T.D. 9/82
DECISION RENDERED ON AUGUST 24TH, 1982

THE CANADIAN HUMAN RIGHTS ACT
BETWEEN:
HARRY C. PRIOR
Complainant,
- and -
CANADIAN NATIONAL RAILWAY COMPANY
Respondent,

Before: Paul L. Mullins, appointed a Human Rights Tribunal pursuant to Secion 39 of the Act.

Appearances: Russell Juriansz, representing Canadian Human Rights Commission and Harry C. Prior

D. Merlin Nunn and Robert Carmichael, representing Canadian National Railway Company

Heard in Halifax, Nova Scotia, on July 6th, 1962.
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THE CANADIAN HUMAN RIGHTS ACT
HUMAN RIGHTS TRIBUNAL
BEFORE:
Paul L. Mullins
BETWEEN:
HARRY C. PRIOR
Complainant
- and -
CANADIAN NATIONAL RAILWAY COMPANY
Respondent
This is a hearing into a complaint made under the Canadian Human Rights Act by Harry C. Prior against the Canadian National Railway Company alleging

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that he had been discriminated against on account of age by reason of his mandatory retirement by the Company at age 65. At the commencement of the hearing the counsel for the parties submitted an Agreed Statement of Facts, the relevant portions of which are as follows:

"AGREED STATEMENT OF FACTS"
1. The Complainant, Mr. Harry C. Prior, had been employed at the Halifax Waterfront as a Cargo Checker with the Respondent, Canadian National Railways (C.N.), since 1945. As a Checker, his responsibilities included checking the amount and composition of cargo as it was unloaded from C.N.'s railway cars. This involved essentially clerical work and did not involve the actual

moving
of the cargo. The job does not involve strenuous physical exercise.

2. C.N. Checkers are represented by the Canadian Brotherhood of Railway,
Transport and General Workers Union (C.B.R.T. & G.W.). They are classified as
"casual" because work is not guaranteed. C.N. Checkers are allocated jobs
under a hiring call system whereby the Checkers report to a hiring hall in
the morning and from there are assigned available jobs according to seniority.

3. There are two groups of Checkers working at the Halifax waterfront: (1)
the C.N. Checkers, who work exclusively for C.N.; and (2) the Checkers
represented by the International Longshoremen's

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- 2 Association
(I.L.A.). I.L.A. Checkers work for a number of different
companies and are dispatched to work from the Union Hiring Hall.

5. The type of work performed by C.N. Checkers is essentially the same as
the work done by I.L.A. Checkers. While the work performed by the two groups
of Checkers is basically the same, there are differences in salary and benefits.

6. The Canadian National Railway Company was created by a statute of Canada
in 1919. The Company is continued under the Canadian National Railway Act,
R.S.C., 1970, c. C-10. The Company is given the statutory power to establish
a pension plan for the benefit of C.N. employees.

7. In 1959, C.N. introduced certain pension plan rules designed to replace
the rules introduced in 1935. C.N.'s 1959 Pension Plan Rules establish a
comprehensive scheme providing not only for pension benefits but, also, for
disability retirement benefits and survivors' benefits which are paid to
widows of C.N. employees. Mr. Prior opted to join the 1959 scheme about the
time it was introduced. C.N. also provides a number of employee benefit
packages which include: (1) sick pay benefits; (2) life insurance benefits;
(3) a dental plan; (4) job security benefits including: (a) weekly lay-off
benefits; (b) severance payments; (c) training of laid-off employees;

(d)
relocation benefits; (e) benefits for those affected by technological, operational and organizational changes. Of these Item 4(a) to (e) does not
apply to casual workers.

8. C.N. employs approximately 71,000 employees in all aspects of the Company's work and all are participants in the Company's pension plan. These
plans apply to management employees as well as Union personnel. The rate of
pension paid is calculated in accordance with the terms of the pension plan.
An employee who is a participant in the 1959 plan contributes 6 1/2% of his

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average earnings to the pension fund and C.N. contributes an additional 6
1/2% on his behalf. The pension is then payable on the employee's best five
years (usually the last). The actual determining formula then applied is as
follows:

(1) Number of years to December 31, 1965 x 2% x average earnings (as indicated above).
(2) Years from January 1, 1966 x 1.3% x yearly maximum pensionable earnings (yearly maximum pensionable earnings is a figure provided under the Canada Pension Plan).
(3) Years from January 1, 1966 x 2% x the difference between yearly maximum pensionable earnings and average earnings.

