CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

WILLIAM CARL WITWICKY

Complainant

- and -
CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -
CANADIAN NATIONAL RAILWAY

Respondent

DECISION

MEMBER: Michel Doucet 2007 CHRT 25
2007/07/06

I. INTRODUCTION

[1] On August 8 and October 25, 2003, William Carl Witwicky (the "complainant") filed two complaints under Sections 7, 10, 14 and 14.1 of *the Canadian Human Rights Act* (the "Act") against Canadian National Railway (the "respondent"). The complaints allege that the respondent has engaged in a discriminatory practice on the ground of disability and retaliation in a matter related to employment.

A. The Facts

[2] The complainant grew up in the town of Jasper, Alberta, where he lived for thirty five years. He came from what he described as a railway family. He began working for the respondent on July 2nd, 1975, as a part-time employee. He got hired on a full time basis on July 22, 1977. He has since been working for the respondent, at the exclusion of a period of eight months, during which he had been dismissed.

[3] The complainant is a train conductor. Conductors are part of a group of employees commonly called the "running trades". These employees operate the trains. The complainant works out of Kamloops, British Columbia, where he also resides.

II. THE EVENTS OF DECEMBER 31, 2001

[4] On December 30, 2001, the complainant was called to work a train from Kamloops to Jasper, Alberta. The trip to Jasper took close to twelve hours. The train arrived in Jasper at 12:15 p.m., on December 31, 2001. Jasper being the final terminal, the complainant booked an eight (8) hours rest period This rest period would have ended at 10:15 p.m. at which time he would be subject to a call for work.

[5] The complainant received "excessive layover pay[1]" for the period between 11:15 p.m., on December 31, and 6:55 a.m., on January 1, 2002. For this period, he received a compensation of $126.90. During his cross-examination, he said that he first became aware, on March 28, 2002, that he had been paid excessive layover pay for that period. He added that he had offered to return the money, but that the respondent had refused.

[6] Upon arriving in Jasper, the complainant "booked" a room at the "bunkhouse". The "bunkhouse" is a facility where employees can "book" a room to rest before returning to work. While there he phoned his wife with whom he had recently separated. According to his own words, this conversation went "sour" and she informed him that she was going to file for divorce. He said that this information left him "devastated".

[7] The complainant's sister lives in Jasper. After his conversation with his wife, he went over to her house to talk to her about his marital problems. They discussed his emotional state. He described himself as very distraught and upset. He added that he had been up all night and still hadn't had anything to eat. In his own word he "was basically a mess".

[8] After talking with his sister, he decided to book himself off as unfit for duty. He had decided to stay in Jasper for a few days, as this was his last trip prior to his holidays.

[9] In order to book himself off, he telephoned the Crew Management Centre ("CMC") in Edmonton, Alberta. The CMC oversees the day-to-day assignment of the manpower for the respondent's trains. The CMC works off a computer system referred to as the "CATS", an acronym which stands for Crew Accountability and Timekeeping System. This system is used to help the CMC identify which employees are available for work at all time. According to the evidence of Richard Froment, the manager of CMC for Western Canada, the computer system ties into a train line-up and shows at what time the train is scheduled to run. CMC then identifies which employees will be working on those trains.

[10] Mr. Froment testified as to the procedure used by employees to "book on or off" the system. "Booking off" requires that the employee call CMC and tell them that he wants to be placed on a status other than "available". The respondent is thereby informed that that employee is not available for work. The dispatcher will enter this information into the system. When this is done, it creates a permanent record that remains in the system for three years. After that period, the information is archived electronically and is available on request.

[11] The CATS does not show whether an employee "booked off" at his "at-home terminal" or at an "away-from-home" terminal. According to Mr. Froment, if an employee books off at the "away-from-home" terminal, the system automatically transfers the employee's "turn back" to his home terminal. By this, he means that the system will indicate that the employee is located at this home terminal. The crew dispatcher will also notify the Chief Rail Traffic Controller who is responsible to line up the manpower at the "away-from-home" terminal, so that he can find a replacement for the employee booking-off. Mr Froment indicated that booking off at the "away-from-home" terminal is very rare.

[12] An employee who has booked off is not subject to be called to work. In order to "book-on" again the employee has to call the CMC and request to be booked "available". Mr. Froment explained that an employee who asks to be booked back on at an "away-from-home" terminal would, as a rule, be booked "back on" at his home terminal, although he accepted that it was possible to do it at the "away-from-home" terminal. CMC has the ability to take the employee's turn and move it to the "away-from-home" terminal but Mr. Froment added that in his twelve years at the CMC, he had never seen an employee book back on at the "away-from-home" terminal.

[13] When booking on or off, an employee must communicate with CMC by telephone. As indicated earlier, these phone calls are handled by crew dispatchers. There are eight crew dispatchers per shift working at the CMC, in Edmonton. Each dispatcher is assigned a specific territory. The employee will call a central number and will be directed to the dispatcher for his region. Mr. Froment explained that two methods are used to record the information when an employee calls in: first, the CATS system will "stamp" a permanent record into the system when the employee calls and secondly, their will be an audio recording of the call. Mr. Froment added that the crew dispatchers are told to keep the employee on the phone until all the information is taken down and recorded in the system. CMC wants to make sure that all the actions necessary to book an employee off are completed before the dispatcher moves on to another task. This method of recording calls was in place on December 31, 2001. At that time, the system used for recording the calls was described by Mr. Froment as a "reel-to-reel system". Each tape would contain

approximately one week's worth of data. It recorded the calls as they were received; so finding a specific call on the tape could be difficult.

[14] It would appear that in the case of the purported conversation between the complainant and "CMC" on December 31, 2001, no recording could be found. When cross-examined on this point, Mr. Froment acknowledged that a tape of the calls received on that day existed. He also said that he could not explain why a copy of this tape was not provided to the union when requested. Finally, he added that he had not reviewed the tape for that day before the hearing.

[15] During his cross-examination, Mr. Froment accepted that errors did happen and that employees were not booked-off or booked-on when they should have been. He also indicated that this was normal considering that CMC receives over a million calls per year. He further specified there would be probably six incidents a month on average where an employee was booked off incorrectly.

[16] A printout of the complainant's work history for December 30, 2001 to January 3, 2002, as recorded on the CATS system, was entered in evidence. There was no record on the work history of the complainant booking off unfit on any of those dates.

[17] Coming back to the evening of December 31, after his sister had left with some friends, the complainant went out for dinner with a friend. He acknowledges that he had some drinks of alcohol during that evening. He testified that "to the best of my recollection it was maybe a total of six or seven" drinks.

[18] Later during the evening, at around 10:30 p.m., the complainant was taken into custody by the RCMP when he was found passed out in a stolen vehicle. According to the complainant's recollection, when he left the restaurant there was a long wait for taxis. He said that he was offered a drive by an individual whom he believed worked at the restaurant. After a couple of blocks the driver abandoned the vehicle and that is where the RCMP officers found him.

[19] He spent the night of January 1, 2001, in police custody. The next morning, at 7:25 a.m., he provided a statement to the police. According to the police document, this interview ended at 7:52 a.m. The complainant was initially charged with possession of stolen property. This charge was later dropped.

