

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE
LA PERSONNE

KASHA A. WHYTE

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN NATIONAL RAILWAY

Respondent

AND:

CINDY RICHARDS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN NATIONAL RAILWAY

Respondent

RULING

MEMBER: Michel Doucet 2010 CHRT 6
2010/03/23

I. INTRODUCTION

[1] The Canadian National Railway ("CN") brought a motion on January 19th, 2010, pursuant to Rule 3(1) of the Canadian Human Rights Tribunal's *Rules of Procedure* requesting that the Canadian Human Rights Tribunal (the "Tribunal") reopen the hearing in the matters of *Kasha A. Whyte vs. Canadian National Railway* and *Cindy Richards vs. Canadian National Railway*, so that CN can "adduce additional evidence that was not available at the time of the hearing".

II. FACTS RELEVANT TO THE MOTION

A. Complaints of Cindy Richards and Kasha Whyte

[2] Cindy Richards and Kasha Whyte filed complaints alleging that CN had breached section 7 of the *Canadian Human Rights Act* ("CHRA") on the prohibited ground of family status. By consent, both cases were consolidated for hearing before the Tribunal. The hearing took place on September 22 to 24, October 6 to 9, 22, and 26 to 30 and on November 12 and 13. Except for October 22, when the hearing was held in Ottawa to accommodate one of CN's witnesses, the place of hearing was Jasper, Alberta.

[3] Although this motion does not deal directly with that case, it is important to note that CN was also a respondent in another hearing held in Jasper in which another complainant, Denise Seeley, raised issues very similar to those of the Whyte and Richards' cases. The Seeley matter was heard from August 10 to 14, 2009 and final arguments were heard on September 21, 2009, the day preceding the beginning of the Whyte and Richards hearing.

[4] The evidence of the Whyte and Richards' hearing will be dealt with in detail in the decision on the merits. However, to understand the issues of this motion, the Tribunal deems it important to give a summary of some of the evidence presented at the hearing. Ms. Whyte, Ms. Richards and Ms. Seeley were conductors working for CN. In the mid-nineties they were laid-off for lack of work. In February 2005, they, along with 45 other laid-off employees, were recalled to cover a shortage in Vancouver. Alleging issues with their respective families, they did not report to Vancouver. On the basis of their failure to report CN terminated their employment. Ms. Richards, Ms. Whyte and Ms. Seeley filed complaints under the CHRA. CN defended its decision by alleging, first, that these employees situation were not protected under the CHRA and, secondly, that if the situations did fall under the CHRA, CN had accommodated them by giving them more time to report to Vancouver in order to sort out their affairs. CN also argued that granting the relief sought by these employees would cause undue hardship in that it would grant them the equivalent of "super seniority" solely on the basis of their status as parents.

[5] At the Seeley hearing, CN was represented by the same counsel who represented it in the Whyte and Richards case and the lawyer for the Commission was also the same. Ms. Seeley was represented by a different counsel than Ms. Whyte and Richards. Neither Ms. Whyte or Ms. Richards, nor their counsel attended the Seeley hearing, although there was no order or direction from the Tribunal precluding them from attending. In essence, with minor distinction, the same evidence was adduced in both hearings and, except for one witness, CN called the same witnesses in both matters.

B. The CATS (Crew Assignment and Timekeeping System) Records

[6] In order to understand the substance of the motion, it is important that we deal, with some details, with the history of the disclosure of the records which are in question in this procedure, with reference, where appropriate, to the transcription of the evidence and to the record of the hearing.

[7] CN's motion refers to information contained on Excel spreadsheets which were first produced in the Seeley hearing and subsequently in the Richards and Whyte hearing. This information is described by CN as the "original data".

