

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3995

Heard in Montreal, Thursday, 14 April 2011

Concerning

VIA RAIL CANADA INC.

And

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

DISPUTE:

The assessment of forty-five (45) demerits to Mr. N. Nasraoui.

JOINT STATEMENT OF ISSUE:

On August 31, 2010, a supplementary investigation was held for Mr. Nasraoui for his alleged conduct unbecoming and damage to company property on August 16, 2010. Mr. Nasraoui was subsequently issued forty-five (45) demerits as a result.

The Union contends that the discipline was excessive, unfair and unwarranted. The incident was not intentional and was accidental, and there were mitigating factors that should have been taken into account. The Union further contends the Mr. Nasraoui is a senior employee. The Union further contends that the assessment of discipline in this case was tantamount to double jeopardy.

The Union seeks the discipline be expunged and Mr. Nasraoui be reinstated with full employment, without loss of seniority and reimbursed all wages and benefits.

The Corporation received a complaint of conduct unbecoming by another employee and consequently investigated the complaint.

The Corporation submits that Mr. Nasraoui was in violation of the Corporation's Code of Conduct and policies and the discipline imposed was warranted and justified.

FOR THE UNION:
(SGD.) R. FITZGERALD
NATIONAL REPRESENTATIVE

FOR THE CORPORATION:
(SGD.) B. A. BLAIR
SR. ADVISOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

B. A. Blair
L. Selesnic

– Sr. Advisor, Labour Relations, Montreal
– Manager, Customer Experience, Montreal

There appeared on behalf of the Union:

R. Fitzgerald	– National Representative, Toronto
D. Andru	– Regional Representative, Toronto
N. E. Nasraoui	– Grievor

AWARD OF THE ARBITRATOR

The Corporation alleges that the grievor violated its code of conduct by engaging in the harassment of a fellow employee, to an extreme and unacceptable degree. The grievor has worked at the Corporation's Toronto Maintenance Centre in Mimico as a stock checker since April of 2003. At that time he was returned to work following a decision in **CROA 3315** which dealt with his previous discharge for the accumulation of demerits following a physical altercation with another employee. At the Mimico location he worked with a number of employees, including Mr. Steve Bynoe, who is also a stock checker at the Toronto Maintenance Centre.

On August 19, 2010 Mr. Bynoe wrote a written report concerning his relationship with Mr. Nasraoui. In that report he advises that on the morning of August 18, 2010, at the commencement of his tour of duty when he was paired to work with the grievor, Mr. Nasraoui said to him "I'm going to terrorize you until September 6th, that is when my shift ends." He further relates that for some time the grievor had made disparaging references to him in the workplace, "... calling me bitch, slave, and boy, just to name a few." He relates that on the day they worked together Mr. Nasraoui turned to him during the loading of train no. 83 and said "Boy, make two bags of ice for train no. 83." During the course of their work together the grievor further referred to Mr. Bynoe as "stupid bitch", a comment he apparently made before violently slamming the door of the cube van he was driving, causing the driver's side window to shatter into pieces.

The record before the Arbitrator confirms that there was some previous history of harassment of Mr. Bynoe by the grievor. On April 1, 2008 Manager, Customer Experience, Lesley Selesnic spoke with the grievor concerning complaints at that time from Mr. Bynoe of "verbal personal attacks" made by Mr. Nasraoui against him. Mr.

Bynoe apparently reported to the supervisor that the grievor made comments about his race and told him that he can't dress, among other things. According to the memo to file of Ms. Selesnic the following exchange occurred between herself and the grievor:

... Nourr said it was all in fun and then pretty much denied it. I advised him he may think it is all in fun however it is considered harassment as Steve does not feel it is "all in fun", he doesn't like it and his comments are not welcome. Nourr agreed to leave Steve alone, make no more personal comments and to work together on a business level.

Unfortunately, as the events of August 18, 2010 reveal, the grievor did not continue to honour the undertaking he made to Ms. Selesnic in 2008. Notwithstanding his history of violence in the workplace and what appears to have been a pattern of harassment for which he had clearly been cautioned, he chose to engage yet again in abusive language towards Mr. Bynoe, resulting in an incident involving damage to the Corporation's property and a written complaint by a fellow employee, Mr. Bynoe, a relatively extraordinary step in any workplace.

Regrettably, the incident here under examination must be characterized as one of disturbing recidivism on the part of the grievor. As one who was returned to work following an act of violence as a result of a prior arbitration, and who was later reminded of the importance of not harassing Mr. Bynoe, the grievor appears to have learned nothing of the importance of maintaining respect for fellow employees. On the whole, I am satisfied that in the circumstances the assessment of forty-five demerits was appropriate, and should not be disturbed. Nor does the overlap of discipline herein with the discipline reviewed in CROA&DR 3994 constitute double jeopardy, as two distinct heads of misconduct are involved.

For the foregoing reasons the grievance is dismissed.

April 18, 2011

(signed) MICHEL G. PICHER
ARBITRATOR