**CANADIAN RAILWAY OFFICE OF ARBITRATION**

**CASE No. 874**

**Heard at Montreal, Wednesday, October 14, 1981**

Concerning

**CANADIAN PACIFIC EXPRESS LIMITED**

and

**BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

**EX PARTE**

**DISPUTE:**

The unilateral decision by the Company in having employee Mr. Jack Mason, Peterborough, Ontario, removed from his bulletined vehicle position "as per Article 7" on medical grounds.

**EMPLOYEES' STATEMENT OF ISSUE:**

In the early part of October 1980, employee J. Mason, was advised by the Company he would be removed from the vehicle staff due to a hearing impediment. Employee Mason held a bulletined position until removed by the Company.

The Brotherhood contends employee J. Mason was removed from his bulletined position illegally and requested he be reinstated to his vehicleman's position and reimbursed for all wages lost while held off his bid position.

The Company refused to adhere to the Brotherhood's request and maintain he was removed because of medical reasons.

**FOR THE EMPLOYEES:**
(Sgd. **J. J. BOYCE**
**GENERAL CHAIRMAN**

There appeared on behalf of the Company:

D. R. Smith - Director, Industrial Relations, Personnel & Administration, CP

Express, Toronto.

B. Neill - Manager, Labour Relations, CP Express, Toronto.

R. A. Colquhoun - Labour Relations Officer, CP Rail, Montreal

And on behalf of the Brotherhood:

J. J. Boyce - General Chairman, BRAC, Toronto

F. W. McNeely - General Secretary-Treasurer, BRAC, Toronto

J. Crabb - Vice General Chairman, BRAC, Toronto

## AWARD OF THE ARBITRATOR

The grievor was removed from his bulletined position (and allowed to exercise his seniority) because the company determined, on the basis of medical examination, that the grievor did not meet the hearing standards set for his job.

The matter was brought to a head, it seems, by the grievor's involvement in an accident. It is said that he did not hear a horn being sounded as he made a reverse movement. I make no finding in this regard, as the grievor was not disciplined, and no question of misconduct arises. The accident is only material to this case insofar as it may have occasioned the re-examination of the grievor's hearing. Regardless of the circumstances of the accident, examination of drivers' hearing from time to time, or when some particular question arises, is quite proper. The company is entitled to require of drivers that they continue to meet certain physical standards, including standards of hearing, in order to perform their work safely and reasonably. The company sought to apply those standards, and did not act arbitrarily or seek to discriminate improperly against the grievor.

Quite apart from its disciplinary power, the company may at all times require that its employees continue to be competent, and physically and mentally able to do their work. Where the company considers that an employee is not competent, or physically or mentally able to do his job, then if a dispute arises, the onus is on the employer to show that such is the case. This is quite apart from the company's policy on the matter which, while it may establish the procedures the

company follows, is not of itself binding on the union.

Article 7.2.14 of the Collective Agreement, relied on by the union is as follows:

> -7.2.14 An employee awarded a position by bulletin will not be permitted to revert to his former position. In the event of ill health or other extenuating circumstances, an employee may be permitted to revert - subject to agreement between the Company Officer concerned and the General Chairman."

This article does not provide that an employee who has been awarded a position by bulletin may remain in it even if he has become incompetent or incapable of doing the work, or of meeting appropriate medical standards. Rather, it deals with the case of employees who might wish to revert to their former position. As a general rule, it prohibits such reversion. In the special cases of ill health or other extenuating circumstances (such as the instant case, no doubt) employees may revert if there is agreement of the parties. In the instant case the grievor was allowed to exercise his seniority. Whether or not that was correct is not in issue. What is in issue is simply whether or not the company properly concluded that the grievor did not meet the medical standards, and that he was therefore subject to removal.