[8] According to the undisputed evidence submitted by the Commission, these documents first came to light as information disclosed by CN one week before the start of the Seeley hearing. They were sent on August 3, 2009, by CN's counsel, to the Tribunal, with copies to

Mr. Renouf, counsel for Ms. Seeley and to the Commission. In the letter accompanying the documents, CN's counsel wrote:

Further to the upcoming hearing in the above-mentioned matter [the Seeley matter] and the letter of July 28th, 2009, from the Complainant's attorney [Mr. Renouf], CN intends to refer to the following additional documents before the Tribunal:

- CN's employment equity policy and employment equity narrative reports, for the years 1996-2008, said reports being publicly available documents published on the website of Human Resources and Social Development Canada, and
- Excerpts from CN's SAPS personnel management system detailing the status of employees referred to as AB, HI, P, U and Y in CN's Amended Statement of Particulars during the year 2005. (Emphasis added.)

[9] The letter also explained the purpose of this disclosure :

None of these documents add any supplemental facets to the debate and are solely designed to facilitate the presentation of already announced facts and testimony regarding, respectively, the employment status of women at CN and the fact set out in paragraph 40c) of CN's Amended Statement of Particulars. (Emphasis added)

[10] Paragraph 40c) of CN's Amended Statement of Particulars in the Seeley matter refers to five (5) employees who were relieved from their obligation to report to Vancouver, but remained in the employ of CN. This same paragraph also appears in CN's Amended Statement of Particulars in the Whyte and Richards matters.

[11] On August 5, 2009, counsel for the Commission wrote to CN's counsel requesting that CN produce the same information for all the remaining employees recalled to Vancouver. These documents were disclosed to the Commission and to Mr. Renouf on August 7, 2009. The records of the remaining 42 employees were included in an Excel spreadsheet and contained numerous pages of information concerning the status of these employees during the particular period relevant to these proceedings.

[12] On September 11, 2009, Commission's counsel sent an e-mail to CN's counsel inquiring whether the document produced on August 7, 2009, would also be disclosed in the Whyte and Richards cases. These documents were in due course disclosed to counsel for Ms. Whyte and Ms. Richards.

[13] As stated earlier, the Whyte and Richards hearing started on September 22, 2009, the day following the closing arguments in the Seeley matter. The hearing continued for almost 15 days, on various dates throughout the fall. According to the "Respondent List of Exhibits", CN put into evidence the CATS records for five employees. (See Exhibit R-1, Tab 27 through Tab 31 inclusively) and two other CATS records (See Exhibits R-10 and R-11). These documents were put into evidence through Ms. Elaine Storms, CN's Senior Manager of the Crew Management Centre for Western Operations in Edmonton, a key witness for CN.

[14] For its part the Commission put into evidence the CATS records for fifteen (15) other employees. (See Exhibits HR-1, Tab 5 through and including Tab 10 and HR-2, Tab 23 through and including Tab 30). These documents were also put into evidence through Ms. Storms.

[15] The remainder of the CATS records were put into evidence by the complainants' counsel (See Exhibit C-33), but not in the format in which they had been disclosed by CN. Ms. Chahley, the complainants' counsel, during her cross-examination of Ms. Storms on October 26, 2009, explained that she had created a new format by re-sorting the information contained in the original Excel spreadsheets provided by CN. This new document was re-sorted in such way that it showed which employees recalled to Vancouver were "available" on any given date in the year 2005.

[16] Mr. Paquette, CN's counsel, raised an objection regarding the production of this document in the format produced by Ms. Chahley. The transcription on this point reads as follows:

MR. PAQUETTE: I have to object to the way this document is being presented to the witness. As Ms. Chahley mentioned, there is a lot of information that was deleted from it, and I'm concerned that it's essentially being presented as, excuse the term, "cherry picking" the entries where only "available" is mentioned. The witness doesn't have any context to draw on to provide a complete answer.

[17] The Tribunal dealt with this objection in the following manner:

THE CHAIRPERSON: [...] I will let Ms. Chahley proceed with this document. [...] If you have any problems with the information that's on this document here, certainly in your reply you will be able to bring any additional information that you believe is necessary to complete the document, and I will allow you to do that at that point. Or if the witness comes to a point where she says "I'm sorry, I can't follow the information in the way that it's presented here", we will go back to the full document. [...] The witness can certainly if she wants to refer to the full document, do so. Or if she believes that she's not able to answer the questions, she will certainly [say so]. Or if you want to complete the document, if you believe that it's incomplete and that the information is not all there you will be able to do that with your reply.

