TD 11/84
Decision rendered on October 16, 1984

IN THE MATTER OF THE CANADIAN HUMAN RIGHTS ACT
S.C. 1976-77, c.33, as amended

AND IN THE MATTER of a Hearing before a
Human Rights Tribunal Appointed under
Section 39 of the Canadian Human Rights Act

BETWEEN:
FRANK E. McCREARY
Complainant
- AND -
GREYHOUND LINES OF CANADA LTD.
AND EASTERN CANADIAN GREYHOUND
LINES LTD.

Respondents
DECISION OF TRIBUNAL
BEFORE: Robert W. Kerr
APPEARANCES: George Hunter and David Aylen,
for the Complainant and the
Canadian Human Rights Commission

François Lemieux and K. Scott McLean
for the Respondents

HEARD IN TORONTO AND OTTAWA ON APRIL 11, 12 and 13, SEPTEMBER 29, OCTOBER
12, 13, and 14, AND DECEMBER 7, 8, 9, 12 and 13, 1983, AND MAY 28, 29 and
30, AND AUGUST 20, 21, 22 and 23, 1984

>THE
PARTIES
The Respondents in this case are Greyhound Lines of Canada Ltd., an inter-city bus company which is controled by a similar United States company,
Greyhound Lines, Inc.; and Eastern Canadian Greyhound Lines Ltd., an inter-city bus company which is wholely owned by Greyhound Lines of Canada
Ltd. Greyhound Lines of Canada Ltd. operates primarily in western Canada and
northern Ontario while Eastern Canadian Greyhound Lines Ltd. operates primarily in southwestern Ontario. In addition to their scheduled services
in these respective areas, both Respondents provide charter service out of
these areas to points throughout North America. The Respondents share common
head offices and management staff located in Calgary, Alberta.

In the spring of 1980 the complainant was an unsuccessful applicant for employment as a "Greyhound" bus driver in Canada. The original

complaint
was filed against Greyhound Lines of Canada Ltd. However, since the
Complainant applied for employment through a Toronto office which is

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regionally responsible for the operations, including driver
recruitment, of
Eastern Canadian Greyhound Lines Ltd., counsel appeared on behalf of
that
company and applied to amend the proceedings by substituting Eastern
Canadian
Greyhound Lines Ltd. for Greyhound Lines of Canada Ltd. as the party
respondent.

Counsel for the Complainant and Canadian Human Rights Commission
(hereinafter referred to as the Commission) was reluctant to agree to
this,
particularly since at that stage of the proceedings the

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between the Respondents in matters relevant to this complaint
was not clear. Counsel for Eastern Canadian Greyhound Lines Ltd.
indicated
that it was not his intent to raise the question of who was the proper
party
respondent in any technical sense which might affect the jurisdiction
of the
Tribunal. Accordingly, after some discussion, an amendment to the
proceedings to add, rather than substitute, Eastern Canadian Greyhound
Lines
Ltd. as a party respondent was agreed to by counsel and ordered by the
Tribunal. This was done on the understanding that the issue of which of
the
Respondents should be subject to an order, if any, as might issue from
the
Tribunal would be determined by the Tribunal on the basis of the
evidence in
the proceedings. Counsel for Eastern Canadian Greyhound Lines Ltd. then
entered on appearance for Greyhound Lines of Canada Ltd.

Following this amendment, no further submissions were made by any
of the parties as to whether Greyhound Lines of Canada Ltd. or Eastern
Canadian Greyhound Lines Ltd. or both were the proper parties to be
held
responsible on the facts of this case for a violation, if any, of the
Canadian Human Rights Act, S.C. 1976-77, c.33, as amended. The evidence
indicates that the actual decision which gave rise to the complaint in
this
case was made by the shared central management staff in Calgary in
accordance
with policies which are common to both Respondents.

Although the Complainant was not aware of the distinction between the Respondent companies, his original application for employment was directed to the southwestern Ontario "Greyhound" operation. If he

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been employed, therefore, he would have become an employee of Eastern Canadian Greyhound Lines Ltd. The Complainant testified that, after submitting his application, he did make a telephone call to the Calgary and
Toronto offices to indicate a willingness to accept employment in western
Canada. Such employment would have made him an employee of Greyhound Lines
of Canada Ltd. However, his interest in such employment appears to have been
expressed purely in terms of seeking to increase his chances of being hired.
In other words, it could have been interpreted as contingent on the possibility that there were openings elsewhere, but none in southwestern
Ontario. Since Eastern Canadian Greyhound Lines Ltd. was in fact planning to
hire drivers at the time, I think the Respondents were entitled to deal with
the Complainant's application as relating only to Eastern Canadian Greyhound
Lines Ltd., and it would appear that they did so. I conclude that Eastern
Canadian Greyhound Lines Ltd. was the party responsible for actually

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rejecting the Complainant's application for employment.
On the other hand, it is also clear that the rejection of the applicant was based on policies which originate with Greyhound Lines, Inc. in
the United States. These policies are transmitted to Greyhound Lines of Canada Ltd. and from there to the other Canadian "Greyhound" operations,
including Eastern Canadian Greyhound Lines Ltd. Moreover, Greyhound Lines of
Canada Ltd. administers these policies jointly with the other operations,
including Eastern Canadian Greyhound Lines Ltd. It is arguable, therefore,
that Greyhound Lines of Canada Ltd. is jointly liable with its subsidiary,
Eastern Canadian Greyhound Lines Ltd., for a

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- 4 discriminatory
practice, if any, which these policies may involve. On the other hand, there are no provisions in the Canadian Human Rights Act covering
the question of such joint liability.

In the final analysis, this question may not matter for it is likely that Greyhound Lines of Canada Ltd. will be guided by any decision concerning the implementation through Eastern Canadian Greyhound Lines Ltd. of the common policies of the two companies. This may explain why the issue was not pursued in argument by the parties. In light of this, I do not propose to rule further on the question of whether Greyhound Lines of Canada Ltd. was properly a party to these proceedings in so far as the determination of the merits of the complaint are concerned. The respective roles of the two Respondent companies would, of course, be relevant to the terms of an order, if any, to made against either or both, but it is premature to deal with that aspect at this point.

Because of the common management and control of the Respondents, it is frequently impossible to distinguish the acts of one Respondent from those of the other. For the same reason, Eastern Canadian Greyhound Lines Ltd., as the legal entity dealing with the Complainant, must be held responsible for the actions taken by the agents of either Respondent with respect to the Complainant's application for employment. Furthermore, assuming, without deciding, that Greyhound Lines of Canada Ltd. can be held jointly liable with Eastern Canadian Greyhound Lines Ltd. because of its controling role with respect to relevant employment policies, the extent of common management and control

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- 5 would similarly fix Greyhound Lines of Canada Ltd. with responsibility for the actions of the agents of Eastern Canadian Lines Greyhound Lines Ltd. in the matter. For all of these reasons, I do not propose to attempt to distinguish between the Respondents in discussing the merits of the case. To the extent necessary, I will return to the question of possible joint liability when I discuss the remedy, if any, to be awarded.

