TD 4/ 85 Decision rendered on July 24, 1985

THE CANADIAN HUMAN RIGHTS ACT (S. C. 1976- 77, C. 33) (Amended by 1977- 78, C. 22; 1980- 81- 82- 83, C. 111, 143)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

DAVID C. RODGER, Complainant, - and

CANADIAN NATIONAL RAILWAYS, Respondent.

TRIBUNAL: SIDNEY N. LEDERMAN, Q. C.

DECISION OF THE TRIBUNAL

APPEARANCES:

RENÉ DUVAL Counsel for the Canadian

JOSEE TOUCHETTE Human Rights Commission and the Complainant

PAUL ANTYMNIUK Counsel for the Respondent DONALD KRUK

DATES OF HEARING: June 10 and 11, 1985. (Version française à suivre) (French version to follow)

>I. FACTS On June 25th, 1975, the Complainant, David C. Rodger, was hired on by CN as a trainman/ yardman. It was work that he enjoyed and he looked forward to a life- long career on the railroad. On April 12th, 1979, however, he suffered a serious set- back in his ambition. He was awakened at 3: 30 a. m. that day by his wife who advised him that he was having a seizure and an ambulance attendant had been called. He however did not go to the hospital at that time but rather back to bed. A second seizure occurred at 6: 30 a. m. at which time he was taken to the hospital and was seen by Dr. Thorsteinson.

Rodger was diagnosed as having experienced two epileptic grand mal seizures. Dr. Thorsteinson placed Rodger on dilantin, an anti- convulsive medication. An E. E. G. (electroencephalograph) was conducted and showed a seizure focus in his left temple. A CAT scan and brain scan all were in the normal range. He was cautioned not to drive or consume alcohol.

Rodger had never experienced a seizure prior to this incident, and as will be mentioned later in these reasons, has never had a recurrence.

> - 2 The seizures took place during the early morning of Thursday, April 12th, 1979. On Tuesday, April 10th, 1979, Rodger worked the 4: 00 p. m. to 12 midnight shift. In the early

morning of Wednesday, April 11th at approximately 1: 30 a. m. he played hockey and then had a few beers. He arrived at his home at about 3: 30 a. m., went to bed and slept until noon. He was at home all afternoon. He had wine with dinner and he retired to bed at about midnight. The seizures took place in his sleep that early morning.

Dr. Thorsteinson gave the opinion that the seizures were caused by a combination of three factors:

1. Approximately one month before, while body- surfing on vacation in Mexico, Rodger fell and hit his head and arm. It appeared to Rodger that the incident was minor and that there were no lasting injuries. However, Dr. Thorsteinson thought that this minor trauma played a role in the seizures;

2. The stress and fatigue arising from the hockey game and the late night shift, together with alcohol consumption were also relevant;

> - 3 3. Moreover, a seizure can be brought on by sleep and may have

been important here. Rodger stayed off work for two weeks upon the recommendation of Dr. Thorsteinson. He resumed his full duties as trainman/ yardman thereafter and continued to perform those functions until July 2, 1979, when he was pulled out of service. He was called in for an investigation with respect to an alleged failure of his duties as a flagman. This was unrelated to his earlier seizures. At the end of the investigation, he was advised that he would have to take a medical on July 9th, 1979.

By this time the CN Medical staff had received a letter from the Trainmaster advising them that Rodger had a recent history of convulsive disorder, was under treatment and that he had to be examined by the Medical Department to ascertain his fitness as a trainman.

On July 9th, he saw Dr. Rempel, (Senior Medical Officer with CN). They discussed the epileptic incident and according to Rodger, Dr. Rempel said words to the effect that "you have clerical experience? You cannot work on the road. You will have to stay off the road for two years without incident before you can return."

> - 4 The Medical Department decided that because of the seizures and the possible side effects of the medication (loss of concentration, distortion of vision and drowsiness), Rodger was no longer fit to serve as a trainman/ yardman but had to be restricted to situations where he would not endanger himself or others. He was not allowed to drive a company car or any other CN vehicle. He was not permitted to climb or work at heights, or around heavy moving equipment, or indeed engage in any activity where he would be working alone.

The reason for the restrictions was obviously the fear that if he underwent another seizure, he could injure himself or jeopardize the safety of others or the railroad operations generally.

On August 28, 1979, CN received a confirming letter from Dr. Thorsteinson stating that Rodger was suffering from epilepsy.

The restrictions were imposed on Rodger in August and he was approved for work as a car retard operator or as a switchtender.