[18] No further objection was raised by CN's counsel during the cross-examination of his witness on the document prepared by Ms. Chahley. During reexamination of his witness, Mr. Paquette did not question her on this document, nor did he bring forward or allude to any information that could have been used to complete or explain the document.

[19] Ms. Storms' cross-examination shows that she was questioned thoroughly by the complainants' and by the Commission's counsels on the CATS records. Taking into consideration the issue raised by CN in its motion, the following excerpts of the transcript of her evidence are worth mentioning:

MS. CHAHLEY: Okay. So, on these CATS sheets, I think you said this last day that when an employee shows as available, that means that they're signed up on the board, but they're not working that day; is that correct?

MS. STORMS: It means that they're on the board, but not working that day, yes.

MS. CHAHLEY: And that they would be available for that two-hour call; correct?

MS. STORMS: Actually, in this document they could actually be on rest or -- this document doesn't have some of the detail that a work history would. So, I would actually have to compare a work history to check, but generally speaking, available does mean that the employee is available for a call.

[...]

MS. CHAHLEY: So, we know that that employee was available to work at least one of those two days, and maybe two of those days; correct?

MS. STORMS: Again, it's very difficult to tell without the full work record.

MS. CHAHLEY: Well, Ms. Storms, CN didn't give me the full work record. This is all --

MS. STORMS: I understand that.

MS. CHAHLEY: -- I have to work with. [...] And I assumed that CN was giving me the document that gave me the information. So, let's work with the best we've got here. Are you saying that it's impossible to make any statements without the full work record?

MS. STORMS: Well, because this type of document is usually a snapshot at a specific time, I am saying it would be difficult to tell you that, yes.

MS. CHAHLEY: So, we can't take from this that any of these employees are available on any of these days?

MS. STORMS: Not -- it's very difficult to tell. So, if they took the snapshot at four o'clock in the morning and the employee showed available, but they worked at eight o'clock, then I wouldn't see that here.

MS. CHAHLEY: Well, wouldn't it say working, if they worked during the day?

MS. STORMS: I'm sorry, yes, you're correct.

[...]

MS. CHAHLEY: Now, correct me if I'm wrong, but what I see is that the employee, when they're working, they get a B number instead of an A.

MS. STORMS: Yes, that's correct.

MS. CHAHLEY: And types in "working"?

MS. STORMS: That's right. If they worked in that time frame, that's correct.

MS. CHAHLEY: And because it's by day, I assumed and correct me if I'm wrong, that meant somewhere in that 24-hour period they were working?

MS. STORMS: Yes.

[...]

MS. CHAHLEY: [...] If the person works in the 24 hour period, the system, as it seems to be configured, would show them as working -

MS. STORMS: That's correct.

MS. CHAHLEY: So, when it shows them available -

MS. STORMS: They're either on rest or available. I can't think of another status that they would be in.

[...]

MS. CHAHLEY: My question was: Can you explain what's going on? I have suggested to you that even with the best of intentions there were times when people weren't deployed very effectively, and that managers worked even though conductors were available, and you said: "Well, that couldn't happen." And I'm suggesting to you that it did happen.

MS. STORMS: And I'm not saying it couldn't happen; I just said it would be unusual for it to happen and it could have happened, but it would just be unusual. That's all I'm saying.

MS. CHAHLEY: Do you have any explanation of why Mr. Employee M was still available and not working?

MS. STORMS: No, I don't.

[Emphasis added.]

(Extracts from Elaine Storms testimony, October 26th, 2009).

[20] On the morning of November 12th, 2009, the day on which the parties' final arguments were scheduled to start, two preliminary issues were raised. The first one, raised by Mr. Paquette, was a request for an adjournment so that the parties could discuss the possibility of a settlement. The Tribunal refused this request, indicating that the hearing had already gone on well beyond the time which had been originally set aside. The Tribunal indicated that the parties could, if they so desired, pursue the avenue of a settlement, but the Tribunal did not believe that it would be in their best interest to grant an adjournment at this late date.