THE APPLICATION FOR EMPLOYMENT

At the time of his application to the Respondents, the Complainant had been employed for six years as a driver by the Toronto Transit Commission. He had obtained experience on the various types of intra-city

street cars and buses operated by the TTC. In 1979 he had transferred for

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the summer months to employment with the TTC's wholely owned subsidiary, Grey Coach Ltd., which operates an inter-city and charter bus system. Grey Coach was involved in pooling arrangements with Eastern Canadian Greyhound Lines Ltd. Under these arrangements, Grey Coach drivers operated "Greyhound" buses over Grey Coach routes and vice versa to save passengers the inconvenience of changing buses where "Greyhound" and Grey Coach services interconnect. Because of these arrangements, the Complainant was in contact with "Greyhound" drivers and on some occasions drove "Greyhound" buses. This appears to have had some influence on the Complainant's decision to seek employment as a "Greyhound" driver.

The Complainant's application took the normal course of
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- 6 applications for employment as a bus driver with the Respondents. When he first contacted the Toronto office late in 1979, he was advised that hiring was carried out only once a year and that, if he left his name, address and telephone number, he would be contacted during the next hiring phase. The Complainant provided this information. He was contacted by the Toronto office in February of 1980 and invited to an interview with Tony Lind, district manager.

During the interview the Complainant was advised respecting the Respondents' requirements and the nature of the job and was asked questions relating to his qualifications. He was asked to undergo a medical examination at his expense conducted by a doctor designated by the Respondents, to provide a photograph and an Ontario Ministry of Transportation report of his driving record, and to complete an application form. Lind filled in an interviewer's form on the basis of the interview. Lind's secretary, Wanda Borg, later completed a typed version of the interviewer's form on the basis of Borg's handwritten version. The Complainant had the medical examination and completed the required documentation in late March, 1980. This documentation and the typed version of the interviewer's form were then sent to the head offices in Calgary.

There was one significant difference between the interview form completed by hand by Lind and the typed form sent to the head office. Lind

noted in hand-writing that the Complainant was "two years too old", while no
such notation was made on the typed form. The only

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- 7 relevant
elements for purposes of this complaint in the other documentation were that his birth date was shown to be 1942 and, although the medical report indicated that he was qualified for employment, the detailed portion
of the medical form indicated that his vision was 20/200 in both eyes uncorrected and was corrected to 20/30 right eye and 20/20 left eye.

Subsequently the Toronto office was advised by the head office that the Complainant was not acceptable for employment because of his age and
vision. This was communicated to the Complainant by Borg by telephone.

Based in part on his conversation with Borg and in part on inquiries of the doctor who conducted the medical exam, the Complainant concluded that his vision was not a serious problem in relation to his

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application. He subsequently filed the complaint which gave rise to these
proceedings alleging violations of sections 7 and 10 of the Canadian Human
Rights Act involving discrimination based on age.

THE RESPONDENTS' POLICIES

It was undisputed that the Respondents have a policy of refusing to hire persons over the age of 35 as bus drivers. This policy has been followed without relevant exception for several decades by "Greyhound" operations in both Canada and the United States.

The Respondents' witnesses also claimed that they had a policy
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- 8 of
not hiring anyone with uncorrected vision of less than 20/60. The existence of this policy is less clear. The documents which are distributed
to the Respondents' district offices concerning driver qualifications and to
doctors examining driver applicants have generally stated minimum vision
requirements in terms which suggest that the requirements can be met by either corrected or uncorrected vision. The Respondents' files with respect
to other drivers hired at the time that the Complainant was rejected indicate
that these drivers were hired with, so far the Respondents' were aware, uncorrected vision equivalent to the Complainant's corrected vision. Thus,
if corrected and uncorrected vision are indeed alternatives under the Respondents' policy, there is some question as to the credibility of

vision
as a reason for rejection. On the other hand, the Respondents' witnesses did
state that the policy was an unwritten one and produced one document as confirmation of testimony that they had at one stage put this policy in writing.

While the evidence does raise considerable doubt as to whether the Respondents' consistently apply an absolute minimum requirement with respect
to the uncorrected vision of driver applicants, there is substantial evidence
that such a standard was applied in fact to the Complainant's,application.
Vision is recorded as one of the reasons for rejection of the Complainant on
the Respondents, master list of driver applicants. Lind testified that he
was advised that this was one of the reasons when he was notified that the
Complainant was unacceptable. Borg noted this as a reason on a memo of her
telephone call to advise the Complainant of the decision. The Complainant
admitted to having been

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- 9 told
that vision was one of the reasons for his rejection.
While the consistency of the Respondents' policy with respect to vision would affect the order, if any, that might be made against the Respondents,
it is not important in so far as the merits of the case are concerned. Clearly age was at least as important a factor as vision in the decision not
to hire the Complainant. It is now settled that it is sufficient to constitute a violation of the Canadian Human Rights Act if a discriminatory
practice is one proximate cause of the treatment of the Complainant, even if
other factors are involved as well: Carson et al. v. Air Canada (1983), 5
C.H.R.R. D/1857 (Review Tribunal), at D/1864. It cannot be seriously dispusted that consideration based on age was a proximate cause of the

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decision not to hire the Complainant. If such consideration was in violation
of the Canadian Human Rights Act, the violation is not lessened by the circumstance that other factors also influenced the decision.

Conversely, while discrimination on the basis of physical handicap is also a violation of the Act, no complaint was filed with respect to any
such violation. As a result, the fact that vision requirements also played

a role in the decision does not assist in supporting the complaint any more
than it serves to undermine it.

THE LAW WITH RESPECT TO AGE DISCRIMINATION
The law with respect to age discrimination has been extensively reviewed in the recent decisions in Carson et al. v. Air

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- 10 Canada
by the Human Rights Tribunal (1982), 3 C.H.R.R. D/818 and the Review Tribunal (1983), 5 C.H.R.R. D/1857. It seems most useful if, for the most
part, I merely summarize the principles here.

The statutory provisions relevant to the merits of this complaint are sections 3(1), 7, 10 and 14(a) of the Canadian Human Rights Act. They
provide as follows:

3.(1) For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

7. It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual, or
(b) in the course of employment, to differentiate adversely in relation to an employee,
on a prohibited ground of discrimination.

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

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

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The Complainant bears the initial burden of proof on the balance of probabilities that a discriminatory practice under sections 7 and/or 10 occurred; Carson et al. v. Air Canada (1983), 5 C.H.R.R.D/1857 (Review Tribunal), at D/1863. A differential in treatment based directly on a prohibited ground of discrimination constitutes a discriminatory practice: Re
C.N.R. and Canadian Human Rights Commission (1983), 147 D.L.R. (3d) 312 (Fed.
C.A.), at 315, 333; Carson et al. v. Air Canada, at D/1864. Similarly, treatment affecting persons differently in terms of a prohibited ground of
discrimination as a indirect result of a differential based on some other
non-prohibited ground, but with the intention to discriminate on a prohibited
ground, constitutes a discriminatory practice: Re C.N.R. and Canadian Human
Rights Commission, at 315, 333. Whether treatment affecting persons differently in terms of a prohibited ground of discrimination as an indirect
result of a differential based on a non-prohibited ground, but without intent
to discriminate on a prohibited ground, is a discriminatory practice is an
issue pending in the Supreme Court of Canada on appeal from the Federal Court
of Appeal decision in Re C.N.R. and Canadian Human Rights Commission, at
312n. The Court of Appeal held that this latter situation did not constitute
a discriminatory practice.