Such an issue raises, essentially, two questions: 1) whether or not the individual did fail to meet certain standards and 2), whether or not such standards were reasonable. As to the first question, the material before me does not raise any doubt as to the medical examination or their findings. The grievor's hearing, tested (quite properly) without a hearing aid, falls (or did at the time of testing) below the standards required by the company. It is proper to conclude for the purposes of this award, that the grievor's hearing was in fact "below standard".

The second question presents greater difficulty. It is not enough for the employer simply to conclude (even correctly) that an employee is "below standard". It must be shown that the standard required to be met is a reasonable one, justifiable in terms of expected practical consequences if it is not met. It should be supported by some form of expert evaluation.

The standard required in the instant case was, it appears, adopted by the company from that promulgated by the Canadian Transport Commission. That standard is, it appears, one applicable to railway employees. It is not clear that it would be equally applicable to an express employee working as a Vehicleman. There may well be appropriate justification for the adoption -of that standard to the classification in question, but that justification does not appear in the material

before me. Apart from this, it has not been shown that the use of a hearing aid would not (at least in the grievor's case compensate properly for this deviation from the standard required. While it may be quite proper to test hearing while the subject is not wearing a hearing aid, the question of the use of a hearing aid to compensate for hearing deficiencies is quite separate, and would appear to involve a number of distinct considerations including the effectiveness of the device to compensate for the particular deficiency, the reliability of the hearing aid, any side effects its use might have, and the like.

The material before me simply does not allow a determination, one way or the other, of the question of the reasonableness of the standards required to be met in this case. Accordingly, an essential element of the company's case has not been made out, and the grievance must be allowed.

It does not necessarily follow that the grievor must be allowed to drive company vehicles if his hearing is seriously impaired. An order of reinstatement need not necessarily imply that certain work must be assigned, although it might usually do so. If, however, the company stands by its position that its standard is an appropriate and reasonable one to rely on, then if such decision is challenged, it must be prepared to justify it to the union and ultimately, if necessary, to an arbitrator. The setting of proper standards is indeed (at least under this Collective Agreement) a management prerogative. What would have to be shown is that such prerogative was exercised in a proper way.

For the foregoing reasons, the grievance is allowed. The grievor is to be reinstated in his classification, and reimbursed for loss of earnings. Having regard to the circumstances of this case, however, it is a part of this award that the company may, as a condition of assigning the grievor to work, require him to meet any proper and reasonable medical or other standards. The outcome of any test in that regard, however, shall not affect the grievor's right to compensation under this award, up to the time when any decision is made by the company in respect of his assignment to work.

J.F.W. Weatherill

Arbitrator

**CANADIAN RAILWAY OFFICE OF ARBITRATION**

**SUPPLEMENTARY AWARD**

**TO**

**CASE No. 874**

Heard at Montreal, Tuesday, September 14th, 1982

Concerning

**CANADIAN PACIFIC EXPRESS LIMITED**

and

**BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS9 EXPRESS AND STATION EMPLOYEES**

(Decided on the basis of the parties' written submissions)

There appeared on behalf of the Company:

D.R. Smith - Director, Labour Relations & Administration, CP Express, Toronto

B.D. Neill - Manager, Labour Relations, CP Express, Toronto

P.E. Timpson - Labour Relations Officer, CP Rail, Montreal

Dr. W.L. May - Chief of Medical Services, CP Rail, Montreal

Dr. R.N.W. McMillan- Otologist, Montreal

And on behalf of the Brotherhood:

J.J. Boyce - General Chairman, System Board of Adjustment No. 517, BRAC, Don Mills

J. Crabb - General Secretary Treasurer, BRAC, Toronto

M. Gauthier - Vice General Chairman, BRAC, Toronto

## SUPPLEMENTARY AWARD OF THE ARBITRATOR

By the award issued in this matter, the grievor was reinstated in employment and entitled to compensation for loss of earnings. The parties have been unable to agree with respect to the amount of compensation to which the grievor is entitled, and that question has come before me for determination. Further, it was made a part of the award that the Company might, as a condition of assigning the grievor to work, require him to meet any proper and reasonable medical standards. The Company did determine that the grievor did not meet certain medical standards with respect to hearing, and the issue has arisen as to the propriety and reasonableness of those standards.