[21] The other issue was raised by Ms. Chahley.

MS. CHAHLEY: Mr. Chairman, I'm put in a very bad position here. I need to discuss an issue with you. My friend had indicated, Mr. Paquette had a second matter that he raised just a few minutes ago regarding a potential issue with the accuracy of certain CN documents. I can't, as an officer of the court, proceed without that at least being addressed as we start this hearing today. I think that it's important that the Tribunal is aware of where we stand moving forward, even in terms of further cross-examination of this very witness, and it's inappropriate to leave it hanging at this stage.

THE CHAIRPERSON: What is this matter?

MR. PAQUETTE: Mr. Chairperson, it concerns the CATS records that have been used in this hearing. Late last night or early this morning depending how you look at it, I was informed that the CATS records may be inaccurate with regards to the question of available versus working.

THE CHAIRPERSON: Well, I would certainly need to hear - CN is a very sophisticated business entity and this in a certain way is coming to a point where I'm just in a position that I can't really understand what's going on. Documents were submitted into evidence by the person responsible for the CATS system, members of CN were cross-examined for a week and a half on those documents and you're telling me that you only heard last night that these documents might be inaccurate?

MR. PAQUETTE: Yes, sir.

THE CHAIRPERSON: Does that - the new information that's coming up -

MS. CHAHLEY: We don't even know what it is yet, Mr. Chairman, but I'd also point out those documents were filed and dealt with in the Seeley matter as well.

THE CHAIRPERSON: Yes, I know.

MS. CHAHLEY: I mean, we're flabbergasted and...

THE CHAIRPERSON: So am I.

MS. CHAHLEY: But I couldn't not deal with it. We can't finish today and then have suddenly new - this has to get dealt with.

THE CHAIRPERSON: Well, it's on record and the Complainants will deal with those documents as they were submitted and the information that was presented will be the information that is. I cannot accept at this late point that counsel would tell me that he was only informed of this late last night. I don't put in doubt that you were, but you had witnesses that are really knowledgeable on the working of the CATS system.

MR. PAQUETTE: It's not a question in the CAT system itself but more the manner in which the reports were generated.

THE CHAIRPERSON: Well, that's something that should have been looked at when the evidence was generated. Unfortunately the evidence was put in after about three weeks of hearing in the manner that it was put in and we will have to live with that and I will deal with that certainly in my decision at one point.

MR. PAQUETTE: I understand and -

THE CHAIRPERSON: And, again, again this information will have also to be submitted to MR. Renouf in the Seeley matter.

MR. PAQUETTE: If I may, Mr. Chairperson, at this point there really is no information to speak of. What I understand is that the manner it was -

THE CHAIRPERSON: Well, the information that you just rendered that there might be - and I want that because I will deal with that in the record also in the Seeley matter, this information has to be forwarded - well, what you've informed both counsel this morning, the Commission and Ms. Chahley. I make a ruling that I'm telling you to send a letter to Mr. Renouf sharing with him that same information with a copy to the Tribunal.

(Emphasis added.)

[22] As the transcript clearly shows, there was no motion presented that morning by Mr. Paquette regarding this "new information", nor was there any explanation as to what this information was and who had given that information. What's more, the transcription of the exchange on that morning plainly and unequivocally contradicts Mr. Paquette's recollection as it appears in CN's motion at paragraph 9. In that paragraph, after explaining that he had brought this information to the attention of the complainants' and Commission's counsels, Mr. Paquette states: "CN's counsel also explained the discrepancy to Michel Doucet, the Tribunal Member hearing the matter. CN's counsel explained that based on the indications provided by Ms. Rusnak the night before, the original data could be misleading with regards to circumstances where employees would be classified as being "available" for work."

(Emphasis added.)