> - 5 Ultimately, on September 28, 1979, Rodger assumed a medically restricted position as a switchtender. As such, he would sit in one of two towers and would work either by himself or with a yardman. The primary tower was known as the "S" tower and in that location the switchtender is responsible for controlling the traffic in the yard. It should be noted that in permitting Rodger to work in the "S" tower, CN had removed the restriction on his working alone. It was Dr. Eggerston's view that if he was rendered unconscious in this position, the safety of operations would not be endangered and only delay would be the consequence. Although the environmental conditions in the tower were much better than those that he would face as a trainman/ yardman where he was exposed to the elements, he did not particularly enjoy the job as his ambition was to be a trainman or a yardman.

He thought that there was a loss of prestige in his new position and he had a loss of freedom. He felt that there was more money to be earned as a trainman/ yardman because even when he was laid- off in that position he could travel to other geographical centres for trainman/ yardman work if jobs were available there. Switchtenders, on the other hand, did not have the same kind of mobility. As it turned out however, Rodger's earnings as a switchtender

> - 6 compared favourably to fellow employees with virtually the same seniority who worked as unrestricted trainmen/ yardmen.

He also felt humiliated that he was put in the position of switchtender. He related one incident in which a car retard operator said to him that he was restricted in the head not in the legs and accordingly he

should not have a more advantageous parking spot which had been reserved for him.

Rodger often requested of Dr. Eggerston (CN's Regional Medical officer) that he be restored to his old position but was constantly told that clearance would have to come from the Chief Medical Officer in Montreal. Rodger, however, described Dr. Eggerston as being "optimistic" about his return to unrestricted work.

In the meantime, progress reports were sent to CN from Rodger's physicians. As early as August, 1979, the results were positive:

(a) in a letter from Dr. Thorsteinson to Dr. Eggerston on August 28, 1979, CN was advised that Rodger was well controlled under

> - 7 dilantin and that the latest E. E. G. was in the normal range; (b) in October of 1980, CN medical staff received another report

from Dr. Thorsteinson which indicated that Rodger had discontinued medication and was seizure free;

(c) on November 28, 1980, Dr. Gomori advised the CN medical staff that Rodger was seizure free and concluded that as Rodger was designated fit to drive a motor vehicle he was therefore just as fit to serve as a brakeman.

Dr. Eggerston testified that he reviewed Rodger's restrictions in view of these progress reports but decided that they should be maintained primarily because Dr. Gomori had also stated in his letter that Rodger had a propensity for seizure recurrence and Dr. Eggerston did not agree with Dr. Gomori's conclusion that Rodger was ready to return to unrestricted work.

Rodger worked as a switchtender until June of 1981. At that time, he sought to return to his position as trainman and had meetings with Dr. Eggerston, to determine if

> - 8 restrictions would be lifted. Dr. Eggerston helped him to get the position of baggageman, which is one of the functions of a trainman. He handled the baggage and the express mail and attended to loading and unloading luggage but only in a central traffic controlled territory where he was not required to flag or run alongside or jump on or off moving trains. CN approved this position for Rodger in June, 1981, and it was concurred in by the Union. He worked as a baggageman for three months at which time he was laid off. Following his lay- off, he was re-employed as switchtender and never returned to baggageman.

During the course of his employment with CN, he had applied for the yardmaster's course on two occasions. The first time he was turned down because he did not have enough seniority. On the second occasion, although he had the seniority, entry into the course was denied because of his previous seizures and because of his restriction with respect to working on heavy- moving-equipment.

Further medical reports showed nothing negative. Quite the contrary. In June of 1981, CN received another progress report from Dr. Thorsteinson who indicated that there had been no further seizures. In July, 1981, Rodger underwent the usual CN bi- annual medical examination which

> - 9 indicated that he had been free of seizures and had been without medication for sixteen months. Further discussions took place between Rodger and Dr. Eggerston about the possibility of lifting restrictions, but Dr. Eggerston did not think it advisable at the time. He again met with Rodger in October of 1981 and told him that as he had been without medication for eighteen months he would again discuss the matter with the Director of Medical Services. This consultation with the Director of Medical Services was of no avail to Rodger as he was advised that no further changes could be made for him. That, for all intents and purposes, was the end of the discussions and meetings between Dr. Eggerston and Rodger, as they never discussed the matter again. A further progress report was received by CN in July, 1982 from Rodger's physician indicating that Rodger was still doing well. It had no greater impact than the earlier reports. In frustration, Rodger resigned his position on December 23, 1982.

He then worked for a real estate company for a few months earning approximately $14,000.00. In October of 1983, he moved to Vancouver and worked part- time in a restaurant as a waiter and has been doing so since that time.

> - 10 II. DUTIES OF TRAINMEN/ YARDMEN Evidence was led to show the responsibilities and physical exertion involved in the position of trainman/ yardman. A yard crew is usually comprised of a foreman, three yard helpers and the engineer running the locomotive. Their responsibility is to make up the train by switching cars on various tracks. Their duties are to move loaded boxcars (sometimes containing dangerous commodities) and unloaded boxcars, and the shunting of locomotives. The work is done in both good and inclement weather. The ground in the yard is uneven, made up of tracks and rocks. Generally, one has to take care as he moves about.