Age is one of the prohibited grounds of discrimination for the purposes of the Act: s.3(1). It has already been noted that, if more than one
reason exists for a differential in treatment, a violation of the statute
occurs if one of the proximate causes of the differential in treatment is a
discriminatory practice: Carson et al. v. Air Canada, at D/1864.

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Notwithstanding that a Respondent may have engaged in a discriminatory practice in accordance with the above principles, the Respondent may be able justify it under one or more of a variety of statutory exceptions to what the Act otherwise defines as discriminatory
practices. Several of the exceptions apply to age discrimination, but the only existing exception relevant to the facts of this case is that of
section 14(a). This permits differential treatment in relation to employment on any ground if it is based on a bona fide occupational requirement. The onus lies on the employer to prove on the balance of probabilities that it is acting on such a basis: Act, s.14(a), Carson et

al. v. Air Canada (1982), 3 C.H.R.R. D/818, at D/828-9; (1983), 5 C.H.R.R. D/1857 (Review Tribunal), at D/1858. Interpreting similar language in Ontario legislation, McIntyre, J. of the Supreme Court of Canada, in Ontario Human Rights Commission et al. v. Borough of Etobicoke
(1982), 132 D.L.R. (3d) 14, at 19-20, has defined a "bona fide" occupational qualification and requirement" as follows:

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

Referring to cases, like the one before me, where the employer claims an
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- 13 occupational
requirement is based on safety concerns, McIntyre, J. goes on to say, at 20-21:

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

This language has been accepted as a appropriate test of what constitutes
a bona fide occupational requirement under the Canadian Human Rights Act: Re C.N.R. and Canadian Human Rights Commission (1983), 147 D.L.R. (3d) 312 (Fed. C.A.), at 318-9; Carson et al. v. Air Canada (1983), 5 C.H.R.R. D/1857 (Review Tribunal), at D/1874.

Consequently, there are two aspects to a bona fide occupational requirement, and the employer must satisfy both. The first aspect is subjective. The employer must act in a genuine belief that the requirement
is job-related and not merely claim this as a cover for an intent to defeat
human rights objectives. The second aspect is objective. The requirement

must appear job related and reasonably necessary in the judgment of the Tribunal.

One issue that does need discussion is the relevance of American jurisprudence as to what constitutes a bona fide occupational requirement.
Both Tribunals in Carson et al. v. Air Canada (1982), 3

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H.R.R. D/818, at D/829-32; (1983), 5 C.H.R.R. D/1857 (Review Tribunal), at
D/1871-4, which involved age of hire for airline pilots, as well as the Tribunal in the other major Canadian case involving age of hire for bus drivers, Canadian Human Rights Commission v. Voyageur Colonial Ltd. (1980),
1 C.H.R.R. D/239, at D/244, have reviewed American jurisprudence under similar legislation. The American position as it has developed through that
jurisprudence was recently summed up in Orzel v. City of Wauwatosa Fire Department, 697 F. 2d 743 (7th Cir., 1983); cert. denied, 104 S. Ct. 484
(1983). In order to establish an age-related bona fide occupational qualification, the employer is required to show first that the qualification
is reasonably necessary to the essence of its business. The employer must
secondly show a factual basis for believing either that all or substantially
all persons in the excluded group would be unable to perform safely and efficiently or that some persons in the excluded group are unable to perform
and it is impossible or impractical to identify such persons on an individual
basis. The second part of the American test was developed in cases decided
after the decision in the case dealing with the age of hire policy of Greyhound Lines, Inc.: Hodgson v. Greyhound Lines, Inc., 499 F. 2d 859 (7th
Cir., 1974); cert. denied, 95 S. Ct. 805 (1975). Some of these subsequent

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cases were decided before and some after the decision in Canadian Human Rights Commission v. Voyageur Colonial Ltd., but only Hodgson v. Greyhound
Lines, Inc. was considered by that Tribunal. The Tribunal followed the approach of the American court. The more developed American test was influential on both Tribunals in Carson et al. v. Air Canada, 3 C.H.R.R.
D/818, at D/847; 5 C.H.R.R. D/1857 (Review Tribunal), at D/1873.

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On the other hand, the Federal Court of Appeal in Re C.N.R. and Canadian Human Rights Commission (1983), 147 D.L.R.. (3d) 312, at 320,

340-1,
has expressed caution about reading into the Canadian Human Rights Act elaborating principles drawn from American jurisprudence on similar legislation. Moreover, McIntyre, J., in Ontario Human Rights Commission et
al. v. Borough of Etobicoke (1982), 132 O.L.R. (3d) 14 (S.C.C.), at 22, warns
against attempting to lay down any fixed rule as to the nature and sufficiency of evidence required to establish a bona fide occupational requirement. While McIntyre, J. was referring to the question of whether
statistical and medical evidence are required, his comments might also be
appropriately applied to the American attempt to define in fairly specific
terms what an employer must show.

In light of these judicial comments, I think it is significant that the Review Tribunal in Carson et al. v. Air Canada, while viewing the American test as similar to that of the Supreme Court of Canada, did not
pursue the American type of analysis, in contrast to the initial Tribunal
which did. Instead the Review Tribunal's analysis is couched more strictly
in terms of the test as set out by McIntyre, J. in Ontario Human Rights Commission et al. v. Borough of Etobicoke. This is in line with the admonitions of the Federal Court of Appeal in Re C.N.R. and Canadian Human
Rights Commission, at 320, that McIntyre, J.'s language is the correct framework to follow under the Canadian Human Rights Act.

I conclude that the American approach ought not to be adopted in Canada as an interpretive elaboration of what constitutes a bona fide

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- 16 occupational
requirement. The proper use of the American jurisprudence is as an illustration of ways in which such a qualification might be shown. For
example, if it can be shown that all or substantially all persons in a particular age range cannot perform a particular job, then exclusion of that
age range from employment in that job might be a bona fide occupational requirement. This would be because such a showing could satisfy a Tribunal
that such an exclusion is "reasonably necessary to assure the efficient and
economical performance of the job", to use the words of McIntyre, J. This
does not mean that in different circumstances a similar showing would necessarily succeed. It might be that, even though substantially all persons
in a particular age range cannot perform, there is some simple and inexpensive way of determining those few who can perform so that it is not

reasonably necessary to exclude everyone in the age group. Conversely, there
may be other ways of establishing reasonable necessity under the Canadian
Human Rights Act in addition to those accepted in the American cases.

The proper approach is for the Tribunal to exercise its judgment on the basis of all the evidence before it in the particular case as to whether

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the test as elaborated upon by McIntyre, J. has been satisfied. Other cases,
including American cases, may provide useful illustrations of the reasoning
process by which this judgment is exercised, but they cannot create new rules
of law to be added to those in the statute.

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- 17 THE
VALIDITY OF THE RESPONDENTS' POLICY
There was no dispute before the Tribunal that the Respondents have a policy of refusing to hire any person over the age of 35 as a bus driver.
This constituted a prima facie violation of section 10 of the Canadian Human
Rights Act in that the Respondents' as employers have established and pursued
a policy which deprives persons of employment opportunities on the ground of
age.