[23] It is clear from the extracts of the transcription reproduced above, that Mr. Paquette's recollection is not totally accurate. He never gave an "explanation" to the Tribunal regarding what he describes as a "discrepancy" in the evidence. At the most, he stated that "late last night or early this morning" he had been "informed that the CATS records may be inaccurate with regards to the question of available versus working" with no other explanation or detail. He even added that "at this point there really is no information to speak of". He certainly never mentioned that this information had been provided by Ms. Rusnak, a name the Tribunal heard for the first time in Ms. Storms' affidavit, nor, for that matter, that this information had been provided to him by Ms. Storms.

[24] In her affidavit, Ms. Storms gives a more detailed explanation of what happened during the evening of November 11th. 2009. She explains that she did not create the Excel spreadsheets for which she was examined and cross-examined at length. She further states that the first time she saw this document was in preparation for her testimony in the Seeley hearing. According to her affidavit, the Excel spreadsheets were created from CN's CATS program by an employee in CN'S Resource Management group, but she does not indicate who this employee was. She adds: "However, because I did not prepare the original data and I have seen similar reports in the past, I assumed at the time of my testimony in both the Seeley hearing and the Richards and Whyte hearing that [the Excel spreadsheet] was a complete document with respect to the 47 employees' work histories." (Emphasis added.)

[25] In paragraph 7 of her affidavit she further declares:

On the evening of November 11, 2009, during the Richards and Whyte hearing, I requested that Michelle Rusnak, a Crew Supervisor in the Crew Management Centre, review the work histories of each of the 47 employees. In particular, I wanted to review the whereabouts of the 47 employees on the days in which the original data showed them to be unavailable for work (due to days in, vacation, illness, leaves of absences, etc.) in order to assist Mr. Paquette with perhaps explaining why those employees had worked less shifts than expected. While doing so, Ms. Rusnak advised me that the original data appeared to be incomplete.

[26] Ms. Storms said that she immediately disclosed "this discrepancy" to Mr. Paquette in the early morning hours of November 12, 2009. Then she declares that on the morning of November 12, 2009, Mr. Paquette brought this information to the attention of Ms. Chahley and to Ms. Osborne-Brown, counsel for the Commission. She also adds that "Mr. Paquette also brought this discrepancy to the attention of Mr. Michel Doucet, the Tribunal member hearing the matter." Unfortunately, the transcript of the hearing does not support this conclusion. It was not Mr. Paquette who raised the matter with the Tribunal but Ms. Chahley and when Mr. Paquette did address the issue, he did not explain what this "discrepancy" was but only indicated that the information on the Excel spreadsheets was incomplete without giving any details. He even added "at this point there really is no information to speak of."

[27] Finally, Ms. Storms explains that following the conclusion of the Richards and Whyte hearing, she requested that the work histories of the 47 employees be reviewed for accuracy by CN's Ressource Management group. According to her affidavit, the complete work history of the 47 employees was subsequently extracted "from various computer systems" and "a new Excel document was created" showing "the most accurate record available, for the year 2005, in which terminal each of the 47 employees worked and how many shifts each of the 47 employees worked."

III. QUESTION IN ISSUE

[28] The only question in issue in this motion is whether the Tribunal should grant the motion sought by CN and allow it to reopen its case to adduce new evidence which it alleges was not available at the time of the hearing.

[29] The Commission did raise another issue. It argued that the Tribunal was *functus officio* because it "had already ruled on the issue regarding alleged incompleteness of the CATS documents". A careful review of the transcript of November 12, 2009, clearly shows that this is not a correct description of what occurred on that morning. On November 12, no motion was presented to the Tribunal asking that it deal with the "issue of the incompleteness of the CATS documents". Consequently, no ruling could have been made on this issue. The only ruling rendered that morning was the one instructing Mr. Paquette to inform Mr. Renouf, counsel for Ms. Seeley, of the new development regarding the CATS documents.

