C?NADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1191

Heard at Montreal, Wednesday, February 15, 1984

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Pacific Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

On February 22, 1983, Mr. G. Surina was called for the position of Extra Gang Foreman on the Alberta No. 1 Tie Gang. On February 25, 1983, he was released from this position on medical grounds.

EMPLOYEES' STATEMENT OF ISSUE:

The Union contends that Mr. G. Surina should not have been released and demoted to a lesser position of Maintainer Grade II.

The Union further contends he be reinstated to his former position of Extra Gang Foreman and paid the difference in total compensation from February 25, 1983 and onward. The difference being what he would have earned and the wages he made, both based on total compensation.

FOR THE BROTHERHOOD:

(SGD.) H. J. THIESSEN
System Federation General Chairman

There appeared on behalf of the Company:

F. R. Shreenan	- Supervisor Labour Relations, CPR, Vancouver
D. N. McFarlane	- Asst. Supervisor Labour Relations, CPR, Vancouver
R. A. Colquhoun	- Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	- System Federation General Chairman, BMWE, Ottawa
L. DiMassimo	- Federation General Chairman, BMWE, Montreal
R. Gaudreau	- Vice-President, BMWE, Ottawa
E. J. Smith	- General Chairman, BMWE, London

AWARD OF THE ARBITRATOR

The company has questioned the arbitrability of the grievor's claim to entitlement to be called for the position of Extra Gang Foreman on the Alberta No. 1 Tie Gang.

It is common ground that Arbitrator J. F. W. Weatherill sustained the employer's assertion that the grievor was unfit owing to his diabetic condition, to assume the position in a Supplemental Award dated May 10, 1983, made to his original award in CROA 1012 dated November 10, 1982. Accordingly, based on that award, the employer submits that the Arbitrator's finding with respect to the grievor's unsuitability was res judicta and that same issue ought not to be relitigated before me.

It is also common ground that no change in the grievor's medical condition was alleged to have occurred since the Arbitrator's finding with respect to the grievor's unsuitability.

The sole argument raised by the trade union in answer to the employer's submission that res judicata ought to apply was the argument that Arbitrator Weatherili improperly assumed jurisdiction to determine the grievor's medical suitability in the Supplemental Award. The circumstances initiating that decision pertained to a dispute over the quantum of compensation to which the grievor was entitled arising out of the Arbitrator's first award.

Indeed, the objection made by the trade union in these proceedings was made before Arbitrator Weatherill and was noted in his Supplemental Award:

> "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.
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> 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 the adjournment would not be proper in the circumstances."

In effect the trade union is requesting that I reverse Arbitrator Weatherill's ruling rejecting its objection to entertaining evidence with respect to the grievor's medical unsuitability to occupy the position. This, I cannot do. The Arbitrator made his decision with respect to the relevancy of the grievor's medical fitness as an incident to determining the issue about the quantum of compensation the grievor ought be paid as a result of his original award. Not only would it be improper for this Arbitrator to second guess another Arbitrator in a different proceeding on a question relevant to that proceeding but, for what it is worth, Arbitrator Weatherill was correct in making that particular ruling. Accordingly, the trade

union's submission must be rejected.

I am satisfied that res judicata ought to apply with respect to the grievor's unfitness to perform the duties of the position. The grievance is not arbitrable.

DAVID H. KATES,
ARBITRATOR.