A great deal of walking is involved. For example, a yard helper may have to walk the length of a train made up of 50 cars, each car being 50 to 60 feet in length. Therefore, it is not uncommon for a yardman to walk 3,000 feet in the course of tying on cars.

Activities in the yard also include jumping on slowly moving cars and riding the boxcars to another point on the track to perform various duties. The yardman has to hop onto a vertical steel ladder leading to the roof of the

> - 11 -

boxcar at a height of about 25 feet at which point the yard helper may have to set or release a handbrake.

There is heavy equipment moving around him. A yardman is constantly getting on and off moving equipment and is working around moving boxcars that are coupling. It is common place for trains on the next lead to be moving alongside and in close proximity to the car on which the yardman is riding.

If his work is done negligently or inattentively, then the contents in the boxcars could be damaged, a derailment could occur, or, individuals could be hurt.

The work- shift is eight hours long. The one commencing at midnight can prove to be tiring. When a yard helper is on call, he knows within eight hours that he will be assigned to a particular shift. Sometimes he may have to take two shifts back to back.

Physical labour is involved, the most significant of which, is the carrying of a knuckle some distance to replace a broken one. A knuckle which weighs about 50 pounds is part of the steel coupling system at the end of a boxcar which allows for the cars to be joined together.

> - 12 A trainman usually rides in the engine or caboose and he is responsible for the movement of the train. If cars are left off or taken off at a particular point, then he performs the duties of a switchman. As between the jobs of yardman and trainman, the former is more strenuous because of the walking and the constant embarking and disembarking from cars*

A trainman's responsibility also includes leaving the train and going ahead or behind it to serve as a flagman should the train become disabled in order to warn or stop oncoming trains. A failure in the flagman's responsibility would create a danger of collision.

In addition, the trainman may be riding on a boxcar as it enters a spurline into an industrial area where the clearances may not be very wide. In those situations, there is always risk to one's own safety and care must be taken by the trainman not only to protect himself but also the private employees who may be working nearby.

Evidence was given by Mr. Walter R. Thomas, Manager of Accident Prevention for the Prairie Region for CN. In that capacity, his responsibility is to ensure that the safety policies of CN are carried out. He reviewed the

> - 13 statistics of the personal injuries incurred by trainmen/ yardmen over the last few years and categorized the injuries as: minor (where there is no loss of time at work); disabling (where there is some loss of time at work); and fatalities. The statistics were as follows:

1983 - 139 minor injuries 47 disabling injuries

1 fatality 1984 - 184 minor injuries

67 disabling injuries 0 fatalities

1985 (Jan. to June) - 66 minor injuries 20 disabling injuries 1 fatality

His review of these accidents indicated that the primary cause was usually deviation from the uniform code and safety rules and that negligence or lack of attentiveness was the main factor. He, however, could not tell from the statistics whether any of the injuries resulted from sudden incapacitation of an employee. Moreover, it could not be inferred from the number and nature of these injuries that a CN trainman or yardman faced a greater risk or peril than an employee working in the average industrial plant in Canada. However, it is clear that a CN trainman or yardman is exposed to considerably greater risk or danger than someone who has an office job.

> - 14 III. EPILEPSY AND SEIZURES Dr. Neelan Pillay gave evidence. He is a neurologist and a specialist in epilepsy at the Health Services Centre at the University of Manitoba.

He testified that epilepsy is different from seizures. Epilepsy is a chronic disorder of the brain due to uncontrolled electrical discharges from brain cells. In layman's terms, it amounts to a short circuit in the brain. It manifests itself in many forms: the most dramatic are convulsions and jerking, biting the tongue, loss of bladder control and loss of consciousness. Afterwards, the epileptic is in a confused state and suffers headaches.

According to Dr. Pillay, a person can have a seizure and yet not be an epileptic. Dr. Pillay reviewed the Rodger file and concluded that he had two seizures on one particular night but disagreed with Dr. Thorsteinson that he was an epileptic. His view was that he had seizures caused by stress factors, ie. a minor trauma while surfing in Mexico; fatigue caused by his hockey game and alcoholic consumption the night before and sleep which can bring on seizures.

> - 15 Dr. Pillay indicated that a seizure is the same physiologically as epilepsy but the chance of recurrence is not as great since the fctors causing seizure can be controlled. An epileptic has an inherent or underlying disorder and control is not as certain.

Dr. Pillay's opinion or diagnosis as to whether Rodger merely suffered a seizure or truly was an epileptic differs markedly from that given by Dr. Thorsteinson, the treating physician. Dr. Pillay says it is possible that he, himself, is wrong on this point but unlikely.