IV. THE LAW

[30] The only case submitted by the parties to address the issue at hand is the Tribunal's decision in *Vermette v. Canadian Broadcasting Corporation* [1994] C.H.R.D. N° 14 (approved in [1996] F.C.J. No. 1274). In that decision, the Tribunal applied the test set out in *Gass v. Childs* (1958), 43 M.P.R. 87, to justify the reception of fresh evidence:

In *Gass v. Childs* (1958), 43 M.P.R. 87 at page 93, Ritchie J.A. set forth three criteria that should be satisfied before tribunal exercises its discretion to reopen:

In order to justify either the reception of fresh evidence or the ordering of a new trial the three conditions set out hereunder must be fulfilled:

1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the trial;
2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[31] The Tribunal in *Vermette* also referred to other decisions dealing with an application to reopen a case. It noted:

Where an application to re-open is received after a decision has been rendered, the principles that should guide the exercise of this discretion are described by Sopinka and Lederman, *The Law of Evidence in Civil Cases* in the following manner at page 542:

"Except in the case of fraud or surprise, the evidence must be newly discovered evidence which reasonable diligence could not have discovered during the trial, and it must be of such a character that it would have formed a determining factor in the result."

Where the application to reopen is received prior to a decision being rendered, a broader discretion to reopen has been recognized. Sopinka and Lederman, *The Law of Evidence in Civil Cases* at page 541 suggest that a case may be reopened "where the interest of justice requires it". Among the cases cited by Sopinka and Lederman is *Sunny Isle Farms Ltd. v. Mayhew* (1972), 27 D.L.R. (3d) 323 (P.E.I.S.C.). In that case Nicholson J. adopted the statement by Boyle J. in *Sales v. Calgary Stock Exchange*, [1931] 3 W.W.R. 392 at 394 (Alta. S.C.) where he said:

"It is in my view a serious matter to open up a trial after all the evidence has been taken, and it should never be done unless it seems imperative in the interest of justice that the case should be reopened for further evidence."

[32] In its motion, CN submits that the order sought should be granted because the situation it is raising meets the criteria set out in the *Vermette* decision. For the reasons that follow, the Tribunal finds that CN has not met these criteria and CN's motion is therefore denied. The Tribunal will now deal with each criterion in turn, although the failure to meet one of these would be sufficient on its own to refuse the order sought.

(i) Could the evidence have been obtained with reasonable diligence for use at the hearings before or during the hearing?

[33] The answer to this part of the test is "yes". It is clear from CN's motion and the supporting affidavit of Ms. Storms, as well as from the record of the hearing, that the information that CN now wishes to submit to the Tribunal was available to CN before and during both hearings.

[34] Considering first the affidavit of Ms. Storms: it is clear that had CN been diligent during the Seeley hearing or right after that hearing, and even after Ms. Storms' evidence in the Whyte and Richards hearing, it could have easily obtained this information. In this regards, Ms. Storms states in paragraph 7 of her affidavit:

During my testimony in the Richards and Whyte hearing, counsel for the Complainants noted that the original data appeared to indicate that several of the 47 employees did not actually perform work on several days in a row in the year 2005 but were indicated as being "available" to work (within CN' this means the employee is available for a call but is not currently performing work). This was surprising to me because I was in Vancouver managing the shortage in late 2005 and it was a very busy terminal at the time. Moreover, the reason CN required the employees to report to Vancouver was due to one of the most serious employee shortages CN had ever experienced In my view the original data should have shown those employees to have been working more shifts. However, I had often worked with documents very similar to the one produced and I believed the report to be complete.

(Emphasis added.)

[35] This paragraph is perplexing for many reasons. First of all, Ms. Storms' assertion that she was "surprised" that "the original data" appeared to indicate that several of the employees did not actually perform work on several days when at the Vancouver shortage is not apparent when we consider her evidence at the hearing. For example, during her cross-examination by Ms. Chahley on October 26, 2009, the question was put directly to her whether she could explain why employees would be "available" in Vancouver and not working. Her answer was: "And I'm not saying it couldn't happen; I just said it would be unusual for it to happen and it could have happened, but it would just be unusual. That's all I'm saying." Then Ms. Chahley asked: "Do you have any explanation of why Mr. Employee M was still available and not working?" and the answer was "No, I don't." There was no indication at that point that she was "surprised" by this information and that she would try to find an explanation. There was no indication either that she doubted the validity of the information. On the contrary, she did not reject the possibility that it was accurate, but simply added that it was "unusual", although "it could have happened".

