

TRANSLATION FROM FRENCH

CANADA

TD 10/ 84

Decision rendered on August 22, 1984

DECISION OF THE TRIBUNAL UNDER THE CANADIAN HUMAN RIGHTS ACT

ACTION TRAVAIL DES FEMMES, Complainant;

V CANADIAN NATIONAL, Respondent; AND

CANADIAN HUMAN RIGHTS COMMISSION, Intervenent.

Dates: December 7- 9, 1981; February 15- 17, May 17- 20, June 7- 9, June 21- 23, July 12- 14, September 20- 21 and November 15- 16, 1982; and January 17- 18, February 7- 9 and May 2- 6, 1983.

Place: Montreal

Before: Denis Lemieux, Nicole Duval Hesler, Joan Wallace

Appearances: Hélène Lebel, Counsel for Complainant; Carole Wallace for Complainant; Rolland Boudreau and Alphonse Giard, Counsel for Respondent;

Yvon Tarte, Counsel for Intervenent.

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ORDER 169

The Tribunal was appointed in July 1981, pursuant to section 39 of the Canadian Human Rights Act, to inquire into the complaint filed by the complainant, ACTION TRAVAIL DES FEMMES, against the respondent, CANADIAN NATIONAL. This complaint was worded as follows:

"A. T. F. has reasonable grounds to believe that CN in the St. Lawrence Region has established or pursued a policy or practice that deprives or tends to deprive a class of individuals of employment opportunities because they are female."

Although the complaint was signed by Carole L Wallace, President of Action Travail des Femmes, this is not a matter of one complaint or of a series of individual complaints, but rather of a complaint of systemic discrimination.

Even before the proceeding began, CN made a motion to the Tribunal to have the hearing of the case adjourned sine die, alleging that negotiations were under way with the Canadian Human Rights Commission to settle the complaint. This motion was supported by counsel for the Commission. The Tribunal decided to reject this motion, since the complainant, Action Travail des Femmes, did not agree with it, and since a long period of time, during which investigation and conciliation procedures had taken place, had elapsed between the filing of the complaint, on November 6, 1979, and the appointment of the Tribunal in July 1981. On the first day of the hearing, December 7, 1981, this motion for adjournment was repeated and the Tribunal upheld its previous decision.

We believe it would be useful to explain the long delays that have occurred during this case, in which the parties produced more than fifty witnesses and filed more than 130 exhibits, some of which were documents several hundred pages long.

The hearing extended from December 1981 to May 1983 because of problems of availability of several witnesses, some of whom were abroad, as well as of counsel and members of the Tribunal.

The Tribunal wishes to note the excellent co-operation received throughout this proceeding from counsel for Canadian National, Action Travail des Femmes and the Canadian Human Rights Commission.

This decision will be divided into six parts, including the final order:

I Canadian National and the employment of women

II The relations between Canadian National and Action Travail des Femmes

III Statistics on the representation of women in CN

IV The legality of CN's hiring practices

V Affirmative action programs in general VI Order concerning the establishment of an affirmative action program at CN and other conclusions

I CANADIAN NATIONAL AND THE EMPLOYMENT OF WOMEN

Summary of complaints against CN regarding discrimination based on sex

The first witness heard, Claude Bernier, appeared in her capacity as Director of the Complaints and Compliance Branch of the Canadian Human Rights Commission (Tribunal Transcript, p 15). She provided information on the number of complaints of discriminatory hiring practices based on sex that had been filed against CN in the St Lawrence Region since the establishment of the Canadian Human Rights Commission in March 1978.

According to Mrs Bernier: (Translation) In our Montreal office, which is in the Quebec Region, which roughly corresponds to Canadian National's St Lawrence Region, we received eighteen complaints of discrimination involving the refusal to hire in what are called non- traditional positions. The eighteenth complaint was that of Action Travail des Femmes, which is before this Tribunal.

Seventeen individual complaints have been filed. Mrs Bernier also testified regarding complaints that had been settled:

(Translation) Of these complaints, a number have been settled... Twelve complaints were settled after investigation; one complaint was dismissed under section 33 because it referred to an act which had occurred more than a year before the complaint was filed; and five complaints are currently under investigation...

The complaint settlements have included the hiring of the complainants as apprentices, provided they met the training conditions, and monetary compensation for wages lost from the time they were refused employment to the time they began work.

Two complaints are currently under investigation. In these the allegation is slightly different in that the complainants refer to the hiring test administered by the company; however, on the whole, the other complaints deal with women's applications for coach cleaner jobs and CN's refusal to hire them. (TT, pp 26- 27.)

Mrs Bernier stated that the last two complaints involved CN's use of two mechanical aptitude tests - the Bennett and the Revised Minnesota in its hiring process (TT, p 28).

She also testified regarding CN's hiring criteria, which gave rise to these complaints:

(Translation) In the cases that I reviewed, persons hired to do coach cleaner work must have knowledge so as to be able to progress to other positions as trainmen/ yardmen. That means they

must have either experience in or knowledge of a trade. For example, I recall a complaint where the applicant did not qualify because she had no knowledge of welding. (TT, p 29)

Mrs Bernier testified that the Commission had also received a complaint dated April 24, 1981, alleging that CN used discriminatory hiring criteria based on sex for blue-collar positions:

"The complainant alleges that in hiring people at the labouring and trade levels and for the apprenticeship program, CN demands higher qualifications for women than for men." (TT p. 32).

She testified that five complaints that CN used discriminatory hiring practices based on sex were currently under investigation in the St Lawrence Region (TT, p 33).

Canadian National One of the first witnesses called by CN was Mr Yvon Masse, Vice-President of CN's St Lawrence Region. Mr Masse outlined CN's operations, explaining the function of CN Rail, its three main departments, the role of its organizational structure and the division of management responsibilities (TT, p 2181- 2184).

Mr Masse described CN's role as follows: (Translation) In general, the function of CN in the country, if we refer to its charter, is to provide the Canadian public and Canadian industries with an integrated transportation service run on a commercially managed basis. (TT, p 2182.)

Mr Masse then went on to describe the structure of CN Rail:

(Translation) ... speaking of CN as a whole, from the organizational standpoint, there is a corporate level which oversees three major operating divisions.

There is CN Rail, which had a budget of \$3.545 billion in 1982, and 53,500 employees and, in terms of CN's primary mission, which I mentioned earlier, it is still CN's main division of activities.

Then there is CN Enterprises - which includes trucking, real estate, express, transportation and oil exploration - and CN Hotels, which has 12,197 employees and whose budgeted revenues in 1982 were roughly \$847 million. The third major division is the Grand Trunk Corporation, which is a holding company responsible for managing CN's American rail subsidiaries, including the Central Vermont Railway, the DTI and Harrington Railway in the Detroit area, Grand Trunk Western, which links Detroit and Chicago, and DWP, which links Duluth and Winnipeg, with \$485 million and 6,500 employees. (TT, pp 2183- 2184)

Mr Masse further stated that CN Rail had approximately 75,000 employees (TT, p 2184). He then described the St Lawrence Region:

(Translation) The St Lawrence Region currently has 8,700 employees who are active in marketing. It had \$430 million in revenues in 1982. Its operating services, which were dealt with at some length during the hearings, comprise transportation, engineering, rolling stock and intermodal services, with a budget of \$342 million.

The St Lawrence Region's territory comprises the province of Quebec - excluding the Gaspé Peninsula east of Mont- Joli - as well as the city of Ottawa and two branch lines that run two hundred miles northwest of Ottawa.

There are 5,000 kilometres of track in the province. There are three main marshalling yards, including one of the largest in Canada, the Taschereau marshalling yard, on Montreal Island. We also have one at Senneterre and one at Joffre, as well as five secondary switching yards.

We serve approximately 8,000 railway customers and almost all the major industrial parks in Quebec.

On average, the St Lawrence Region invests \$36 million in Quebec. The whole of CN's services in Quebec, including Headquarters, has about 16,765 employees, with a payroll of \$347 million. (TT, pp 2185- 2187 and Exhibit R- 33)

Mr Masse provided the following breakdown of CN's employees in Quebec: (Translation) We often speak of the number of CN employees in Quebec. The organization chart that was filed earlier mentions 16,000 employees (Exhibit R- 34).

As of September 31, 1981, there were 3,583 employees at the Pointe St- Charles general workshops; as of March 2, 1982, there were 2,750 such employees.

CN Express, which is a profit centre, has 797 employees in Quebec. CN Real Estate has 88 employees in Quebec. The St Lawrence Region has 8,297 employees. So that gives you the information on the various services: 2,800 in transportation, 2,724 in rolling stock, 1,898 in engineering, 401 in intermodal, 143 in marketing and 331 positions of an administrative nature.

When that document was prepared, we had 840 persons likely to be called back from layoffs. So in March 1982 there were 840 persons likely to be called back. (TT, pp 2192- 2193.)

Mr Masse then described the structure and operations of the St Lawrence Region Employment Office:

(Translation) To my knowledge, since I joined CN in 1961, the Employment Office has always been directly under Headquarters.

The company's national headquarters is in Montreal, as is the headquarters of the St Lawrence Region. I believe there is a single employment office in Montreal for reasons of administrative efficiency - an economy of scale.

In the past few years, the company has undertaken a reorganization of its activities. Previously, everything was housed in the CNR building. Profit centres were organized and, more recently, the second stage of this restructuring has been aimed at decentralizing as many corporate services as possible within the division, so that, starting in June of this year, the Employment Office will come under the St Lawrence Region.

... We will continue to have a single employment office. The St Lawrence Region will be responsible for hiring for Headquarters and for such places as the Pointe St- Charles general workshops, which come under the authority of Headquarters. (TT, pp 2189- 2190.)

Mr Masse also described the operation of CN's locomotive repair workshops:

(Translation) In the area of major repairs for locomotives and car equipment, CN has three main workshops: one - the TRANSCONA workshop - in Winnipeg, one - Pointe St- Charles - in Montreal, and one in Moncton.

These workshops are responsible for repairing rolling stock that may be used System- wide. I think it was in about 1965 or 1966, when the St Lawrence Region was responsible for budget planning or otherwise, for supervision of the main workshops, that it was decided that, because of this national responsibility for the programs, this should come under Headquarters, which had a better understanding of System- wide needs in that respect.

Now I should add that, within the perimeter of what are called the Pointe St- Charles workshops, there is the diesel- electric workshop and the coach yard, which comes directly under the St Lawrence Region, since it is responsible for maintenance of Voyageur cars and electric locomotives - commuter trains, for example - which are operated Region- wide. Those are routine repairs. (TT, pp 2191- 2192)

Mr Masse then testified regarding the Boyle- Kirkman report (Exhibit A- 2), which is entitled "Canadian National Action Programs - Women":

(Translation) This report was produced seven or eight years ago and, as I recall, it was commissioned by CN's President, Robert Bandeen, who wanted to have an assessment of the situation of female manpower at CN. The report showed that there were very few women - they accounted for about 4 per cent of CN employees - and it made management aware of attitudes. (TT, p 2195)

The summary of the Boyle/ Kirkman report outlined the reasons for this study and the methods used by the authors. It also identified the problems that were discovered in the study and recommended solutions to the problems pointed out in three specific areas:

"1. Lack of Definitive Executive Management Commitment Top management's interest on the issue of women has not been communicated effectively nor have direct actions demonstrated their concern. The majority of managers are understandably perplexed regarding the current and future role of women within CN. CN managers across the system await a definitive policy statement with specific action programs. Executive management must commit themselves to begin to encourage their subordinates to change the environment to one which truly provides equal opportunity. They must convince both men and women that a special emphasis program is needed to utilize the talents of CN women. These actions must begin now in order to assure CN of a new, qualified management resource in the future.

2. Traditional beliefs by managers and women in the many negative myths and stereotypes about working women

Our interviews revealed a disturbing degree of negative behavior. For example, the majority of women seeking employment are channeled into secretarial positions, whereas, men are guided toward clerical positions which most often lead to promotions to higher level clerical jobs and/or middle management positions. In job bidding situations, women are frequently strongly discouraged from bidding on traditional men's job. Until the negative environment that these attitudes create is improved, equal opportunity for women will never occur.

3. Current personnel policies and procedures These policies are limited and ineffective as they relate to the majority of women at CN." (Exhibit A- 2, pp. 1- 2)

The report also contained, the highlights of a Statistical analysis on the number and types of jobs held by female employees at CN:

"Women workers comprise 1/ 3 of the total labor force in Canada (2,356,000). They hold 14.3% of Managerial positions, 41.2% of professional and technical positions and 72% of all clerical jobs nationwide. These indicate of occupational segregation result in part from the social mores and the traditional inherent physical nature of the work. As these influences diminish, however, few people can justify the exclusion of women from any area of the workforce.

In contrast to national employment statistics, women constitute only 4% of the total CN workforce and less than 1/ 2 of 1% of the Senior Management jobs which indicates a drastic underutilization of the women resource. A brief profile of the 3312 CN women highlights a low turnover rate and amazing longevity record despite the fact that the majority of them are clustered in the lowest level, lowest paying positions.

1. 31% of the schedule and 44% of the non- schedule women have 11 or more years of service.

2. 36% of the women hold non- schedule jobs and 41.5% of them earn over \$10,000 per year; only 2.5% earn over \$15,000 per year.

3. 64% of the women hold schedule positions but only 9.5% of them earn over \$10,000 per year.

4. Women represented 9% of the terminations in 1973 and 5% in the first 7 months of 1974.

... All statistics were provided by the Personnel and Labour Relations Department and are as of July 25, 1974." (Exhibit A- 2, p. 4)

The attitude of CN's male staff toward women was also described in this report: "One of the major reasons why women are not in positions of major responsibility within CN today is due to the unconscious, as well as the conscious, beliefs of male- dominated management in the many myths and stereotypes that exist about women as a group.

During our Environment Study, we kept notes on direct statements made by men and women indicating their attitudes on women in business. Representative statements are on the following pages.

We wish to emphasize that the majority of the statements included represent thoughts which were expressed by more than one CN employee.

These statements represent perceptions which, in some cases, statistics and direct experience do not bear out. They are no less important, however, valid or not, as they still affect behavior and, thus, represent real problems that any effective program must address." (Exhibit A- 2, p. 16)

Some examples of comments, arranged in categories by the authors of the Boyle/ Kirkman report, are reproduced below:

"1. WOMEN - STEREOTYPES 1. "Women are generally disruptive to the workforce." 2. "Women aren't tough enough to handle supervisory jobs. They

fail miserably under pressure. 10. "The best jobs for women are coach cleaners - That's second nature to them." (Exhibit A- 2, p. 18)

2. WOMEN - MORALLY DISRUPTIVE AND PHYSICALLY INCAPABLE 1. "One big problem adding women to train crews would be policing

the morals in the cabooses." 6. "Work in the yards is too physically demanding. The weather is too harsh." 8. "Women cannot do the physical aspects of a CN conductor's job.

There's too much handling of drunks, transients and undesirables." (Exhibit A- 2, p. 19).