[20] The complainant was released from police custody on the morning of January 1, 2002, a little before 8:00 a.m. He got a ride with an off-duty RCMP officer to the bunkhouse to retrieve his belongings. He arrived at the bunkhouse a little after 8:00 a.m. He was then told that a supervisor was looking for him to take a call for duty on a train leaving for Kamloops.

[21] According to David James, who was the on-duty supervisor in Jasper, the complainant was ordered on a train for 7:10 a.m. At the "away-from-home" terminal, the employee is responsible to provide the CMC with a room number where he or she can be reached. In this particular case, when it came time to call the complainant, he was nowhere to be found. CMC was notified and the MCO (Manager of Corridor Operations) contacted Mr. James at his home to advise him of the situation. Mr. James testified that he made a few phone calls. One to the hospital, in Jasper, and another to the RCMP, to see if they had any knowledge of where the complainant might be, but to no avail. The call to the RCMP was automatically forwarded to the Edson detachment, a town about 160 kilometres away, because there were no on-duty RCMP officers at Jasper at the time. This is surprising since Mr. James testified that he made the calls between 7:00 and 7:30

a.m., and the complainant at that time was still detained at the Jasper detachment. The answer given by the Edson detachment, according to Mr. James, is also surprising since it appears that they did not bother checking with the detachment in Jasper where they would have found an answer to their queries.

[22] Mr. James added that he also spoke to Larry Hindle, the engineer who had worked the train with the complainant the previous day to see if he knew about the complainant's whereabouts. Mr. Hindle answered that did not know where the complainant was.

[23] At approximately 8:10 a.m., just before he was getting ready to drive to Jasper, Mr. James got a call from the bunkhouse attendant indicating that the complainant had just showed up. He then asked to speak to the complainant. He said that he asked him where he had been and the complainant answered "I spent the night at a friend's place." He also added that he had asked him why he had not let anybody know where he could be reached. The complainant answered " I screwed up and would in the future do this.". He finally asked the complainant if he was fit to go to work, to which he answered that he was. Based on this answer and on the fact that the complainant sounded normal, Mr. James told him to get on the train as soon as possible. On cross-examination, the complainant conceded that at no time during this conversation did he mention that he had booked himself off as being unfit the night before, nor did he later contact the CMC to book himself back on, as it would be the normal procedure.

[24] Later that same morning, Mr. James phoned Mr. Mitch McAmmond, the on-duty train master in Kamloops, and told him that the complainant had been late for his assignment at Jasper. He also informed him that the train had been delayed as a result. He suggested that Mr. McAmmond may want to speak to the complainant upon his arrival in Kamloops.

[25] The train got into Kamloops at about 7:00 p.m. on January 1, 2002. On arriving at destination, the locomotive engineer, Larry Hindle, and the complainant proceeded to do their time return tie up in the computer room. At that time, according to the complainant, supervisor McAmmond walked through the room. He wished them both a happy New Year and then inquired how the trip had gone. He never questioned the complainant. Larry Hindle corroborated this version of the events.

[26] The version of Mr. McAmmond is quite different. He testified that when he saw the train arriving, he walked towards it to meet the crew. He said that he saw Mr. Hindle get off and that he waited for the complainant to come off but he never did. Mr. McAmmond got on board the train to see if the complainant was still there but he did not find him. He then went back into the building and asked Mr. Hindle if he knew where the complainant was, Mr. Hindle answered that he did not. He added that he was never able to locate the complainant on January 1, 2002. If the version of Mr. McAmmond is correct, then the complainant would have had to have gotten off the train before it pulled into the station at Kamloops. This certainly would be very unusual and one would expect the respondent to investigate such an incident. It is curious that Mr. McAmmond did not pursue this matter further by interviewing the complainant as to his whereabouts when the train pulled into the station on that day. Considering Mr. McAmmond's recollection of what happened on that day, I will, if it is relevant to my decision, accept the complainant's version of what happened.

[27] On January 7, 2002, the complainant left for a month and a half vacation to Australia.

III. THE RCMP REPORT

[28] Constable Benoit Lecuyer of the Royal Canadian Mounted Police (the "RCMP") was one of the officers on duty on the evening of December 31, 2001. At around 10:00 p.m., the detachment received a complaint regarding a stolen pick-up truck. The truck was parked outside a restaurant in Jasper and when the delivery person for the restaurant came out to use it, it was gone. The vehicle was later located in a parking lot in front of a gas station. An individual was passed out in the passenger seat and the engine of the vehicle was still running.

[29] At around 10:48 p.m., Constable Lecuyer arrived on the scene where the stolen vehicle had been located. He testified that he noticed that there was one male individual, who appeared to be sleeping on the passenger side. As he approached the truck, he said that he could smell a strong odour of alcohol. He added that he tried to wake the male occupant up for approximately five minutes, but to no avail. Constable Lecuyer and another colleague then pulled the individual out of the vehicle in order to proceed to his arrest. According to Constable Lecuyer, the individual was highly intoxicated.

[30] Constable Lecuyer testified that they were able to identify this person by his British Columbia driver's licence as William Witwicky, the complainant. At the detachment, the complainant was put into a holding cell. During all this time, he was still passed out.

[31] At around 1:16 a.m., Constable Lecuyer was informed by the cell block guard that the complainant was now awake and standing up. He said that he then approached the cell and tried to determine his level of consciousness. He added that he noticed that the complainant was using the walls of the cell for balance which indicated that he was still intoxicated. He then tried to explain to the complainant where he was and why he was there. The complainant just nodded his head but did not reply. According to the officer, the complainant did not appear to understand what was happening.

[32] Constable Lecuyer returned to check on the complainant at around 3:01 a.m. and found him wide awake but agitated. He said that he tried to calm him down. The constable again concluded that the complainant was still too intoxicated to understand fully what was happening.

[33] His next dealing with the complainant was around 7:25 a.m. on the morning of January 1, 2002. He noticed that, at this time, the complainant was calm and in a better condition to understand why he was being detained. He decided at this point to let him out of the cell and proceeded to lead him to the interview room where his rights and police caution were read to him. The complainant advised the officer that he did not want to call a lawyer. He added that he hadn't done anything wrong and that he wanted to apologize for his behaviour. He then proceeded to give a recorded statement to the officer.

[34] The complainant was later charged with possession of stolen property and released, at around 8:00 a.m., on his own recognizance. The follow-up investigation was conducted on January 2, 2002. It mainly consisted of going back to the restaurant from where the truck had been taken. Constable Lecuyer stated that, during this investigation, he spoke with the owner of the restaurant and two other employees. According to these interviews, the complainant arrived at the restaurant at around 8:00 p.m. with two other individuals. The owner of the restaurant also informed the constable that he did not want to pursue

this matter any further. Following this, the constable informed the complainant that the charges relating to stolen property had been dropped.

[35] The Continuation Report prepared by Constable Lecuyer indicates that on January 9, 2002, Constable Benoit Tessier, a policeman with the respondent, had contacted the Jasper detachment of the RCMP and had requested a copy of the complainant's statement as soon as possible. On January 24, 2002, a transcription of this statement was forwarded to Constable Tessier.

IV. FOLLOW UPS TO THE EVENTS OF DECEMBER 31, 2001

[36] On the complainant's return to Kamloops from his Australian vacation in late February 2002, he contacted Mr. Gary George Kopp, Chairperson for the Local Committee of Adjustment of the United Transportation Union, to see how things were going. Mr. Kopp informed him of a conversation he had with Hans Nederpel, a supervisor with the respondent. He said that Mr. Nederpel had approached him and had brought up the subject of the complainant's conduct on December 31, 2001. According to Mr. Kopp, Mr. Nederpel said that the complainant had a drinking problem and that he wanted to see him in a program for alcohol abuse.