The level of pension obtained by an employee, therefore, will depend on the
salary he is earning from time to time and the number of years of service
that he has. Employees will, therefore, receive varying amounts of pension.
Harry Prior is receiving a pension in

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amount of $1,133.20 per month, effective as of November 30, 1980.
9. Rule 1(0) of C.N.'s Rules of 1959 Pension Plan is in the following terms:
"Normal retirement date" means the last day of the month in which an employee attains the age of 65."

Mandatory retirement at age 65 is not a requirement under C.N.'s Collective
Agreement relating to Checkers.

10. It is a policy of C.N. that all employees retire at the age of 65 years.

This policy pertains to all C.N. employees, including Checkers, without exceptions. It is only with the approval of the Board of Directors that an employee can be retained past the age of 65. According to C.N. records this approval has only been given twice and both times to a very senior management person in unusual circumstances.

11. I.L.A. Checkers employeed at the Waterfront in Halifax are not required to retire upon attaining the age of 65. I.L.A. is the only union representing Checkers in Canada which does not have a mandatory retirement at age 65 in all its Locals. Some I.L.A. Checkers are required to retire at age 65, namely, those employeed in Toronto, Ontario. In Halifax there are approximately 70 I.L.A. Checkers and approximately 30 C.B.R.T. and G. W. Checkers. This includes all C.N. Checkers.

12. The exact number of Checkers working at Canadian waterfronts who are subject to compulsory retirement at age 65 is not known. According to the investigator's report, 365 Checkers employed at Canadian ports are subject to mandatory retirement at age 65 and 228 are permitted to work beyond the age of 65.

13. Checkers represented by the Brotherhood of Railway, Airline and Steamship Clerks (B.R.A.S.C.) are subject to mandatory retirement at age 65.

14. Checkers in Vancouver, who are represented by the International Longshoremen Warehousing Union, are all obligated to retire at age 65.

15. In St. John's Newfoundland, the Waterfront Checkers are represented by

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the L.S.P.U., whose members are required to retire at age 65.

16. Longshoremen at Halifax, Nova Scotia in 1974 could have received a pension in the maximum amount of $225.00 per month. The present maximum, effective July 1, 1982, is $600.00 per month. The funds which contribute to the Halifax longshoremen's pension are obtained by an assessment on all cargo passing through the ports of Halifax, Nova Scotia and Saint John, New Brunswick.

17. In February of 1980, Mr. Prior received a letter dated

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19, 1980, signed by Mr. Y. Khatib, Manager for Pensions Administration at C.N., in the following terms:
It is C.N. policy that employees will under normal circumstances, retire at the end of the month in which they attain the age of 65. The existing company rules do not permit the retention of employees in service beyond their 65th birthday.

18. Mr. Prior attained the age of 65 in November of 1980 and was retired at
the end of November of that year.

19. In May of 1980, Mr. Prior lodged a Complaint with the Canadian Human
Rights Commission alleging that C.N.'s policy of mandatory retirement at age
65 was a discriminatory practice on the basis of age. An investigator employed by the Human Rights Commissin investigated the Complaint and in his
report he recommended that Mr. Prior's Complaint against C.N. be dismissed.

In addition to the Agreed Statement of Facts, Mr. Prior gave evidence on
his own account. He indicated that he worked for Canadian National Railway
since 1934 except for the period during which he served during the Second
World War in the armed services. During that time he indicated that he was
fully aware of the Company policy that required retirement at age 65. However, he quite strenuously expressed his desire to continue to work and
there was no suggestion by the Respondent that he was incapable either physically or mentally to perform the work as a Checker. He stated that he
rated as a "pretty good checker" and that his health was in pretty good shape" and there is no evidence to indicate anything to the contrary. He also
stated that he found his forced retirement to be degrading and humiliating
and that he wished to return to his position as a Checker for the Canadian
National Railway. As the Checker with the most seniority, he indicated that
he was assured virtually fulltime work with considerable overtime, especially
since his seniority permitted him to obtain work on Saturdays and Sundays
with preferred rates of pay.