It is also clear that this policy was an effective part of the reasons why the Complainant's application for employment was rejected. In
other words, it was a proximate cause of the rejection. This constituted a
prima facie violation of section 7 of the Act in that the Respondents' refused to employ the Complainant on the ground of age.

The real issue of the case, therefore, is whether the age of hire policy is a bona fide occupational requirement in relation to the employment
of bus drivers by the Respondents. The rationale for this policy as set out
by counsel for the Respondents is as follows.

The business of the Respondents depends in large part upon offering service on demand to the travelling public. Since this demand is highly unpredictable, the Respondents must have a pool of drivers who are available
on call to meet demand as it arises. This is done through what is called the
spare board. Drivers who work on the spare board are subject to great

uncertainty as to their working hours and their free time, to the possibility
of extended absences from home as they are

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- 18 dispatched
from one point to another to meet the demand for service, to the impact of such uncertainty on their family and social life, to constantly
changing and unfamiliar routings as their assignments vary from day to day,
itemizing just some of the unpleasant conditions which such drivers experience. Such conditions subject spare board drivers to exceptionally
high levels of stress and at the same time tend to disrupt support systems,
such as family and friends, which help individuals to cope with stress. Moreover, this type of work imposes an irregular life style on the individual
which is injurious to health in ways which further decrease the ability to
cope with stress, such as by creating fatigue. Any failure to cope with stress in turn can manifest itself in diminution of the care and attention
which is required to ensure safe operation of a bus.

Most of the Respondents' scheduled service is operated by drivers on a regular run basis. The work schedule of a regular run driver contrasts
sharply with that of a spare board driver. The work schedule is fixed for a
period of three or four months. Within that period the driver operates the
same route at the same time from day to day with regular days off. Thus,
regular run drivers are not subject to many of the conditions which are

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particularly stressful upon spare board drivers.
Work assignments to a regular run or to the spare board are determined through a seniority-based bidding system. Regular run assignments
are individual, that is, a driver bids a particular route and

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- 19 schedule,
while spare board assignments are operated as a pool so that once assigned to the spare board a driver is on the same footing as every other
driver on the spare board. The only role played by seniority within the spare board is that a regular run may become available for a temporary period
due to the absence of a regular run driver and, in that event, spare board
drivers may use their seniority to bid for temporary assignment to the regular run.

Generally regular run assignments are preferred to spare board assignments with the result that the spare board is normally made up of the least senior drivers. New drivers can expect to spend the first 10 to 15 years of their employment on the spare board. More senior drivers may occasionally bid for the spare board, because of the possibility of higher earnings during peak demand periods, in particular during the summer. Drivers are paid on a mileage basis and it is possible during peak demand periods to get assignments involving more mileage on the spare board than on a regular run. When this occurs, however, the ability of the driver to return to regular run driving after the next bid may substantially mitigate the adverse effects of working on the spare board. The last part of the Respondents' rationale is that, for both psychological and physiological reasons, ability to cope with stress declines with age. Largely because of the psychological aspect, it is not possible to determine on an individual basis those persons who may fail to cope with stress. Consequently, in order to avoid the safety

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- 20 risk created by a failure to cope, the Respondents' age of hire policy is designed to ensure that drivers will no longer be subject to continuing assignment to the spare board by the time they reach an age when they will be unable to cope with the exceptional stress involved in being a spare board driver.

While this age is not specified, in view of the maximum hiring age of 35 and the evidence that new drivers may be compelled to serve on the spare board for 10 to 15 years, it is apparent that the critical age under the Respondents' policy must be in the 45 to 50 age range. I attach no significance to the lack of a more specific designation of the critical age.
Any bona fide occupational rquirement involving age must of necessity have a certain arbitrariness. If the Respondents' rationale is sufficient to support their age of hire policy as a bona fide occupational requirement, and if the evidence provides a factual basis for this rationale, it follows that the seniority system renders necessary a time span between the age of hire and the critical age to which the Respondents' safety concerns relate. In

operational terms it is the age of hire which must be fixed with a certain
arbitrariness. There is no necessity to fix the critical age, which again
would involve a certain arbitrariness, since that age has no operational
significance.

It is significant that the Respondents do not contend that age is
critical in terms of ability to cope with stress in the age 35 range itself.
If they had done so, their case would have been doomed to failure. Their
present age of hire policy clearly contemplates the

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- 21 possibility
of new drivers serving on the spare board until about age 50. If
there is a significant safety risk on account of inability to cope with
stress beginning about age 35, one could only conclude that the risk was
acceptable to the Respondents. No evidence was led that would indicate why,
if such a risk were acceptable, the risk of having older drivers who are
similarly unable to cope would be unacceptable. Such an inconsistency
between the rationale underlying a requirement and the way in which the
requirement works in practice would destroy the credibility of any claim that
the requirement is reasonably necessary. The Respondents' rationale, on the
other hand, is consistent with the practical operation of its age of hire
requirement.

Counsel for the Complainant and the Commission submitted that the
Respondents had failed to satisfy both the subjective and the objective
branches of the legal standard for a bona fide occupational requirement as
set out by McIntyre, J., in Ontario Human Rights Commission et al. v.
Etobicoke (1982), 132 D.L.R. (3d) 14 (S.C.C.), at 19-20. With respect to the
subjective branch, the employer must show a genuine belief that the
requirement is imposed in the interests of the adequate performance of the
job, and not for the purpose of defeating the objectives of the Canadian
Human Rights Act. Counsel did not contend that the Respondents had any
intent to defeat the objectives of the Act, but did contend that they had
failed to show they had any genuine belief that the requirement was related
to the adequate performance of the job. This contention was based on the fact

that the Respondents had never carried out any study, scientific or otherwise, to assess the practical

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- 22 validity
of their age of hire policy. The Respondents had simply accepted the directive of Greyhound Lines, Inc., and in particular had never examined the policy in light of the adoption in Canada of the Canadian Human Rights Act. Moreover, there was little evidence that the practical validity of the policy had ever been studied by Greyhound Lines, Inc. There was testimony that some sort of study had been made when the policy was challenged under the similar American legislation, but James Renforth, Senior Director Safety and Insurance, of Greyhound Lines, Inc. testified that he had been unable to find any copy of that study in his company's files. Renforth was not involved in senior management when any such study was done and thus was not in a position to provide any information as to the nature of that study.

In my view, it was entirely appropriate for the Complainant and the Commission to raise this issue. It is often the case, as it was here, that the origins of particular job requirement are lost in history. When such origins predate the existence of human rights legislation, which was also the case here, there is a strong possibility that the original reason for the policy was purely and simply an intent to discriminate in terms of today's law. Such a objective would have been perfectly lawful at the time, and it

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was the prevalence of such objectives which led to the enactment of human rights legislation. When an employer having a policy which is prima facie contrary to such legislation has no clear recollection of the origins of its policy and can not demonstrate that it has ever conducted any serious study of the practical validity of its policy, it is certainly open to question

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- 23 whether
the employer has a sincere belief in the practical validity of its policy. If the origin of the policy was in fact a subjective intent to

discriminate, it may even be questionable whether, where the employer is a corporation, it can now claim that it is innocent of such intent merely because no one can remember why the policy was originated. Given the burden of proof on the employer with respect to a bona fide occupational requirement, at the very least it seems fair in such a situation to say that the employer cannot show a genuine belief in practical validity of its policy.