[37] The complainant was suspended from work on March 22, 2002. A formal investigation of the matter was then undertaken by the respondent. Two "employee statements", one of the complainant and the other of Mr. Larry Hindle, were conducted. The first one, with the complainant, was conducted on March 28, 2002, while the second, with Mr. Hindle, took place on April 17, 2002.

(i) Employees Statements

a) The Complainant's Statement

[38] The complainant's statement lasted from 10:00 a.m. to 6:30 p.m., with a break for lunch. The "employee statement" is not a transcript of everything that is said during the investigation. It is a résumé of the questions asked and the answers given. The statement is prepared by an investigator chosen by the employer. At the end of the investigation, the employee and his representative are asked to read the document and to sign it.

[39] Mr. Kopp was the complainant's representative at his "employee statement". The investigation was conducted by Mr. John Gosse. Before the start of the procedure, Mr. Kopp had requested that certain documents be made available for inspection including "[a]ll transactions and/or all tapes of any conversations between Mr. Witwicky and the involved Transportation Supervisor and/or any Yardmaster and/or any other employees of the railroad on the evening and day that the incident took place." Mr. Kopp testified that he was never provided with the tapes requested. He added that he had also objected to the excessive delay in holding this investigation.

[40] The statement indicates that the complainant arrived in Jasper at 12:15 p.m., on December 31, 2002. He had booked eight (8) hours rest, placing himself ready for duty at 8:15 p.m. He had a room at the "bunkhouse". He said that after checking, he went over to his sister's home and there, called his estranged wife. This is a different version of events than what the complainant had testified to at the hearing. He then said that he had called his wife from the bunkhouse before going over to his sister.

[41] During this conversation, his former wife informed him that she would be asking for a divorce. He said that this information left him emotionally distraught and that he didn't feel "mentally capable" of doing his job. He added that he then phoned his employer to

book himself unfit for work. The complainant said that he spent the rest of the afternoon at his sister's house.

[42] At around 6:30 or 7:00 p.m., a friend came over to pick him up and they went to a restaurant. He said that he had several drinks there and "had something to eat", although later he adds the "he had several drinks on an empty stomach."

[43] During the "statement", Mr Gosse asked the complainant to explain, if he had indeed booked himself unfit, why he had been placed on excessive layover pay from 11:15 p.m to 6:55 a.m., on the night of December 31 to January 1st. The complainant answered: "It never occurred to me. Now in retrospect I should have contacted them and have it removed."

[44] Asked by the investigating officer why he had taken the January 1st call, if he had indeed booked unfit the day before, the complainant answered: "When I arrived at the station, I found out that I was called for 0710 and that the crew office had held the call for me. The train was there. I felt that it was in my best interest given the fact that I was totally sober and fit for duty, that I was responsible to do my job without delaying the train or getting myself in deeper trouble. I realize that I never should have booked unfit at the "away from home" terminal but giving my state of mind, I felt it was the right thing to do at the time."

[45] On the morning of January 1, 2002, at around 8:10 a.m., the complainant spoke with supervisor Dave James who asked him if the was fit for duty and the complainant answered, "yes". The record indicates that he did not inform supervisor James that he had booked unfit the day before, nor did he informed him that he had spent the night at the police station. The complainant explained that he didn't think he needed to, since Mr. James had told him that he had talked to the RCMP and that the complainant would have questions to answer on his arrival in Kamloops.

[46] Asked how he could have said that he was fit for duty on the morning of January 1st 2002, when according to the RCMP reports he was still intoxicated at 3:01 a.m., the complainant answered that by the morning he "felt totally sober". He added that he had had several hours to sober up and that he had realized that he should never have booked himself unfit for duty. He felt that what had happened during that evening was an isolated incident and a big mistake which could be explained by the very difficult time he was going through in his personal life. He said that he felt very remorseful and embarrassed by the whole situation.

[47] The "employee statement" report was signed by the complainant and by his representative, Mr. Kopp.

b) Larry Hindle's Statement

[48] Larry Hindle is a locomotive engineer. On April 17, 2002, he gave an "employee statement" in connection with his tour of duty on December 31, 2001, and January 1, 2002, while operating the train from Jasper to Kamloops. The "statement" was conducted by Mr. John Gosse before Mr. Kopp, who was acting as the complainant's representative, and Mr. Jim Manson, Mr. Hindle's representative.

[49] Mr. Hindle was the locomotive engineer on train Q103, on January 1, 2003, on the return trip to Kamloops. He indicated that, during this trip, the complainant had operated the locomotive on the stretch between Blue River and Kamloops. Mr. Hindle added that the complainant seemed "fine" when he arrived for work. He also indicated that he had

told him that he had booked himself off unfit for duty on the previous night without giving any explanation as to the reasons why.

[50] Mr. Hindle also mentioned that upon the train's arrival in Kamloops, he was approached by supervisor Mitch McAmmond with whom he said he exchanged New Year's greetings. He also indicated that the complainant was present during this encounter.

[51] Finally, in response to a question asked by Mr. Kopp, Mr. Hindle mentioned that he had been "interviewed" about the events of December 31, 2001, on January 28, 2002, by supervisor Dave James in Jasper. He also added that, at that time, the supervisor had in his possession a transcript of the complainant's statement to the RCMP.

[52] Following his investigation, Mr. Gosse prepared a summation of these two "employee statements". He concluded: "In view of the above information and investigation, it is recommended [...] that [the complainant's] employment with the [respondent] be terminated for "violation of CROR General Rule G and violation of GOI Section 8, part 3.1 including violations of CN Policy to Prevent Workplace Alcohol and Drug Problems." This summation was forwarded to Eric Blokzyl, the then District Superintendent for British Columbia South. Mr. Blokzyl testified that, because of the severity of the violation, he immediately contacted his superior, Mr. James Fitzgerald, General Manager Operations Pacific Division - British Columbia, to discuss the matter. After this discussion with Mr. Fitzgerald, Mr. Blokzyl told Mr. Gosse to proceed with his recommendation.

V. THE EVENTS FOLLOWING THE COMPLAINANT'S DISMISSAL

[53] The complainant was dismissed, on April 19, 2002.

[54] The Union filed a grievance contesting the complainant's dismissal. It took the position that the respondent had disciplined the complainant on improperly obtained evidence. Consequently, it submitted that the investigation was flawed and requested that the discipline assessed to the complainant be cancelled.

[55] On July 19, 2002, the complainant was diagnosed with squama cell carcinoma. He had a tumour on his tonsil and it had spread into several lymph nodes in his neck. His medical condition was very serious and his doctor decided to operate immediately to have this tumour removed. On July 24, he underwent a neck surgery to have the lumps removed. After the operation, he received thirty treatments of radiation. These treatments lasted until around the middle of October 2002.

[56] The complainant's also testified that his dismissal left him devastated and that, at that time, he solicited counselling from the Employee Family Assistance Program ("EFAP"). He also sought other employment. He filed for unemployment insurance and received these benefits until his cancer was diagnosed, at which time Human Resources put him on sick leave benefits.

