CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD

TO

CASE NO. 1012

Heard at Montreal, Tuesday, May 10, 1983

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(PACIFIC REGION)
and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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

There appeared on behalf of the Company:

I. J. Waddell -	- Manager Labour Relations, CPR, Montreal
F. R. Shreenan	- Assistant Supervisor, Labour Relations, CPR, Vancouver
Dr. W. L. May	- Chief of Medical Services, CPR, Montreal
R. S. Ritchie	- Asst. to Vice-President, Operating and Maintenance, CPR, Montreal
D. G. Dow	- Deputy Regional Engineer, CPR, Vancouver
K. W. Sutherland	- Superintendent of Maintenance of Way, CPR, Montreal
R. A. Colquhoun	- Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	- System Federation General Chairman, BMWE, Ottawa
F. L. Stoppler	- Vice-President, BMWE, Ottawa
L. DiMassimo	- Federation General Chairman, BMWE, Montreal

SUPPLEMENTARY AWARD OF THE ARBITRATOR

The Award in this matter was as follows:

"Having regard to the foregoing, it is my award that the grievor be allowed to exercise his seniority for a position as Extra Gang Foreman, and that he be compensated for any loss of earnings resulting from the Company's refusal to allow him to do so. It is to be borne in mind, however, that 1) any compensation or actual assignment is dependent on the grievor's relative seniority rights; and 2) it is always open to the Company to address the question of the grievor's medical fitness to be assigned any job.

> Nothing herein should be taken as prejudging any question which might arise as to the grievor's actual ability to meet the bona fide occupational requirements of a position as Extra Gang Foreman."

Pursuant to that Award, the grievor sought to exercise his seniority rights as an Extra Gang Foreman, as his relative seniority allowed him to do. The Company refused to allow the grievor to take up such a position, on medical grounds. The Union now requests compensation for the grievor, pursuant to the Award.

The Award provided that the grievor be compensated for "any loss of earnings" resulting from the Company's failure to allow the grievor to exercise seniority rights as an Extra Gang Foreman. At the time of the hearing, the Company had not addressed itself to the question of the grievor's medical fitness to be assigned that job, although the Award pointed out that no decision was taken on any question which might arise as to the grievor's actual ability to meet the bona fide occupational requirements of a position as Extra Gang Foreman. It was, it seems, following the Award, and when the grievor sought to exercise seniority in that classification that the Company did specifically address that question, and determined that the grievor did not meet the bona fide medical requirements of that job.

The grounds for this determination are the same as those put forward at the first hearing, with respect to the position of Machine Operator, namely that the job involved factors of hazard and risk which the Company could not accept in the case of an employee who was (as is the grievor) an insulin-controlled diabetic. While the grievor's own doctor would appear to have certified him as fit to work, the Company's Chief of Medical Services was of the opinion, having in mind the requirements, hazards and risks of the job and the nature of the grievor's disease, that no insulin-controlled diabetic could be allowed to work in a Maintenance of Way crew. The possibility of insulin reaction is ever-present, and would appear to be greater by reason of the changing energy demands, irregular hours of actual work, and irregular meal hours. The risk of harm in the event of insulin reaction is a substantial one, having regard to the nature of the duties and the circumstances in which they are performed.

Having regard to the material before me, it is my conclusion that the employer was justified in refusing to allow the grievor to work as an Extra Gang Foreman. The grievor did not meet the bona fide occupational requirements of such an assignment.

At the second hearing, the Union sought to limit the hearing to the question of "compensation", and sought to have the matter adjourned as to any medical evidence. It also sought the right to present its own such evidence at a later hearing. This request was opposed by the Company. In my view, it should not be allowed. The question of compensation (subject to the exception to be noted below) necessarily involves the determination that the grievor would have worked. The Award specifically indicated that no determination was made as to the grievor's actual ability to do the job now in question, and made it clear that it was open to the Company to address the matter.

Further, the Union was aware of the Company's position, and of the fact that medical evidence would be adduced, well in advance of the hearing. The medical issue was of the essence, and an adjournment would not be proper in the circumstances.

Although I have found that the Company was justified in concluding that the grievance did not meet the bona fide requirements of the job of Extra Gang Foreman, that would not disentitle the grievor to compensation in respect of the period prior to the time at which that matter was specifically addressed. The issue originally before me was as to the grievor's fitness to work as a Machine Operator. It was held that while he was properly refused work in that classification, he would (from the material then before me), have been able to work as an Extra Gang Foreman. At that time (so far as appears from the material before me), the Company had not specifically addressed the matter of the grievor's ability to perform that job. It cannot now be heard to deny that ability in respect of the period prior to the time when it addressed that question. No doubt the Company did so immediately following the issue of the Award.

Thus, while the grievor is not now entitled to work as an Extra Gang Foreman, the Union has rightly put the matter in its submission : "--the grievor should be paid the Extra Gang Foreman's rate of pay retroactively from February 25, 1982, until such point in time as the Company makes a decision--". I would find that the Company did make such decision following the issue of the Award. In the result, the grievor is entitled to compensation, in respect of net loss of regular earnings, for the period from February 4 to November 10, 1982, and I so award.

J. F. W. WEATHERILL,
ARBITRATOR.