The Respondents cited their admirable safety record as proof of the validity of the policy. However, since they have never hired drivers over 35, logically this says nothing about whether safety is jeopardized by hiring drivers over 35. Of course, since a question of the safety of human life is involved, there is good reason for reluctance to require that the practical validity of such a requirement be studied by scientific experimentation. At the same time, it would seem at least some attempt could be made to design a study for examining the factors involved without such experimentation. Perhaps this is what the study conducted by Greyhound lines, Inc. involved, but without more information about that study it is not possible to give any weight to it in these proceedings.

Were it not for another important fact in this case, therefore, I might be inclined to accept the submission that the Respondents failed on the burden of proof with respect to the subjective

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- 24 aspect of the bona fide occupational requirement test. This important fact is that the identical policy of Greyhound Lines, Inc. was held to be a bona fide occupational requirement under substantially similar United States legislation in Hodgson v. Greyhound Lines, Inc., 499 F. 2d 859 (7th Cir., 1974); cert. denied, 95 S. Ct. 805 (1975). In view of the similarity of the underlying policies, as well as the actual legislative language, between the American law and the law embodied in the Canadian Human Rights Act, I think it was sufficient to satisfy the subjective branch of the bona fide occupational requirement for the Respondents to rely on this decision as the basis for a belief in the legitimacy of their age of hire policy in Canada.
It is clear that this decision was so relied upon since Greyhound

Lines, Inc.
made a point of notifying the Respondents of the decision and the Respondents' management witnesses cited the decision in support of their
belief in the policy.

This brings me to the question of whether the Respondents' age of hire policy also satisfies the objective branch of the bona fide occupational
requirement standard. This involves two sub-issues in the circumstances of
this case. First, does the evidence support the Respondents' rationale for
this policy on a factual basis? Secondly, does the rationale, if factually

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supported, lead to the legal conclusion that the requirement "is reasonably
necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public"?

The first question which arises concerning the factual basis
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- 25 for
the Respondents' age of hire policy is the very basic question of whether
the rationale set out by the Respondents' counsel is in fact the rationale
for the policy. Normally this question would be answered by the determination that the subjective branch of the bona fide occupational requirement test was met. However, in the circumstances of this case, the
question also arises, albeit in a different sense, in relation to the objective branch of the test. This is because the witnesses for the Respondents were less than clear in their understanding of the rationale.
This was probably a result of their reliance on the American court decision
as supporting the policy. This decision was in fact rendered before any of
the Respondents' witnesses became concerned about the legality of the age of
hire policy. In the case of the Respondents' management people, the American
decision was rendered before the passage of the Canadian Human Rights Act,
and therefore before there was anything unlawful about the policy in Canada.
In the case of Renforth, the witness from Greyhound Lines, Inc., he only
entered a senior management position after the decision and, because of a
turnover in management which occurred at that time, apparently had little

contact with persons who would have been knowledgeable concerning the policy
prior to the decision. The rationale was never clearly stated until the submissions of counsel for the Respondents in argument.

While the rationale was never stated in such clear terms by the Respondents' witnesses, I do find that the evidence of the witnesses is consistent with this rationale. While counsel cannot add to the evidentiary
record in the course of argument, they are of course entitled

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- 26 to
make submissions as to inferences to be drawn from the record. The only significant point on which the submission of counsel went beyond the record
was in stating that the critical age was not 35, but rather some later age by
which all drivers should be off the spare board. While the proceedings tended to focus on the age 35 as being critical, I conclude that this was
more of an assumption based on the fact that this was the cut-off age under
the hiring policy than it was an inference to be drawn from the testimony of
the Respondents' witnesses. The witnesses tended instead to simply talk of
concern over older drivers on the spare board.

The only management witness who identified 35 as a critical age in the ability to cope with the stresses of the spare board was Tyson, and he
did so only in response to cross-examination which was directed more to his
personal opinion, than company policy. Moreover, he based his opinion on the
decision in Hodgson v. Greyhound Lines, Inc., rather than on any rationale
formulated by the Respondents. While similarly unable to clarify the origins
of the age policy with Greyhound Lines, Inc., Renforth testified to concern
over the long term period of service on the spare board which might extend
into the 50's if drivers were hired over 35. This testimony is supportive of

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the interpretation of the Respondents' rationale offered in the submissions
of their counsel. On the balance of probabilities, I am prepared to accept
that the correct inference to be drawn is that the Respondents' concern did
relate to drivers nearing and past 50 who might find themselves on the

spare
board in the absence of the age 35 hiring cut-off.

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- 27 -
Since declining physical well-being is the concern that tends to
come to mind when the relationship between age and ability to perform a
job
is raised, it is appropriate to deal with this at the outset in
considering
the factual underpinnings of the Respondents' rationale for its age of
hire
policy. Capacity to perform in the purely physical sense is not really
involved in this rationale. If it were, it would be inconsistent with
the
fact that the Respondents continue to employ drivers well beyond the
upper
end of the age range to which its hiring policy relates. There is no
evidence that bus drivers already employed are likely to be any more
physically fit than new drivers who might be hired at any given age.
Indeed
the evidence is to the contrary that employment as a bus driver tends
to be
detrimental to the state of physical well-being which is most
desireable in
a bus driver. While the nature of demands placed on spare board drivers
might call for a somewhat higher level of physical fitness than that
demanded
of regular run drivers, there is really no evidence of age-related
physical
impairment which would make it unsafe for an older driver to operate on
the
spare board, without similarly affecting the capacity of such driver to
operate a regular run, at least in so far as concerns the purely
physical
aspects of impairment. Moreover, I am satisfied on the evidence that
the
purely physical aspects of impairment can be detected adequately for
the
purposes of the Respondents in the case of persons within the age range
in
question here. While there may be increased risk that an undetected
physical
condition will suddenly affect the ability of older drivers to operate
safely, again there is no reason to believe that the risk will be
greater at
any given age for drivers who might be hired after age 35 than

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those who were hired at an earlier age.
In actuality, physical impairment is relevant to the Respondents'
rationale, not directly, but indirectly in the sense that age-related
physical impairment contributes to the inability of older drivers to
cope
with the stresses of the spare board. In this sense, it is appropriate

to
deal with the issue as a part of the stress issue as a whole.

The first factual element actually involved in the Respondents' rationale is the claim that the spare board does involve extraordinary stresses that regular runs do not. None of the witnesses really disputed this. Some of the expert witnesses called by counsel for the Complainant and the Commission did suggest that the effect of such stresses would not necessarily be adverse and might be mitigated by other factors. On the whole, however, their evidence supports the conclusion that the effects are likely to be adverse and aggravated, rather than mitigated, by other factors in the circumstances of a spare board driver, unless the Respondents significantly alter their existing practices. I will return later to the question of whether the possibility of alternative practices being adopted by the Respondents affects their claim that the age of hire policy is a bona

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fide occupational requirement. Within the framework of their existing practices, I am satisfied that spare board drivers are subjected to exceptionally high levels of stress that regular run drivers do not face. I am also satisfied that any failure to cope with this stress could manifest itself

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- 29 in
a lack of care and attention and thus interfere with a driver's ability to operate safely.