VI. THE REINSTATEMENT CONTRACT

[57] In October 2002, the vice general chairperson for the United Transportation Union, Mr. Ron Hackle, contacted the complainant. Mr. Hackle told him that Mr. Robert Reny, from the Labour Relations department of the respondent, had indicated that the respondent would be prepared to reinstate the complainant, conditional on him agreeing to the terms outlined in a Reinstatement Contract.

[58] Several days later, Mr. Hackle contacted the complainant and informed him that he had a deal with the respondent. He explained that the complainant could return to work

immediately if he passed the respondent's medical requirements and signed a Reinstatement Contract. The complainant said that he then contacted Mr. Kopp to discuss his options. He testified that although he felt that this was "a violation of his human rights", he had no other option but to sign the document if he wanted his job back.

[59] The complainant signed the Reinstatement Contract on November 2, 2002. The contract was also signed by Barry Henry, the General Chairperson of the United Transportation Union, the complainant's union, and an officer of the respondent.

[60] A week after he had signed the Reinstatement Contract, the complainant was contacted by a nurse from the respondent's health provider, Medisys. She informed him that he would have to pass a medical before returning to work. On November 16, 2002, the complainant saw the respondent's doctor who did a complete physical examination. The doctor did not require, at this time, that any alcohol or drug testing be administered. He cleared the complainant for his return to work.

[61] On November 22, 2002, the complainant met Eric Blokzyl, Superintendent Operations, who welcomed him back to work. At around one o'clock in the afternoon, he was put back on the "furlough board"[2]. Later, on the same day, at around 5:30 p.m., the complainant got a call from supervisor Mitch McAmmond informing him that he was pulled out of service following the instructions of supervisor Gosse. Supervisor McAmmond told the complainant that he had no idea as to the reasons why he was being pulled off and that he should call supervisor Gosse if he wanted more information.

[62] The complainant immediately called supervisor Gosse whom, according to the complainant said "Mr. Witwicky, I hear you're trying to pull a fast one by trying to get yourself back on the working board". The complainant told him that the had been cleared to return to work by supervisor Blokzyl, to which Mr. Gosse answered that Mr. Blokzyl was not his immediate supervisor, that he was and that he would decide whether the complainant could go back to work or not.

[63] On that same day, Mr. Kopp testified that he had a conversation with Mr. John Gosse. He stated that Mr. Gosse had asked him if the complainant had provided a blood sample or a urine sample to the respondent's medical provider, prior to being cleared to come back to work. Mr. Kopp answered no.

[64] Mr. Gosse did not deny removing the complainant from the working board on that day. He explained that the complainant's Reinstatement Contract provided that certain things had to be done before he would be allowed to return to work. Mr. Gosse said that he had not been informed that the complainant had met with Mr. Blokzyl. He added that he pulled the complainant from the working board for a short period of time in order to confirm that he had indeed complied with these obligations under the contract. Once the meeting with Mr. Blokzyl had been confirmed, he put the complainant back on the working board. He added that not more than a couple of hours had elapsed between him pulling the complainant off work and then putting him back on. No pay was deducted from the complainant's salary during this time.

VII. THE ALLEGATIONS OF HARASSMENT AND RETALIATION

[65] Most of the facts surrounding the allegations of harassment have to do with the tenuous relationship that existed between the complainant and his supervisor, Mr Gosse. This strained relationship certainly showed during Mr. Gosse's cross-examination by the complainant. Mr. Gosse was a very uncooperative witness with significant memory lapse

whenever the questions of the complainant did not seem to please him. He was argumentative and somewhat provocative in the way he answered the questions.

[66] Mr. Gosse was, at all time relevant to the present case, the Assistant Superintendent, Manager Train Service, for the respondent in Kamloops. His duties were the overall running of the terminal. He was responsible for all the "running trade" employees. He characterized his position as a "frontline" supervisor. Mr. Gosse resigned his position with the respondent on June 30, 2006. He now works for Via Rail.

[67] The first allegation of harassment raised by the complainant occurred on March 14, 2002. The complainant was then representing Mr. Plante, a co-worker, at a formal investigation. During these proceedings, the complainant claims that Mr. Gosse came into the room and stated: " I have been reading some very funny stuff about you on the [bathroom] walls." None of the individuals present during this statement could recall this exchange.

[68] According to the complainant, Mr. Gosse was referring to a document entitled "Procedures and Protocols for use of the Jasper Pizza Truck" which was a parody of the December 31, 2001 events. The document did not specifically refer to the complainant by name but the events it narrated were certainly referable to what had happened in Jasper. The complainant testified that he found these documents posted on various bathroom walls in the respondent's workplace. The complainant made enquiries to various employees whether they knew where the bulletin had originated from, but to no avail. The complainant provided the respondent with the name of a fellow employee who had been seen with copies of this document which he had handed out to another employee. For an unexplained reason, during its investigation of these allegations, the respondent did not interview this employee.

[69] It is interesting to note that, during his cross-examination, Mr. Gosse admitted that he had been informed by "an employee" that this document was being distributed but never investigated the matter further.

[70] Another incident occurred on January 17, 2003. On this day, the complainant was required to attend a CN medical appointment for drug and alcohol testing. He had obtained proper authority from supervisor J. Power to attend this medical. The complainant took the time off, went to his medical appointment and when supervisor Gosse was informed of this, he penalized the complainant one day's pay. A grievance was filed by the complainant following this incident.

[71] Mr. Gosse explained that Mr. Power was a supervisor who had "come up to Kamloops on loan" since they were short of supervisors at the time. He added that he came from Vancouver where they did not have a "Furlough Board", so he was not aware of the policies and procedures for employees on the board. He explained that while on the "Furlough Board", the complainant was paid a set daily rate. If he was allowed to book for the medical, as requested, he would, under the collective agreement, be paid a different daily rate which would be higher than what he would normally receive on the "Furlough Board." Allowing the complainant to book off was, according to Mr. Gosse, contrary to these policies and procedures and that is why he intervened to reverse the decision and take away the part of the payment to which the complainant was not entitled to.

[72] One month later, on February 17, 2003, the complainant was once again called by Medysis to provide another drug and alcohol test. At that time, the complainant was on

what is referred to as the "protected Furlough Board." He phoned his supervisor Mr. Gosse to get authorization to attend the appointment. He explained to Mr. Gosse that he was required to attend the medical appointment and that he needed his authorisation to be off because he was on a working board. Mr. Gosse asked him when the appointment was, what it was for and how long it would take. According to the complainant, when informed of the reasons for the appointment, Mr. Gosse started laughing "uncontrollably". The complainant added that he felt degraded by his supervisor's conduct.

[73] According to the respondent, this request was declined on account of the complainant's position on the "Furlough Board" at that specific time. Mr. Gosse explained that he considered where the complainant was on the "Furlough Board" and since he was not in a position to be called to work, he decided not allow the request. The respondent further adds that it is its policy that medical appointments be scheduled during employee's time off.

[74] The complainant stated that he had no choice but to attend this appointment since this was one of the condition set out in the Reinstatement Contract. He explained that if he did not attend he could be fired for not respecting the terms of the contract. According to the complainant, Mr. Gosse told him "you can take your chances, Mr. Witwicky and see what happens." Finally, he did not give the complainant authorization to take time off for this appointment.

