CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 945

Heard at Montreal, Tuesday, May 11, 1982

Concerning

C.P. TRANSPORT - BULK SYSTEMS

and

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

DISPUTE:

The arbitrary decision of the Company in removing Mr. E. Erickson from his position of Warehouseman Driver.

JOINT STATEMENT OF ISSUE:

Mr. Erickson was advised by the Company that he would be removed from his position as driver, due to and quote "not meeting Company standards regarding hearing capability" unquote.

The Union contend that Mr. Erickson was terminated illegally and requested he be reinstated and reimbursed for all lost wages.

The Company refused the request.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) P. L. ROUILLARD, FOR R. WELCH System General Chairman	(SGD.) G. E. D. LLOYD General Manager, Bulk Systems.

There appeared on behalf of the Company:

N. W. Fosbery	- Director, Labour Relations, CP Transport, Toronto
B. P. Scott	- 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:

R. Welch	- System General Chairman, BRAC, Vancouver
W. T. Swain	- General Chairman, BRAC, Montreal

AWARD OF THE ARBITRATOR

The grievor was hired by the Company subject to his meeting its medical standards. He was, nevertheless an employee of the Company at all material times, a member of the bargaining unit, and entitled to the benefit of the provisions of the Collective Agreement. At the time of the termination of his employment, the grievor had not accumulated 65 days' compensated service. He was, by virtue of Article 11.6 of the Collective Agreement, still a probationer and not

yet "permanently employed". Such a person "comes within the terms of the agreement" unless he is "removed for cause which in the opinion of the Company renders him undesirable for its service".

In the instant case it was the Company's opinion, reached on the advice of its Medical Officers, that the grievor was undesirable for its service by reason of a hearing deficiency. It appeared from the Company's examination of the matter that were the grievor to make use of a hearing aid, the necessary amplification would then take the grievor beyond the limits allowed by the Noise Control Regulations under the Canada Labour Code.

I make no findings of fact on the grievor's actual medical condition,since the Union was not prepared, at the hearing to offer medical evidence to refute that of the Company. In my view, the matter does not require any findings of fact in this connection, apart from the very general one - which is not in doubt - that the grievor does suffer from a degree of hearing impairment.

Article 11.6, as was noted in Canadian Railway Office of Arbitration Case No. 836, gives a broad discretion to the employer. In the instant case, it exercised that discretion on the basis of medical opinion, which was founded on clinical results which do not'appear to be in doubt. In a case such as this, it is not the Arbitrator s role to determine the "objective correctness" of the Company's decision. Such a role may well arise in the case of the "non-culpable discharge" of a regular or permanent employee, in which the cases cited by the Union would apply. The instant case, however, involves the exercise by the Company of the discretion accorded to it by Article 11.6 in cases of probationary employees Thus, the Arbitrator's role is not to determine whether or not the decision was "correct", but rather whether or not it was a decision made within the scope of the discretion accorded by Article 11.6.

For the Company to make a decision of this sort, based on the opinion of its Medical Officers, and in reliance on clinical observation and having regard to government regulations, is, in my view, a proper exercl of the discretion referred to. If it could be shown that the decision were arbitrary or in bad faith or, even without these, that it were patently unreasonable, then it would not be a proper exercise of the discretion. In the instant case however, there is no allegation of arbitrariness or bad faith, and no suggestion of such in the material before me. There is a suggestion that the decision was not "reasonable", in that too high a standard was applied: the grievor did, it appears, meet the provincial standards for employment as a driver, and he could, and did, perform such work for other employers. While that may well be the case, it does not follow that insistence by this employer on a higher standard is unreasonable.

Having regard to the nature of the issue which arises in cases to which Article 11.6 applies, therefore, it must be my conclusion that the Company's decision was in the exercise of the discretion which it has under that Article. Accordingly, the grievance is dismissed.

J. F. W. WEATHERILL,
ARBITRATOR