I shall deal first with the hearing standards. As is set out in the award (and it remains the case), there is no doubt as to the medical examinations or their findings. The grievor's hearing, tested without a hearing aid, falls below the standard required by the Company. As to the reasonableness of requiring such standards for a job such as the grievor's (driving a truck) the material now before me (and it should be said that this is not an "appeal" from the award in this matter but a further hearing relating to a subsequent decision which the award contemplated might be made), shows that given the average noise level of the Company's fleet at the grievor's location, the degree of amplification required to permit the grievor to hear and discern sounds adequately would result in a noise level to which, under the Canada Noise Control Regulations, the grievor could not be exposed for more than one hour per day. Full-time performance of his job would involve violation of the Regulations. Further, the use of a hearing aid to

provide such amplification would itself, on the medical evidence before me, lead to a further deterioration of the grievor's hearing, given the nature of his particular hearing disability.

From all the material before me, I am satisfied that both from the point of view of the grievor's health, and from that of the efficiency of its operations and protection from claims, the hearing standards applied were proper and reasonable. The grievor did not meet them, and was therefore properly removed from such work.

On the matter of compensation, it will be remembered that the outcome of the subsequent decision was not to affect the grievor's right to compensation up to the time when any further decision was made with respect to his assignment.

It would appear to be common ground that the grievor's gross earnings as a vehicleman for the material part of 1980 and all of 1981 (after which he was paict fully), would have been **$21,996.54.** The Company contends that in calculating the compensation payable to the grievor, there should be deducted any actual earnings, as well as any amount it can be shown the grievor would have earned, had he taken advantage of the opportunities available.

As to the grievor's actual earnings during the period in question, these of course reduced the total of his loss, and his compensation is to be reduced accordingly. This principle was expressed in Case No. 168 (the Supplementary Award) and others. In the instant case the grievor earned **$2541.38** from work for the Company in the material portion of 1980, and $3699.41 from work for the Company in 1981. As well, the grievor had earnings from outside employment in 1981 of $2,742.00. The total of these amounts, $8982.79, is to be deducted from the potential gross earnings lost.

The Company also seeks to deduct the value of work which it offered to the grievor, but which he refused to accept. I do not determine, in this case, the question of whether or not the grievor ought, in mitigation of his losses, to have exercised his seniority by transferring to another location. That may be more than mitigation of losses requires, although such a question might depend on individual circumstances. He was, in any event, under a general obligation to mitigate his losses, and he ought to have accepted the part-time work offered by the Company. It is no answer to say that on the separation form issued pursuant to Unemployment Insurance regulati ' ons the "reason for issuing this record" was given as "shortage of work". That did not relieve the grievor of his obligation to took for work, and the fact is that it was offered to him by the Company. That work was available, and the grievor would have earned $6124.79 by accepting it.

That amount would, as a general matter, also be deductible in determining the grievor's compensable loss. The work involved, however, was work beginning at 4:00 A.M.; and if he had accepted that work (as he ought to have done), the grievor would then have had a partial conflict of hours with respect to the outside work he performed. It would not be correct to deduct both these amounts in calculating the compensable loss. Thus, if $6124.79 is added to the amount above referred to as deductable, for a total of $15,107.58, then credit should be given for the outside earnings of **$2742.00.** Thus the **proper deduc**tion from the gross loss of earnings in figure would be $12,365.58. The balance, or compensable loss, is $9630.96. The grievor was in fact paid **$6888.96. He is entitled to be paid the balance, $2742.00,** forthwith.

The final award in this matter is therefore that the application of the Company's medical standards was proper, and that the compensation payable pursuant to the award is **$9630.96, of which** the balance now payable is $2742.00.

**(Sgd.) J.F.W. WEATHERILL**

**ARBITRATOR**