[75] In February 2003, the complainant held the position of vice-local Chairperson of Local 691 of the United Transportation Union, in Kamloops. Sometime during that month, he was contacted by a supervisor D. Savage to attend a company-initiated meeting. The complainant informed supervisor Savage that he would attend the meeting provided supervisor Gosse authorised his booking off on company business. Supervisor Gosse did not give his consent and the complainant did not attend the meeting. Following the complainant's refusal to attend the meeting, he was penalized one day's pay.

[76] The complainant also referred to a mentoring program that the respondent had put in place. According to this program, each employee of the running trades was assigned a mentor. The mentor was somebody the employee could go to if he had a problem. Prior to being terminated, the complainant's mentor was an individual named Elio Marrelli. Upon his return to work after having been dismissed, the complainant learned that his mentor was going to be Mr. Gosse.

[77] On March 17, 2003, he wrote a letter to Mr. Blokzyl requesting that he be assigned a new mentor. In a letter addressed to the complainant, dated June 10, 2003, Mr. Blokzyl states that the request by the complainant to have a mentor change had been "complied with in accordance with your wishes." The complainant testified that there was never any change in mentor and that Mr. Gosse continued to act as such until July 2006.

[78] The complainant wrote a letter to Mr. Gosse on March 18, 2003, in which he requested that Mr. Gosse "stop harassing [him]." A copy of this letter was send to Mr. Blokzyl. Mr. Blokzyl replied to this letter on April 8, asking for more details regarding the allegations contained in the complainant's letter.

[79] On April 29, 2003, in accordance with the respondent's "Human Rights Policy for a Harassment Free Environment", Mr. Roger Worsfold, a Transportation Officer, for the respondent, was mandated to conduct an investigation regarding the complainant's allegations of harassment. For this, Mr. Worsfold conducted an interview of Mr. Gosse

and interviewed the witnesses that the complainant had identified, namely Hans Nederpel, Jerry Plante, Jim Manson and Mike Robinson. Following these interviews, he proceeded to interview the complainant. Based on these interviews and on various documents that he had, he concluded that the allegations of harassment were unfounded.

[80] The allegation of retaliation pertains to a situation regarding an employment opportunity with the Union Pacific Railway, a United States based company, who had canvassed the respondent's employees in the fall of 2003. Union Pacific was short of employees during this period, while the respondent had a surplus of employee in Western Canada. Union Pacific had approached the respondent to see if it would be possible to hire some of these employees to work for Union Pacific in the U.S. Mr. Kopp testified that all Kamloops employees had applied, except one who was needed as a yard master, so the respondent did not want to let him go. The complainant, who had manifested his interest, was denied the opportunity to apply. The explanation given by the respondent was that they could not monitor the complainant's Reinstatement Contract if he was allowed to work in the U.S.

VIII. ANALYSIS

[81] This is not an arbitration proceeding where an arbitrator must decide whether the employer has or not violated the collective agreement. Also, it is not an action for wrongful dismissal. Therefore, it is not in my mandate to determine whether the respondent has shown just cause for its decision to dismiss the complainant following the events of December 31, 2001. The procedure provided by the Act for the treatment of complaints cannot be seen as an alternative for the grievance procedure provided by the Collective Agreement.

[82] In order to benefit from the protection afforded by the Act, a complainant must demonstrate the involvement of one or more of the proscribed grounds listed in section 3 of the Act. Consequently, the analysis which follows will deal only with issues relevant to the Act.

A. The Sections 7 and 10 Complaints

[83] Mr. Witwicki's complaints are brought pursuant to sections 7 and 10 of the Act. Section 7 makes it a discriminatory practice to refuse to employ, or to continue to employ, an individual, on a prohibited ground of discrimination. Section 10 makes it a discriminatory practice for an employer to establish or pursue a policy that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination. In contrast to complaints under section 7 of the Act, which relate to employer actions affecting specific, named individuals, section 10 of the Act addresses the discriminatory effect that employer policies or practices may have on an individual or a class of individuals.

[84] For its part, section 3 of the Act designates "disability" as a prohibited ground of discrimination. Section 25 of the Act makes it clear that the term "disability" includes "previous or existing dependence on alcohol or a drug." Furthermore, it is well-established that the protection of the Act extends to those who are mistakenly perceived to have a disability. (See *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Montréal (Ville),* [2000] 1 S.C.R. 665, at para. 49.)

[85] As a result of the Supreme Court of Canada decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R.3 ("*Meiorin*") and *British Columbia (Superintendent of Motor Vehicles v. British Columbia (Council of*

Human Rights), [1999] 3 S.C.R. 868 ("*Grismer*"), the historic distinction between direct and indirect discrimination has been replaced by a unified approach to the adjudication of human rights complaints. Under this approach, the initial onus is still on a complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in absence of an answer by the respondent. (See *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985] 2 S.C.R 536, at p. 558.)

B. Was a *prima facie* case made out?

[86] The complainant submits that he was subjected to differential treatment. He alleges that he has been discriminated against on the basis of a perceived disability, namely the perception that he suffered from a substance abuse disorder and that he was perceived as being an alcoholic. The complainant bears the onus of establishing on a balance of probabilities that the respondent perceived him as disabled.

[87] The evidence before me does not establish that the respondent perceived the complainant to suffer from a substance abuse disorder or that it perceived him as being an alcoholic. The evidence shows that the reason why the complainant's employment was terminated is because the respondent felt that he had violated "CROR General Rule G" and "GOI section 8, part 3.1 including violations of CN Policy to Prevent Workplace Alcohol and Drug Problems". Rule G)(a) of the "Canadian Rail Operating Rules" (the "Rules" or "CROR"), states that "[t]he use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited." Rule 3.1(a), under the heading "Responsibility for Safety", declares that "[e]veryone (Management, Employees, Contractors, Visitors, etc.), must: a) Report fit for duty, alert and able to perform safely. For specific rules on alcohol, drugs, prescriptions and medication, see CN handbook entitled Policy to Prevent Workplace Alcohol and Drug Problems." These rules were in force on December 31, 2001.

[88] According to Robert Reny, the respondent's Senior Manager, Human Resources, the reason for these rules is to ensure the employees' health and safety, as well as the safety of the public. In his words, the rules are designed to set "very clear expectations for all employees as to what their obligations are". Their objective is to prevent the use of drugs and alcohol and to punish specific conducts on the job. Whether the respondent was right or wrong in its conclusion that the complainant had violated this policy is not for me to decide. This is a matter to be decided by an arbitrator under the grievance procedure provided for in the Collective Agreement.

[89] The complainant might have some legitimate issues with the time the respondent took in processing its investigation. He might also have some issues with the procedure used by the respondent in investigating the events. But these have no relation to an alleged violation of the Act. In order to benefit from the protections afforded by the Act, the complainant must demonstrate the involvement of one or more of the proscribed grounds listed in section 3 of the Act.

[90] Having reviewed all of the evidence, I conclude that the complainant has not established that when the respondent dismissed him, it did so because it believed or perceived him to be an alcoholic. I find that the reason why he was dismissed was because the respondent felt, rightly or wrongly, but that is not for me to decide, that he had violated its rules and policies.

[91] I will now address the issue of the Reinstatement Contract. The complainant is asking that the Tribunal conclude that the terms of this contract created the perception that he is an alcoholic and that this is a discriminatory practice. The respondent argues that the only label which is placed on a person who is subject to a Reinstatement Contract under the policy is that they contravened the work rules.