Dr. Thorsteinson was aware of the restrictions imposed on Rodger's activities. He initially agreed with those restrictions and thought it was reasonable that Rodger not drive vehicles and be kept away from moving equipment for fear that if he had a seizure a serious accident could occur. Dr. Thorsteinson, however, thought that the restrictions were temporary.

Being seizure free on medication is not the equivalent of being seizure free off medication. In March of 1980, Rodger was taken off dilantin. An E. E. G. was repeated and the results were normal. Dr. Thorsteinson advised a further monitoring period to see if there was control without

> - 16 medication. His view was that if Rodger continued for a further year without medication and suffered no seizures, then he could resume his previous duties.

Both Dr. Thorsteinson and Dr. Pillay commented on the risks of recurrence of seizures. They stated that there is an element of risk for an individual who has had two previous seizures if he is exposed to undue stress in the future. The stress could arise from physical exertion, mental pressures, alcohol, disorders of the brain, going without medication, the administration of drugs - any of which could trigger a seizure in the future. However, the risk of seizure decreases with increasing passage of time. For example, if an individual has been seizure free for three years, then he has less risk of recurrence than an individual who has been seizure free for only two.

Dr. Pillay could not provide an opinion as to whether it was appropriate for CN to impose restrictions in the first place in July, 1979 since he did not really understand the complexity of the tasks performed by trainmen/ yardmen. He felt, however, that it is reasonable that a person should be restricted in his duties for one year. Anything beyond that is even more reasonable, but not necessary.

> - 17 Dr. Pillay acknowledged in cross- examination that if a job called for any one of three eight- hour shifts, with no predictability as to the shifts and there was little advance notice of which shift the individual would be workng on, such a position would not be the best for a man prone to seizures. It would be better if he had a job with regular hours which afforded regular and predictable sleeping habits.

Dr. Pillay considered the various aspects of a trainman/ yardman's job and concluded that a person prone to seizures can do this kind of work if he has not suffered any setback during a one year period. He felt that the risk of recurrence is little after that period. He conceded that it would be easier to make a more reliable assessment after a period of three years than one year. The one year period appears to be a medical guideline or rule of thumb derived from experience. It is not expressly recognized in any medical text.

Dr. Pillay was of the view that the duration of restrictions must

turn upon the individual himself. If Rodger had suffered paralysis or injury to the brain or if he had a family history of epilepsy or seizure or brain tumor, then the risk of recurrence would be fairly high. However,

> - 18 the only risk factors in Rodger's case are controllable, ie. alcohol, sleep, physical and mental fatigue.

Dr. Pillay acknowledged that there must be a subjective element to the assessment of risk but felt it was crucial to consider the individual and his particular characteristics.

Dr. Pillay in his October 6, 1982 letter (Ex. R- 1) stated that there were no symptoms in Rodger to suggest that he might experience further seizures. But his opinion is not entirely unqualified as he hints that if there is any tendency of recurrence, certain occupations should be avoided. Further, he feels Rodger would be better off working as a trainman than a yardman. The relevant portion of Dr. Pillay's letter reads:

"Someone who has had recurrent seizures always has a risk of further seizures and this is greater than the risk for the general population. However, if precipitating factors were present which might have been the case in this patient, and elimination of them would reduce that risk considerably. It is almost 3 1/ 2 years since the two seizures and except for the first 10 months he has been on no anti- convulsants and there has been no symptoms to suggest recurrence. In general seizures occurring at night only have a better prognosis than the ones occurring during the day or both during the day and night.

> - 19 Canadian National Railways, obviously is very concerned for the safety of the employee and of its fellow employees and the safety of operations. Although that is a quote that few would argue against, however, this should be considered in the context of this particular patient. My own feeling is that persons who are completely seizure free should be able to participate in any employment setting and those with a tendency to recurrence should avoid certain occupations that involve use or operation of motor vehicles, climbing or altitude work or heavy machinery. To answer your question specifically, I am not sure whether Mr. Rodger has the necessary qualifications for a trainman, but I would have thought he would be better served if there is a choice as a trainman than a yardman."

Although there are many studies relating to seizure recurrence among epileptics, most of these studies turn on the peculiar nature of the patients who form the basis of the sample group and there is no study relating directly to Rodger's situation. An authoritative study published in the New England Journal of Medicine on August 26, 1982, entitled "Seizure Recurrence After A First Unprovoked Seizure" deals with situations where there are no identifiable factors such as alcohol, trauma, physical stress, as the causes of the seizure. It concludes that there is little risk of recurrence if three years have passed without any seizure

> - 20 incidents. Dr. Pillay, however, feels that Rodger does not fall into that study sample because the evidence here indicates that his seizure likely was provoked by these external

factors. If they can be controlled, then there is no reason to extend the waiting period beyond one year as far as Dr. Pillay is concerned.

Dr. Pillay did say, however, that he has sometimes inaccurately predicted the risk of recurrence of seizures in his patients.

