

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1012

Heard at Montreal, Wednesday, November 10th, 1982

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

From January 19, 1982, to February 18, 1982, G. Surina was on sick leave and his illness diagnosed as diabetes. Prior to being on lay-off account illness, G. Surina worked as Group 3 Operator at Edmonton, Alberta and also held seniority as Extra Gang Foreman on Alberta District Gangs. These positions had been awarded to him in accordance with Section 14.1 and 14.12, Wage Agreement 41. On his return to work February 19, 1982, he was not allowed to work his regular position of Group 3 Operator or exercise his seniority as Extra Gang Foreman. G. Surina had medical clearance from his Doctor that he could resume duty. The Company did not allow him to work these positions and placed him in the Edmonton Equipment Repair Shop as Assistant Maintainer.

JOINT STATEMENT OF ISSUE:

The Union contends that: 1.) G. Surina was medically cleared to operate the Group 3 vehicle and should have been allowed to work this position on return to work February 19, 1982. 2.) On/or about February 25, 1982, G. Surina should have been recalled as Extra Gang Foreman on Alberta Tie Gang as required by Section 15.7, Wage Agreement 17. 3.) G. Surina be paid the difference in rate to that of Group 3 Operator and/or Extra Gang Foreman since February 18, 1982, and reinstated to his position he held prior to being on sick leave.

The Company declines the Union's contentions and denies payment of claim.

FOR THE BROTHERHOOD:

(SGD.) H. J. THIESSEN
SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) L. A. HILL
GENERAL MANAGER, OPERATION AND MAINTENANCE

There appeared on behalf of the Company:

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| L. J. Masur | – Supervisor, Labour Relations, Vancouver |
| Dr. W L May | – Chief of Medical Services, Montreal |
| J. L. Fortin | – Superintendent, Alberta North Division, Edmonton |
| K. W. Sutherland | – Superintendent of Maintenance of Way, Montreal |
| R. A. Colquhoun | – Labour Relations Officer, Montreal |

And on behalf of the Brotherhood:

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| H. J. Thiessen | – System Federation General Chairman, Ottawa |
| R. Wyrostok | – Federation General Chairman, Edmonton |
| E. J. Smith | – General Chairman, London |
| L. DiMassimo | – General Chairman, Montreal |
| F. L. Stoppler | – Vice-President, Ottawa |

AWARD OF THE ARBITRATOR

Shortly after the grievor went on sick leave he was advised that because of the nature of his illness, it would be necessary for him to obtain authority from the Company's Chief of Medical Services to resume duty. This was, in the circumstances, a proper requirement. The grievor authorized his own doctor to communicate with the Chief of Medical Services, and on February 2 the grievor's doctor wrote, stating that the grievor was an insulin dependant diabetic, setting out certain details of his treatment, and advising that the grievor "has a good control of his diabetes and that he is able to return to his normal working duties".

On February 9, 1982, the Chief of Medical Services advised the grievor's Superintendent as follows:

"The use of insulin is not considered compatible with the *bona fide* occupational requirements of the position of machine operator or other positions of employment on Maintenance of Way crews in which the onset of a sudden or subtle incapacity could result in serious injury to fellow employees or could seriously jeopardize operations. Although Mr. Surina's physician has advised that his condition is now under satisfactory control with insulin injections, there is always the possibility that, because of changing energy demands in his work, irregular meal hours or a variety of other factors, he might be subject to an insulin reaction which could result in impairment ranging from light headedness to loss of consciousness. If a position can be found where this man might work regular hours, not requiring extended shifts, with regular meals and a constant energy demand and which, in the event of an insulin reaction, would not result in serious injury to others. Mr. Surina may be assigned to that work but he cannot be returned to duty under circumstances which might permit him to be employed in work involving the type of risk outlined above."

At the hearing of this matter, Dr. May, the Chief of Medical Services, gave evidence in support of the above conclusion. Of particular concern were the nature of the grievor's condition diabetes requiring insulin control; and the nature of the risks involved in his work as a Group 3 Machine Operator. The nature of that work was variable in terms of the degree or length or regularity of effort required, and those factors might be said to increase the chances of insulin reaction. The risk of harm in the event of such reaction was a substantial one.

On February 24, 1982, the grievor's doctor wrote to the effect that the grievor's diabetes was under good control, and that there was "no medical reason why Mr. Surina cannot return to a supervising position".

On the material before me, there is no conflict in the medical opinion. Dr. May addressed himself to the matter of the grievor's working as a Machine Operator, and it was his opinion that the grievor ought not to be permitted to perform such work. That is a professional opinion supported by the evidence. The grievor's doctor did not address himself to the requirements of a Machine Operator's view, and his opinion cannot be said to contradict that of Dr. May.

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 a Machine Operator. The grievor did not meet the *bona fide* occupational requirements of such an assignment.

The grievor did, however, have seniority as an Extra Gang Foreman. The grievor's doctor's letter of February 24 states that he would be able to return to a "supervising position", and while that might refer to the fact that the Company had considered the grievor (who is regarded as an excellent employee) for a managerial position, it would appear to cover, in a general way, work as a foreman. From the material before me, while the nature of that work might involve certain hazards for the grievor, it would not involve the same risks of harm to others as would be the case with a Machine Operator.

On the material before me, there must be said to be a rather general medical opinion that the grievor could return to "supervisory" work, which would include that of an Extra Gang Foreman, and there is nothing specifically to the contrary. The Chief of Medical Services was not asked to consider the matter of the grievor's working as an Extra Gang Foreman, and gave no opinion in that respect.

From the material now before me, it must be concluded that the grievor could properly have returned to work as an Extra Gang Foreman, a job with respect to which he could exercise seniority. He could, it appears, meet the *bona fide* occupational requirements of that job. He ought, then, to have been allowed to exercise his seniority for such a position.

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.

(signed) J. F. W. WEATHERILL
ARBITRATOR.