

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 1513

Heard at Montreal, Tuesday, May 13, 1986

Concerning

### CANADIAN PACIFIC LIMITED

and

### BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

#### DISPUTE:

Mr. T. J. Deshevy, B&B employee with less seniority than Mr. A. Birtch was recalled to work May 13, 1985.

#### JOINT STATEMENT OF ISSUE:

The Union contends that: (1.) The Company violated Section 15.7, Wage Agreement 41 in failing to recall Mr. A. Birtch, the senior employee. (2.) Mr. A. Birtch was declared medically fit by his doctor to resume his normal employment with CP Rail. (3.) Mr. A. Birtch be compensated from May 13, 1985 and onward on total wages and benefits he could have earned account recalling a junior employee.

The Company denies the Union's contentions and declines payment. The Company further submits that the grievor was not allowed to return to service as there are no positions to which his seniority entitled him, that are compatible with the grievor's medical condition.

#### **FOR THE BROTHERHOOD:**

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

#### **FOR THE COMPANY:**

**(SGD.) G. A. SWANSON**  
GENERAL MANAGER, OPERATION AND MAINTENANCE.

There appeared on behalf of the Company:

J. H. Blotsky	– Assistant Supervisor, Labour Relations, Toronto
M. Grimard	– Assistant Chief of Medical Services, Montreal
R. A. DeCicco	– Supervisor, Labour Relations, Toronto
R. A. Colquhoun	– Labour Relations Officer, , Montreal
D. J. David	– Labour Relations Officer, Montreal
D. A. Lypka	– Observer
R. E. Noseworthy	– Observer
W. C. Tripp	– Observer

And on behalf of the Brotherhood:

H. J. Thiessen	– System Federation General Chairman, Ottawa
L. M. DiMassimo	– Federation General Chairman, Montreal
E. J. Smith	– General Chairman, London

## **AWARD OF THE ARBITRATOR**

This case arises out of an alleged violation by the Company of the recall provisions of the collective agreement.

The parties have agreed that the main question that I must resolve is whether the grievor was medically fit to perform the duties of a B&B Bridgeman.

The facts are not controversial. The grievor has had two episodes of epileptic type seizures. He has been on a medical leave of absence since July 1, 1983. During this period he has been under the medical care of Dr. B. M. Bowker M.D., FRCP (c). Dr. Bowker has referred the grievor to the Toronto General Neurology Clinic for treatment. Based on the advice of that institution and the grievor's progress while under his care, Dr. Bowker has recommended the grievor's return to work.

The grievor, however, must remain on the drug Dilantin (at best until June, 1988) in order to control the likelihood of a seizure.

Dr. M. Grimard B. Sci, M.D. M.Sc. Ph.D. is a Physiologist employed by the Company. He is of the view that the grievor, so long as he remains on the drug, Dilantin, represents an unacceptable safety risk to himself, his fellow employees and the travelling public should he be returned to regular bridgeman's duties.

From Dr. Grimard's perspective the fact that the grievor must remain on prescribed medication is proof, in his view, that the grievor is still vulnerable to an epileptic seizure.

In cases where an Arbitrator is confronted with diametrically opposed expert medical opinion as to the fitness of an employee to perform the duties of his position the same concern is always at issue. From the Company's perspective, given its overriding interest for safety, one wonders whether the medical opinion of its expert is overly conservative. And, from the grievor's viewpoint, given his desire for the most obvious of reasons to return to work, one wonders whether the medical view advanced on his behalf is much too liberal.

Dr. Grimard succinctly put the issue correctly. The problem that I am faced with is attempting to quantify the risk that is entailed in the face of the grievor's medical condition should he be returned to work while under prescribed medication.

On the one hand Dr. Grimard acknowledged the proposition that employees with all types of ailments such as heart, diabetes, alcohol etc., are returned to service while under prescribed medication. On the other hand, he would also argue, in those circumstances, employees with those ailments might be treated, as the grievor, as incapacitated from reinstatement. Each case in other words must be resolved on its own merit.

The problem I am confronted with in the grievor's situation is a lack of medical evidence to neutralize and dispel the ostensibly legitimate concerns that were raised by Dr. Grimard. Since the onus rested on the Trade Union to adduce that evidence, it was incumbent upon it to call either Dr. Bowker and/or a physician from the Toronto Neurological Clinic to establish, than an employee, in the grievor's circumstance, despite his requirement to take Dilantin, represents on the balance of probabilities, a minimal safety risk. It has not done so. As a result, I am left with the uncontradicted concerns that were advanced by Dr. Grimard. And, in his opinion, the grievor continues to remain an unacceptable risk.

As a result, because of the Trade Union's failure to satisfy the onus of establishing the grievor's medical fitness to resume the functions of a B&B Bridgeman the grievance must be denied.

**(signed) DAVID H. KATES**  
**ARBITRATOR**