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The first question raised by the Respondent related to the Jurisdiction of the Tribunal to hear the dispute. The objection was that the Tribunal is,

in spite of its name, in fact a Superior Court under Section 96 of the British-North American Act and that Section 96 provides that the Governor-General appoints the Judges to the Superior Court. In arguing that this Tribunal is a Section 96 Court, Mr. Nunn, for the Respondent, pointed out that the Tribunal has no administrative functions and its sole purpose is to adjudicate a dispute between Mr. Prior and the Canadian National Railway

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Company, that this Tribunal is empowered to call evidence, issue subpoenas, interpret the statutes and issue an Order in a manner virtually identical to any Court. I find as a fact that the Tribunal does exercise a purely judicial function and that the Canadian Human Rights Act very carefully segregates its duties and from that of the Human Rights Commission which is also established under the same Act.

In advancing his argument, the respondent relies upon the Supreme Court of Canada decision in the Reference Re Residential Tenancies Act (123, D.L.R. (3rd)) wherein the Residential Tenancy Commission was established by the Province of Ontario. It was held that the Provincial Legislature had sought to withdraw historically entrenched and important judicial functions from the superior court and invest them in one of its own Tribunals. In the decision of Dixon J., a test was set out to determine whether the Residential

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Commission was in fact a superior court and whether it was in fact a Section 96 Court. I find it unnecessary however, to determine whether the principles set out therein apply to this Tribunal.

Section 101 of the British-North America Act provides as follows:
"101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution Maintenance and Organization of the General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

Although I have not had the benefit of argument in relation to this section, it would appear to give the Parliament of Canada very broad powers to establish any specialized court, to define its jurisdiction, and

also to
make special provisions with regards to the admissability of evidence, as, in
fact, it has done under the Canadian Human Rights Act. In addition, the
Tribunal has been appointed under the provisions of Section 39 of the Human
Rights Act by the Governor-General in Council.

On the other hand, the appointment to hear a particular case is made
pursuant to Section 39(1) of the Canadian Human Rights Act, by the Canadian
Human Rights Commission. I would consider this to be analagous to the
assignment of a particular case by a Senior Court Judge at any court level.
Section 96 of the British-North American Act cannot be interpreted to
restrict the power of the Federal Government to establish a specialized
Tribunal or Court.

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- 7 Accordingly,
I find that my appointment to the Human Rights Panel pursuant to
subsection 5 of Section 39 of the Human Rights Act and the subsequent
assignment to this particular Tribunal by the Canadian Human Rights
Commission pursuant to subsection 1 of Section 39 to be properly made and
that I have jurisdiction to hear the matter before me.

In argument before the Tribunal, the Respondent made several following
submissions upon each of which he argued that the complaint should be
dismissed. The first submission was that the discretion giving the Canadian

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Human Rights Commission the power to appoint a Tribunal to enquire into a
complaint is limited by Section 36(3) if the Commission has designated a
person to investigate a complaint under Section 35 of the Act. Section 36(3)
provides as follows:

"On receipt of a report mentioned in subsection (1) the Commission
(a) may adopt the report if it is satisfied the complaint to which
the report relates has been substantiated and should not be
referred pursuant to subsection (2) or dismissed on any ground
mentioned in subparagraphs 33(b)(ii) to (iv); or
(b) shall dismiss the complaint to which the report relates if it
is satisfied the complaint has not been substantiated or should be
dismissed on any ground mentioned in sub-paragraphs 33(b)(2)(iv)."
(emphasis added)

The Respondent argues that there are only two alternatives open to the
Commission upon the receipt of a report of the investigator. They are, to
either adopt the report or dismiss the complaint. He argues further

that if
the report is a negative report, meaning that the investigator has
recommended that the complaint should be dismissed, the Commission is
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by the finding of the investigator and pursuant to subsection 36(3)(b)
it has
no option but to dismiss

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complaint. He stresses the permissive use of the word "may" in
subparagraph 3(a) as opposed to the mandatory use of the word "shall"
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paragraph 3(b).

I find no difficulty in interpreting subsection 3 to provide a
discretion in the Commission to adopt the report if it is satisfied
that the
complaint to which the report relates has been substantiated or to not
adopt
the report. The only constraint on the discretion of the Commission
under
paragraph (b) is that it cannot continue to pursue a complaint if it is
satisfied that the complaint has not been substantiated or should be
dismissed by reason of any of the exemptions in subparagraph
33(b)(2)(24).
The operative words in both subsections relate to the Commission being
satisfied and if it is satisfied that the complaint has not been
substantiated it must dismiss the complaint but if it is satisfied the
complaint to which the report relates has been substantiated it may or
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not pursue the matter further. There is no obligation upon the
Commission to
provide the Tribunal with its reasoning and it is not for this Tribunal
to
attempt to second guess the Commission in deciding whether it has
reasons to
be satisfied that the complaint should be pursued. The Tribunal must
take the
complaint and the evidence adduced at the hearing and draw its own
conclusions based upon that evidence and upon the law. It is clear that
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Commission is to draw its own conclusions and to satisfy itself as to
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proper course of action based upon the facts adduced by the
investigator’s
report and it is not bound to accept the recommendation contained
therein
which could, in fact, recommend