3. WOMEN - CAREER MINDED 1. "Women have no drive, no ambition, no initiative." 3. "A woman can't combine a career and family responsibilities." 10. "The 'old boy network' for promotions is very strong at CN.

This naturally inhibits women's advancement." (Exhibit A- 2, p. 20)

4. WOMEN - UNWANTED 1. "My department is all male - they don't want a woman snooping around." 5. "Railroading is a man's sport - there's no room for women." 7. "Unless I'm forced, I won't take a woman." (Exhibit A- 2, p. 21).

Some favourable comments on women were also included in the study: "MEN'S COMMENTS - FAVOURABLE TOWARD EQUAL OPPORTUNITY 1. "Women are a vast, untapped resource we have overlooked until now." 3. "Women are the same as men - as long as they do the job, they should get hired, developed and promoted." 12. "We are guilty of unconscious discrimination against women by never identifying and developing their talents." (Exhibit A- 2, p. 23)

The comments of female employees showed that they were very aware of the negative attitude of their male superiors:

"WOMEN'S COMMENTS 2. "We always hear - 'You're taking a job from a man'." 14. "We're at the mercy of the individual supervisor. If he's against women, we're sunk." 17. "When my Supervisor heard that he had to take two women, you should have heard the uproar he made in front of us." The Boyle/ Kirkman report also suggested some policies that could be adopted to improve the situation of women at CN:

"The majority of CN managers have established their priorities in the order in which they feel their performance will ultimately be measured, i. e. a reflection of their interpretation of top management's concerns. Allotting time and energy from their busy schedules to manage their people properly and to provide special attention to eliminate discrimination against women have not been viewed as integral components of their jobs and, therefore, do not receive the necessary attention.

The Executive management of CN is committed to equal opportunity for all people. The commitment alone, however, is not sufficient to accomplish significant results in the area of women.

Our interviews at all levels of management reveal that the majority of managers with rare exceptions are not motivated to change their traditional behavior. Many of them see no need because they do not perceive the women as "disadvantaged". But more important, CN managers are unaware of executive management's interest and concern on the women's issue.

Clearly, top management must recognize that the motivation to change must be created through executive directive.

... Specifically, CN executive management needs to:

1. Get involved in demonstrating their commitment and in measuring their managers on progress against pre- set goals.
2. Require that each major department define their own specific problems; develop detailed programs for solving them; and set concrete targets for line managers to achieve." (Exhibit A- 2, p. 35)

The Boyle/ Kirkman report stated that: "Three action steps must be implemented in order to convince CN managers that executive management is seriously backing equal opportunity for women. Specifically, CN executive management must:

- a. Communicate their intent to utilize women more effectively. ... b. Demonstrate their personal commitment. ... c. Make good people management with special attention toward women a factor in performance appraisal for managers." (Exhibit A- 2, p. 36)

The Boyle/ Kirkman report stressed the importance of setting goals and targets:

"Setting specific (name and number) targets is essential, as without these goals, day- to- day priorities will take precedence over the more intangible employee development efforts. Good faith, persuasion and the "morality and justice ethic" are simply not powerful enough incentives to motivate managers to create and engender an environment of change reflecting better utilization of women workers. The majority of managers are familiar with numerical objectives and measurement, so applying these standards to the women's program will merely be a variation on the normal business theme. Considering the system as it now operates, it is always more expedient to put a man in a job. There has to be such serious commitment from executive management that managers get the message that to continue the current status quo would be unwise.

Based on CN's tradition of development and promotion from within, long- range targets are imperative. Women must get into the pipeline and gain the experience they need to qualify for the more responsible positions.

Short- range goals are also necessary in order to demonstrate management commitment, establish credibility and provide role models for both managers and women. Traditional attitudes will break down only when people have exposure to women performing capably in responsible positions and when they can appreciate good decisions and gain respect for someone's ability regardless of sex." (Exhibit A- 2, pp. 37- 38)

The Boyle/ Kirkman report strongly recommended that awareness programs be established for CN's managers and female employees:

"An overwhelming majority of the managers we interviewed during the Environment Study freely expressed strong negative feelings toward women in CN. Their opinions were often generalizations based on one experience with an individual woman or on hearsay derived from peer discussions. Their perceptions of potential problems associated with a full utilization of women were largely a result of assumptions with no factual basis whatsoever. This had had to play a significant role in the current status of women within CN and unless addressed, will act as an overwhelming obstacle in the future.

Consequently, a Management Awareness Program needs to be developed and implemented which addresses general awareness of attitudes and behaviors toward women and focuses on techniques for understanding, managing and motivating women more effectively." (Exhibit A- 2, pp. 40- 41)

The report justified its recommendation as follows:

"Many people believe that all women need in business is equal opportunity, which has, for the most part, been denied to them and they will learn to deal successfully in the business environment. The solution is not that simple. It is not enough to filter women into management training programs, place them on important committees and promote them to higher management positions. Full acceptance of women as peers or supervisors requires relearning by both sexes to dispel previously learned male- female role expectations.

Because of our traditional cultural conditioning, most women are not prepared to compete for responsible positions. They lack self- confidence; they see a conflict between the executive and the feminine roles; they have a deflated self- image; or lacking female role models, they fear being first." (Exhibit A- 2, p. 42)

The Boyle/ Kirkman report also recommended that CN immediately undertake a complete review of its administrative structure (Exhibit A- 2, p 60).

The report stated that such a review of all jobs at CN would be beneficial for the following purposes:

"Internal Equity There are a number of professional growth situations in which an employee can progress from an entry- level position up through several levels to a Senior or Supervisory position. Updated job descriptions and standardized job specifications resulting from the job review establish and document quantifiable measurements to differentiate between the levels of a growth- type job. The establishment and documentation of these measurements eliminates the dependence upon the manager to serve as sole judge as to an employee's readiness for elevation to the next level. Currently, standards are often applied more liberally to male employees and more strictly to female employees.

(Exhibit A- 2, p. 60)

Standardized Job Specifications ... During the Environment Study interviews, we ascertained that one set of job specifications are normally quoted as minimal for adequate job performance. Often, recently hired or transferred male candidates do not possess these basic qualifications, yet the managers state that they "have potential and fairly good track records". Women candidates are rarely given this type of consideration for an opportunity to utilize their on- the- job experience or to take advantage of the job training available in most departments for non- management exempt positions." (Exhibit A- 2, p. 61)

The Boyle/ Kirkman report also made recommendations regarding the recruitment of women:

"CN needs to adopt a well- planned, aggressive program for the recruitment of women.

The following are some suggested actions which could be included in the recruitment program:

A. Establish numeric objectives by level for the recruitment of women.

B. Train all the personnel recruiters about how to interview women effectively.

C. Develop new avenues for locating women: (1) Advertise in women's periodicals (2) Work with women's search agencies (3) Specify women candidates wanted from all search agencies (4) Encourage women referrals from employees (5) Identify an individual within Personnel who could provide immediate follow- up on resumes and other leads regarding potential women candidates. Be prepared to act fast." (Exhibit A- 2, p. 69)

The Boyle/ Kirkman report concluded by stating that:

"A comprehensive total emphasis program is necessary. A fragmented approach produces minimal - often negative - results. ... Managers know the reward system. They will go through the motions but won't take "risks" and accomplish any real results unless they know their superiors are sincerely interested and involved and that they themselves are being measured against established goals and objectives."

Mr Masse testified that CN had adopted the recommendations of the Boyle/ Kirkman report regarding awareness seminars:

(Translation) As a result of that study, as far as I can recall, in 1975, 1976 and 1977 we started giving seminars that were conducted by Boyle/ Kirkman, the company itself. After that our people were trained to give the same seminars to our executives. The main message I got out of that seminar was that the Canadian population is made up of two pools - men and women - and that each pool has its statistical profile of talents. There are people who are at the top of the scale in talents, people with average talents and others with weaker talents, and as long as CN continued to have access to only one pool, given its large number of employees, it would have to draw on people with less talent than others might have for tradesmen and executives.

Thus the overall message was that CN was not helping itself by continuing that practice. (TT, pp 2195- 2196.)

Mr Masse also stated that the then President of CN, Robert A Bandeen, sent a letter dated January 23, 1975, to all CN vice- presidents and department heads asking that action be taken to rectify the situation revealed by the Boyle/ Kirkman report:

"Each one of us must act to overcome these deficiencies within our jurisdiction. We must set goals in respect of recruitment, both into traditionally male- oriented job categories and in respect of promoting female employees into supervisory and management positions. There is much that can be done as well to increase the scope of the contribution of female employees in secretarial or administrative work, which will improve administrative support while furthering their development.

A meeting has been called by Mr. Cameron with Employee Relations representatives for early February, to improve personnel systems and procedures in support of the actions which will be undertaken by you towards your goals. Mr. Cameron will also arrange for "awareness" seminars for both managers and female employees to help overcome the problem of unconscious bias among managers and misconceptions on both sides among managers and female employees about the capabilities of the latter. He will be in touch with you about arrangements for these seminars.

Women constitute a rather meagre 4% of our workforce and there is no doubt that goals must be set and actions taken towards achieving a substantial increase in this proportion. A report of progress will be tabled for the Vice- Presidents' meeting planned for April 30 - May 1." (TT pp. 2196- 2198, pièce R- 35, pp. 1- 2)

A speech by Dr Bandeen, referred to in The Canadian Business Review, summer 1975 issue, described the efforts made by CN in the first part of 1975:

"We have initiated a series of awareness sessions for our managers at System Headquarters during which traditional prejudices against women are analyzed through case histories and role-playing. As soon as a major portion of our managers - including women managers - have attended these, we will be launching awareness sessions for female employees at all levels. At these sessions the women will also examine the fallacies behind prejudices and stereotypes so that they will be better prepared to play their full role in the company.

We have appointed a full-time coordinator of female resource development to ensure that the subject is given the attention it deserves in the company. Among other steps being taken to destroy typical stereotype roles has been a policy by our employee newspapers to feature pictures of women in CN performing jobs normally thought of as being for men only. We have female lawyers, freight sales people, truck drivers and track workers in the company, but few people know they exist.

The process of changing the percentage of women in management and non-management ranks in CN to something closer to that of the general workforce will be a slow one. There is general agreement that a crash program would result only in "tokenism". The promotion of women to jobs for which they were not qualified would only defeat the long term objectives of ensuring that women are given the same opportunities for promotion on the base of merit that men enjoy." (Exhibit A- 13, p. 10)

Allan Deegan, vice-president of CN central services at the corporate level, also testified. Mr Deegan was assistant vice-president of personnel from 1977 to 1979 and vice-president of personnel from 1979 to 1981 (TT, pp 2481- 2483).

Mr Deegan provided details on the awareness seminars given to CN managers. He indicated that the intent and seriousness of CN's executive management regarding a given question "gets translated into the most important and serious thing an executive can do, and that is to allocate resources within a corporation." He stated that CN had allocated about one and a half million dollars* (including the participants' time) for awareness seminars (TT, p 2533) and that about 250 managers from the St Lawrence Region had taken part in the seminars over a two-year period (TT, p 2492).

Mr Deegan went on to explain that unionized employees did not take part in the awareness seminars because:

"... with our unionized employees, any change to the existing contract has to be discussed, and, in effect, either agreed on mutually, or further negotiated with the union ... Certainly there was no great clamour from the representatives or our organized labour who wanted to have seminars put on their membership."

(TT, pp. 2561- 2562) He further testified that, in addition to awareness seminars, CN had already implemented many of the other recommendations of the Boyle/ Kirkman report, such as those

involving job review, job descriptions, standardized hiring requirements, equal pay, evaluation of systems and performance appraisals (TT, p 2496- 2500).

Mr Deegan indicated that, when the awareness seminars were completed, Heather Pratt, who had been in charge of these programs, returned to her former position at CN headquarters (TT, p 2510). Her responsibilities for female employees at CN were transferred to the regional vice-presidents and, in turn, to the regional personnel managers (TT, p 2511).

* Should this read "half a million dollars"? - Tr.

Mr Deegan explained that there was no specific budget allocated for problems involving female employment in the company, and that this activity had been integrated into the regular personnel resources (TT, p 2534).

He pointed out that CN was not in agreement with the Boyle/ Kirkman report's recommendation that "Setting specific name and number targets is essential ..." (TT, p 2250), because "so many of the factors are beyond our control and beyond our knowledge" (TT, p 2552). He explained that the number of female candidates for a job at CN, their qualifications and the number of jobs available at CN were all unknown factors (TT, pp 2552- 2553).

The witness also described the relationship that existed between CN's corporate and regional personnel units. He explained that the company was divided into divisions and that each division president reported directly to the chief executive officer of the corporation (TT, p 2486):

"I could cite the example, if I may, of Mr. Conrad Marcoux who is the regional manager of employee relations on our St. Lawrence Region charged with carrying out, on Mr. Masse's behalf, all the personnel related activities on that region.

The relationship of Mr. Marcoux as regional manager of employer relations to the vice- president of personnel is one of a cooperative relationship wherein the corporate personnel unit provides advice, support and coordination to the activities of Mr. Marcoux and his colleagues in the other different regions of the company.

So, it is not a direct line authority type of relationship, but rather a relationship of functional guidance of cooperative direction." (TT, p. 2487)

According to Mr Deegan, CN's policy was to have recruiting done by CN's own employment offices and that promotions were made from within. This meant that, except for entry- level positions, outside recruiting was rather inconsiderable (TT, p 2504).

II RELATIONS BETWEEN ACTION TRAVAIL DES FEMMES AND CN

Action Travail des Femmes

Christine Gordon, although now a resident of Vancouver, was one of the founders of Action Travail des Femmes (ATF). She testified that this organization began as an extension project

funded by Canada Manpower (now the Department of Employment and Immigration). The purpose of ATF was to promote the creation of jobs for women, whom Canada Manpower had found it very difficult to serve in the past (TT, p 2705).

Dominique Leclercq, a regular employee of ATF, explained that AIF's clientele included female family heads, women over forty and young women with no work experience (TT, p 96).

Carole Wallace stated that she had been associated with ATF since its foundation in 1976 (TT, p 364). At that time, she was a member of ATF's board of directors. In March 1978 she became a regular paid member of this movement (TT, p 274).

Mrs Wallace explained that about a month later, in April 1978, the links between ATF and Canada Manpower were cut because ATF had put pressure on Canada Manpower to have women admitted to certain training courses. ATF was then reorganized to operate as a pressure group (TT, pp 365- 366) and was incorporated in June 1978 (TT, p 275).

Miss Gordon pointed out that ATF was registered under two names " Action Travail des Femmes" and "Womanpower" - because it was intended to serve both the French- speaking and the English- speaking communities. (TT, p 2706).