He did state that if Rodger was responsible for the safety of passengers or otherwise had a public responsibility he would be worried about limiting the risk period to only one year. Some comparison may be made to the qualifications for a driver's licence in Manitoba in this regard. In order to be licenced to drive a private car the individual should be seizure free for one year under medication. However, there is an absolute prohibition for a person becoming licenced to drive a taxi or a small bus or ambulance or school bus if he has been diagnosed as epileptic. It may be that, as such, he holds the lives of other people in his hands and if he is diagnosed as an epileptic he should not be involved in such activities.

> - 21 IV. ARGUMENTS In argument, Mr. Duval, counsel for the Canadian Human Rights Commission conceded that there is really only one significant issue arising from these facts, ie. how long should the restrictions have remained on Rodger. He argued that CN's conduct in continuing the restrictions for an inordinately long duration, well beyond what was reasonable in the circumstances amounted to discrimination against Rodger by reason of handicap in contravention of Section 7 or alternatively a discriminatory practice contrary to Section 10 of the Canadian Human Rights Act.

It is Mr. Duval's argument that the position or policy taken by CN's medical department completely ignored all the signs which would warrant the removal of the restrictions well before Mr. Rodger was driven to resign in December of 1982 in an act of frustration. He points to the following facts:

(a) the CN medical department blindly accepted the diagnosis of Dr. Thorsteinson that Rodger was epileptic without due regard to his personal, family and medical history;

> - 22 (b) CN's medical department disregarded the fact that the progress

reports indicated that Rodger was seizure free on medication for approximately one year and then he was doing well without medication for a subsequent period of eight or nine months;

(c) CN's medical department totally refused to take into account

the acknowledged expert opinion of Dr. Gomori. The medical department preferred to place reliance upon questionable statistical data rather than the individualistic and personal medical assessment of Rodger himself;

(d) Dr. Eggerston, who had no particular expertise with epilepsy disagreed with the specialist, Dr. Gomori, and yet he did not seek any further consultation from other experts in support of his position;

(e) the CN medical staff failed to give appropriate weight to the fact that Rodger worked as a trainman for a period of three months right after his seizures and at a

> - 23 time when he was most prone, if ever, to suffer recurrences; (f) CN failed to advise Rodger of what it felt was the appropriate

period of restrictions and left him with the impression that it may be permanent.

Mr. Duval, however, does readily acknowledge that it was quite proper to impose restrictions in the first place. In so doing, he is recognizing that although the imposition of restrictions constitutes an act of discrimination, it amounts in these circumstances to a bona fide occupational requirement (hereinafter referred to as "BFOR") within the meaning of Section 14(a) of the Canadian Human Rights Act. It reads as follows:

"It is not a discriminatory practice if (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;"

CN's position is that there is no evidence of discrimination against Rodger. No one contends that the restrictions were unnecessary. CN argued that it is a matter of judgment as to the time when they should be removed and

> - 24 the exercise of that judgment cannot be said to be discriminatory. Alternatively, counsel argues, that if there has been discrimination, then CN has discharged the burden of establishing that the length of time that the restrictions were maintained was a BFOR of the position of trainman/ yardman.

V. FINDINGS (1) Adequacy of Complaint

Mr. Rodger's Complaint Form (Exhibit C- 3) alleges that the discrimination complained of took place on or about July 10, 1979 (three months after the seizure) but at the hearing, it was clear that the only

contested issue was the legitimacy of continuing the restriction beyond one to two years after the seizure. Commission counsel clearly conceded that the restrictions were BFOR during those times. Therefore, the issue considered by the Tribunal was not the subject of the original complaint.

A defect in the complaint, however, does not necessarily preclude the Tribunal from hearing the case. If the Tribunal determines that the parties involved were adequately notified and were treated fairly, even serious

> - 25 defects in the complaint may be ignored. (Tarnopolsky, Discrimination and the Law, 1982, p. 444).

Here, both parties were aware of the issues at stake and considerable attention was devoted to the question of what length of seizure- free time is a BFOR for the position of trainman/ yardman. Moreover, the question of the adequacy of the complaint was not raised and therefore nothing further need be said about it.

(2) Burden of Proof of Discriminaton Ordinarily, the plaintiff has the onus of establishing a prima facie case of discrimination. If he is successful, the respondent has the onus of justifying the discriminatory activity. The standard of proof is the balance of probabilities. (Ontario Human Rights Commission v. Borough of Etobicoke (1982) 132 DLR (3rd) 14 (SCC) at 19; Ward v. Canadian National Express [1982] CHRR D 689 (CHRA Tribunal) para. 6193.) In this case, however, it may be argued that because the complainant conceded that the restriction was a BFOR at the time it was imposed, he must show that it was no longer a BFOR at the time asserted (one to two years after the seizure). This would effectively relieve CN of its normal burden of proof.

