

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3316

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:

Concerning the dismissal of Mr. Patrick Zembski.

UNION'S STATEMENT OF ISSUE:

Mr. Zembski was disciplined twice for "alleged conduct unbecoming of a VIA employee". He was assessed 30 demerits for an alleged altercation with fellow employee Mr. Nourr Nasraoui on November 28, 2201; and was dismissed for an alleged altercation with Mr. Nasraoui again on January 5th, 2002.

It is the Union's position that the Corporation has failed to show clear and cogent evidence that Mr. Zembski is guilty of any wrongdoing. A higher standard of proof is required to support dismissal. It is further the Union's position that the Corporation discharged the grievor as a means of political expediency, given that they also discharged the perpetrator, Mr. Nasraoui. The Corporation failed to exercise due diligence in this matter, by failing to explore other means of protecting the two employees from each other.

It is the Union's position that the discipline assessed is unwarranted in the circumstances; and if warranted, excessive. The Union requests the grievor be reinstated to his position with no loss of wages, benefits or seniority.

The Corporation denies the Union's request.

FOR THE UNION:

(SGD.) D. OLSHEWSKI

NATIONAL REPRESENTATIVE

There appeared on behalf of the Corporation:

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

And on behalf of the Union:

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

M. Bastien	- Sr. Officer, Labour Relations, Montreal
E. J. Houlihan	- Sr. Manager, Labour Relations
L. Heller	- Sr. Advisor, 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 |
| N. Nasraoui | – Witness |
| P. Zembski | – Grievor |

AWARD OF THE ARBITRATOR

The first of the two grievances concerns the assessment of thirty demerits against Mr. Zembski for an incident which occurred in the baggage room of Union Station in Toronto on November 28, 2001. The facts of that incident are related in **CROA 3315**. The second grievance concerns the discharge of Mr. Zembski following a second confrontation between himself and employee Nourr Nasraoui on January 5, 2001. The events of that incident are also related in **CROA 3315** and need not be repeated here.

In the Arbitrator's view the assessment of thirty demerits against Mr. Zembski for the incident of November 28, 2001 should not be disturbed. It is clear that in a loud voice he made a racist remark associating Mr. Nasraoui, who is of Arab descent, with Muslim terrorists shortly following the events of September 11, 2001. That insensitivity provoked Mr. Nasraoui to physically assault Mr. Zembski in what was a fortunately brief altercation.

The second incident concerned the grievor attending at work where he again became involved in a confrontation with Mr. Nasraoui. I am satisfied that Mr. Zembski had no good excuse to be in the workplace when he apparently knew that the grievor would be at work, on a day when Mr. Nasraoui was apparently to be arrested and charged for his earlier assault on Mr. Zembski.

With respect to the incident of January 5, 2002, the Arbitrator is satisfied that the Corporation was justified in assessing discipline against Mr. Zembski. His presence in the workplace while Mr. Nasraoui was on duty was clearly unjustified and was aggravated by the use of words which apparently were again provocative towards Mr. Nasraoui. The grievor would appear to have learned nothing from the thirty demerits assessed against him relating to the incident of November 28, 2001. The Arbitrator is nevertheless satisfied that it is extremely unfortunate to see the career of a fourteen year employee, who apparently has never previously been disciplined beyond a single counselling, for such unfortunate events. In the result, I am satisfied that it is appropriate to substitute a penalty short of discharge, subject to conditions fashioned to protect the interests of the Corporation and the grievor.

The grievance relating to the incident of January 5, 2002 is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for wages and benefits lost, with the period he was out of service to be recorded as a suspension. The grievor's reinstatement shall be conditional, however, upon his accepting to be subject, for a period of two years, to assignment and scheduling by the Corporation in such a way as to avoid contact between himself and Mr. Nasraoui, it being understood that any such adjustment should be made in a manner that is fair to both employees. The Arbitrator retains jurisdiction in the event of any dispute concerning the interpretation or implementation of this award.

January 17, 2003

(signed) MICHEL G. PICHER
ARBITRATOR