Mrs Leclercq testified that ATF gradually changed its orientation and began to look for non-traditional jobs for women, that is, jobs in sectors where women were absent. She explained why ATF stressed so-called non-traditional jobs:

(Translation) So because of the present situation - although this has been happening for several years now - employment opportunities have been shrinking, especially in traditionally female jobs. However, increasingly women want jobs, steady jobs, well paid jobs, jobs that offer opportunities for advancement. So where are these jobs? In non-traditional trades, that is, in expanding sectors, in sectors where jobs are now being created - in other words, in jobs that up to now have traditionally been reserved for men. Thus a woman's only chance of finding a decent job at the present time is to go to those sectors. (TT, pp 92- 93.)

Mrs Leclercq explained that ATF had a budget of about \$50,000 per year to cover office expenses and the salaries of four permanent, part-time employees (TT, p 93).

Mrs Wallace described the duties of ATF's permanent employees as follows:

(Translation) The duties of a regular employee of ATF are quite varied, I can assure you. Mainly, they involve helping women who are looking for a job. They may be helped in all sorts of ways. ... It would involve receiving women who are looking for a job, listing their employment possibilities and supporting them in their efforts to find a job. Sometimes it could be ... because it should be understood that the organization has evolved over time. At the start, in 1977, we operated much more like a placement agency, not in the sense that we were a non-profit agency, but rather in the sense that we tried to make contacts with employers in order to place women. We no longer operate that way, but at the start it was much more a matter of approaching employers and then trying to refer women to specific employers. (TT, pp 275- 276)

Mrs Wallace indicated that ATF looked for job openings in various companies, including CN. She described a meeting organized by ATF, in which several large Montreal companies were involved:

(Translation) ... in January 1978, Action Travail des Femmes organized a round table discussion in which many large Montreal employers participated, including Bell Telephone, the MUCTC, big employers like that. The purpose of the round table was to make employers aware of the situation.

That day there was a representative from Canadian National, Colette Beauchamp, who participated and then spoke to the other employers about the women whom CN had recently hired as coach cleaners. So we also contacted other employers, certainly. (TT, p 277)

Mrs Leclercq testified that ATF's clientele was recruited through several community organizations, including social service agencies, newspapers and job counsellors (TT, pp 98- 99).

Relations between ATF and CN from 1977 to the summer of 1978 Yvon Masse, vice- president of CN's St Lawrence Region, briefly described CN's efforts to bring women into non- traditional jobs:

(Translation) ... historically speaking, if we are talking about the period before July 1978, when the policy was issued at the regional level, I had the opportunity several times to talk with my personnel director, Mr Marcoux, who informed me in a general way of the progress being made by the committee that was responsible for preparing that policy. It was at an enlarged management committee meeting which I had been asked to attend or to accept on the agenda that I was given a loose- leaf presentation that described the general measures that the St Lawrence Region was going to take to achieve the female hiring objectives, not only in non- traditional jobs but in other areas as well.

So it was a policy which I personally accepted right away because, in my opinion, it was in line with Dr Bandeen's letter, which we have just seen.

This also coincided with Bill C- 25 which went into effect, as far as I can recall, in March 1978. Three months later we came up with a program designed to increase the number of women in the St Lawrence Region... (TT, pp 2199- 2200)

This testimony was completed by that of Normand Toutant, who has been head of personnel for CN Rail's St Lawrence Region since December 1979. Before that, from April 1977 to December 1979, Mr Toutant was director of the employment service for the Montreal office (TT, pp 1501- 1502).

Mr Toutant stated that CN's policy on the hiring of women had been explained to him in a job interview in 1977:

(Translation) ... first of all, when I was interviewed for the job as director of the employment service, I was told that one of the priorities for the next director would be to immediately

emphasize the hiring of women for non- traditional jobs. This I hastened to do, and in May 1977 we began hiring women for non- traditional jobs in Montreal. (TT, pp 1509- 1510)

Mr Toutant described his initial contacts with ATF as follows: (Translation) The first experience goes back to about mid- October 1977, when I received a pamphlet in the mail from Jocelyne Chicoine, who was a sort of liaison officer with employers for the Department of Manpower and Immigration and for an organization that was then called Womanpower.

Around mid- October, Miss Chicoine, accompanied by Christine Gordon, came to see me at the employment office in order to explain to me the purpose of the organization, which, as I mentioned earlier, was funded by Canada Manpower. (TT, pp 1502- 1503.)

... During this meeting, they told me briefly what they planned to do and we agreed to arrange a meeting

It was in late October, so that we could give more thought to the possibilities of our working together. (TT, pp 1503- 1504)

... At the second meeting I explained to Misses Chicoine and Wallace what types of jobs CN had to fill each year, but it was not only non- traditional jobs - I mean those involving heavy physical demands. ... So at that time I presented the list of jobs to Misses Chicoine and Wallace.

Among other things, I told them about the entry- level positions that were most often available, such as freight handler in the express division, and truck driver, which is available fairly frequently, and labourer...

The labourer jobs were in CN Rail, in any division at CN. I also told them about brakeman jobs, and naturally coach cleaner jobs, as well as various apprenticeship courses, apprentice positions in various trades.

For each of these jobs that I have mentioned, naturally I gave them the prerequisites, as well as the hiring times, because hiring was not done on a continuous basis for any of the positions that I mentioned. At that time there were about ten to twelve openings per month in various positions. (TT, pp 1504- 1506)

Mr Toutant then described a seminar that CN held in Montreal on November 10 or 11, 1977, around the time of his first contacts with ATF, at which the employment of women in non- traditional jobs was discussed:

(Translation) ... we were supposed to meet some people who were coming to talk to us about putting much more emphasis on hiring women in non- traditional positions. ... Those people explained to us the importance that each of us should give this and the emphasis that each of our offices should put on substantially increasing the proportion of women in non- traditional jobs.

At the end of the seminar, around the middle of November 1977, each of us was asked to send a report and a memo to Mr Stupen, by the start of 1978, in which we were to indicate the strategy

that our particular office planned to follow in the next few years in order to make non- traditional jobs accessible to women. (TT, pp 1507- 1508)

Mr Toutant stated that he sent a memorandum to his superior, Ron Stupen, on January 11, 1978. In that memorandum, he explained his strategy for recruiting more women for non- traditional jobs:

"Strategy for the recruitment of Females in non- traditional roles 1. We feel it is better to present this subject to female candidates by their female counterparts; namely, the employment clerks, Colette and Lise. To this end, special training has been given to these clerks and greater attention is directed towards both those candidates who apply for non- traditional roles and those who apply for traditional roles, but are not aware that CN is a progressive Company in this area. Thus, at the counter, we are reaching out as much as possible to attract a greater number of females.

2. Another source of recruitment is WOMANPOWER, a division established by the Federal Government to promote the hiring of women in non- traditional roles. They have supplied us with various candidates, two of whom have started as coach cleaners. We also have a waiting list of women who have been tested and interviewed for the apprenticeship program. Weekly contact is usually kept up with this agency.

3. Endeavours are being made to exhibit various photos in the outer waiting room to visually portray opportunities for females to apply on non- traditional roles." (TT, p. 1508, Exhibit R- 5)

The initial relations between CN and ATF were also described by Christine Gordon and Carol Wallace, both of ATF. Christine Gordon indicated that ATF's first contact with CN Rail had been made through Dominique Perez, one of ATF's regular staff members, whose job was to contact employers regarding the possibility of their co- operating with ATF to promote the hiring of women. Miss Gordon indicated that Miss Perez met an officer from CN's personnel office and, later, Normand Toutant. The latter assured her that he would be able to initiate collaboration between CN and ATF.

Miss Gordon testified that Mr Toutant told her in a telephone conversation a few weeks later that CN was interested in finding women to fill a number of skilled blue- collar jobs at CN. He then explained to her that progress would be made by moving them from coach cleaner jobs to more skilled trades (TT, pp 2706- 2707).

Mrs Wallace testified that Mr Toutant had told her: (Translation) ... those women would start as coach cleaners, but the company would train them later on to become apprentice carmen; they would learn welding and then the whole carman trade. (TT, p 280)

According to Miss Gordon, the only requirements for the jobs that Mr Toutant had mentioned were a minimum height requirement, which was five feet five inches, good health, a weight requirement, and a passing mark on a mechanical aptitude test. She claimed that no mention was made of a welding requirement at that time (TT, pp 2707- 2708).

ATF then began to refer candidates to CN and continued to do so in the months that followed. The first two women referred by ATF passed the aptitude test and were hired about three months after their initial interview. Miss Gordon testified that neither of these women had welding or other trade experience (TT, pp 2708- 2709).

According to Mrs Wallace, after these two women had been hired, CN informed ATF that these two candidates showed promise and would be hired as coach cleaners (TT, p 281).

Mrs Wallace then described the relations that existed between ATF and CN at the end of 1977 and the beginning of 1978:

(Translation) It is also important to understand the arrangement that we had with CN's employment office at that time because it was an arrangement that we found very, very encouraging. When we had a candidate whom we considered suitable for the job in question, we called the employment office immediately. There was someone there and we almost had the impression she was looking after us. We knew that she had other duties, but we were always able to reach her and she was always very friendly with us. First it was a woman named Colette Beauchamp, then it was a woman named Lise Bourque. They were very open; when they had openings to fill they got in touch with us. They did not necessarily wait for us to call them - they called us. (TT, p 282)

Christine Gordon claimed that ATF had a "very positive" relationship with CN (TT, p 2709). She stated, "It was an opportunity to training* which we were trying so hard to find with so many companies" (TT, p 2717).

According to Miss Gordon, ATF referred some twenty to twenty- five women to CN over a period of eight months. Most of the candidates, with a couple of exceptions, had no previous training (TT, p 2714).

*sic - Tr

Mrs Wallace indicated that one of those exceptions was Mary Booth Kaye, who already had training as a machinist. Mrs Wallace explained that Mrs Booth had passed all of CN's tests and that she was hired as an apprentice machinist after five or six weeks. She was the first female machinist at CN in Montreal, and was subsequently transferred to Toronto (TT, p 284).

Mrs Leclercq provided figures on the number of women referred by ATF to CN, compared with the number of women who came to ATF for counselling:

Total Referred counselled Year to CN by ATF

1978 12 150 1979 26 170 1980 0 200 1981 70 345

(TT, p 94.) Mr Masse testified that in July 1978 he sent a letter to all first and second- level managers, twenty- one in all, asking them to "inform their staff and supervisors that this was now the policy of the St Lawrence Region" (II, pp 2201- 2202 - Translation). This letter referred to a

document entitled "Equal Opportunities Program, or The Optimum Use of Female Manpower in the St Lawrence Region." The letter also contained a copy of the new Canadian Human Rights Act, which had come into force in March 1978 (Exhibit R- 36 and TT, pp 2201- 2202).

The "Equal Opportunities Program" set forth three general objectives for female representation at CN:

1. An increase in the total number of female employees at CN; 2. An increase in the number of female management employees; 3. An increase in the number of females in positions for which men only were traditionally hired. We should like to point out at this stage that we have absolutely no intention of imposing quotas on anyone but rather would like us to work together towards rationally employing the male and female job applicants who approach our Employment Office, seeking work in our Company. (Exhibit R- 36, p 1)

Mr Masse stated that he was opposed to the imposition of quotas: (Translation) As a manager responsible for the St Lawrence Region, I am not in favour of that. I am in favour of opening more and more positions to female applicants, but I think it would be unfortunate for a company that has commercial activities to have to deprive itself of fully skilled personnel, to have to say to a tradesman who comes to our office with his papers and with ten years of experience - someone who was laid off somewhere else and who meets our needs exactly - that we can't hire him because we haven't filled our female hiring quota. (TT, pp 2203- 2204)

The "Equal Opportunities Program" had this to say about the success of the awareness seminars:

As far as the general attitude towards women is concerned, the management employees in our Region said they agreed in principle with employing women in positions for which men only have so far been hired although they doubted that "real women" would agree to work under trying conditions (e g, night shifts, work that is not always clean, exposure to bad weather, long hours, work that is far from home, etc). (Exhibit R- 36, p 2)

The document proposed a policy for the future: We feel that the time has come to go one step further and to progress from "saying" to "doing", from "attitudes" to concrete actions so that female manpower can be integrated into the field of activity of their choice at CN, provided they are qualified to do the work involved.

In view of the fact that Bill C- 25* was passed in June 1977, we advocate very clearly defined provisional measures be introduced to gradually eliminate all traces of discrimination in our Region and minimize the impact of the eventual presence of women within an all- male work team.

The St Lawrence Region intends to channel its efforts toward five ACTION OBJECTIVES that we can pursue together, with each department becoming a party to the cause at its own pace as the qualified female manpower becomes available and agrees to join an all- male work group that is willing to accept them. (Exhibit R- 36, p 3)

The document ended with a five- point program of action with the following objectives:

1. Hire female employees; 2. Increase receptiveness to female employees at CN; 3. Support the female employees at CN in their efforts to adapt

and progress; 4. Project a public image of a company that is in favour of hiring female employees; 5. Periodically analyse the evolution of female manpower at CN. (Exhibit R- 36, pp 3- 6)

Relations between CN and ATF from the summer of 1978 to December 1979 Mrs Wallace testified that relations between CN and ATF began to change in late 1978. She stated that she had maintained contact with the first two women hired by CN and that one of them, Rachelle, told her of incidents of sexual harassment and comments made by some of the men she was working with:

(Translation) ..." why do you want to work here? Your place is in a factory - you should be in a factory, operating a sewing machine." (TT, p 286)

Mrs Wallace went on to explain that ATF had referred three women to CN early in the summer of 1978, but that only one of the three had passed the mechanical aptitude test (TT, pp 287- 288). In the summer of 1978 another woman failed the mechanical aptitude test but was hired as a labourer (TT, pp 289- 290).

Mrs Wallace testified that it was then that she began to realize that the mechanical aptitude test had the effect of preventing women from obtaining jobs at CN. She tried the test herself and passed. However, she attributed her success to the fact that she had studied physics and science in high school (TT, pp 290- 292).

She stated that the next candidate referred to CN had some welding experience, but nevertheless failed the mechanical aptitude test (TT, p 293). The next candidate, Carla Nemeroff, was referred to CN on October 13, 1978. She passed the tests (TT, p 294) and was hired as a labourer on December 8, 1978 (TT, p 317). Mrs Wallace stated:

(Translation) I also said that we were a bit surprised that she had been hired as a labourer, since she had received a year of specialized mechanical training in a course given by Canada Manpower. (TT, p 317)

According to Mrs Wallace, another woman, Kathy Curten, passed all the tests but was not hired. Mrs Wallace telephoned the CN employment office to find out what had happened. She learned that her usual contact, Lise Bourque, had been transferred to another job. She was referred to a Mrs Serfati, who agreed to meet her in order to clarify the hiring criteria (TT, p 294).

Mrs Wallace described that meeting as follows: (Translation) I was very surprised when I got there and Mrs Serfati told me that CN had changed its criteria so that now women needed welding experience in order to be hired as coach cleaners. I protested, saying that women don't having training or experience in welding, that they've never had the opportunity to get it and that such a requirement would mean that other women at CN wouldn't have it.