[92] To better understand the reasons for the Reinstatement Contract, it is important that we look at the respondent's document entitled "Prevention our Safe Choice. Policy to Prevent Workplace Alcohol and Drug Problems - Policy and Guidelines". This policy provides:

Alcohol

Possession, distribution or sale of beverage alcohol, and the use of any form of alcohol, is prohibited while on duty (including during breaks on or off CN property), on company business, or on company premises, including vehicles and equipment. Limited exceptions to this restriction will be allowed with prior approval of a Vice-President. This does not limit retail outlets and licensed business establishments form carrying out their normal operations.

Presence in the body of alcohol above BAC of 0.04 when on duty or on company business or premises, is also prohibited for all employees. In any situation where employees are to be tested with reasonable cause including after an accident or incident, they are prohibited from using alcohol within eight hours of the accident or incident, or until tested or advised that a test will not be necessary.

[93] This document also defines what a safety sensitive position is. It states that "safety-sensitive positions are those which the company determines have a key and direct role in rail operation where impaired performance could result in a significant incident affecting the health and safety of employees, customers, the public, property or the environment." It also establishes that engineers, brakemen and conductors are positions designated as being safety critical.

[94] The document also provides that if an employee violates its provisions or does not meet the company's "satisfactory standards of work performance" as a result of alcohol or other drug use", then appropriate corrective actions may be taken. These corrective actions will depend on the nature of the violation and the circumstances surrounding the incident. Some violation, if considered sufficiently serious, can result in dismissal of the employee on a first occurrence.

[95] The document also provides for the reinstatement of an employee following a policy violation. It states:

Depending on the circumstances, employees may be permitted to continue their employment with the company. Such employees will be advised of the conditions governing their continued employment, which will include at a minimum, the following:

Assessment by a substance abuse professional

Completion of any recommended treatment and compliance with medically recommended relapse prevention programs after treatment

Abstinence from using any drugs or alcohol for at least 2 years

Unannounced testing for a period of a least two years

No further policy violations during the monitoring period ;

Maintenance of job performance according to expectations.

Continuing employment in safety sensitive jobs will be subject to requirements for medical fitness for duty for that position.

[96] The policy also states that the respondent could investigate off-duty activities where these involved alcohol or drugs and had an implication for the workplace. As regards to an employee's return to duty following a positive test for alcohol or drugs or any significant policy violation, the policy provides that testing might be required. More specifically the policy states:

Any employee dismissed after a policy violation, including those not in safety sensitive positions and those who are not diagnosed as having a substance use disorder, may be required to undergo drug and alcohol testing as terms of continuing employment or reinstatement. In these cases, testing will be conducted on an unannounced basis for at least two years and will be done according to the terms of the continuing employment or Reinstatement Contract agreed to by the Company and the union.

The test dates will be determined on an unannounced basis through Medical Services. The site manager will be informed that an individual is required to report for a test, and arrangements will be made to complete the collection process as soon as possible after the site management has been notified. The scheduling will remain unannounced to the employee until the collection can be arranged.

[97] The evidence clearly establishes that the complainant is not an alcoholic. However, would it be possible to argue that, under the respondent's policy, any incident of possession or consumption of alcohol in the workplace or during off-duty activities results in a person being treated as though they were prone to alcohol dependency and therefore, subject to termination? The policy states that if an employee violates its provisions as a result of alcohol use, then appropriate corrective actions may be taken. These corrective actions will depend on the nature of the violation and the circumstances surrounding the incident. Some violation, if considered sufficiently serious, can result in dismissal of the employee on a first occurrence. According to the respondent, the events of December 31, 2001 were of this nature.

[98] Could we compare the respondent's policy with that of Imperial Oil in *Entrop v. Imperial Oil Ltd* (2000), 189 D.L.R. (4^{th}) 14? In that decision, the Ontario Court of Appeal stated, at paragraph 92:

Thus, though the social drinker and casual drinker are not substance abusers, and, therefore, not handicapped, Imperial Oil believes them to be substance abusers for the purpose of the policy. In other words, Imperial Oil believes that any person testing positive on a pre-employment drug test or a random drug or alcohol test is a substance abuser. Because perceived as well as actual substance abuse is included in the definition of handicap under the Code, anyone testing positive under the alcohol and drug testing provisions of the policy is entitled to the protection of ...the Code. Imperial Oil applies sanctions to any person testing positive - either refusing to hire, disciplining or terminating the employment of that person - on the assumption that the person is likely to be impaired at work currently or in the future, and thus not "fit for duty". Therefore, persons testing positive on the alcohol or drug test - perceived or actual substance abusers - are adversely affected by the policy. The policy provisions for pre-employment drug testing and for random alcohol and drug testing are, therefore, *prima facie* discriminatory.

Imperial Oil bears the burden of showing that they are bona fide occupational requirements.

[99] Also, is there any similarity with the Federal Court of Appeal's decision in *Canadian Civil Liberties Assn. v. Toronto-Dominion Bank* (1998), 163 D.L.R. (4th) 193, where the court stated at paragraph 24:

I do not see how one can avoid the conclusion that the Bank's drug testing policy constitutes a prima facie discriminatory practice. I say this because the Bank's policy raises the likelihood of drug dependent employees losing their recently acquired employment. An employment policy aimed at ensuring a work environment free of illegal drug use must necessarily impact negatively on those who are drug dependent.

[100] I do not believe that these decisions apply to this case. For example, in the *Canadian Civil Liberties Assn* case, the Court found that the drug testing policy raised the likelihood of drug-dependent employees losing their employment. Consequently, the discrimination was against those employees who were drug dependent. The complainant in this case is not alcohol or drug dependent. Therefore, the respondent's policy does not impact on him in the same manner that the drug testing policy impacted on the employees tested in the *Canadian Civil Liberties Assn.* case.

[101] Again in *Entrop*, the Court accepted that substance abuse was a "handicap" under the statute and found a *prima facie* case of discrimination because all users were perceived to be substance abusers under the policy. Through its policy, the employer used drug and alcohol testing to identify employees or prospective employees who had consumed alcohol or drugs and applied sanctions to them based on the assumption about what they were likely to do in the future.

[102] In this case, the respondent's policy is not directed at identifying all users of drugs or alcohol. Rather, it imposes sanctions against those whose are identified as possessing or consuming drugs or alcohol on the job. There is nothing in the policy preventing employees from using alcohol as long as they do not do so on the job or as long as it does not affect their capacity to perform their duties. (See also, *Middlemiss v. Norske Canada Ltd*, 2002 BCHRT 5, at par. 25.).

[103] Turning our attention to the Reinstatement Contract, its purpose was to give details of the conditions under which the complainant could resume his employment with the respondent. According to Article 1 of the contract, its duration was two years from the date of the complainant's signature unless there was medical evidence indicating that "follow-up should be extended beyond two years", as determined by the respondent's Chief Medical Officer. Article 2 provided that the complainant had agreed to be medically examined and this included being tested for drugs and alcohol prior to reinstatement. The complainant also agreed to unannounced tests for drugs and alcohol use for a period of two years or more, as may be determined by the Chief Medical Officer.