The next important question is whether age in the range involved in the Respondents' rationale is relevant to the driver's ability to cope with such stress. Since the rationale involves ensuring that drivers hired up to age 35 will have the 10 to 15 years seniority needed to be sure of a regular run under the seniority system before the impact of age on their ability to cope with stress is significant, the relevant age range is 45 to 50.

The Respondents called two expert witnesses who testified on the relationship of age and ability to cope with stress. The first was Dr. Frank Musten, a clinical psychologist who specializes in treating persons suffering the effects of stress. He also acts as a consultant to government and

industry on the problems of career stress. The average age of his patients
is in the mid to late 30's. I should note that Dr. Musten is not a medical
doctor.

The principal points made by Dr. Musten relevant to the
relationship between age and ability to cope with stress were that the
ability to cope does decline with age and that it is not possible to reliably
predict ability to cope on an individual basis. He testified concerning
research which indicates the psychological development of individuals
progresses through a series of stages. It was found that at about the age of
35 to 40 a stage is reached where individuals feel a

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- 30 biological
urge to put down roots or, in other words, to have established for
themselves a relatively settled life style. Dr. Musten testified that his
own clinical practice tended to confirm this research. Based on a review of
the work schedules of various drivers, he testified that spare board drivers
would be subject to stress in the 35 to 40 age range because the lifestyle
demanded by their job would not be compatible with their stage of
psychological development and that the impact of stress at this stage would
be significantly greater than in their earlier years.

Dr. Musten's evidence is not helpful with respect to the age range
of 45 to 50 since he did not testify as to any stages beyond 35 to 40, apart
from stating in general terms that, the later individuals are in life, the
more distressed they are if they do not seem to be achieving their goals. If
anything, however, his evidence would suggest that the critical age range in
the relationship between age and declining ability to cope with the stresses
of the spare board is the 35 to 40 age range. To this extent, his evidence
undermines the rationale of the Respondents since the present age of hire
policy readily accepts the employment of drivers on the spare board for
several years after this age range. I will return later to the question of
whether ability to cope with stress can be predicted on an individual basis.

The Respondents' other expert witness was Dr. Harold Brandaleone.
Dr. Brandaleone has had extensive experience as a medical consultant to

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bus industry and was the only witness with this type of experience. Since
1970 he has not been actively involved with the bus

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- 31 industry,
but he has been called as an expert witness during this period in some of the major United States court cases concerning whether an age of hire
restriction is a bona fide occupational qualification for bus drivers.

Much of Dr. Brandaleone's evidence related to potential physical impairments of persons over the age of 35. On the question of age and ability to cope with stress, he testified that the ability to cope does decline with age, although he did not specify an age range when this decline
is significant. He did testify that persons over 35 should not start working
on the spare board, but he did not elaborate as to why this age was significant for this purpose. As a result, while Dr. Brandaleone's evidence
is consistent with the position that the critical age in terms of ability to
cope with stress is actually sometime after the age of 35, his evidence does
not provide any concrete support for the position that 45 to 50 is a critical
age range. Dr. Brandaleone also testified that it was not possible to predict ability to cope with stress which I will deal with later.

With respect to the effect of age-related physical impairments on the ability ,to cope with stress, the evidence of Dr. Brandaleone was rather
unspecific. Logically, if a given individual does not suffer such impairments, there would be no reason to expect any impact upon that individual's ability to cope with stress as a consequence of such impairments. In light of the evidence of the possibility of detecting relevant physical impairment, therefore, I do not think the possibility

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- 32 of
physical impairment operating indirectly by its impact on the ability to
cope with stress really adds anything to Respondents' contention that the
ability to cope with stress is directly related to age. In any event, in so
far as Dr. Brandaleone's evidence goes, it would suggest that, if this does
create a risk factor, it becomes significant at age 35. His evidence fails
to indicate that any later age range in particular is significant such as
would justify the objective of removing persons from the spare board at

such
later age.

Counsel for the Complainant and the Commission called three expert witnesses with a wealth of expertise in questions of aging and stress. They
were Dr. Stanley J. Freeman, Dr. Carl Eisdorfer, and Dr. Stanley Mohler. All
three are medical doctors and Drs. Freeman and Eisdorfer are specialists in

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impairment or loss of ability to cope with stress in any significant way, at
least for persons in the 35 to 40 age range. They also testified that, while
there was no highly reliable way to predict individual ability to cope with
stress, there were a number of test

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- 33 mechanisms
available that allowed one to assess whether an individual was being unduly stressed. Age on the other hand was not seen as predictive at
all of one’s ability to cope with stress.

I think the weight of this evidence, while reduced, is not greatly affected by the fact that these three witnesses have litle or no experience
with the bus industry. The fact that all three have a background in research
adds weight to their testimony, and I am persuaded as to the tranferability
of their observations respecting the human being between occupations.

Subject to one piece of evidence by Dr. Eisdorfer which I will return to shortly, the evidence of these three witnesses does not support the
rationale of the Respondents. The concentration of attention on the 35 to 40
age range, to which they were directed by counsel, creates the same problem
as the testimony of Drs. Musten and Brandaleone that it does not relate to
the relevant age range when the Respondents’ policy is designed to get drivers off the spare board. However, there is also testimony from these
witnesses that age in a broader sense is not relevant to ability to cope with
the spare board. In any event, the lack of evidence from these witnesses as
to any reason for special concern about persons beginning in the 45 to 50 age
range does not assist the Respondents in view of the burden of proof on

them
to establish that the age of hire policy is a bona fide occupational requirement.

During cross-examination, Dr. Eisdorfer was asked whether age
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- 34 curves
existed based on various physical impairments and age. He admitted that such curves existed, although they constitute only statistical averages
for the population. He was then asked if a similar curve existed for stress.
His response indicated that he did not find the term "stress" meaningful in
this context. He was then asked if he could distinguish a 40 year old and a
45 year old in terms of physiological changes. He initially interpreted this
as a rephrasing of the question concerning stress and reiterated his difficulty in finding that term meaningful. When the question was repeated
with the clarification that it referred to all the various physiological
changes being discussed, Dr. Eisdorfer said he saw no distinction between
persons up to age 50, but "It begins to be a little stranger at about age 50
and beyond." In the context, this might be interpreted as indicating that,
taking stress in a broad sense, there is at least statistical significance in
the incidence of stress-related problems beginning around age 50. However,
I am satisfied that Dr. Eisdorfer was directing his mind back to the range of
changes in the human body about which he had just been examined. Since he
did not find stress to be meaningful in terms of age-related curves, the
reference to age 50 must relate primarily to the areas of physical impairment
about which Dr. Eisdorfer had been testifying moments earlier. For reasons
already given, age-related physical impairment does not support the Respondents' age of hire policy. Therefore, this evidence does not assist

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their case. In any event, even if Dr. Eisdorfer was encompassing stress in
his statement that distinctions become "a little stronger" about age 50, it
does not necessarily follow that these distinctions are relevant to the capacity

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- 35 of
a person to work as a spare board driver. In the absence of further exploration of what Dr. Eisdorfer meant, this single statement does not persuade me that there is a significant relationship between age 50 and ability to cope with the spare board.