Mrs Serfati didn't seem to grasp this argument and said that this was done because the union demanded it and CN couldn't do anything, that the union forced it to do so. She added that, anyway, to be fair, the company couldn't hire women unless they had at least the same ability, experience and training as men. In other words, she said that for CN equal opportunity meant that CN hired the best-qualified person and that if it didn't do that it would be accused of discrimination; men in the company would complain, and with reason; so that was why exceptions could no longer be made for women.

I tried to argue, but it was really a very clear position. At the end of our meeting, Mr Toutant, who was then the director of the employment office, came and confirmed this position.

I figured that as long as I was there I might as well try to get as much information as possible. So I asked her to tell me, according to the new requirements or those then in effect, what the hiring criteria were for each of the entry-level positions so that I would know what to tell women; if they had been changed, we wanted to know what they were. So she gave me the following information.

She told me that for a coach cleaner you had to be at least eighteen years old, pass a mechanical aptitude test - but she never explained what she meant by passing a mechanical aptitude test, it was never explained. You had to be available to work shifts. The company would provide training to people who had welding experience and training. That was for a coach cleaner.

Then for apprenticeship programs, I had been told of apprenticeship programs for electricians, sheet-metal workers, machinists, pipefitters and carmen. I had been told that these apprentices had to be between seventeen and thirty years old, have five years of secondary schooling plus one year of specialized training; they had to have two thousand hours of trade experience and pass the tests. I didn't know what tests... (TT, pp 298- 300)

In January 1979, CN published a study entitled "Women in CN Status Report." This report was signed by Heather E Pratt, System Co-ordinator, Female Resource Development (Exhibit A- 1). Mr Deegan indicated in his testimony that this study was "the most formalized report in a series of informations [sic] that were [sic] conveyed to the president" in response to Dr Bandeen's letter of December 1975 (TT, pp 2520- 2521).

Following are some excerpts from that study: "COMMENTS BY SYSTEM COORDINATOR, FEMALE RESOURCE DEPARTMENT Conclusion On a System basis progress is poor and, in fact, hardly merits being called progress. The numbers do not tell the whole story, but they certainly indicate insufficient return on heavy investment in the initial awareness program. Improvement requires committed and planned action on a much more widespread basis than at present.

Limited Progress at all Levels

In spite of the decrease in the number of men in our work force, the number of women as a percentage of the work force has only increased by 1.61% since 1974. Between 1974 and 1978, therefore, the number of women in the work force has increased by 960. In middle management,

with a population of over 8,000, there are 189 more women than there were four years ago. (Exhibit A- 1, p. 1) ...

Lingering Belief that Men Have First Claim to Jobs Another concern frequently expressed and often given as the reason for lack of action, or overly cautious progress in improving the status of women, is the need to avoid "backlash". (Presumably "backlash" means resentment and/ or complaint on the part of male employees.) There could be only two reasons for such backlash. One, the belief that men have first claim to consideration for any position, and two, the token appointment of women who are not qualified.

In view of the extreme caution with which women are screened before any appointment to other than traditionally female jobs, there can be no accusation of tokenism. Therefore, it can only be assumed that the slow rate of progress is attributable to the still lingering belief on the part of some influential officers that men are entitled to first consideration for most opportunities.

Women Being Accepted into Wider Range of Non- Traditional Jobs Under these circumstances it is, therefore, a source of satisfaction that more women are being accepted into a wider range of the traditionally male non- clerical entry level occupations. Credit must go to the commitment and goodwill of employment office staffs, and to the willingness of some line managers to make a difficult re- adjustment to their thinking.

The entry of women into the yards, shops, warehouses, ships, etc. is important for two reasons. One, it puts women on career ladders in junctions that largely follow a practice of promotion from within. Two, it gives women access to more highly paid occupations than the traditionally female ones. A very few of these women are starting to move up; for example, as E. S. B. 's in CN Rail and pursers and a quartermaster in CN Marine.

(Exhibit A- 1, p. 2). ...

A Regional Example of a Policy, Objectives and Action Plans An excellent example of a system with objectives and action plans designed to address all the problems and needs of an equality of opportunity program for women, is contained in the report by St. Lawrence region. Their policy and action plans were published in August 1978 and are contained in this report with an up- date on actions during the last months of the year.

To quote from their statement:

"... When we talk of discrimination against women and equal employment opportunities for women, everyone knows the answers by heart. The time has come to take one step further: To go from talking to doing; from attitudes to concrete actions ..."

(Exhibit A- 1, p. 3) ... STATISTICAL HIGHLIGHTS - Women as a percentage of the total CN population increased by .69% in the past year

- Since 1974, women in CN have increased by 1.6% ... - In the non- clerical occupations (which are, in general, non- traditional for women), 62 women and 4420 men were hired through

employment offices into permanent positions. 277 women and 2581 men were hired into non-clerical temporary positions.

(Exhibit A- 1, p. 4) Mrs Wallace testified that, at the same time, in January 1979, three women - Margaret Manwaring, Sylvie Charbin and Colleen Levis - were referred to CN by ATF (TT, pp 317- 318). ATF tried to get in touch with CN's employment office so that the candidates could be interviewed and take the aptitude tests. When this attempt failed, a telephone call was made to Yves Noel, who at that time was the co- ordinator of the equal opportunities program. He arranged a meeting for February 8, 1979.

According to Mrs Wallace, the CN representatives at that meeting told her that, for the company, "equal opportunity" meant that women had to have the same qualifications as men in order to be hired (TT, p 325). After that meeting, the three candidates were allowed to take the mechanical aptitude tests, which all three passed (TT, p 326).

Mrs Wallace went on to testify that another woman, Kathy Curten, who had previously filled out an employment application at CN, was called in to meet the foreman at the CN marshalling yard. He apparently told her right off that it was a dirty and difficult job and that it was not a job for a woman. He then asked her to lift a brakeshoe with one hand. When she was unable to do so, he told her that if she could not even do that she was not capable of doing the job. Mrs Wallace stated that when Kathy Curten later spoke with a CN employee she was told that it was not necessary to lift that object with one hand (TT, p 336). According to Mrs Wallace, Miss Curten underwent a medical test at CN on March 10 or 11, 1979.

Mrs Wallace testified that Miss Curten attended an electoral meeting on March 23, 1979, at which she publicly criticized the Honourable Marc Lalonde for his inaction on women's issues and told him of the difficulties she had had with a foreman at CN. On April 3, Miss Curten was hired by CN as a coach cleaner (TT, pp 336- 337). She had no welding experience (TT, p 339).

Mrs Wallace then described what happened on March 10, 1979: (Translation) The other three women were called in by CN for interviews with foremen. They told me afterward that they mainly had interviews with Mr Gagnon and Mr Roy and that, in the end, they had all been rejected on the grounds that they didn't have enough welding experience. Two of them had even worked for a couple of months as welding- machine operators. In their case the foreman apparently said that there were applications from men who had welding papers, so he couldn't hire the women when there was a man who already had his papers. They were all rejected. (TT, p 338)

Mrs Wallace went on to testify that on March 12, 1979, ATF arranged a meeting with representatives of the CN employees' union, the Brotherhood of Railway Carmen of the United States and Canada. She stated that ATF believed that the unions representing the workers at Pointe St- Charles supported the integration of women into non- traditional jobs. The ATF representatives met Richard Grenier, the union president, and Andre Leblanc, vice- president (TT, pp 442- 443).

Mrs Wallace described the meeting as follows: (Translation) We tried to explain our problem to them. They didn't seem to understand our case very well. They made remarks such as "What do you want, a woman is made for that," "I wouldn't let my wife work at CN," "It's not a job for a woman - a series of remarks like that, so that we were rather disappointed. We began to think that perhaps the union wasn't our ally, that we couldn't rely on the union for help in this matter. (TT, p 443)

Mrs Wallace indicated that the two union representatives confirmed that the welding requirement was new and that neither of them had had welding experience when they were hired by CN. They told her that, previously, men without welding experience had been hired and that the company had set up welding courses that were given on Saturday mornings (TT, pp 444- 445).

According to Mrs Wallace, candidates Manwaring, Levis and Charbin were called for an interview with a foreman during the week of May 10, 1979. Mrs Wallace said that after that interview she spoke with Mr Noel, who seemed annoyed. Her last communication with him was a telephone conversation around May 24:

(Translation) I remember the conversation well. It was rather brief and the part I remember best was when Mr Noel told me that nothing could be done, that without strong outside pressure CN would not hire more women. (TT, p 340)

In his testimony, Mr Masse described the problems CN was encountering in implementing its equal opportunities program for women:

(Translation) Q. You have spoken about your program. I would like to know whether you had any internal problems in applying that program.

A. Yes, we did. I spoke earlier about some of the difficulties.

Although we had problems, I don't think you could blame them on ATF. They started within the company. In fact, that's why, because of the attitudes that had been revealed at the seminars, we had appointed a co-ordinator. As I recall, at that time Mr Noel was supposed to be acting as a sort of ombudsman.

Mrs Gagnon told you that she did not view herself as having an executive role, as being responsible for enforcing policy. However, I would like to say with regard to the whole apparatus that was set up to implement our policy - in retrospect I think it was a mistake not to have given the co-ordinator enough authority to settle problems as they arose, as they were identified.

... The kind of problems we had involved the behaviour of certain higher executives. We might have had the same problems with supervisors. There is no doubt that unkind remarks were made by certain individuals, and female candidates were made to take a number of tests that were exceptional, to say the least. Mrs Gagnon has mentioned our perception or the perception of certain individuals regarding the workplace, which was dirty.

... So I think that, as regards the behavioural mistakes made at that time by certain first- line supervisors, if Mr Noel had had the authority or if it had been reported to someone else in authority, perhaps some of the cases, six or seven cases could have been settled more easily. That, in retrospect, is my view.

A few months ago Mr Noel, who is continuing in his role, issued a directive saying that if any situations were discovered that in his opinion were not reasonable, that had to be settled, he was to report them to the regional director of operations, who is the number two person in authority in the St Lawrence Region. (TT, pp 2236- 2238)

Mr Masse provided the following details on the assessment of female candidates by the foremen: (Translation) I was informed that several supervisors were perhaps a bit traumatized by what happened, by the directive that was issued, by the complaints we had received, by the Tribunal, and perhaps did not assess female candidates with the same objectivity as they displayed in assessing male candidates.

It would appear that certain injustices were done. Slightly lighter work can be given and that has already resulted, I am told, in a number of complaints - not formal ones, but a number of complaints to supervisors by male employees - that some of the women are perhaps treated differently. (TT, pp 2283- 2284)

On June 8, 1979, ATF wrote a letter to Dr Bandeen, President of CN Rail, proposing a meeting to discuss the problem (Exhibit A- 10). This meeting was scheduled for June 13 (TT, pp 340- 342) and was held at the office of Mr Marcoux, director general of personnel for the St Lawrence Region.

According to Mrs Wallace, "they explained to us their new policy, which was equal opportunities; for them, that meant the job is given to the most- qualified person" (TT, pp 347- 348 - Translation).

Mrs Wallace indicated that ATF would have tried to obtain a clarification of the requirements for the position of coach cleaner but CN refused to specify what these requirements were (TT, p 349). She stated that the ATF members left that meeting feeling very frustrated.

The next day, June 14, 1979, ATF representatives accompanied the three women - Sylvie Charbin, Colleen Levis and Margaret Manwaring - to the office of the Canadian Human Rights Commission, where the three women filed individual complaints. ATF also filed its first complaint of systemic discrimination against CN. This complaint was later replaced with a differently worded complaint. It was this second complaint that determined the mandate of this Tribunal (TT, pp 358- 360).

The first complaint of systemic discrimination read as follows: (Translation) The systematic refusal of the company to hire female personnel for non- traditional jobs, for jobs traditionally reserved for men, prevents the complainant organization from pursuing its major goal, the integration of women into non- traditional jobs. (TT, pp 360- 361)

Mrs Wallace indicated that she and Rachel Vinet of ATF attended a second meeting with CN on July 16, 1979. That meeting opened with a presentation by Heather Pratt on CN's special program for women. According to Mrs Wallace, Mrs Pratt stated, "There were a lot of individuals in the company who were not comfortable with the integration of women and that the company had to cope with this, that it was a problem for them" (TT, p 371 Translation).

She went on to testify that another CN representative, Mr Morris, said at that meeting: "We have nothing except persuasion, we have no other tool but persuasion, and we cannot unilaterally change the situation which exists.

Mr Morris went on to say, "You can be dealing with 10,000 employees and still have 2,000 orangutans amongst them, and there is nothing you can do about those people." And he reiterated, "... our option is persuasion, education and training." According to Mrs Wallace, Mr Morris claimed that Quebec was a major problem for CN because of fundamental cultural differences between Quebec and the rest of the country. This meant that it was much more difficult to integrate women into non- traditional jobs in Quebec (TT, p 373).

During that same meeting, Mr Toutant explained: "... The technical criteria for a given job were determined by the supervisors and that was they the job criteria seemed to be very floating. He explained that the employment office could refer women for jobs, but they could not control the kind of criteria that the supervisor was applying." (TT, pp. 374- 375).

Mrs Wallace also quoted Mr Morris: "As a result of this meeting, we have put into effect a study to find out what the real qualifications are for these jobs ... the objective for the work ... was a program to make selection more objective, more job related, less discriminatory." (TT, pp. 377- 378).

Mrs Wallace stated that Mr Morris had ended the meeting by saying, "where there are individual cases, we will address them" (TT, pp 376- 377).

On September 6, 1979, ATF referred another candidate, Ghislaine Desrochers, to CN. She applied for a coach cleaner job, but was told at the employment office that there were no openings for coach cleaners at that time (TT, pp 437- 438). Mrs Wallace described this incident as follows:

(Translation) The lady in question became impatient because she claimed that Ghislaine had been a bit too insistent. The lady explained that CN's policy was to give preference to people who already had a trade, whether welders or electricians. She suggested to Ghislaine that she make another job application for office work. (TT, p 438)

Mrs Wallace testified that on September 10, 1979, she had had a telephone conversation with Mr Stuppen in order to obtain information about the three women's applications. She said that Mr Stuppen told her that these three women, who had filed individual complaints with the Canadian Human Rights Commission, had since been offered jobs in CN's trucking division in Lachine (TT, pp 385- 387). Mrs Wallace stated "... our conversation closed with Mr Stuppen's telling me

that the policy at the employment office was to encourage women when they came to apply for jobs in non- traditional trades" (TT, p 387 - Translation).

Mrs Wallace testified that she spoke with Mr Stuppen again on September 12, 1979:

He also told me, "our definition of success is not to integrate women in great numbers; it is to get the line managers to accept women in principle". He told me "we cannot encourage women to make job applications in the regions if the managers are not ready to accept them". He further said "the chief of transportation, unlike Mr. Pasteris, is really a tough nut, and we don't have to tell you publicly in any case what our criteria are; we have undertaken a study to establish criteria for all jobs, and I can assure you that things are moving; we will call you back." (TT, pp. 439- 440).

