

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2189

Heard at Montreal, Wednesday, 9 October 1991

concerning

### CANADIAN PACIFIC LIMITED

and

### BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

#### DISPUTE:

Removal from service of Mr. J.A. Gardner on October 22, 1990, due to a medical condition.

#### JOINT STATEMENT OF ISSUE:

On October 22, 1990, Mr. Gardner was removed from service due to his medical condition of epilepsy. The decision to remove Mr. Gardner from service results from a policy issued by the Company on May 10, 1990, concerning "The Employment of Diabetics and Epileptics". The Union contends that: **1)** The Company violated Section 18.1 of Wage Agreement No. 41 by not conducting an investigation either prior or subsequent to Mr. Gardner's removal from service; **2)** The employer's general policy not to employ epileptics is unreasonable, unjust and discriminatory; **3)** The employer unjustly removed Mr. Gardner from service without consideration of supportive medical evidence and has erred in treating Mr. Gardner as a member of a group, rather than determining the issue of his employability based on the merits of his individual circumstances and medical condition; and **4)** The employer removed and continues to withhold Mr. Gardner from service unjustly.

The Union requests that: Mr. Gardner be returned to work forthwith with full seniority rights and compensated for all lost wages and expenses as a result of this discrimination.

The Company denies the Union's contentions and declines the Union's requests.

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

**(SGD.) L. M. DIMASSIMO**  
SYSTEM FEDERATION GENERAL CHAIRMAN

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

**(SGD.) E. S. CAVANAUGH**  
GENERAL MANAGER, OPERATION & MAINTENANCE

There appeared on behalf of the Company:

H. Wendlandt	– Counsel, Ottawa
D. T. Cook	– Labour Relations Officer, Montreal
W. S. Karns	– B&B Foreman, London
S. Stekman	– Division Engineer, London
Dr. G. Berthiaume	– Medical Services, Montreal
R. P. Egan	– Labour Relations Officer, Toronto
Dr. J. T. Marotta	– Witness
R. M. Smith	– Observer
Dr. G. Farah	– Observer
M. Senecal-Tremblay	– Observer

And on behalf of the Brotherhood:

D. Brown – Counsel, Ottawa  
L. M. DiMassimo – System Federation General Chairman, Ottawa  
R. DellaSerra – General Chairman, Montreal  
J. A. Gardner – Grievor

### **AWARD OF THE ARBITRATOR**

The Arbitrator can find no violation of article 18.1 of the collective agreement as no discipline was assessed against the grievor and he has not been discharged. Nor can I conclude, on the basis of the material before me in the instant case, that the Company's policy with respect to the employment of epileptics is unreasonable, unjust or discriminatory as alleged by the Brotherhood.

The material establishes, beyond controversy, that the grievor is an epileptic who suffers complex partial seizures. The evidence of Dr. J. Marotta, a physician expert in the diagnosis and treatment of epilepsy, establishes that the grievor's condition, as diagnosed by his own specialist, Dr. Warren T. Blume of University Hospital in London, Ontario, is marked by an unpredictability of seizures which are generally greater than a minute in length and involve a significant clouding of the grievor's consciousness. It is common ground that Mr. Gardner has suffered a number of seizures at work. The Arbitrator is satisfied that the grievor's condition, insofar as it relates to his work as a Bridge and Building labourer is incompatible with the *bona fide* occupational requirement that he be free from seizures occasioned by his proved epileptic condition. For these reasons the removal of the grievor from service in the Bridge and Building Department cannot be said to have been in violation of his rights under the collective agreement.

In the Arbitrator's view, however, an issue which implicitly falls within the scope of the Joint Statement of Issue is whether the grievor was justifiably removed from any form of service within the bargaining unit. The material before me establishes that in some locations there are positions of tradesmen's helpers in shops where there is no risk inherent from the presence of moving equipment, work at heights or other risk situations. Both of the Company's own witnesses confirmed that work in such a setting could be performed without undue risk by the grievor in his present condition. On the material before me it does not appear that consideration has been given to any such option prior to this time. As the availability of such work or the grievor's right to claim it under the terms of the collective agreement was apparently not addressed in the preparation and presentation of the dispute, the matter is remitted to the parties for their joint consideration of such opportunity for accommodation as the Company might have by way of alternative employment for the grievor within the bargaining unit. I retain jurisdiction in the event of the inability of the parties to reach any ultimate agreement in respect of that issue.

October 11, 1991

**(Sgd.) MICHEL G. PICHER**  
ARBITRATOR