[104] Article 3 specified that if the complainant failed to pass the drugs and alcohol testing, he would not be eligible for reinstatement and his file with the respondent would be closed. Article 4 provided that the complainant was expected to fully comply with the requirements of the *Policy to Prevent Workplace Alcohol and Drug Problems*, the General Safety Rule 1.1. and CROR General Rule G, including complete abstinence from alcohol and drugs.

[105] Article 5 stated that during the term of the contract, the complainant was to abstain from drugs and alcohol use and to comply with the condition of the contract, failure to do so could result in his discharge or make him ineligible for reinstatement. He was also to be subject to frequent performance observations by his supervisor which would be documented and shared with the Chief Medical Officer.

[106] Finally, Article 7 provided that the complainant was required to attend a meeting with Eric Blokzyl for the respondent, prior to returning to work. This contract was signed by the complainant, the General Chairperson of the United Transportation Union and a CN Officer.

[107] The contract was part of a proposal regarding the resolution of the grievance relating to the termination of the complainant's employment. In order to better understand the origin of this document, I intend to go through the process which culminated in its conclusion.

[108] Following the discharges of the complainant, the United Transportation Union filed a grievance in which it stated its position as follows:

[I]t is the Union's position that the Company has disciplined W.C. Witwicky based on improperly obtained evidence. Accordingly, the Union submits that the investigation is flawed and request that the discipline assessed to W.C. Witwicky be expunged and he be made whole.

In the alternative, and without prejudice to the foregoing, the Union submits that the very fact that the Grievor was released from police custody is evidence of his sobriety. Accordingly, no violation of the rules can be demonstrated, and the Union requests that the discipline assessed be expunged and W.C. Witwicky, be made whole.

[109] It is interesting to note that nowhere in the grievance is there any mention of a violation of the complainant's human rights or that his dismissal was motivated by a perception that he was an alcoholic. The reason for the grievance is founded solely on what the Union characterises as "improperly obtained evidence".

[110] The grievance was ultimately resolved on the terms set out in a letter from D. Edison, Vice-President - Pacific Division for the respondent, concurred with by B. J. Henry, General Chairman of the Union. In this letter, the respondent agreed to reinstate the complainant, conditional on him agreeing to the terms and conditions of the Reinstatement Contract. The complainant agreed to these terms and conditions on November 2, 2002.

[111] The fact that the grievance was resolved to the satisfaction of the parties does not prevent the complainant from bringing forward a human rights complaint. Therefore, I must now answer the following question: Is the Reinstatement Contract in violation of the complainant rights under the Act? Arbitrator Michel G. Picher expressed the applicable law in such circumstances in *Canadian Railway Office of Arbitration & Dispute Resolution, Case No. 3598*, an arbitral award dated December 13, 2006. In this award, he stated that where an employee has been reinstated following a violation of the respondent's drug and alcohol policy, "[h]is reinstatement shall be conditional upon his accepting to be subject to full medical assessment for the purposes of determining whether he is subject to any drug or alcohol addiction or dependence. Should the assessment indicate that he is, his reinstatement shall be conditional upon his following any course of treatment that is directed by the assessing authority and any documentary or reporting obligations which might be related thereto." (The emphasis is mine.)

[112] We will never know what the respondent's reaction would have been had the complainant tested positive or had he breached his obligations under the Reinstatement Contract because the complainant at the beginning and during the duration of this contract abstained from drug and alcohol and never failed any of the tests. In *Milazzo v. Autocar Connaisseur Inc.*, [2003] C.H.R.D. No. 24, paras. 177 to 180, this Tribunal stated:

177 In accordance with Autocar Connaisseur's drug testing policy, any employee testing positive for either alcohol or drugs will be summarily terminated. Where a prospective employee tests positive, Autocar Connaisseur's offer of employment will be withdrawn.

178 It will be recalled that Mr. Devlin testified that Autocar Connaisseur was of the view that these actions are necessary because an employee who knowingly comes to work with alcohol or drugs in his system so fundamentally breaches the trust between employer and employee that there is no alternative but to terminate the employment relationship. It may well be that such a course is open to Autocar Connaisseur (at least from a human rights perspective) where employees use alcohol or drugs as a matter of personal choice, and voluntarily breach the company's alcohol and drug policy.

179 The situation is different, however, in cases where the individual suffers from a condition that qualifies as a disability. In such cases, an employer has an obligation to accommodate the employee to the point of undue hardship, unless it is impossible to do so.

180 The fact that an employee tests positive in an employer-sponsored drug test does not automatically mean that the employee is disabled. In order to distinguish between employees who suffer from a substance-related disability and those who do not, it may well be necessary to require that the employee submit to a professional assessment by an appropriate health care practitioner. While employers must be sensitive to the role that denial can play in substance abuse disorders, ultimately, the onus is on the employee or prospective employee to demonstrate that they are entitled to the protection of the Canadian Human Rights Act. (The emphasis is mine.)

[113] In this case, since it wasn't established that the complainant suffered from a disability, real or perceived, the duty to accommodate referred to in the *Milazzo* case was not triggered. Furthermore, since there was no breach of the Reinstatement Contract, there is nothing for this Tribunal to assess in terms of failure to accommodate.

[114] In his closing arguments, the complainant referred to the fact that since the Reinstatement Contract provided for "blood samples", this was a violation of his "human rights". In this case, the "blood samples" were provided with the consent of the complainant. There was no evidence provided to establish that he was coerced into providing these samples. In these circumstances, I cannot conclude that there was a violation of the complainant's human rights. (See. *R. v. Dersch*, [1993] 3 S.C.R 768.)

C. Conclusion Regarding the Complainant's Sections 7 and 10 Complaints

[115] Having failed to establish that he was either disabled or perceived by the respondent to be disabled, the complainant has not established a *prima facie* case of discrimination and accordingly, his section 7 complaint is dismissed.

[116] Regarding the section 10 complaint, considering the evidence before me, I cannot conclude that the respondent's policy regarding alcohol or drugs in the workplace and the

Reinstatement Contract with the complainant violates this section. This is not a situation where an individual suffers from a disability. In such a case, an employer would have an obligation to accommodate the employee to the point of undue hardship, unless it is impossible to do so. What we are dealing with here is a policy which imposes sanctions against those who are identified as possessing or consuming drugs or alcohol on the job. There is nothing in the policy preventing employees from using alcohol as long as they do not do so on the job or in a way that renders them unfit to perform their duties. Accordingly, the section 10 complaint is also dismissed.

D. The Section 14 Complaint

[117] According to section 14, it is a discriminatory practice to harass an individual on a prohibited ground of discrimination. As explained previously, prohibited grounds under the Act include a perceived physical disability such as alcoholism. Considering my conclusion that the complainant has not established that he suffers from a disability, real or perceived, there is no reason for me to consider this matter any further since, if there was harassment, and I am not concluding that there was, it was not on a "prohibited ground of discrimination" as provided for by section 14.

[118] The evidence did establish that there was a very strained relationship between the complainant and his supervisor, Mr. Goose. I have no doubt that the complainant was bothered and annoyed by the attitude and behaviour of his supervisor and he might have had reason to be. He might also have had reasons to be exasperated at what he considered as the respondent's lack of response to his complaints but this is not sufficient under the Act. For the Act to be triggered, the alleged conduct must relate to a prohibited ground.

[119] For this reason, the complaint under section 14 is dismissed.

E. The section 14.1 Complaint: Has the Respondent retaliated against the Complainant?

[120] Section 14.1 of the Act provides that it is a discriminatory practice for a person against whom a complaint has been filed to retaliate or threaten retaliation against the individual who filed the complaint.

