behalf of the Union:

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|--------------|---------------------------------------|
| D. Andru | – Bargaining Representative, Toronto |
| D. Olszewski | – National Representative, Winnipeg |
| R. Massé | – Bargaining Representative, Montreal |
| P. Zembski | – Witness |
| N. Nasraoui | – Grievor |

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that from the time of his hire, in June of 1996, the grievor had a relationship with fellow employee Pat Zembski which can only be qualified as mutually antagonistic. Both employees work in the baggage room at Toronto's Union Station as Station Service Agents, with Mr. Zembski sometimes having the responsibility of Senior Service Agent, a quasi-supervisory or lead hand responsibility.

The first grievance arises by reason of the assessment of forty-five demerits against Mr. Nasraoui for a physical assault upon Mr. Zembski. The incident occurred on November 28, 2001, shortly after the unfortunate events of September 11, 2001. It appears that Mr. Zembski was then in conversation with another employee, Mr. Alain Gervais, apparently in the presence of two other employees, not including Mr. Nasraoui. The evidence confirms that Mr. Nasraoui was then in an adjacent office. The Arbitrator is satisfied that during his conversation with Mr. Gervais, Mr. Zembski commented upon the potential for a rise in the price of oil in the event that Arab terrorists should sabotage oil pipelines. While Mr. Zembski has no recollection of it, I am satisfied that during the course of the comment he referred to such deeds as being performed by "Nourr and his banditos", referring to Mr. Nourr Nasraoui, who is a Muslim of Arab descent. Upon overhearing the comment Mr. Nasraoui left the office and proceeded to confront Mr. Zembski. Mr. Nasraoui then seized Mr. Zembski by the neck and collar, apparently choking him, and causing him to fall to the floor. The two then disengaged as Mr. Zembski backed away and Mr. Gervais intervened to calm the situation.

Following an investigation the Corporation assessed forty-five demerits against Mr. Nasraoui for his assault upon Mr. Zembski, and assessed thirty demerits against Mr. Zembski for his racist comments and provocative behaviour.

The Arbitrator is satisfied that the assessment of forty-five demerits against Mr. Nasraoui was justified in the circumstances. Needless to say, an assault upon another employee, in a public area attended by numbers of the Corporation's passengers dealing with their baggage, is unacceptable conduct. To the extent that it goes to the Corporation's own ability to maintain a safe and orderly workplace, it might well have resulted in the discharge of the grievor. I am satisfied that in assessing forty-five demerits, a measure of discipline short of discharge, the Corporation did give appropriate consideration to mitigating factors, most significantly the provocation to which Mr. Nasraoui was subject at the hands of Mr. Zembski.

Even accepting, however, that the racist comments of Mr. Zembski were entirely unacceptable, it need scarcely be said that employees cannot resort to self-help and violence in the workplace to settle their disagreements with other employees, even those prompted by personal insults. The Arbitrator therefore denies this first grievance and sustains the Corporation's assessment of forty-five demerits against Mr. Nasraoui. In so concluding the Arbitrator specifically rejects the Union's suggestion that Mr. Nasraoui should be assessed the same discipline as Mr. Zembski, against whom thirty demerits were assessed. There is, in my view, a substantial difference between abusive words and physical violence, even allowing for provocation. Bearing that difference in mind the difference in the measure of discipline assessed against the two employee was not inappropriate, in my view.

I turn to consider the second grievance. It concerns a further confrontation between the same two employees which occurred on Saturday, January 5, 2002. On that day the grievor was assigned to work as a red cap at Union Station, while Mr. Zembski was on his day off.

Mr. Zembski, who resides near Union Station, came to the workplace and attended at the baggage room. He states that he did so to obtain the telephone number of another employee who had possession of his work keys, apparently to call that employee and remind him to bring them to work. The Corporation suggests that Mr. Zembski's motives may have been different. It appears that Mr. Zembski had filed a complaint with the police concerning the assault upon himself by Mr. Nasraoui on November 28, 2001. The Corporation maintains that Mr. Zembski was then aware that the police intended to arrest and charge Mr. Nasraoui while he was at work on January 5th, and that in all probability he came to the workplace to witness Mr. Nasraoui's arrest.

It is common ground that it was a busy time, and that there were in excess of twenty customers awaiting service at the baggage room counter. While the evidence of what was said is not entirely clear, it does appear that Mr. Zembski spoke loudly in praise of another employee, and that at one point he made the comment, "We are all God's children." Whatever he may have said, Mr. Nasraoui, who was then servicing a client nearby, became extremely agitated and confronted Mr. Zembski. The two apparently engaged in what was described by a Corporation witness as a loud exchange of verbal insults which had every indication of escalating into physical violence. The two were finally separated by another employee. It appears that when Mr. Zembski then attempted to leave the area Mr. Nasraoui blocked his passage and used his radio to call security. Shortly thereafter security arrived, as well as two station managers, and the incident apparently ended.

Following disciplinary investigations both employees were assessed sixty demerits for the incident, for conduct unbecoming VIA employees, and were dismissed. In addition to this grievance against discharge Mr. Nasraoui has apparently filed a complaint with the Canadian Human Rights Commission alleging harassment and racial discrimination leading to his discharge.

The issue is whether the grievor was subject to discipline for the incident of January 5, 2002 and, if so, whether the termination of his employment was the appropriate measure of discipline in the circumstances, or whether mitigating circumstances would suggest that the Arbitrator should exercise his discretion to implement a reduction in penalty. The record before me is extensive as to the antagonism between Mr. Nasraoui and Mr. Zembski, over a long period of time. It appears that from 1996 through 2002 both employees had occasion to file written complaints with management about the conduct of the other. In those complaints Mr. Nasraoui has alleged that he was made the subject of taunting and racial harassment by Mr. Zembski, and was repeatedly denied overtime opportunities when Mr. Zembski was responsible for assigning overtime. Mr. Zembski, on the other hand, filed letters indicating that the grievor continually made insulting remarks to him, questioning his competence to discharge the responsibilities of a senior service agent and ridiculing him in the presence of other employees. Needless to say the record indicates that these two individuals operated for a long time in a relationship of mutual antagonism and disrespect.

In the Arbitrator's view there are, nevertheless, reasons to consider a mitigation of penalty in the case at hand. The record does disclose that Mr. Zembski has a disturbing tendency to make provocative statements of a politically incorrect nature. For example, he was previously counselled for having made a disparaging comment about a gay employee. Based on the incident of November 28, 2001, reviewed above, he obviously had little compunction in making loose comments to another employee, associating the grievor with Arab terrorists, in tones that could be easily overheard. While the Arbitrator does not condone the reaction of Mr. Nasraoui in the face of the bigotry displayed by Mr. Zembski, in my view it is unfortunate that such personal antagonisms should result in the termination from employment of two otherwise good and productive employees. In my view the interests of the Corporation and of the grievor can be reasonably protected by an order of conditional reinstatement, effectively substituting a lengthy suspension for the discharge of Mr. Nasraoui.

The second grievance is therefore allowed, in part. The Arbitrator directs that Mr. Nasraoui be reinstated into his employment forthwith, without loss of seniority and without compensation for wages and benefits lost. His reinstatement shall be conditional on his agreeing to allow the Corporation the latitude to assign and schedule himself and Mr. Zembski in such a way as to avoid their working together for a period of two years, it being understood that any such adjustment should be made in a manner that is fair to both employees. Should there be any issue as to the interpretation or implementation of this award the matter may be spoken to.

January 17, 2003

(signed) MICHEL G. PICHER
ARBITRATOR