CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD TO

CASE NO. 874

Heard at Montreal, Tuesday, September 14, 1982

Concerning

CANADIAN PACIFIC EXPRESS LIMITED

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, 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, Toronto
B. D. Neill	– Manager, Labour Relations, 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, Don Mills
J. Crabb	– General Secretary Treasurer, Toronto
M. Gauthier	– Vice General Chairman, 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 of 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 paid 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 $2,541.38 from work for the Company in the material portion of 1980, and $3,699.41 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 regulations the "reason for issuing this record" was given as "shortage of work". That did not relieve the grievor of his obligation to look 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 $6,124.79 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 $6,124.79 is added to the amount above referred to as deductible, for a total of $15,107.58, then credit should be given for the outside earnings of $2,742.00. Thus the proper deduction from the gross loss of earnings figure would be $12,365.58. The balance, or compensable loss, is $9,630.96. The grievor was in fact paid $6,888.96. He is entitled to be paid the balance, $2,742.00, 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 $2,742.00

(signed) J. F. W. WEATHERILL
ARBITRATOR