

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

**CASE NO. 3996**

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 sixty (60) demerits to Mr. N. Nasraoui.

**JOINT STATEMENT OF ISSUE:**

On September 1, 2010 an investigation was held for Mr. Nasraoui for his alleged conduct unbecoming resulting in injury to a VIA Rail supplier's delivery person on August 18, 2010. Mr. Nasraoui was subsequently issued sixty (60) 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 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 from its supplier concerning the injury caused to their employee by Mr. Nasraoui. The Corporation submits that Mr. Nasraoui has been disciplined for the same type of behaviour in the past. A violation of the Corporation's code of conduct, and demonstrating violent behaviour is a serious infraction of the code of conduct and damaging to the Corporation's reputation.

Consequently the Corporation submits the discipline was reasonable and appropriate and that the termination of employment of Mr. Nasraoui was 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 – Sr. Advisor, Labour Relations, Montreal
- L. Selesnic – 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 deliberately injured the employee of a supplier contractor during an incident which occurred on the loading dock of the Toronto Maintenance Centre on August 18, 2010.

The video tape of the incident, taken from a security camera, reveals that the grievor was seated on a metal two-seater bench filling out a report when he was approached by Mr. Murray Windross, a delivery employee of the Corporation's linen supplier, a company called "Ms. Clean". After backing his truck close to the loading dock, Mr. Windross came around behind the bench where Mr. Nasraoui was writing a report, asking him what he was doing. The tape reveals that in fact Mr. Windross placed a hand on the grievor's shoulder and another hand on the back of the bench.

The grievor's account, which I accept, is that he told Mr. Windross that he did not wish to be disturbed while he was writing. As is evident from the video, when Mr. Windross touched the grievor on the back, the grievor grabbed the bottom edge of the bench with his right hand and pulled himself up, at the same time causing the bench to spill over backwards. According to a subsequent report filed by the employer for Mr. Windross, it would appear that the steel bench fell onto the driver's right foot, causing serious bruising which resulted in his subsequently losing a day's work to obtain medical attention for his injury.

The position of the Corporation is that the grievor deliberately flipped the metal bench back onto Mr. Windross, deliberately causing the injury which resulted. The

Union's representative submits that in fact the driver leaning on the back of the bench was a substantial contributing factor to the bench tipping over as it did.

Having carefully reviewed the video, the Arbitrator has some difficulty with the Union's interpretation of what happened. It is clear that upon being touched by Mr. Windross the grievor made a very quick movement, an intrinsic part of which was to pull the bottom part of the bench upwards with his right hand, sufficiently to cause it to flip over backwards. I am not persuaded, on the balance of probabilities, that a bench as heavy as the two-seater bench in question would have possibly tipped over backwards without significant thrust of force, as was applied by the grievor.

I do not consider it necessary to find that the grievor intended to have the bench land on Mr. Windross' foot, as it apparently did. In my view it is sufficient to conclude, as I feel I am compelled to, that it is clear that the grievor deliberately upset the bench in a backwards direction, reckless as to whether it would or would not strike Mr. Windross. That action, apparently prompted by anger on the grievor's part, did obviously result in injury to the supplier's delivery driver. I am satisfied that the carelessness exhibited by the grievor in the circumstances did warrant a severe level of discipline.

The grievor is an employee with a prior record of violence in the workplace (**CROA 3315**). In all of the circumstances I am satisfied that the assessment of sixty demerits was not inappropriate, and that the grievance must be dismissed.

April 18, 2011

**(signed) MICHEL G. PICHER**  
ARBITRATOR