On September 18, 1979, Mrs Desrochers, another candidate who had been referred to CN, filed a complaint with the Canadian Human Rights Commission (TT, p 469).

In November 1979 ATF filed its second complaint (Exhibit C- 2) after an officer from the Commission, Mrs Judy Wouk, who was investigating the complaint, told it that the Commission believed the first complaint to be inadmissible. ATF was asked to reword its complaint so as to allege a discriminatory practice against women in general rather than against ATF itself (TT, pp 453- 454). This complaint, which is before us, reads as follows:

"ATF has reasonable grounds to believe that CN in the St. Lawrence region has established or pursued a policy or practice that deprives or tends to deprive a class of individuals of employment opportunity because they are female." (Exhibit C- 2).

CN's task force on human rights Mr Deegan testified that in 1979, before ATF had filed its complaints (TT, p 2543), he had been put in charge of setting up and chairing a task force on human rights. This task force was made up of representatives from personnel, labour relations, the St Lawrence Region and the other regions and departments (TT, pp 2522- 2523).

Mr Deegan explained why this task force was set up:

"The task force came about because clearly recognizing the environment was changing as quickly as a number of social issues, and in particular the employment of women in the company was becoming a heated issue, that we had a much diverse opinion of most our employees on it, that the Human Rights legislation had been enacted, there was now a Human Rights Commission in place, that we were starting to encounter complaints through the Human Rights Commission. Then the task force was set up to try to get a broad internal multifunctional, multidisciplinary outlook approach in this whole area." (TT, p. 2543)

Mr Deegan described the role of the task force as follows: "... to interpret and to seek clarification of the Human Rights Act ...

... to monitor the application of the Human Rights Act in the company; ... to monitor the compliance done by the line managers.

... to perform a watching brief on the various complains under the legislation that were starting to be filed with our company ...

... to make recommendations to executive management in this whole field." (TT, p. 2523).

Mr Deegan stated that the task force prepared an inventory of the complaints filed thus far against CN:

"We had determined to prepare an inventory of all the individual cases of which the Commission is well aware of but to categorize and classify that in terms of type of complaints, in terms of type of geographic area that it occurred in, in terms of the type of management practice that was affected and from this particular analysis of the Human Rights, complaints we were able to start to zero in, to start to allocate our resources to those areas where we seemed to be in non-compliance or alleged to be non-compliance with the legislation." (TT, p. 2524).

According to an inventory of complaints dated February 18, 1982 (Exhibit R- 55), 155 complaints had been filed against CN by that date. Sixty- six of those complaints were still outstanding, while 89 had been closed. Mr Deegan explained that when these complaints were divided by type of discrimination, it was found that 38% were based on physical handicap, 26% on sex and 23% on race. As regards the sectors concerned, 31% of the complaints involved hiring standards, 16% hiring activities and 17% supervision of employees (TT, pp 2525- 2526).

Mr Deegan indicated in his testimony that, as a result of the analysis of the cases relating to hiring standards, the company decided to accelerate its efforts to establish bona fide job requirements for entry- level positions at CN (TT, p 2526).

The major recommendation that came out of the task force was the policy statement entitled "Equal Opportunities Program," which CN issued in March 1981 (TT, p 2523).

Relations between CN and ATF: 1980- 81

Mrs Wallace testified that ATF had made many feminist groups aware of its complaints of systemic discrimination. As a result, the Canadian Human Rights Commission had received a large number of letters urging the Commission to conduct an investigation. On July 8, 1980, ATF received a letter from the Commission informing it that a conciliator had been appointed (TT, pp 448- 449).

This conciliation resulted in the settlement of individual complaints, but an impasse was reached regarding ATF's complaint of systemic discrimination.

CN's equal opportunity policy According to Mr Deegan's testimony, CN officially adopted the equal opportunity policy statement on March 2, 1981. This was the document produced by the task force on human rights. This document circulated throughout CN's various departments and services and was published in the May 1981 issue of the in- house organ "Keeping Track" (" Au fil du rail") (Exhibit A- 9):

"Policy and authority on equal employment opportunity It is the policy of Canadian National to provide safe, modern and efficient transportation and other services. Consistent with this policy is Canadian National's active support for the principle of equal employment opportunity.

It is, therefore, an integral part of this policy to provide equal employment opportunity for all persons. That is, CN will recruit, hire, establish working conditions, compensate (including benefits and privileges of employment), train and develop, promote, transfer, and terminate employment (including layoffs and recalls) on a non-discriminatory basis, subject to employment contractual obligations. Employment will be undertaken without discrimination because of: race, colour, religion, physical handicap, sex, age, national or ethnic origin, marital status, and conviction of an offence for which a pardon has been granted.

Accordingly, it is policy, in providing safe, modern and efficient transportation and other services:

1. To ensure that other Company policies are consistent with the principles of equal employment opportunity.
2. To ensure that recruitment practices do not discriminate.
3. To ensure that selection standards and practices are based on bona fide job requirements.
4. To ensure that working conditions are not a barrier to employment where the Company can make reasonable accommodation to eliminate these obstacles.
5. To ensure that compensation practices are consistent with the principles of equal employment opportunity.
6. To train, develop and provide career opportunities in accordance with equal employment opportunity principles.
7. To promote and transfer in accordance with equal employment opportunity principles.
8. To ensure that there is no discrimination in terminations of employment as well as in demotions, layoffs, and recalls.
9. To negotiate labour agreements and employment contracts that are consistent with the principle of equal employment opportunity.

Authority

1. Vice- Presidents, Division Heads, and Heads of Departments are responsible for the application of equal employment opportunity in accordance with the provisions of the foregoing policy.

2. The Corporate Vice- President (Administration) is responsible for over- all coordination and monitoring of this policy." (Exhibit R- 54)

According to Mr Deegan: "This policy follows and confirms practice that is now prevalent in our company, policy guides and statements do not forecast practice or values. They follow them. Hence, we look up on this statement as a confirmation of the values which we have adopted and the practices which we now follow.

(TT, p. 2512) ... This statement places that equal employment opportunity is a basic value in the company and that those charged with carrying out this policy must ensure that all other policies to the extent effective must take into account the principle of equal employment opportunity that is cited in detail in this policy statement.

So, it then becomes part of the day- to- day responsibility of every manager in authority in our company to ensure that the principles of equal employment opportunity as stated are followed.

The other employment offices were instructed to review their practices, their procedures, to ensure that there was not discrimination in their practices and procedures.

They all attempted to follow the practice in the St. Lawrence region and headquarters employment office by clearing the way to accept applications from women applicants, to encourage women applicants coming into the company." (TT, pp. 2514- 2515)

Mr Deegan explained to the Tribunal that, for the purpose of implementing the third part of the policy, which deals with hiring standards and practices, CN is currently reviewing the whole matter of hiring for entry- level positions.

Mr Deegan also made the following statement with regard to point 9, which deals with the negotiation of labour agreements and employment contracts consistent with the principle of equal employment opportunity (Exhibit R- 34):

"... this has been discussed with the labour organization ... that as new contracts come up and are negotiated ... that we will ensure that the principles of equal employment opportunity have been followed in all such contracts ..." (TT, pp. 2518- 2519).

Mr Deegan went on to describe his responsibilities for carrying out this new policy:

"My responsibilities personally under the direction of the corporate vice- president were to carry out the necessary coordination and monitoring of the policy. The compliance with the policy is cited in part one as being the responsibility of vice- presidents, department heads, etc..." (TT, pp. 2519- 2520).

Appointment of the Tribunal and 1981 complaints Mrs Wallace testified that in late March and during April 1981 CN hired six women as coach cleaners:

(Translation) At one point, someone from the Commission suggested to us that CN wanted to show its good faith. However, we were somewhat skeptical because we saw that it involved only coach cleaner jobs and we did not want to see women re-ghettoized within the company. Although the company seemed to want to hire women as coach cleaners, women who applied for apprenticeship programs were being rejected. We wondered what this meant; we were skeptical about CN's good faith, especially since on April 21 Ginette Brunelle, Francine Beauchamp and another woman, Murielle L'Africain, filed a complaint against CN because it had not wanted them to apply for the apprenticeship programs. (TT, pp 490- 491)

According to Mrs Wallace, ATF was informed on May 12, 1981, that the Canadian Human Rights Commission had decided to refer its complaints to a Tribunal (TT, p 479 and Exhibit C-1).

She went on to state that, on May 20, 1981, another candidate, Martine Légaré, filed a complaint with the Commission on the grounds that she had been refused employment at CN in the fall of 1978. Her application had been rejected on the grounds that she had no welding experience. Her complaint was subsequently dismissed by the Commission because the incident had taken place more than a year previously (TT, pp 491- 493).

Mrs Wallace explained that several women who had filed complaints against CN were subsequently hired by CN:

(Translation)

We had a young woman who had been hired in June, late June, as an apprentice brakeman. I don't have the date of her hiring. On June 29, Ginette Brunelle was hired as an apprentice electrician. Jobs were also offered to Murielle L'Africain and Francine Beauchamp, who had filed complaints.

Q. Were the offers of employment made before or after they filed complaints?

R. In the case of the coach cleaners and the apprentice brakeman, no complaints were filed. The other women who were hired as apprentices were hired after the complaints. (TT, p 494)

According to Mrs Wallace, the complaints of Jocelyne and Micheline Chamberland were settled on August 27, 1981:

(Translation) Q. Were they hired as a result of a formal settlement after having filed a complaint with the Commission? A. No, there was no formal settlement. I think what happened and CN can tell you more about it than I can - was that as soon as CN learned that there was a complaint, it acted quickly to limit the damage. I have the impression that they operated something like that. (TT, p 494)

Mrs Wallace also explained why ATF had filed a complaint of systemic discrimination and why it had insisted on having its complaint referred to a Tribunal:

(Translation) It's because we wanted to go beyond the stage of having token women.

...

It's such a structural thing, such a systemic situation, that I hardly know where to begin. But we did find that the situation was unbearable for women who were all alone and it's still not bearable. You will hear other witnesses who will be much more eloquent than me on this subject. We saw that it was necessary to go beyond the stage of having token women, but we saw that CN's hiring policy seemed for some time and you could say, judging from the document that we saw this morning, that this is still the case - to be a policy that said women could be admitted to apprenticeship programs, could have access to jobs only when they had the same or better qualifications than men, even if these qualifications were not essential for performing the job in question.

... So we tried to think how this could be done without us as a group or without the Commission trying to manage this company. We don't want to meddle in the company's policies. We only want it to adjust its policies so that it no longer discriminates and so that women can be hired by it in the same percentage as they represent in the labour force. (TT, pp 49- 497)

Testimony of women The following thirteen women testified concerning their experiences as CN job applicants or employees:

Witness Tribunal Name for transcript

BEAUCHAMP, Francine ATF 559- 614 BRUNELLE, Ginette ATF 510- 559
CHAMBERLAND, Jocelyne ATF 132- 170 CHAMBERLAND, Micheline ATF 170- 187
COLLOT, Nadia ATF 4020- 4042 KAYE, Mary Booth CN 2253- 2269 LAMARCHE, Réjeanne
CN 3588- 3610 LEBOEUF, Laurette CN 3535- 3588 LECLERCQ, Francine ATF 4130- 4190
MOSSA, Gracia ATF 114- 121 NEMEROFF, Carla ATF 187- 232 SKLIVAS, Julie ATF 4190-
4205 WILHEMY, Anita ATF 618- 653

The main points of their testimony are indicated in a table on the next page. The table shows that four of these thirteen women applied for both a non- traditional job and apprenticeship training, that four others wanted only a non- traditional job, and that five applied only for an apprenticeship program. Out of eleven women who passed the aptitude tests, seven were hired, although two were hired only after they had filed complaints with the Commission. Four were hired in non- traditional jobs and three as apprentices. Two of the three hired as apprentices had filed complaints with the Commission before being hired.

TABLE OF THE WOMEN'S TESTIMONY

Applied for a X X X X X X X X 8 non- traditional job

Applied for an X X X X X X X X X 9 apprenticeship program

Discouraged from applying X X X X 4 for a non- traditional job

Encouraged to apply X X 2 for an office job

Offered an office job X X 2 Rejected (no trade X 1 qualifications or no welding)

Rejected X 1 Passed mechanical X X X X X X X X X X 11 aptitude test

Failed mechanical 0 aptitude test

Not hired after X X X 3 passing tests

Hired for a X X X X 4 non- traditional job

Hired as an X 1 apprentice

Filed complaint with X X X X X X X 7 the Commission

Hired after filing X X 2 complaint

Sexually harassed X X X 3 Rejected for apprenticeship X 1 program after being hired

Seven of the women filed complaints with the Commission. Six of these complaints were on the grounds of having been refused employment and another because the applicant had been rejected for an apprenticeship program after having worked at CN as a labourer for two years.

Several of the women who were hired described the kind of work they did at CN.

Carla Nemeroff testified that she had been hired as a labourer on December 4, 1978, and assigned to work in a repair shop at the Pointe St- Charles yard:

"... in the car shop there were welded cars, I swept up boards they had cut with the oxyacetylene torch on the floor and then dust from electronic arc welding, rods, and plus all this kind of electronic arc welding rods, under the freight cars which were up on jacks. So, I would have to crouch and sweep it up into this shovel, and then plus in the tracks you would have a special wire broom to sweep up all the stuff that got in the tracks. So, you would be underneath and your head would be knocking into brake cylinders and stuff. I was really lucky I am short.

... Then, you would stick it on the wheelbarrow, cart the wheelbarrow and then shovel from the wheelbarrow to a box.

... Then, when I went into the other shop, I was washing pistons and liners with varsol and an airgun and sandblasting. I was also sweeping the floor, the men would have sandwiches and throw it on the floor, so I would sweep that up. Scrap lumber, piling up scrap lumber." (TT, pp. 195- 196)

Miss Nemeroff stated that she had received training as a helper hostler in December 1979, and had later become a hostler. She described her work as a helper hostler:

"The other thing I wanted was at the diesel shop, it is a running shop, and around the shop are yards where the locomotives come in from Central Station, and I eventually did do this, working with the engines at a job called helper hostler, signalling, turning switches, coupling, coupling trains, lining them up to go out to Central Station again, and bringing them in and out of the shop, et caetera." (TT, p. 204)

Miss Nemeroff also indicated some of the problems she encountered as the only woman in her workplace:

"They told me they did not want me there. How did they behave? Well, they tried to confuse me. Instead of telling me things like two or three moves at a time, which is all you have to do, they would tell me about 15 moves in a row, like talking really quickly, using the numbers, like this "take a locomotive, put it there, go here, go there", you know, like really - so that I would get confused, or they would tell me to jump off the train at a switch, I would get off at the switch, and they would leave me at the switch, and they would not tell me what they were doing, they would leave me there, or they would just go off on break, and they would not tell me they were going on break. Sometimes they would leave me at a switch, or at an engine. They would say "go release the brakes on that engine and wait for my signal"; I would never hear the signal, they would go off and eat lunch and leave me there. They used to do that all the time." (TT, p. 215)

Francine Leclercq testified that she worked as a brakeman at CN's Montreal yard from June 1980 until April 27, 1982, when she was laid off (TT, pp 4130- 4131).