> - 26 That cannot be so. It is a cardinal rule of statutory interpretation that the party asserting an exception must bring himself within it. It is true that Rodger has conceded that he was disabled and that the restriction was bona fide for a certain period, but this admission should not preclude him from asserting that it is discriminatory at a later date. By showing the length of time for which he has been seizure- free and demonstrating that increased time without seizures reduces the risk of recurrence, he is bringing into question the continuing validity of the BFOR and thus the burden of justification remains upon CN.

That the job restriction placed on the complainant was prima facie discriminatory is indubitable. It now appears that the Commission and the complainant acknowledge that the restriction was initially a BFOR. If, however, it should lose this status, it would constitute an act of direct discrimination under Section 7 since Rodger had been removed from his job solely because of his disability.

Some confusion has been generated by the Federal Court of Appeal decision in Canadian National Railway Co. v. Canadian Human Rights Commission and Bhinder [1983] C. H. R. R. D/ 1404 which ruled that intent to discriminate

must be proved > - 27 in some cases. However, the Court was unanimous that no proof of intent is required where there is differential treatment, as is the case here (Bhinder para 1203; 12142).

Having shown that he was differentially treated on a prohibited ground and having explained his concession that the restriction was orginally, but not after a certain period of time, a BFOR, Rodger's position is that he has been the subject of unwarranted discrimination.

Two substantive questions thus arise: Is duration of a BFOR subject to review for discrimination by the Tribunal? If so, has CN shown that BFOR status continued to attach to the restrictions on Rodger after the period conceded to be justified?

(3) Duration as an Element of BFOR By contending that the length of time for which a BFOR is imposed on the individual is a matter solely within the discretion of the employer, CN is

suggesting that mere acknowledgement that some restriction is necessary at one point in time will forever estop an individual from arguing that it is no longer necessary. Such a contention cannot be accepted.

> - 28 It is well established that to justify a discriminatory act as a BFOR, it must be shown that it is "reasonably necessary" to performance of the job by the affected individual or individuals (Etobicoke supra at pp. 19- 20). Logically, the requirement can cease to be "reasonably necessary" in one of two ways: either the job itself will change so that someone lacking the requirement is able to perform it at the requisite standard, or the status of the individual will change so that he now meets that standard. It is in the latter sense that duration is an issue here and, far from being unrelated to the bona fides of the restriction, it is the crucial element.

Since it is clear that the Tribunal must decide whether any contested restriction qualifies as a BFOR (Cameron v. Nel- Gor Castle Nursing Home & Nelson [1984] CHRR D/ 2170 (Ont. Board of Inquiry); Villeneuve v. Bell Canada, May 31, 1985, as yet unreported (Canadian Human Rights Tribunal)), in this case it must rule on whether or not CN's requirement that Rodger continue to be seizure- free for more than one to two years after his seizure episode in April, 1979 constitutes a BFOR.

> - 29 (4) Application of the BFOR

The test for a BFOR was established by the Supreme Court of Canada in the Etobicoke case supra at pp. 19- 20:

To be a bona fide occupational qualification and requirement a

limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

The answer to the second question will depend in this, as in all cases, upon a consideration of the evidence and of the nature of the employment concerned.

This test has been specifically applied to s. 14(a) of the Canadian Human Rights Act (Bhinder, supra; Villeneuve, supra) and to the equivalent sections of most provincial human rights statutes.

> - 30 In this case, only the objective branch of the test must be examined as there is no question that CN imposed the restriction solely out of concern for public safety. Two issues arise in objectively establishing that the job restriction on Rodger was a BFOR. First, to what degree was CN required to assess Rodger on an individual basis? Second, what degree of risk is sufficient to warrant the imposition of the restriction?

With respect to the first question, Tarnopolsky, supra writes at p. 311:

Anti- discrimination legislation does not compel employers or those who provide accommodation, services and facilities to disregard the disabilities of handicapped individuals or to make substantial modifications in order to allow disabled persons to participate. It does, however, require that persons with a handicap should receive individualized assessment and treatment and "reasonable accommodation" to such a person's handicap. (added emphasis)

The cases of Ward supra at para. 6223- 4 and Cameron, supra at para. 18508 support this proposition, but they are distinguishable from the situation before this Tribunal. In both of those cases the complainants had permanent disabilities of the hand, and their abilities to safely

> - 31 perform their duties were easily ascertainable by the employer through simple observation. The medical evidence as to the complainants' capacities was uncontradicted. Here, the risk of recurrence of a seizure cannot be so reliably determined.