While their opinions differed as to the usefulness of such tests as now exist for predicting a person's ability to cope with stress, all of the expert witnesses agreed that the reliability of such tests is open to question. This factor would help to support the use of age criteria as a bona fide occupational requirement if it were shown that there was some significant relationship between age and ability to cope with stress. The evidence before me, however, does not convincingly show any such relationship, and certainly does not show that there is any significant relationship involving the relevant age range when the Respondents' age of hire policy is designed to get drivers off the spare board. Even Dr. Brandaleone's evidence, which is quite specific that physical impairment starts to appear after age 35, becomes unspecific on the point at which age actually affects ability to cope with stress. I do not mean to suggest that it would be necessary to identify a specifically significant age to support an age-related bona fide occupational requirement. What Dr. Brandaleone's evidence in relation to this point demonstrates is simply that medical science appears most uncertain on the relationship between age and ability to cope with stress.

Since the evidence does not show any significant relationship between age and ability to cope with stress in the relevant 45 to 50 age

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- 36 range,
it is unnecessary for me to decide how substantial such a relationship must be in order to say that it is reasonably necessary to the safe and efficient performance of the job for applicants to be screened on the basis of age. Using the standard of the practical work-a-day world, as required by the decision of McIntyre, J. in Ontario Human Rights Commission et al. v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14 (S.C.C), at 16, I am by no means certain that any minimal risk is sufficient, even where there is no reliable means of testing persons individually. The question becomes even

more difficult if age and individual testing may each be somewhat predictive
of ability, but both may also be equally unreliable. I have noted evidence
that individual ability to cope with stress cannot be predicted or that, if
it can be individually tested, the reliability of the tests is open to
question. There is also evidence that the effects of aging vary greatly from
individual to individual so that, even if there is a relationship between
aging and ability to cope with stress, the age of particular individuals
would not necessarily indicate their ability to cope with stress. Although
it is not necessary for me to decide the question here, the policy of the
Canadian Human Rights Act against the use of criteria like age suggests that,
to be a bona fide occupational requirement, such criteria should at the very
least have a greater proven reliability then individual testing.

In summary, I find that the Respondents' rationale for its age of
hire policy for bus drivers is not supported on a factual basis since the
evidence does not show a significant relationship between age and

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- 37 lack
of ability to cope with stress beginning during the age range of 45 to
50 when the Respondents' policy is designed to get drivers off the spare
board. Since the evidence does not establish any other rationale on which
this age of hire policy can be maintained, the finding is fatal to the
Respondents' claim that this policy constitutes a bona fide occupational
requirement. It fails to satisfy the objective branch of the legal standard
for such requirements. Since the underlying rationale is not factually
supported, viewed objectively the age requirement is not reasonably necessary
to the safe and efficient performance of the position of bus driver for the
Respondents', including the position of spare board driver.

While this is sufficient to decide the merits of this case, I
recognize that this decision will not necessarily mark the end of the matter.
Along with the possibility of an appeal from this decision, there is the
possibility that in the future the Respondents may develop some evidence
which would factually support an age of hire policy, whether it

involves an
age 35 cut-off or some other age. In light of this, I think it appropriate
to deal briefly with the issue that would arise if the Respondents' claim of
a bona fide occupational requirement had been factually supported.

This issue is whether the Respondents' rationale, if factually
supported, would lead to the legal conclusion that their age of hire policy
is a bona fide occupational requirement. I am inclined to the view that it
would. Some evidence was led to suggest that the

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- 38 Respondents
could operate the spare board differently so as to reduce the
stresses involved. The possibility also arises that, since the nature of the
work of regular run drivers and of spare board drivers is so different, these
two positions could be separated so that the age of hire policy need not be
applied to regular run drivers. However, I am satisfied that the Respondents
are justified in operating as they do at present even if this compelled them
to discriminate on the basis of age in the hiring of bus drivers. Much of
their spare board operation is in a competitive market, as indeed is their
entire business if one takes into account alternative modes of public
transportation. I have no doubt that the flexibility of operation that the
spare board makes possible is highly valuable to the Respondents in terms of
maintaining their competitive position. Seniority and job bidding are widely
recognized as fair and reasonable ways to distribute available work among
employees. The evidence also indicates that the prospect of eventually
gaining a regular run is a major incentive to drivers to continue in their
employment with the Respondents during the unpleasant conditions of
employment on the spare board. This leads me to the conclusion that it is
reasonably necessary, in a practical work-a-day world sense, for the
Respondents to operate as they do.

If persons over a particular age could not safely operate on the
spare board, it follows that the Respondents would have to do something to

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ensure that persons over that age did not find themselves on the spare
board.

While they might, subject to gaining agreement with the union representing
the drivers, adopt a direct rule removing drivers from

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- 39 the
spare board, this would significantly disrupt the seniority system. It would mean that either drivers over that age unable to bid a regular run
would have to be laid off or they would have to be given priority in the
bidding for regular runs. These options are contrary to the basic concepts
of fairness, acquired job rights and job security underlying seniority systems. Thus, a policy to ensure that drivers are in a position to bid off
the spare board in the normal operation of the system is a reasonably necessary way of providing that drivers of a particular age will not be employed on the spare board. In line with the operation of the seniority
system, this would necessitate a cut-off in hiring at an earlier age, with
the difference between the maximum hiring age and the critical age for service on the spare board being equal to the likely length of service on the
spare board. This is the rationale advanced for the Respondents' present
policy. Thus, if it had been supported by facts as to the relationship between age and ability to serve on the spare board, this rationale would
have legally justified the Respondents' age of hire policy as a bona fide
occupational requirement.

I would, however, add one qualification to this. While there is no evidence before me with respect to the Respondents' retirement policy for bus
drivers, it is possible that they have a policy which includes mandatory
retirement at or about a certain age. It is also possible that, if any significant relation between age and ability to cope with the spare board
does exist, the relevant age range may coincide with the age range for mandatory retirement. If this should be the case, and if the provision for
mandatory retirement is itself a bona fide

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- 40 occupational
requirement, the Respondents' rationale would not support an earlier maximum age of hire as a bona fide occupational requirement because
mandatory retirement would be sufficient to ensure that drivers over the
critical age did not operate on the spare board. The evidence does not indicate that any particular period of service on the spare board is

necessary to ensure that the Respondents have a supply of qualified regular run drivers. Consequently, the possibility that some drivers might never achieve enough seniority to get off the spare board prior to retirement would not appear to be a problem, as long as drivers over the critical age, in any, would not be operating on the spare board.

Since I have found that the Respondents' age of hire policy does not constitute a bona fide occupational requirement, it follows that the complaint is substantiated. There was a discriminatory practice contrary to section 7(a) of the Canadian Human Rights Act in that Eastern Canadian Greyhound Lines Ltd. refused to employ the Complainant because of his age. There was also a discriminatory practice contrary to section 10(a) in that the Respondents have pursued a policy of refusing to hire persons over 35 as bus drivers which deprives individuals of employment opportunities because of their age. This leaves the question of remedy to be dealt with.