[36] The other problem I have with paragraph 7 of Ms. Storms' affidavit is the last sentence which reads: "However, I had often worked with documents very similar to the one produced

and I believed the report to be complete." If I understand that sentence correctly, Ms. Storms is telling us that she considered the documents to be complete and trustworthy because she "had often worked with documents very similar." Her evidence at the hearing and the way she answered the questions put to her in her examination and on cross-examination corroborates this conclusion. When she was testifying, she had no doubts about the accuracy of the documents. If Ms. Storms had doubted its correctness, she would certainly have made the necessary verifications and raised the question immediately with CN's counsel and not have waited until November 11, fourteen days after her testimony in the Richards and Whyte hearing was finished and over a month and half after her testimony in the Seeley matter, to raise these concerns. She gives no explanation in her affidavit as to why she did not verify or ask questions before the evening of November 11, 2009 and why she was prompted to do it on November 11.

[37] Also, it seems from her affidavit that reviewing these "work histories" did not require much time. In paragraph 8, she states that "on the evening of November 11, 2009" she requested that Michelle Rusnak, a crew supervisor, review the "work histories" of the 47 employees. It did not take Ms. Rusnak long to find these "inaccuracies", because on that same evening she advised Ms. Storms that the "original data for several of the 47 employees was incomplete." Later that evening or early the next morning Ms. Storms advised Mr. Paquette.

[38] In regards to whether CN knew that there was more information in CATS that it had decided to put in evidences, again Ms. Storms' answers in cross-examination are revealing. In one part of her cross-examination, which is set out above, she herself raises the possibility that not all the information was in the original Excel Spreadsheet. Following are excerpts of the transcription:

MS. CHAHLEY: So, we know that that employee was available to work at least one of those two days, and maybe two of those days; correct?

MS. STORMS: Again, it's very difficult to tell without the full work record.

MS. CHAHLEY: Well, Ms. Storms, CN didn't give me the full work record. This is all --

MS. STORMS: I understand that.

MS. CHAHLEY: -- I have to work with. [...] And I assumed that CN was giving me the document that gave me the information.

[39] Furthermore, Ms. Storms also indicates in her cross-examination that this information was a "snap shot" of data compiled by the computer program at approximately 4:00 a.m. Again, it is important to repeat the exchange between Ms. Storms and Ms. Chahley on this point.

MS. STORMS: Well, because this type of document is usually a snapshot at a specific time, I am saying it would be difficult to tell you that, yes.

MS. CHAHLEY: So, we can't take from this that any of these employees are available on any of these days?

MS. STORMS: Not -- it's very difficult to tell. So, if they took the snapshot at four o'clock in the morning and the employee showed available, but they worked at eight o'clock, then I wouldn't see that here.

MS. CHAHLEY: Well, wouldn't it say working, if they worked during the day?

MS. STORMS: I'm sorry, yes, you're correct.

[40] This exchange clearly contradicts the assertion made by CN in paragraph 6 of its motion where it states: "However, unknown to CN at the time of the hearings, the original data was compiled by the computer program which takes a "snap shot" of an employee's work day as of approximately 4:00 a.m." (Emphasis added.) If CN had no knowledge of this, its key witness on this matter certainly knew.

[41] Ms. Storms has significant experience as the Director of the Crew Management Center and she showed throughout her testimony her knowledge of the working of CN as it pertains to "crewing". She had a very good understanding of CATS and the records that could be generated from the system. CN did not choose this witness at random but because of her familiarity and knowledge with the crew management.