She described a normal day in a marshalling yard. She explained that the foreman gave the brakemen instructions for moving the cars (TT, pp 4157- 4158). She said she had never had to change a "knuckle" (TT, p 4165) or open or close car doors (TT, p 4166) and that the physical strength required for the job was minimal. She indicated that if there were difficulties in moving a switch, one asked one's co- workers for help. In any event, there were always two people working together. She added that even the foreman often asked for help: "They don't want someone to put out his back or break a leg or something as a result of overexertion" (TT, p 4169 - Translation).

Laurette LeBoeuf testified that she began working at CN as a labourer on July 22, 1981 (TT, p 3538). She described her work as follows:

(Translation) It involved cleaning the engine room and the area in front of it, where the engineers drive the trains. Then there was another job that involved washing the windows of those engines.

... It wasn't difficult - it was very easy. (TT, pp 3540, 3541).

Three of the seven women who were hired testified that they were subjected to some form of sexual harassment in the workplace. Carla Nemeroff, who worked in non- traditional jobs at CN for two years, from December 4, 1978, to December 3, 1980, described the sexual harassment she experienced as the only woman in a totally male environment:

"All the men in the shop, machinists, everything, they all lined up, they quit their work, they lined up just to watch me do this, and they did this a couple of times, like they were really fascinated. (TT, p. 198). basically to them I was new entertainment, ... something new to talk about, they used to make fun of me, they used to harass me the way that they would get in a group and ask me questions which were supposed to embarrass me and then laugh at whatever I answered ... they would ask me a lot of questions about sex, my own personal sex life, about my body, about women's bodies, things like that.

Q. How did these kinds of questions make you feel? A. Angry, hurt, upset. Because I was alone, because after a while I started thinking they were right, you know, and that there was something wrong with me, because of the pressure of being with all these people who have a completely different point of view but that was not the worst. The worst was when they asked me sexually related questions.

Q. How often did you get this kind of comment? A. About 50 times a day, every day, every day for two years, every day, and they also touched me, they also tried grabbing me, and stuff like that all the time.

Q. What did they say to you that indicated how they felt about the idea of a woman being there working in CN? Were there any comments on that issue?

A. Yes. Some of them said "it is not a place for a woman, I would never let my wife or daughter work here". Some of them were threatened, they would say "now there is one, there is going to be 50". They were all kinds of rumors that many women were going to come, that women were stealing men's jobs, that that is why the economy was bad, because before in the old days the men worked and the women stayed at home, and the woman has her job in the home taking care of the family, et caetera, and the man brings in the money. Now, women want to be independent, they don't have kids, they come out in the work force, they take the jobs from the men, the men are unemployed, it screws up the nuclear family where the woman is at home. They were really upset by that.

Q. Did you really get comments of that sort? A. Oh, yes, discussions. We used to have big discussions all the time, all the time. I would say 99 per cent of the male population there had those kinds of opinions.

... Another time, a few guys - we were on break sort of hanging around outside because it was warm out; a few guys jumped me and pretended they were going to rape me. I found that quite offensive.

Then, another time, I was bringing a train into the shop - you see, I was not a cleaner any more; I was signalling, and I was bringing a train into the shop. The boss yelled out something obscene to distract me from my work, and it was very dangerous. Nothing happened, but I could have had an accident. I could have really hurt myself." (TT, pp. 199- 202).

Ginette Brunelle related similar experiences of sexual harassment (TT, p 518- 519). Réjeanne Lamarche testified that advances had been made to her on her first day of work but that, after

saying no, she no longer received such propositions (TT, p 3594). On the other hand, four of the seven women hired testified that they had never had any problem with their co-workers.

III STATISTICS ON THE PLACE OF WOMEN AT CN

As we have already seen, the 1974 Boyle/ Kirkman report revealed a poor state of affairs at CN, with women making up only 4% of CN's total workforce. Let us look at how the statistics have evolved since 1974.

In 1976, Heather Pratt, an employee in CN's personnel and labour relations department, who had been made co-ordinator of female resources development, filled out a questionnaire (Exhibit A-16) prepared by the Canadian Advisory Council on the Status of Women for use by Crown corporations. It can be seen from the answers to certain questions that there were still obstacles to the hiring and advancement of women at CN. For example, the Corporation had not yet revised its hiring forms to eliminate questions on marital status. Mrs Pratt was not able to indicate how many female employees had taken advantage of a training program the previous year, "due to staff shortage." In any event, the statistics attached to this questionnaire showed that in October 1976 women made up only 5.94% of CN's workforce.

The following year, Louise Dulude, a witness heard by this Tribunal, prepared a report entitled "La situation de la femme dans les sociétés fédérales de la Couronne" (Exhibit A- 15) for the Canadian Advisory Council on the Status of Women. Its conclusion was sombre:

(Translation) It seems evident that the 1974 Cabinet directive on the status of women in Crown corporations has had very little effect. The corporations that had already committed themselves to improve the situation of their female employees have continued to do so at their own pace, while the rest have continued to do nothing...

The next relevant statistics are found in document A- 1 (Pratt Report), which contains comparative statistics for the years 1974 to 1978. In December 1978, as mentioned above, women made up 6.37% of CN's total workforce, an increase of 1.161% since December 1974.

In terms of actual hiring statistics, the picture is hardly any brighter. Report No 13 on the St Lawrence Region's hiring for non- traditional positions (R- 38) shows that women accounted for only 9% of hirings between April 15, 1981, and May 26, 1982. In several cases it may be questioned whether non- traditional jobs were really involved. For example, Exhibit A- 7 shows that for the St Lawrence Region and headquarters, under the heading "Hiring of women in non- traditional occupations," from 1977 to 1981, cleaning women, janitors, waitresses, cook helpers and stewardesses were included as non- traditional occupations. So although there is some progress in terms of figures, it can be seen that the figures in themselves do not necessarily provide an accurate picture of the situation.

In her argument, counsel for ATF made several extrapolations from the exhibits filed; CN did not challenge the accuracy of these extrapolations. The number of women in blue- collar jobs in the St Lawrence Region was calculated on the basis of Exhibit R- 13. Waitresses and constables were not counted, nor were Carole Charland, Rachèle Desrochers and Carla Nemeroff, all of

whom had left CN. For the other regions, Exhibit A- 7 was used for this calculation. CN's total blue- collar workforce, both male and female, was obtained by using CN computer programs 01698- 372- S- A1A (p 4), 01698- 372- S- A2A (p 4), 01698- 372- S- A3A (p 4) and 01698- 372- S- A3B (p 4). According to these statistics, at the end of 1981 there were 57 women (0.7%) in blue- collar jobs in the St Lawrence Region and 276 (again 0.7%) in all of CN's regions.

By contrast, women made up 40.7% of the total Canadian labour force (Exhibit C- 9) in 1981. According to Exhibit R- 3, women comprised only 6.11% of CN's total workforce at that time; nevertheless, they held a preponderant 58% of clerical positions.

According to Exhibit C- 6, women held 13% of blue- collar jobs in Canada. However, between January and May 1982 only 5% of the applications to CN for such jobs came from women (Exhibit R- 15). The disparity between the proportion of blue- collar jobs held by women at CN and Canada- wide is 12.3%. Even applications for this kind of job at CN, as we have just seen, were well below the national average of 13%. We believe this must be seen as a sign of the "chilling effects" that often results from an employer's hiring practices and which case law has recognized on many occasions. We will return to this point later.

Counsel for ATF made calculations, which again went unchallenged by CN, on the basis of exhibits R- 13 and A- 7, and CN computer programs 01698- 373- S. A1/ A2/ A3/ B1/ B2/ B3.

Women made up the following percentages of newly hired brakemen and trainmen in the St Lawrence Region:

- in 1979: 0%

- in 1980: 2% - in 1981: 2.6% In the positions of bridges and building labourers, extra- gang / sectionmen / track maintainers / signal helpers / signal- maintainers (Engineering Department), they accounted for the following percentages of new hirings in the St Lawrence Region:

- in 1979: 0% - in 1980: 0% - in 1981: 0.29% The total in all the regions for these positions is only 0.9%, which represents the hiring of one woman per 1,114 positions.

In apprentice positions, women represented:

- in 1979: 0% of new hirings; - in 1980: 1.4% of new hirings; - in 1981: 13% of new hirings. But it should be pointed out that this last figure of 13% includes, out of ten women hired, eight who were hired after filing complaints with the Canadian Human Rights Commission.

In labourer positions, women represented: - in 1979: 0% of new hirings; - in 1980: 0% of new hirings; - in 1981: 18.5% of new hirings. It should be noted that this last percentage is made up of five women who were hired as coach cleaners in July 1981, after this Tribunal was set up.

Women have made considerable gains in the St Lawrence Region as coach cleaners and checkers, going, in the former case, from 1.3% and 0% in 1979 and 1980 to 20% in 1981; and in the latter case, from 0% in 1979 to 17% in 1980 and 29% in 1981. However, they have had no

success as agents, accounting for 0% of hirings in 1979, 1980 and 1981 in the St Lawrence Region. It should be pointed out that coach cleaner and checker positions account for 50% of all the women hired by CN in non- traditional jobs in the St Lawrence Region. We are forced to conclude that, at this rate, women will not be integrated into non- traditional jobs at CN in the near future unless a much greater effort is made.

We find it surprising that CN has not been as successful in solving the problem of integrating women into its workforce as it was, in a few short years, in integrating another group: Francophones. Exhibit R- 39 shows that the breakdown of CN employees by mother tongue in the St Lawrence Region as of September 30, 1981, corresponds roughly to the proportion of Francophones, Anglophones and other non- Francophones in the general population. Not long ago the situation was completely different. If the same effort had been made, would not the proportion of women in blue- collar jobs at CN have risen since 1974 to 13% - the national average for women in such jobs? The facts show, however, that we are not far from what case law has called "the inexorable zero." At the national level, women made up 38.3% of the workforce in December 1979, around the time the complaint was filed (see Exhibit A- 5, p 36). Exhibit C- 6 (Table 3) clearly shows that the situation is substantially the same in Quebec as in Canada as a whole, since the proportion of women in the workforce in Quebec was 39.0% in 1981.

What importance should be attached to these statistics? Let us not forget that we are dealing with a complaint of systemic discrimination, where statistics play a major role. The following passage from *Commonwealth v Flaherty*, 11 FEP Cases 993 (1975) may be instructive:

"THE DISCRIMINARY EFFECT OF THE SELECTION PROCESS: The marked difference between the population ratios, the labour force ratios, and the applicant ratios as divided between white and black applicants, and the make- up of the Pittsburgh Bureau of Police as similarly divided demonstrates a "racially disproportionate impact" of the method of selection ..."

The scope of statistical evidence was also studied in *Floyd W Williams, Jr, et al v Owens- Illinois Inc*, 9th US Court of Appeals no 79- 4410 (January 11, 1982):

"(20) Appellants' statistical studies indicated that although women comprised more than 30% of the Oakland plant work force, they were systematically excluded from many job categories. No women were employed as machine repairers, mold repairers or teamsters. Women were concentrated in three departments: janitorial, accounting and finished products. Women comprised only 4% of the officials and managers and 4% of the craft workers but were 48% of the operatives and 67% of the office and clerical workers. These statistics were demonstrably disproportionate when compared with the relevant labor market ..."

... Of the new hires between 1971 and 1976, 37.2% were women. No women were hired, however, as "journeymen", teamsters or lehr attendants. Appellants also introduced evidence showing that as late as 1974 some departments were still designating by gender their request for applicants and that particular individuals were denied promotions and harrassed because of their sex ..."

Another example of the use of statistics by the courts is seen in Schefer v Tannian, Eastern District of Michigan US District Court, no 39943 (May 22, 1974):

"... (1) women make up only 2.15 percent of department's police officers, as contrasted with 39.7 percent of area work force, and (2) it has not been shown that these discriminatory practices are or have been necessary to safe and efficient operation of department ...

... Administrative convenience is not acceptable justification for sex discrimination, and unsupported suggestion that discrimination is or was for safety of women does not show any rational relation between any discriminatory hiring or assignment practices and legitimate state objective ..."

See also Contreras v The City of Los Angeles, Ninth US Court of Appeals, no 78- 2060, 656 F 2d 1267 (1981); EEOC v Local 14, International Union of Operating Engineers, 553 F 2d 251 (1977); International Brotherhood of Teamsters v United States et al, 431 US 324; EEOC v Mead Foods, Incorporated, 466 F Supp 1; Castaneda, Sheriff v Partida, 430 US 482; and US v County of Fairfax, Va, 25 FEP Cases 662.

IV THE LEGALITY OF CN'S HIRING PRACTICES

The parameters of the complaint

The complaint by Action Travail des Femmes is aimed primarily at CN's general hiring process for positions described as unskilled, as this was being carried out in the St Lawrence Region at the time the complaint was filed.

During the proceeding, Action Travail des Femmes, supported by the Canadian Human Rights Commission, requested that this Tribunal judge CN's hiring practices not only in the St Lawrence Region but in CN's other Canadian regions as well. The Tribunal decided that it was incompetent to broaden the scope of its mandate itself, in view of the fact that this mandate is defined by the complaint which it is hearing.

In the light of the evidence brought during the proceeding, it can be established that CN's headquarters had adopted a general hiring practice, but that this practice was applied somewhat differently in its various regions in Canada. However, the testimony of several CN executives and professionals suggests that, in future, the policy will become increasingly uniform throughout the regions.

> 83 Although the judgment that we are rendering in this case must be limited to the St Lawrence Region, it should prompt Canadian National to apply its provisions elsewhere in order to avoid similar complaints in other regions.

As for the period of the complaint, the Tribunal is of the opinion that, for the purpose of determining whether CN's hiring process was legal or not under the Canadian Human Rights Act, we must adhere essentially to the period specified in the complaint. However, we shall consider the period prior to that of the complaint in order to show what developments occurred

and to get a better idea of the hiring process in effect at that time. Finally, any changes that may have occurred since the filing of the complaint are also relevant, not for determining whether the hiring process was legal at that time, but for determining whether there are grounds for concluding that an affirmative action program should be adopted, and if one should, for determining its essential features.

None of the parties has been able to provide a thorough description of all the positions covered by the complaint.

It seems there are three categories of blue-collar entry-level positions at Canadian National. The first category covers tradesmen, such as sheet-metal workers, carmen and electricians, for whom trade training is a prerequisite. Applicants for these positions must have a trade certificate or documented evidence of at least four years' experience in the trade (see Exhibit R-6).

While the complainant expressly excludes this first category from its complaint, this is not the case for apprentice positions, for which trade training is also a requirement.

Finally, the complaint deals with positions requiring no special qualifications. These positions are found in various CN departments. For example, in the transportation department there are brakeman and checker positions; in the engineering department, bridges and building labourers, track maintainers, signal helpers and signal maintainers; in the rolling stock department, coach cleaners and the various apprentice positions; and under the general classification of "labourer" are engine cleaner and other positions not requiring any special qualifications.