REMEDY

In respect of the Respondents' general policy to refuse to hire persons over the age of 35 as bus drivers, I do not think it is necessary to make any order beyond declaring that this policy is contrary

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the Canadian Human Rights Act. I do note that the reaction of the Respondents when the similar policy of Voyageur Colonial Ltd. was under question in Canadian Human Rights Commission v. Voyageur Colonial Ltd. (1980), 1 C.H.R.R. D/239, was to remove reference to the maximum age of hire from their written hiring policies, but to continue the policy in effect as an unwritten policy. This may raise some question as to whether the Respondents can be relied upon to actually change the policy in the absence of a more substantial order. However, I am of the view that the Respondents' action at that time was more in the nature of a cautious wait-and-see approach with respect to the outcome of that case, than it was a deliberate attempt to evade the law. If that case had reached a different final result, I think it likely that the Respondents would have abandoned their maximum age of hire policy. Consequently, I do not think it necessary to make any more

substantial an order with respect to the elimination of this discriminatory
practice for the future.

The Respondents' policy is such a simple and straightforward violation of the Act that it is not really a case for the imposition of any
sort of special program under section 41(2)(a) of the Act. Moreover, I would
hesitate to make such an order without including at least some guidelines to
be followed in any plan that would be drawn up. No submissions were made to
me on behalf of the Complainant or the Commission with respect to such an
order, except in the most general terms. I think it inappropriate for me to
make such an order without more specific submissions, particularly since the
lack of such submissions makes it difficult for the Respondents to respond on
the

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- 42 question
of remedy. Since I am not making any order under section 41(2)(a), it is unnecessary for me to deal further with the question of whether Greyhound Lines of Canada Ltd. can be held jointly liable with Eastern Canadian Greyhound Lines Ltd. with respect to the section 10 violation on the
complaint of a person who was, from the Respondents' perspective, an applicant for employment only with Eastern Canadian Greyhound Lines Ltd.

With respect to the refusal to employ the Complainant, the Complainant is entitled to be put in the position he would have been in but
for the application to him of the Respondents' age of hire policy. As counsel for the Respondents correctly noted, this does not mean that he is
entitled to an offer of employment, but only to an opportunity to enter the
training program for new drivers. On the other hand, it is my understanding
that those admitted to this program can reasonably expect to be hired if they
successfully complete the program.

Another factor which enters the picture is the question of the Complainant's vision. Since vision was also a factor in the decision to refuse the Complainant's application, and since no question as to the legal

validity of the vision requirements was raised by this complaint, I am compelled to rule that the offer of a position in the driver training program
is subject to the Complainant meeting the normal and uniformly applied vision
requirements of the Respondents for bus drivers, such as those requirements
may be. If he is rejected on this ground, he may of course initiate a new
complaint on that basis if he believes it

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- 43 unlawful.
I should add that this order is conditioned as well that the Complainant is also otherwise still qualified and eligible for employment as
a bus driver with the Respondents.

As indicated in my initial discussion with respect to the parties to this proceeding, Eastern Canadian Greyhound Lines Ltd. was the party responsible for refusing to actually hire the Complainant. The offer, therefore, is to involve the next opening that Eastern Canadian Greyhound
Lines Ltd. has for a bus driver. Since the evidence indicates that Eastern
Canadian Greyhound Lines Ltd. have not been hiring on an annual basis in
recent years, I do think that the Complainant is entitled to some reasonable
notice as to when this opening will be occurring. In all of the circumstances, I think 6 months is an appropriate notice.

Before I leave this aspect of the order, I would observe that, considering the intervening length of time and intervening developments, and
particularly the fact that the Complainant has now moved to the western United States and may therefore experience many obstacles to taking advantage
of such an offer from Eastern Canadian Greyhound Lines Ltd., this is a case
in which an award of compensation for the lost opportunity of employment
might be preferable to an actual offer of employment as a remedy. However,
the Canadian Human Rights Act does not seem to contemplate this sort of compensatory remedy. Section 41(2)(c) allows for compensation for lost wages, but that is not really the same thing as compensating the person in
lieu of offering them the actual rights or opportunities that were denied.
Section 41(3) does allow for

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- 44 compensation
in a more general sense, but only if the Respondent was acting wilfully or recklessly or if the Complainant suffered in respect of

feelings
or self-respect. This implies that such compensation should relate to the
wilfulness or recklessness of the Respondent in the one case or the injury to
the feelings or self-respect of the Complainant in the other case. Since the
Complainant did testify that he still wished to pursue employment as a bus
driver with the Respondents, I have decided to award this remedy, without
deciding the question of whether I have jurisdiction to award compensation as
an alternative.

The evidence does not support any award of compensation for lost
wages to the Complainant. He was employed full-time by the Toronto Transit
Commission when his application to the Respondents was rejected. While he
testified to some prospect of earning more money with "Greyhound", the
likelihood of being laid-off for long periods during the first several years
of employment as a bus driver by the Respondents would indicate that this was
a long term prospect only. The Complainant was subsequently unemployed for
periods of time, but this was a result of his voluntary decision to quit the

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Toronto Transit Commission and of a set back in the alternative arrangement
he had made for employment at that time. While the rejection of his
application by the Respondents may have been a factor in his decision to quit
the Toronto Transit Commission, he clearly was not compelled to quit by the
rejection. Consequently, the Respondents cannot be held responsible for any
loss of income that the Complainant suffered.

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With respect to compensation under section 41(3) of the Act, I am
satisfied that the Complainant suffered in respect of feelings and
self-respect as a result of the rejection of his application by the
Respondents. On the other hand, the evidence also indicates that his
emotional well-being was being affected at the same time by marital
difficulties. It is hard to separate the impact of this from the effect of
the rejection by the Respondents. This, of course, only compounds the
problem of trying to place a value on injured feelings and self-respect. In
the final analyis, I am persuaded that an award toward the bottom end of the

range contemplated by section 41(3) is appropriate in this case, but that the amount should nonetheless be of some size. I would award $1500.

I would note that, if Greyhound Lines of Canada Ltd. can be held jointly liable in law with Eastern Canadian Greyhound Lines Ltd. for the latter's refusal to hire the Complainant, it would be proper to make the compensation portion of the order jointly against both Respondents. On the other hand, I am confident that an order against Eastern Canadian Greyhound Lines Ltd. alone will be sufficient to ensure that the Complainant is in fact compensated. In the absence of further submissions on the law with respect to joint liability under the Act, I am of the view that this issue is not ripe for decision in this case. Since I see no practical necessity to decide this issue, I decline to do so and accordingly only Eastern Canadian Greyhound Lines Ltd., which is clearly liable, is named in the compensation portion of the order as well.

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ORDER
IT IS DECLARED that the policy of the Respondents not to hire any person over the age of 35 as a bus driver is a discriminatory practice contrary to section 10 of the Canadian Human Rights Act;

IT IS ORDERED that the Respondent Eastern Canadian Greyhound Lines Ltd. offer the Respondent Frank McCreary the next available position in its driver training program with the same opportunity for employment if he successfully completes the program as is enjoyed by other persons with comparable success, subject to the Complainant meeting the normal and uniformly applied qualifications for employment as such a bus driver, including vision requirements, and IT IS FURTHER ORDERED that the said Respondent give the said Complainant at least six months notice prior to the date when he is expected to commence training;

IT IS ORDERED that the Respondent Eastern Canadian Greyhound Lines Ltd. pay the Complainant Frank McCreary the sum of $1500.00 as compensation in respect of injury to his feelings and self-respect.

DATED this 16th day of October, 1984.
Robert W. Kerr