[121] This Tribunal has taken two slightly different approaches to the legal framework under which a claim of retaliation should be examined. These approaches are illustrated in two cases: *Wong v. Royal Bank of Canada*, [2001] C.H.R.D. No.11 and *Virk v. Bell Canada (Ontario)*, [2005] C.H.R.D. No.2. The primary difference between these two approaches is the emphasis placed on the intention of the alleged retaliator.

[122] In *Wong*, the Tribunal determined that given the remedial nature of the Act, the complainant should not be required to prove that the respondent intended to retaliate against the complainant. Rather, the focus of the analysis is on the perception of the complainant and whether or not the complainant could reasonably have viewed the respondent's conduct as an act of retaliation:

219 According to Entrop, to prove a violation under this section, there must be a link between the alleged act of retaliation and the enforcement of the complainant's rights under the Act. Where there is evidence that the respondent intended the act to serve as retaliation for the human rights complaint, the linkage is established. But if the complainant reasonably perceived that the act to be retaliation for the human rights complaint, this could also amount to retaliation, quite apart from any proven intention of the respondent. Of course, the "reasonableness" of the complainant's perception must be measured. Respondents should not be accountable for unreasonable anxiety or undue reaction of the complainant.

220 There have been a number of provincial human rights tribunals that have not agreed with the Entrop analysis. These tribunals have taken the position, that under the retaliation/reprisal provisions of their legislation, the complainant must prove an intention to retaliate on the part of the respondent. The retaliation/reprisal provision is not like the other provisions in the legislation that confer rights and should not be interpreted as extending to apparently neutral actions of the respondent that may have an adverse impact on the complainant.

221 As the Supreme Court of Canada stated in Robichaud v. Canada (Treasury Board)[5], the Canadian Human Rights Act is aimed at eliminating invidious discrimination. The Act is remedial and not punitive and, therefore, the motives or intention of those who discriminate are not central to the concerns of the Act.

222 In my opinion, the logic of Robichaud tells us that section 14.1 should not be interpreted as requiring a complainant to prove an intention to retaliate. Nor, in my opinion, should section 14.1 be viewed as different in operation from those sections in the Act that confer rights. The language of section 14.1 makes it a discriminatory practice to retaliate. The remedies for a contravention of this section are the same as for any other discriminatory practice under the Act. In this respect, section 14.1 should be contrasted to section 59 of the Act.

[123] This approach has been adopted in other Tribunal decisions. (See *Bressette v. Kettle and Stony Point First Nation Band Council*, [2004] C.H.R.D. No. 26 and *Warman v. Winnicki* [2006] C.H.R.D. No. 18).

[124] The other approach is set out in the *Virk* case:

155 Under section 14.1 of the Act, it is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

156 Retaliation implies some form of wilful conduct meant to harm or hurt the person who filed a human rights complaint for having filed the complaint. This view departs in part from those expressed in previous decisions of this Tribunal on the issue of retaliation (Wong v. Royal Bank of Canada, [2001] CHRT 11; Bressette v. Kettle and Stony Point First Nation Band Council, 2004 CHRT 40).

157 In Wong and Bressette, the views expressed are to the effect that a complainant does not have to prove an intention to retaliate and that if a complainant reasonably perceived the impugned conduct by the respondent to be in retaliation to the human rights complaint, this could amount to retaliation quite apart form any proven intention of the respondent.

158 The burden of proving retaliation rests with the complainant who must prove, on a balance of probabilities, that the person against whom he or she alleges retaliation knew of the existence of the complaint, that the person acted in an inopportune way and that the person's misbehaviour was motivated by the filing of a human rights complaint by the complainant. Retaliation being a form of discrimination under the Act, the same evidentiary burden should apply to allegations of discrimination and retaliation.

159 Thus, proof on the part of the complainant that the person who is alleged to have retaliated knew of the existence of the complaint and that he or she acted in an inopportune way may give rise to a prima facie case of retaliation requiring the alleged retaliator to come forth with a reasonable explanation as to the reasons for his actions. If

the explanation given is not credible, the Tribunal should find the allegation of retaliation substantiated.

[125] This approach has since been applied in *Shulyer v. Oneida Nation of Thames*, [2006] C.H.R.D. No. 35.

[126] Whether we apply one or the other of these approaches, the conclusion is the same: there is no evidence to support the allegations of the complainant that the respondent retaliated against him because he had filed a complaint under the Act. The only evidence of retaliation brought forward by the complainant was that he was denied the opportunity to apply for a position with Union Pacific Railway, in the fall of 2003, because he had filed a complaint under the Act. Unfortunately for the complainant, there is nothing in the evidence to support this contention. The only evidence on this issue was put through the respondent's witness, Mr. Blokzyl. Cross-examined on the reason why the complainant's request had been denied, Mr. Blokzyl explained that the respondent felt that it could not properly monitor the conditions of the Reinstatement Contract should he be allowed to work in the United States. There is no evidence that the respondent's refusal had anything to do with the complainant's filing of a human rights complaint. Mr. Blokzyl was not challenged in cross-examination with respect to this allegation and no other witnesses were questioned on this point.

[127] The complainant has not proven on a balance of probabilities, that the respondent was motivated in its decision to deny his request by the filing of a human rights complaint or that it can be concluded that it intended to retaliate against him because he filed the complaint.

[128] For this reason the complaint under section 14.1 is denied.

IX. CONCLUSION

[129] For all of the forgoing reason, it is my decision that the complaints of William Carl Witwicky, filed with the Canadian Human Rights Commission, on August 8 and October 25, 2003, should be and are hereby dismissed.

"Signed by"

Michel Doucet

OTTAWA, Ontario
July 6, 2007

[1] An "excessive layover pay" is paid to an employee who is at an "away-from-home" terminal and is not called back on another train within eleven hours. The employee will remain on this excessive layover until he accepts a call to his home terminal.

[2] The respondent's workforce is divided into two boards and the employees are divided equally between these boards. One board is referred to as the "protecting Furlough Board" while the other is referred to as the "non-protecting Furlough Board" While occupying the "protecting Furlough Board", the employee is subject to calls seven days a week, twenty four hours a day, for a period of fourteen day. On completion of a trip, an employee is allowed to take a maximum of twenty four hours rest and during this rest period he is not subject to be called to work.

Once the employee has completed his two weeks on the "protecting Furlough Board", he is put on the "non-protecting Furlough Board" for a period of two weeks. During this period, the employee is not subject to being called in for work but he still receives a daily rate of pay. The reason for this workforce organisation is due to the fact that the respondent's had, at a certain time, a surplus of employees and could not guarantee work to everybody at the same time.

PARTIES OF RECORD

TRIBUNAL FILE:	T1123/0506
STYLE OF CAUSE:	William Carl Witwicky v. Canadian National Railway
DATE AND PLACE OF HEARING:	November 20 to 23, 2006 December 5 to 7, 2006 January 15 and 17, 2007 Kamloops, British Columbia
DECISION OF THE TRIBUNAL DATED:	July 6, 2007
APPEARANCES:	
William Carl Witwicky assisted by Gary Kopp	For himself
(No one appearing)	For the Canadian Human Rights Commission
Joseph H. Hunder assisted by Adrian Elmslie	For the Respondent