One of the main positions about which testimony and evidence were received during the proceeding was that of brakeman.

A brakeman works aboard trains, assisting the locomotive mechanic and the engineer. He helps specifically in train operation, either in marshalling yards or on main lines. The brakeman reads signals and calculates speed in order to brake. He could be described as an assistant whose primary duty is to look after the brakes.

The brakeman position is at the entry level and normally leads to the positions of engineer and locomotive engineer.

Brakemen have to climb up on cars in order to apply the brakes and must replace brakeshoes in case of emergency.

A brakeman and a yardman perform the same job, except that the latter works in a marshalling yard while the former works on the train itself.

A coach cleaner cleans cars inside and out with a brush. Basically it is a job that requires no special qualifications, and normally it leads to the positions of carman helper, carman trainee and carman.

A checker works in a marshalling yard, using punch cards to make up trains or to take them apart. He has to walk across tracks to note car numbers.

In addition there are labourer positions, such as snow shoveller, engine cleaner and janitor.

These are the main blue-collar entry-level positions at Canadian National.

The law

The complaint by Action Travail des Femmes is based on section 10 of the Canadian Human Rights Act, which stipulates:

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

Section 10 requires that the complainant provide prima facie evidence that the disputed hiring practices are such as to deny a protected group the same employment opportunities as other applicants.

We have seen in the preceding part that statistics would tend to provide such prima facie evidence, since the proportion of women hired by CN for the positions covered by the complaint was substantially lower than the average among employers in similar sectors.

In addition to such prima facie evidence, the complainant must also prove that the disputed hiring practices were adopted for the purpose of lessening the employment opportunities of a protected group.

Section 10 of the Canadian Human Rights Act is largely based upon, not to say copied from, section 7.03 of Title VII of the 1964 US Civil Rights Act.

According to American case law, which seems to have been consistent, section 7.03, which is very similar in wording to section 10, does not require evidence of an intent to violate another's rights. This can be seen in the following decisions:

[Original English follows.] However, in *CN v Binder and Canadian Human Rights Commission*, rendered on April 13, 1983, a majority of the Federal Court of Appeal held, *Le Dain J* dissenting, that an essential condition for the application of section 10 was evidence of the employer's intent to discriminate by the use of a particular hiring practice.

With respect, we believe that this decision, in which leave to appeal has been granted by the Supreme Court of Canada, is in error, and that the distinction that the Court attempted to make between section 10 and section 7.03 of Title VII rests on no solid foundation.

Nevertheless, it will not be necessary for us to distinguish that case since we believe that, here, Canadian National was aware of the consequences of its hiring practices. We have already shown, at the beginning of this judgment, that Canadian National knew several years before the complaint was filed that its hiring practices had a negative effect on the employment of women and that women were under-represented at Canadian National compared with their general employment situation. Yet Canadian National continued these hiring practices, knowing their consequences. The proclamation of the Canadian Human Rights Act, which did not take Canadian National by surprise, as can be seen from the testimony in the proceeding, has not resulted in any marked changes in its hiring practices.

We therefore believe that CN "meant what [it] did" (Robinson v Lorillard Corporation, 444 F 2d 791 - 1971). Certainly it cannot be said that the hiring practices being challenged by Action Travail des Femmes were purely accidental.

Furthermore, we believe that the intentional character of discriminatory hiring practices is a factor to be considered by the Tribunal in deciding whether to exercise the discretionary power which the Act confers upon it to order an affirmative action program (cf section 7.06g) of Title VII).

Statistical evidence alone regarding the negative effect of a hiring practice is not sufficient grounds for concluding that the process is illegal within the meaning of the Canadian Human Rights Act. Thus section 14 of the Act provides:

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;

Section 14, too, seems to be inspired by section 7.03 of Title VII, which recognizes that a hiring practice that has a negative effect on a protected group may be justified by "a business necessity." It will therefore be necessary to consider Canadian National's hiring process in order to determine whether the practices that resulted in a very small number of women in blue-collar jobs at CN are justified.

To do this, the Tribunal believes it is necessary to examine the whole process rather than isolated parts of it. From the whole we can obtain an overall picture of CN's system for screening job applications.

American case law also considers that it is the overall situation that is important (see *Friend v Leidinger*, 558 F 2d 61 (1978)).

Apparently neutral practices may be considered illegal if they have the effect of perpetuating past discrimination (see *Nance v Union Carbide*, 397 F Supp 436; *Robinson v Lorillard Corporation*, 444 F 2d 791 - 1971; and *James v Stockham Valves & Fittings Company*, 559 F 2d 310 - 1977).

Finally, as we indicated earlier, the fact that illegal hiring practices may have been corrected since the filing of the complaint will be a relevant factor in our determining whether there are

grounds for ordering an affirmative action program and, if there are such grounds, in determining its content (see *US v County of Fairfax*, 25 FEB Cases 662 (1981); *Nance v Union Carbide Corporation*, 397 F Supp 436 (1975); *Albemarle Paper Company v Moody*, 422 US 405 (1975); and *James v Stockham Valves & Fittings*, 559 F 2d 310 (1977)).

The hiring process at Canadian National The hiring process at CN can be broken down as follows. The first phase includes all practices relating to information and advertising of job openings at CN. The second phase concerns the reception given applicants at the employment office. The third phase involves the various hiring criteria as such. The fourth, and last, phase deals with the reception in the workplace.

1. Information, advertising, recruitment

At the time of ATF's complaint, Canadian National was aware that it was not recognized as an employer that hired women (see Mrs Gagnon's testimony, TT, p 2098). This situation was also reflected in the testimony of women who had applied for work at CN and who had been unaware, before being informed by ATF or the employment office, that CN hired women for non- traditional jobs (see in particular the testimony of Mrs Wilhemy (TT, p 620) and Miss Nemeroff (TT, p 191)).

Despite this state of affairs, Canadian National made no real effort to seek out prospective female candidates for non- traditional jobs.

Thus CN sent representatives to visit trade schools in Quebec in order to advertise employment opportunities. However, it was known that there were no women in those trade schools (see testimony of Mr Toutant (TT, p 1549) and Mr Ménard (TT, p 1773)). CN made no attempt to provide career information to girls in the lower levels of the educational system, arguing that CN was under no obligation to provide vocational guidance to children (see testimony of Mr Toutant (TT, p 1721)).

Although Yvon Masse uttered the pious hope that guidance counsellors would be made aware of career opportunities with CN, he admitted that this had not yet been done (see testimony of Mr Masse (TT, p 2208)).

Canadian National cited the advertising done in its house organ, "Keeping Track," which is aimed at CN employees and retirees. This publication lauded the accomplishments of women in non- traditional jobs, and in a number of instances encouraged women to apply for such positions. But this newspaper is distributed only in- house and therefore does not reach a wide audience.

Nor, apparently, was any definite contact made with the Manpower Centre in order to obtain more female applicants for non- traditional jobs (see testimony of Mr Toutant (TT, p 1719)).

Canadian National testified that it had run an advertisement in a newspaper (testimony of Mr Toutant (TT, p 1749)), but had not continued this practice because the advertisement had attracted many applicants whom CN considered unqualified.

Finally, Canadian National turned to ATF for applicants, with the results that we have seen.

The evidence shows that most of the applications for non- traditional jobs were the result of "walk- in applications" advertised by word of mouth. No attempt was made to ask women applying for such positions how they had heard of the openings; this would have helped CN to carry out more efficient recruitment (see testimony of Mr Toutant (TT, pp 1749 to 1751)).

This word- of- mouth approach, whereby the employer relies on employees' contacts with family and friends, is not in itself illegal unless it produces an "adverse impact," which is illegal. Naturally employees are going to tell members of their own sex and race of job openings. It has been reported more than once that CN employees did not favour the employment of women in non- traditional jobs and even discouraged members of their own families from applying for such jobs.

American case law recognizes that the practice of word- of- mouth advertisement, resulting in walk- in applications, may be illegal when a group protected by law is already under- represented in a company (see EEOC v New York Times Broadcasting Service, 13 FEP Cases 813 (1976); Kohre v Imco Container Company, 21 FEP Cases 535 (1979); and Rowe v General Motors Company, 457 F (2d) 348).

Given the unfavourable status of women at Canadian National, the employer should have made special efforts to change the situation. In fact, no real effort was made to inform women in general of opportunities in non- traditional jobs.

2. Reception at the employment office It cannot be denied that Canadian National's employment office did make some effort to facilitate the recruitment of women in non- traditional jobs.

For example, photographs of women working in non- traditional jobs were posted on the walls of the office.

As well, two clerks at the employment office were trained to give a special reception to women (see Exhibit R- 5 and testimony of Mr Toutant, pp 1508 and following).

It should be noted that the employment office did not carry out the formal hiring of applicants. It merely referred them to a foreman, who had the real power of deciding whether the person was to be hired (see testimony of Mr Toutant (TT, p 1603) and Mr Noel (TT, p 3980)).

It emerges from various testimonies that non- traditional jobs were not necessarily offered to women who went to the employment office. It would appear, rather, that they were offered secretarial jobs (see testimony of Jocelyne Chamberland, TT, p 136).

Mrs Brunelle, however, testified that the employment office was not as receptive to women as to men (TT, p 541). Mr Ménard tried to explain this, saying that when two people reported for a job for which one was more qualified than the other, the more qualified person might receive better treatment (see testimony of Mr Ménard, TT, p 1765).

No effort was made to present non- traditional jobs (see testimony of Mrs Lamarch (TT, p 3598) and of Mrs Leboeuf (TT, p 3555)). Nor, when a woman applied for a non- traditional job for which there was no immediate opening, was any special effort made to find her one (see testimony of Mrs Mossa, TT, p 119).

Rather, according to the testimony of several women, including Jocelyne Chamberland (TT, p 135), an attempt was made to discourage women. They were told that they were not qualified for such non- traditional jobs, without, however, being told exactly what qualifications they were lacking.

Women were not told clearly what the requirements were for the positions offered (see testimony of Mrs Beauchamp (TT, p 565) and Carole Wallace (TT, p 349)).

However, Mr Pasteris, superintendent of the rolling stock division, told the employment office to hire women for apprentice positions, specifying clearly that trade experience was no longer a requirement. As soon as women passed the apprenticeship aptitude tests, including the Bennett test, and agreed to be available to work nights, they were eligible to apply (see testimony of Mrs McLachlan, TT, p 1815). However, it appears that the trade experience requirement was mentioned a number of times by employment office staff.

In conclusion, it appears that, despite CN's efforts to train office clerks and to make the employment office more receptive to female applicants, the information given to female applicants remained incomplete, insufficient and even contradictory, and was not such as to encourage them, despite certain episodic efforts at aggressive recruitment. These efforts, in any case, were made after the complaint and do not seem to have had any lasting effect.

The fact that CN did not adequately explain the requirements for non- traditional jobs and was not receptive to applications from a group that was already the object of prima facie discrimination, may be considered not a neutral practice but a discriminatory practice in itself (see *Kohne v Imco Container Company*, 21 FRP Cases 535).

3. Employment criteria a) Actual qualifications needed to fill the jobs covered by the complaint From the various descriptions of the jobs provided by Canadian National and various witnesses, there emerge a number of qualifications that remain fairly constant from one position to another.

One of these qualifications is a sense of responsibility (see testimony of Mrs McLachlan (TT, p 1827) and that of Mrs Collot (TT, p 4026)).

As well, a certain amount of physical toughness is required in order to be able to work in dust, rain, snow or cold, if necessary (testimony of Miss Nemeroff (TT, p 214) and Mrs Leclercq (TT, p 4172)).

Another requirement for these jobs is a willingness to work evenings, nights, days and weekends, without a normal schedule. In this regard, it seems the employment office tried to scare female applicants away. For example, Mrs Leclercq testified that when the job of brakeman was described to her it was implied that she might be called without notice to work at any hour of the

night. She said this description was an exaggeration, since there was a type of rotation: employees knew their position on the list and had a good idea of when they might be called (TT, p 4171).

To these requirements can be added the ability to work with others and the ability to work under supervision.

With regard to the physical requirements, it is clear that when workers had to handle heavy objects, they sought help. They did not like to risk injury by carrying heavy objects; moreover, CN, as an employer, sought to prevent work accidents (see in particular the testimony of Mrs Leclercq (TT, p 4169) and Miss Nemeroff (TT, p 195)).

In sum, these jobs require no special qualifications. The most difficult things can be learned on the job, as Mrs Leclercq testified (TT, p 4171).

These jobs do not require intellectual ability beyond that needed to obtain a high school education.

b) The forced- promotion argument Can qualifications required for higher positions be required for entry- level positions as part of a forced- promotion system?

Dr Lawshe, an industrial psychologist, testified that EEOC guidelines allow the employer to test an entry- level applicant's ability to fill higher positions when such positions can be obtained in a reasonable period of time. Dr Lawshe stated that, if this were not allowed, an employer could find itself with workers who were unable to progress through the company (TT, pp 3432- 3435).

According to Canadian National, there was a very rapid progression of coach cleaners to carman trainee and carman positions around 1977. The need for welders arose very quickly (see testimony of Mr Toutant (TT, p 1520) and that of Mr Ménard (TT, p 1778)).

There are two ways of rising to the job of carman. The first is by the apprenticeship route, the second via the coach cleaner position. However, according to Raynald Masse (TT, p 1940), henceforth it will no longer be possible to reach the job of carman by way of the coach cleaner position. Only those having received outside training - in other words, apprentices will be able to move up to carman jobs.

This new approach was dictated by the new technology and the need for more employees who are qualified from the outset.

So while the forced- promotion argument may have been valid in the beginning, it no longer seems applicable.

As we shall show below, even at the time the complaint was filed CN's unskilled workers had various possibilities of acquiring, even in a very short time, skills and aptitudes required for higher jobs. For example, welding could be learned on the job from other CN employees.

According to Dr Piché (TT, pp 1429 and 2908), there was forced promotion from brakeman to locomotive engineer and conductor.

However, it is not certain that the skills required for these positions could not be acquired by a brakeman in the course of his work or through training received at CN or elsewhere.

American case law considers the argument of forced promotion unacceptable if, in practice, it perpetuates past discrimination (see in particular *Albemarle Paper Company v Moody*, 422 US 405 (1975) and *Robinson v Lorillard Corporation*, 444 F (2d) 791 (1971)).

Increasing the requirements for a position which at the outset requires no special qualifications is unacceptable if these requirements are not really necessary and if they have the effect of preventing the correction of past discrimination. Such a policy would be legal only if advancement could not be achieved otherwise (see *Griggs v Duke Power*, 401 US 424 (1971)). In the case of Canadian National, the evidence shows that CN's workers have always been able to benefit from the company's policies designed to enable them to receive training so that they can advance in the company.

c) Academic qualifications and trade experience For the job of coach cleaner, Canadian National required applicants to have completed Grade 9.

The only requirement for labourer positions was average intelligence.