The principles enunciated in the age criterion cases of Etobicoke, supra and Air Canada v. Carson et al February 15, 1985, as yet unreported (Fed C. A.) are more analogous. In both, it was recognized that there may be situations where it is impossible or impractical to deal with safety concerns

on an individual basis. In Air Canada the majority judgment suggested that where an employer wishes to justify a "blanket" policy, it must prove that individual testing is not practical. In Etobicoke, it was held at 22:

In an occupation where, as in the case at bar, the employer seeks to justify the retirement in the interests of public safety, to decide whether a bona fide occupational qualification and requirement has been shown the board of inquiry and the Court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interest of safety of the employee, his fellow employees and the public at large.

> - 32 Thus, the employer who seeks to justify the absence of individual assessments must show that such assessments are inappropriate, and that, in general, there is known to be a sufficiently high risk of failure to warrant the imposition of a blanket restriction.

Here, CN argued that it did treat Rodger as an individual case because it had no applicable existing policy. However, its actions were more consistent with the development of such a policy than with determining Rodger's particular abilities. CN disagreed with the assessments of the risk posed by his condition given by Rodger's doctors and relied instead upon general medical studies in asserting that Rodger could not safely perform his job. There is no evidence to show that it placed any serious weight on the unique characteristics of Rodger's case: the possible causes of the seizure, the length of time he had been off medication without problems, the lack of any family or prior medical history of seizures, the satisfactory performance of his duties for three months after the seizures, etc.

Even if CN did not assess Rodger on an individual basis, the difficulty of so doing in the absence of reliable medical information to predict recurrences may well mean that such assessments are impossible. The objective branch of the

> - 33 Etobicoke test requires only that the restriction be reasonably necessary to the job and this element turns on the degree of risk involved.

It is clear that when there is a public safety element involved, the burden on the employer is lower than the ordinary civil standard. In Ward, the Canadian Human Rights Tribunal stated (at para. 6213):

"There have been many cases which say that the burden of proof on the employer to justify an employment requirement will be considerably less where it can be shown that there are safety implications for the employee or for his/ her fellow employees or the general public. However, even though the burden of proof is lighter where safety is a factor or when the job is a hazardous one, the bona fide occupational requirement must still be strictly construed."

(See also Cameron at para. 18510; Little v. St. John Ship- building and Drydock Co. Ltd. [1980] CHRR D/ 7 (N. B. Board of Inquiry) at D/ 8.)

We are dealing here with a job function where there is legitimate employer's concern for the safety of the complainant and fellow employees. There is no question that CN has a public duty to carry on its operations with the highest degree of safety.

> - 34 While it is clear that no fixed rule is possible (Etobicoke, supra p. 22), cases have suggested that even a very low threat to public safety will be sufficient to justify a disability-based restriction. For example, in Foucault v. Canadian National [1982] C. H. R. R. D/ 677, a Canadian Human Rights Tribunal found that the unpredictability of recurrence of a treated back injury was sufficient to warrant CN's refusal to employ the complainant in the physically demanding position of bridgeman. In Manitoba Human Rights Commission and Loveday v. Baker Manufacturing Ltd. [1984] 5 W. W. R. 704 (Man. Q. B.) the court dismissed an appeal from a Board of Adjudication's decision that a lack of back problems was a BFOR for warehouse work. Although the requirement had to be "real and substantial" the degree of danger to the complainant himself was a sufficient risk:

"No employee has the right to risk serious injury to himself, and no employer should be required to employ someone whose physical condition subjects him to the risk of more than a trivial injury." (p. 709)

The problem is drawing the line at which it can be said with reasonable assurance that it is relatively safe to permit an individual such as Rodger to resume his former

> - 35 duties. It appears to be a matter of professional medical judgment where that line should be drawn.

Was it unreasonable for CN to take the position that it did with respect to Rodger at the relevant time? Or were there enough clear and reliable telltales to lead to the conclusion that a continuation of the restrictions amounted to unwarranted discrimination against Rodger because of his handicap?

Much seems to turn upon whether the condition has been diagnosed as epilepsy or merely that of seizures. Although they both manifest themselves in the same way, there appears to be a greater risk of recurrence if the individual is an epileptic mainly because the problem is latent and not as controllable as seizures whose causes are known. The medical opinion that CN received at an early time from the treating physician was that Rodger was an epileptic. This was confirmed by Dr. Thorsteinson and Dr. Gomori and was accepted by Dr. Eggerston. It is only Dr. Pillay, in his evidence and with his hindsight, who has concluded that Rodger suffered from seizures and was not epileptic.

As to the question of the appropriate time during which

restrictions should be maintained, again medical > - 36 opinion differs. Dr. Pillay feels that one year is reasonable. Dr. Thorsteinson advised in his opinion to CN that restrictions should be imposed for two years.

The medical literature on the subject is based on studies of patients who, for the most part, do not fit the characteristics of Rodger. Dr. Eggerston relied upon medical literature in existence in 1981 indicating that there is a 70 percent chance of an epileptic suffering a recurrence and such recurrence is likely to take place within five years of the first seizure. Accordingly, CN felt that a five year period was appropriate, although this fact was not conveyed to Rodger.