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number of actions, including the laying of the complaint, the
appointment
of a conciliation officer, the active support of the Commission before
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Tribunal, or permitting the complaint to proceed to a Tribunal without the

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Commission appearing as a party.
The next argument raised by the Respondent relates to the operation of the pension plan, specifically Section 32 (7) of the Canadian Human Rights
Act which provides as follows:

"No complaint may be dealt with by the Commission pursuant to subsection (1) that relates to the terms and conditions of a superannuation or pension fund or plan, if the relief sought would require action to be taken that would deprive any contributor to, participant in or member of, such fund or plan of any rights acquired under the fund or plan before the commencement of this Part of any pension or other benefits accrued under such fund or plan to that time, including:
(a) any rights and benefits based on a particular age of retirement; and
(b) any accrued survivor's benefits.

In addition the C.N. Pension Plan in paragraph 3 of page 12, provides as
follows:

"The Pension of a contributor retained in service with his consent beyond his normal retirement date shall be calculated as of normal retirement date and shall be payable only after his retirement."

This paragraph would seem to anticipate the employment of workers beyond
the normal retirement date. I cannot find that upholding the complaint of Mr.
Prior would result in any action being taken that would deprive any contributor to, or participant in or member of, the C.N. Pension Fund of any
right acquired under the

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or plan before the commencement of this Act. On the contrary, I find that if Mr. Prior were to be reinstated in his employment, the Pension fund
would be enhanced, since he would of necessity be drawing benefits for a
shorter period of time. In addition, the plan itself would continue to have
the benefit of the use of those funds for a number of years beyond which it
had originally anticipated.

Nor do I find a suggestion that the benefit package for the Company as it relates to other benefits of employees would impose an undue burden on the

Company as persuasive or relevant. The Company would no longer have to pay the 6 1/2% of salary into the pension plan and there is no evidence of any increased costs of benefits for such items as dental care, drug plan or life insurance. If there are factors which are related to age in terms of providing those benefits then these would be properly the subject matter of negotiations.

Mr. Nunn argues that if the Company is not able to enforce its policy of mandatory retirement at age 65, the effect of losing this right could lead the Company to abandon its present practice of continuing to employ certain people after they reach their late 50's or early 60's knowing that they will be retired in a few years anyway.

I find no merit in the speculation proposed by the Respondent that the removal of the mandatory age will prompt the

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- 11 Company to terminate the employment of those who are in their late 50's or early 60's who are not capable of performing their work. I see no reason why a good employee whose competence is not in question, should be penalized because the Company does not take appropriate steps to deal with those who have not yet reached this age but who are incompetent. Nor does permitting someone to continue to work after they reach the age of 65 take away from others who have, through negotiations, acquired the right to retire at 65, the right to do so if they so desire.

It is true that if Mr. Prior were to be permitted to continue to work beyond the age of 65 that others would not achieve the priority in terms of seniority as quickly as they had anticipated. But Mr. Prior's seniority is one which he has acquired through decades of service. The right which Mr. Prior has acquired remains his right until he is incapable of exercising it properly. There is no suggestion that he has reached that stage. It would be most unusual to have anyone who is seeking employment with C.N. to inquire as to the age of the Company's employees so that they could determine when

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could expect to reach the highest seniority. I have no evidence upon which I
can find that this is a substantial element in anyone's decision to accept
employment with the Company. In any event, it is not a defense to an allegation of discrimination recognized in the Act.

It is common ground between the parties that the case before me is covered by Sections 7 and 10 of the Canadian Human

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Act which prohibits discrimination based upon age. It is also common ground that the decision must be determined on whether it comes within the
exception of Section 14(c) in the Act which provides as follows:

"It is not a discriminatory practice if (c) an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual."