[42] If CN had put its mind to it, it would have been able to obtain this evidence for use at the hearing. The affidavit of Ms. Storms clearly suggests that CN had this information in its possession. This conclusion is confirmed by the fact that Ms. Rusnak, who, according to Ms. Storms' affidavit did a review of the employees' work histories on the evening of November 11th 2009, did not seem to have any problem gathering the information. Waiting until the night before the closing argument to look into possible explanations does not in the Tribunal's opinion show the reasonable diligence necessary to meet the first criteria of the *Vermette* test. The Tribunal therefore concludes that CN has not met the first criterion.

[43] This conclusion would be sufficient to dispose of the motion, but since the parties have presented extensive arguments regarding the other two criteria, the Tribunal will address them.

(ii) Would the evidence have an important influence on the result of the case, although it need not be decisive?

[44] In its motion CN states that without the "new evidence [...] the Tribunal could make the inference that the recall was never a necessity and therefore the Complainants' terminations of employment would never have occurred or were unrelated to the refusal to report to cover the employee shortage." This allegation is speculative at best. It would be quite surprising if the Tribunal was to make an inference that the recall process for the Vancouver shortage was not necessary.

[45] The other reason put forward by CN as to why the "nature of the updated data" might have "a determining effect" is that "the Tribunal could make erroneous conclusions with respect to CN's ability to accommodate the Complainants in 2005 to the point of undue hardship." CN's motion provides no reasons to explain how this "updated data" could affect its undue hardship argument.

[46] CN has not demonstrated in its motion how the content of the "new spreadsheet" would have an important influence on the result of the case.

(iii) Is the evidence apparently credible?

[47] CN is seeking an order granting permission to reopen its case in order to present what it alleges is more accurate evidence in regards to a document which it prepared, formed part of its evidence and which covers information over which it had complete control.

[48] CN has the burden of establishing the necessary facts which would assist the Tribunal in determining if this evidence is apparently credible. In her affidavit, Ms. Storms summarily explains how this new information was gathered. She states that following the Richards and Whyte hearing, she requested that the work histories of the 47 employees be reviewed for accuracy by CN's Resource Management group. She gives no indication of what the Resource Management group is and who, besides Ms. Rusnak, in this group was in charge of doing this review. Concerning the methodology used to do this work, the only information in her affidavit is that the "complete history" was "extracted from various computer systems" with no further detail.

[49] This very limited information does not give the Tribunal the factual background necessary to establish whether or not the new evidence is "apparently credible". CN reproduces this new evidence in Ms. Storms' affidavit, but at this point, it is not for the Tribunal to determine whether this information is credible or not, taking into consideration that the Tribunal has not had the benefit to hear the evidence of those who prepared the document, nor of their cross-examination. At this preliminary stage it is for CN to put forward sufficient evidence to assist the Tribunal in appreciating whether or not this information is "apparently credible", which it has not done.

[50] Even if the Tribunal was to give the benefit of the doubt to CN on this criterion, it still would not order the reopening of the case, because CN has not met the other two criteria of *Vermette*.

V. CONCLUSION

[51] In its arguments, CN states that allowing the opening of the case would present no prejudice to the other parties and that the whole issue raised in the motion is basically a question of fairness for CN. CN should understand that fairness is equitable and that it cuts both ways. The Complainants and the Commission deserve to be treated and judged fairly as much as does CN. CN had control over this information. CN had two opportunities to examine Ms. Storms and its other witnesses on these documents. CN's witnesses were thoroughly cross-examined on them. CN had ample opportunity to correct this information if it was inaccurate; it did not do so before the last day of the hearing when Counsel raised the issue that some of the information might be inaccurate but without going into any details. CN cannot now say that by refusing its motion it would be treated unfairly.

[52] After a careful review of the material and argument submitted by the parties, the Tribunal is of the opinion that CN has not met the criteria set out in the case law for the reopening of a hearing in order to present new evidence. In particular, it has not shown that it used reasonable diligence to obtain the evidence so that it could be used at the hearings.

[53] For these reason, CN's motion is dismissed.

"Original signed by"

Michel Doucet

OTTAWA, Ontario
March 23, 2010

PARTIES OF RECORD

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APPEARANCES:	
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