The August, 1982 article published in the New England Journal of Medicine was readily acknowledged as authoritative by Dr. Eggerston. The study indicated that individuals with the characteristics that were studied should be relatively safe if they go through a three year seizure free period. The conclusion of that study is as follows:

"From a clinical standpoint the principal result of this study is the demonstration, contrary to clinical impression, that no more than one in three patients presenting with an unprovoked seizure will have a recurrence and that few recurrences may be expected

> - 37 if the patient remains free of seizures for three years. Patients with first seizures are not homogeneous in terms of the risk of recurrence. A positive family history, a spike- wave pattern, and a history of prior neurologic insult increase the risk of recurrence of seizures after a first unprovoked seizure."

Dr. Pillay's response is that Rodger did not suffer an unprovoked seizure but one provoked by the stress factors reviewed earlier, so he does not fit the terms of this study.

Therefore, there did not exist any definitive medical evidence at the relevant time as to the nature of the proper period of maintaining employment restrictions upon a person such as Rodger. All the medical testimony and literature acknowledged that an individual who has suffered a seizure

has a greater risk of recurrence than someone experiencing a seizure for the first time. Moreover, unquestionably, the longer the period of time that an individual who has had a seizure goes without incident, the less is the risk of any repetition. The risk diminishes with the passage of time. The medical testimony before the Tribunal varied not only as to whether Rodger was epileptic but as to the length of time during which restrictions should

> - 38 be imposed. Moreover, in the recent New England Journal of Medicine article

on seizure recurrence this statement appears: "The risk of seizure recurrence after a single seizure has been addressed in four previous studies, but none provides sound prognostic guidance. The sample size has been small, the follow- up incomplete, or the duration of follow- up unspecified." (emphasis added)

Further in the article it is stated: "The literature provides little useful information about the risk of subsequent seizures in the patient presenting with a first seizure."

(5) Conclusion There remains the application of these principles to the circumstances in this case. The likelihood of recurrence of seizures cannot be reliably predicted, and the doctors heard by the Tribunal agreed that having had two seizures meant that Rodger was more likely than the average person to have another. The leading expert, Dr. Pillay, who was most positive about Rodger's abilities, suggested that he was more suited to a trainman's position than a yardman's.

> - 39 The job itself requires shiftwork, manual labour and a high degree of attentiveness. A seizure on the job could easily have drastic consequences to life and property unlike the situation in Sandiford v. Base Communications Limited (1984) 5 C. H. R. R. D/ 2237. In that case, a Saskatchewan Board of Inquiry found that the complainant's epilepsy could be accommodated and that an absence of epilepsy did not constitute a reasonable occupational qualification for the position of telephone operator with the respondent's telephone answering service. The Board also found that "any disruption in the work environment due to an epileptic seizure could be handled in the same manner as a switchboard operator becoming suddenly ill or a switchboard operator leaving the work- place to attend their sick children at school". (para. 18917) The nature and responsibilities of a trainman/ yardman's job however are materially different from the complainant's duties in the Sandiford case.

Given the absence of reliable information on the risk of recurrence of seizures in persons like Rodger and given the public safety element in his position which reduces the acceptable level of risk, one cannot readily conclude that the position taken by CN was unreasonable. Thus there

> - 40 does not appear to be any sound basis for interfering with its judgment in this regard. Accordingly the complaint must be dismissed.

The importance of assessing each individual case on its own terms cannot be emphasized enough, especially given the need to overcome prejudicial generalizations about conditions such as epilepsy. That a five year, or, indeed a three and one- half year restriction (when Rodger left CN), was a BFOR here should not be taken to suggest that it will continue to be

bona fide in the future. Indeed, the article in the New England Journal of Medicine suggests the contrary for certain kinds of situations and is accepted by Dr. Eggerston. Accordingly, the period of five years originally assumed by Dr. Eggerston has now been reduced by two.

Although society cannot permit any substantial threat to public safety, it cannot condone hasty assumptions about the capabilities of the handicapped. Employers must ensure that in imposing BFORs, they are relying upon the most authoritative and up to date medical and statistical information available and adapted to the circumstances of each individual case.

> - 41 Dr. Eggerston testified that CN would be prepared to look afresh at Rodger's situation. If Dr. Eggerston were satisfied that Rodger has been seizure free since 1979 and was otherwise fit, he stated that he would be prepared to declare him medically fit as a trainman/ yardman, particularly in reliance upon the New England Journal of Medicine article which he believes should have general application. Although the finding of this Tribunal is that Rodger's complaint must be dismissed, the time may be opportune for Rodger to reapply for a position as trainman/ yardman with CN.

Dated at Toronto, this 16th day of July, 1985. SIDNEY N. LEDERMAN, Q. C.