The first matter of disagreement with regard to the application of 14(c)
is whether the onus lies upon the Respondent who is seeking to bring himself
within the exemption, or whether it lies with the Applicant to show that he
does not come within the exemption. The question of onus was dealt with by
the Supreme Court of Canada in the case of Ontario Human Rights Commission et
al v. Bureau of Etobicoke, 40 N.R. at page 165 where Laskin C. J. states as
follows:

"Once a complaintant has established before a board of inquiry a prima facie case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer. The only justification which can avail the employer in the case at bar, is the proof, the burden of which lies upon hum, that such compulsory retirement is a bona fide occupational qualification and requirement for the employment concerned. The proof, in my view, must be made according to the ordinary civil standard of proof, that is upon a balance of probabilities."

Although this was a decision under the Ontario Human Rights Act I accept
that the same principles apply. Accordingly, the onus is on the respondent to
establish the application of Section 14 (c) and the proof must be made according to the ordinary civil standard

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proof, that is upon the balance of probabilities.
Mr. Nunn further argues that the use of the word "employees" in Section 14(c) should be interpreted to refer to the employees of the employer, that
is Canadian National Railway Company, and that since all 71,000 of Canadian
National employees are subject to the policy requiring mandatory retirement
at age 65, Mr. Prior has not been discriminated against based upon the saving
provisions of this Section. He supports this argument by reference to Section
7(a) where the Act uses the word "individual" as follows:

"It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any md individual,

or;"
and Section 10 which also refers to an individual or a class of individuals
as follows:

"It is a discriminatory practice for an employer or an employee organization
(a) to establish or pursue a policy or practice, or
(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

I have no difficulty in reconciling the apparent inconsistent terminology used in these sections. Sections 7 and 10 encompass situations
that could apply to not only those who are presently employed by an employer,
but also those who have not

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acquired that status, whereas the exemption in Section 14(c) must apply to someone who is or has been an actual employee. By definition, someone who
is an employee in a similar position, must be someone who has acquired status
of an employee. I accept the interpretation set out in Campbell V. Air Canada, C.H.R.R. Volume 2, 602, that the Section must be read to refer to
employees of various companies who have similar positions.

Having found that the onus is upon the Respondent to bring itself within

the exception of Section 14 (c), and having found that the proper reading of
the Section requires a consideration of employees who do similar work, not
confining that to mean the employees of the individual employer, we must
determine whether the onus has been satisfied. To do this we must first give
some meaning to the words "normal age of retirement" as set out in the Act.

Some consideration is given to the meaning of this phrase in the case of
Campbell V. Air Canada (supra). However, in that case, the Complainant had
conceded that Air Canada had retired him at the normal age of retirement. I
do accept however, that by the normal canons of statutory interpretation the
words are to be given their clear and normal meaning unless there is
something to indicate that the words are being used in a special sense.

It is a common element in the definitions of "normal" to use it
synonymously with the word "usual" and as the opposite of "exceptional" or
"highly extraordinary". On the facts of this case,

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find that approximately 60 percent of the Checkers across the country have
a mandatory retirement age of 65 and 40 percent do not. We also find that in
the Halifax area 30 percent have a mandatory retirement age of 65 and 70
percent do not. When 40 percent of the Checkers do not have mandatory
retirement it can hardly be said that this is "exceptional" or "highly
extraordinary". Nor can it be said that Checkers "usually" have mandatory
retirement at age 65. This is particularly true if we give any consideration
to the variation of the local working environment. The only exception in the
Act that applies is Section 14(c). If, in fact, a norm or standard cannot be
established for a particular occupation then 14 (c) does not provide a
defense to a prima facie case of age descrimination.

On the facts before me, I find that the Respondent has not satisfied the
onus of establishing that it comes within the exemption of 14 (c).
Accordingly, I find that they are in violation of the Act by reason of Age
Discrimination against Harry C. Prior and duly order that he is to be
re-instated to his former position as a Checker with full seniority.

I have no hesitation in finding that the Canadian National Railway has acted in good faith upon a well-established, long-standing policy. Accordingly, I find that this is not a proper case to make an order for special compensation pursuant to Section 41 (3). They shall, however, pay to
Harry C. Prior, the compensation provided for him in Section 41 (2) (c) and
if the

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cannot agree to the proper amount I reserve the jurisdiction to determine the matter.

I wish to compliment council for their assistance in this matter, especially Mr. Nunn whose argument was very thorough.

DATED at the City of Windsor, in the County of Essex, this 17th day of August, 1982.

PAUL L. MULLINS