The real academic requirement came into play for apprentice positions, for which trade school training and a specified number of hours of trade experience were required.

However, the employment office was apparently instructed in 1981 to hire women for apprenticeship programs even if they lacked the prerequisites. They were then required to take a battery of tests, including the Bennett and other mental skill tests, such as the Wonderlic, the Revised Minnesota and the Morgan (see testimony of Mrs McLachlan, p 1815).

It appears that CN's academic requirements for unskilled non-traditional jobs at the entry level were very low. In fact, one might question whether apprentice positions are really unskilled jobs, since normally an apprentice must already have received basic trade training.

On the other hand, we find less justified the welding experience requirement for coach cleaners.

In considering this point, we must refer to a letter (Exhibit R- 7) sent by Mr Pasteris, the superintendent of rolling stock, to Mr Toutant, the employment office supervisor. The letter reads as follows:

(Translation) You will recall that in March 1978 we asked you to inform applicants for coach cleaner jobs, who would eventually be promoted to trainee carmen, that they would be asked to take welding tests when they started as trainee carman and that, if they failed these tests, they would be relieved of their duties.

I would appreciate it if you would do everything possible to hire as coach cleaners people who have electric welding experience or who will eventually be taking suitable courses to meet our standards when they become trainee carmen.

The coach cleaner position leads to the positions of carman helper, trainee carman and carman (Exhibit R- 25). Only Grade 9 and trade experience or training were required for the position of coach cleaner (see Exhibit R- 25).

According to Canadian National, the welding requirement, which was added in 1978, was related to a major car repair. This repair project involved installing metal plates and repairing car chassis. CN claimed that this welding requirement was added because of this project (see testimony of Mr Toutant, p 1535). CN added that since promotions were given very rapidly, it wanted people who could become operational in a short period of time (see testimony of Mr Toutant, p 1537).

Canadian National has established that for the position of coach cleaner, experience was required in various trades related to rolling stock, such as upholstery, refrigeration, painting and carpentry, because of the versatility needed to perform the job (see testimony of Mr Masse, p 1953).

Most of the people who were hired had welding experience (see Exhibit R- 27 and testimony of Mr Masse, TT, p 1953).

Mr Toutant stated that the courses referred to in Mr Pasteris's letter, which was quoted from above, were not intended for beginners but for people who already had a solid welding background. The courses were to be given on Saturdays (see testimony of Mr Toutant, TT, pp 1536- 1539).

Mrs Beauchamp, who, as a result of a complaint to the Canadian Human Rights Commission, was hired as an apprentice carman in 1981, had no welding background, unlike her co- workers (see her testimony on p 581). She learned welding in two weeks at the CN school (TT, pp 579- 583).

The welding requirement, which was used against female applicants at the time of the complaint, does not seem in keeping with Mr Pasteris's letter, which stated that such experience could be acquired either before joining CN or through training provided by CN.

In fact, the welding requirement helped to keep out a large number of women interested in working at Canadian National, especially since, at the time of the complaint, coach cleaner jobs were a particularly active sector at the employment office.

Since few women had welding experience, whereas almost all the men had acquired such experience at a trade school, this requirement, which was not essential for the coach cleaner entry- level position, had an "adverse impact" and therefore constituted a discriminatory practice contrary to section 10.

American case law considers that a requirement that is too high for the needs of the job may constitute a discriminatory practice where such a requirement has an adverse impact on a protected group (see *James v Stockham Valves and Fittings Company*, 559 F (2d) 310 (1977), and *US v Georgia Power*, 401 US 424 (1971)).

d) Interviews at the employment office

Interviews at the employment office were conducted by two persons, who relied mainly on their intuition and their interviewing experience. The interviews were not very structured; their main purpose was to provide a general impression of the applicant. The interviewers used their intuition to ascertain an applicant's sense of responsibility, but there were no specific standards (see testimony of Mrs McLachlan, TT, p 1877 and following).

Certainly it is legitimate to want to ensure a certain amount of motivation on the part of an applicant, and to do this one must describe not only the advantages but also the disadvantages of the job. However, it seems clear that an attempt was made to discourage a number of women by presenting a too negative picture of the job (see testimony of Jocelyne Chamberland, p 135). For example, work schedule difficulties were sometimes exaggerated to discourage a female applicant (see testimony of Mrs Leclercq, TT, p 4170). As well, the interview was sometimes used to steer a female applicant toward a secretarial job instead (see testimony of Micheline Chamberland, p 179). This was the case in the interview that Nadia Collot had for a brakeman job. She was told that the difficult hours might cause a couple to break up (TT, pp 4026- 4027). Mrs Collot's interview for a brakeman job apparently lasted an hour, whereas such interviews took only about twenty minutes for male applicants (TT, p 4029).

From the foregoing it can be concluded that CN's interviews for unskilled jobs were very superficial and could hardly form the basis for an objective assessment of applicants.

The women who testified about having taken this interview agreed on the main point, namely, that the interview was hardly encouraging to female applicants. In several cases, the interview had a "chilling effect" likely to disorient the applicant and encourage her to apply for a more traditional job.

It appears from Dr Piché's testimony that Canadian National is now considering improving its interview structure, at least for the brakeman position. However, this is only a proposal, not a reality.

e) The Bennett test and the new tests According to Mr Toutant, applicants had to pass the Bennett test for the following entry- level positions: signal helper (engineering

department); all apprentice positions, carman helper, mechanic helper and coach cleaner (equipment department); and brakeman (transportation division). Mr Toutant also mentioned the hostler position, but this is not at the entry level. The entry- level position that leads to hostler is labourer or engine cleaner, according to Miss Nemeroff and Mrs Lamarche.

Between 1958 and 1962, CN headquarters revised the various hiring standards for blue-collar entry-level positions. Starting in 1962, new procedures were applied and the mechanical comprehension test (form AA-F, by G K Bennett) was introduced.

This test is designed to test a person's ability to recognize and understand physical and mechanical principles involved in everyday situations.

The test consists of sixty questions. For example, there is an illustration showing a 30-watt light bulb and a 60-watt bulb. The question is: Which bulb uses more current? Another example is a picture of two men carrying a long board which has a weight suspended from its midpoint. One of the men has the end of the board on his shoulder, while the other man is carrying the board at a point midway between the hanging weight and the end of the board. The question is: Which man is supporting a heavier weight? (See Exhibit A-8.) The sixty questions follow a similar pattern of presenting a drawing and a short question.

This test is recognized as an excellent tool for measuring mechanical aptitude and is apparently in common use in North American industry. The great majority of American studies on the assessment of mechanical aptitude refer to the Bennett test (see testimony of Dr Lawshe, TT, p 3416, and Dr Piché, a PhD in industrial psychology and CN's corporate head of employment policies and practices, TT, p 1349).

Several witnesses, notably Dr Bordeleau, who is an industrial psychologist (TT, p 3650), and Professor Picker (TT, p 813), testified that this test had become less popular in the United States. This was apparently because of decisions unfavourable to employers who had used the Bennett test without being able to demonstrate its relevance to the job in question.

Furthermore, for jobs requiring mechanical aptitude, this test has a very high reliability coefficient of 0.6 (on a scale of 0 to 1). This means that the higher the applicant scores, the more likely he is to perform his job well. But this reliability varies from one task to another (see testimony of Dr Bordeleau, TT, pp 3643 and 3652, and Dr Lawshe, TT, pp 3488, 3520 and following).

Finally, the Bennett test has a monopoly on mechanical aptitude assessment. If for some reason an employer does not use it, he is forced to resort to an inferior derivative or else devise his own test. The Bennett test is superior for a number of reasons. It has been rigorously tested for internal consistency (see Dr Piché, TT, p 1349, and Dr Lawshe, p 3419), so that each of the sixty questions is designed to measure the same thing: mechanical aptitude. Another significant advantage is that verbal content is kept to a minimum. This reduces the possibility of having a person with good mechanical abilities misunderstand the question.

Finally, the Bennett test has the great advantage of aging well. It is still quite current because it uses principles that do not change over the years, such as those relating to the three classes of levers and gravity (see testimony of Dr Lawshe, TT, p 3423). However, Dr Mishara, a clinical psychologist, claimed that this test, which was developed forty years ago, is outdated (TT, p 79).

She said that there is a form of the Bennett test designed specifically for women - form W1. However, no expert seems to know anything more about this test form, which has apparently never been used at Canadian National and may even have been abandoned (see Dr Mishara, TT, p 77, and Dr Lawshe, p 3470). Thus form AA is used at Canadian National for both men and women.

The scientific literature recognizes that women score lower than men on this mechanical aptitude test. Dr Piché made no secret of this (TT, p 1355).

The various experts suggested several reasons that might explain this difference between the scores of men and women.

According to Dr Mishara, it is explainable by the fact that women's environment and life experiences do not make them familiar with the content of the tests. She also claimed that, since, culturally, women are not well versed in mechanical matters, they become anxious when dealing with this type of question and situation and their performance is affected.

She went on to say that the authors of the test were wrong in claiming that a better knowledge of physics would not affect the score. She stated that a crash physics course would definitely improve one's score on this type of test (TT, pp 84- 87).

According to Dr Bordeleau (TT, pp 3666- 3679), it is important to determine whether the groups are comparable. He said that it would be unjustifiable to compare graduates of technical schools with a group of female clerical employees. He also advanced other reasons, such as education, experience, training and personal preferences. Obviously, in our culture women are less well educated than men in this area.

Finally, there is controversy over the sex factor taken in isolation. According to Dr Lawshe (TT, p 3476), there is no study that shows that a man and a woman with equal mechanical abilities would obtain different scores. Dr Mishara (TT, p 86), on the other hand, argued that as long as there was no evidence to show that sex was not a significant factor, sex must be considered to play a role. Dr Lawshe replied that mechanical comprehension is not learned like a multiplication table: it involves a combination of personal interest and cultural exposure. Mechanical comprehension, in his opinion, is deeply rooted and difficult to modify with age (see TT, pp 3483- 3484).

As we mentioned earlier, it is a recognized fact that women do not perform as well as men on this test.

At Canadian National, both male and female candidates were required to score in the 45th percentile. The Bennett test manual (Exhibit A- 21) sets different standards for men and women.

According to Dr Piché, it is justifiable to use the same standards for men and women, since the test is recognized as an efficient yardstick and, if different standards were applied, Canadian National would have obtained employees with unequal abilities (see testimony of Dr Piché, TT, pp 1439- 1441).

According to Dr Lawshe, such a practice is justifiable; a test user does not have to blindly follow the norms in a manual, as these are only indicative (see TT, p 3480).

In the matter of setting a passing mark, it is considered essential to establish different marks for certain groups (see Exhibit A- 29, p 70):

"In norm- reference interpretations, a test user should interpret an obtained score with reference to sets of norms appropriate for the individual tested and for the intended use. Comment: the reverse is also a standard of competent use: the test user ordinarily should not interpret an obtained score with reference to a set of norms that is inappropriate for the individual or for the purpose of the testing."

CN required a ranking in the 45th percentile; the Bennett manual indicates that, to obtain such a ranking, one must score 33 out of 60. According to the norms established for women (Exhibit A- 21), this score would be achieved by only 15% of female college freshmen.

Dr Piché said she had no statistics available on the Bennett scores of CN applicants before 1981 (see TT, p 3014).

Between January and November 1981, 109 male applicants out of a total of 272 were hired by CN. Of this number, 131 failed the Bennett test and 32 were rejected after the interview. As for the female applicants, 12 out of a total of 36 were hired by CN. Seventeen women failed the Bennett test and 7 were rejected after the interview.

This means that the average scores on the Bennett test were 51.8% for men and 52.8% for women. However, the answer sheet for the Bennett test had been leaked and this was not discovered at Canadian National until December 1981. Therefore we consider these scores invalid.

Exhibit R- 14, which presents the scores obtained on the battery of tests for apprentice positions, shows that 22 women out of 46 and 132 men out of 479 failed the Bennett test (see Dr Piché, TT, p 3016).

The failure rate on the battery of tests was 27.6% among men and 48% among women. The battery of tests can therefore be considered to have had an adverse impact on women.

However, the groups of women who took the Bennett test were not very large. This is an important factor, for statistics are a less reliable guide when the group is small. The larger the sampling, the more valid the results (see testimony of Dr Bordeleau, TT, p 3467, Dr Barrett, who is another eminent specialist in industrial psychology, TT, p 3690, and Dr Lawshe, TT, p 3426).

Experts have advanced various theories to explain the poorer performance of women on the Bennett test.

The value of the test for measuring mechanical aptitude is not disputed. Nevertheless, this test does have an adverse impact on women, as Dr Piché admitted (TT, p 1457).

In *Griggs v Duke Power*, 401 US 424 (1971), the US Supreme Court emphasized that a selection procedure could be justified if the employer could show its job-relatedness. The Supreme Court judges also referred to "business necessity," an expression that appears in Title VII of the Civil Rights Act of 1964 (see testimony of Dr Barrett, p 4252, and Prof Picker, p 808; see also *Nance v Union Carbide Corporation*, 397 F Supp 436 (1975), where it was recognized that men scored better than women on the Bennett test; see also, more generally, *Contreras vs Los Angeles*, 656 F (2d) 1267 (1981); *Guardians Association of New York City v Civil Service*, 630 F (2d) 79 (1980); and *Firefighters Institute v City of St Louis*, 14 FEP Cases 1486). However, this does not mean that the Bennett test is never appropriate (see, in addition to the preceding references, *Cormier v PPG Industries Inc*, 519 F Supp 211 (1981)). Thus it appears that the Bennett test measures either abilities that are much higher than what is required for unskilled entry-level jobs at Canadian National, or knowledge that can be acquired on the job. The job tasks performed have never been clearly defined in the past, so it has not been possible to validate the Bennett test.

The method indicated by the experts for validating this test is called "criterion-related validity," which verifies the correspondence between the score obtained on the test and the employee's performance on the job once he has become accustomed to it (see testimony of Dr Barrett, TT, p 4259, and Dr Mishara, TT, p 80).

CN has never validated its test, as its counsel, Mr Girard, admitted (TT, p 4928). To determine whether the Bennett test is valid for a particular job, it would first be necessary to carry out a job analysis (Dr Lawshe, TT, p 3456).

The ability of the Bennett test to predict work performance varies from job to job. For example, while it seems to be a good instrument for predicting the performance of job setters, it is not so reliable for engine testers.

Therefore, the Bennett test should not be used to eliminate candidates for several types of jobs unless it has been determined that each job requires that type of ability (see Dr Mishara, TT, pp 80- 81).

In conclusion, we believe that use of the Bennett test for entry-level positions not requiring special qualifications constitutes prima facie discrimination and is not justifiable on the basis of the requirements of the jobs applied for.

The Bennett test is only one of the tests taken by applicants for apprentice positions. The evidence is less clear regarding the discriminatory nature of the other tests. There is, moreover, some uncertainty regarding the Revised Minnesota Paper Form; it is not clear whether it is still used at Canadian National. This test is designed to measure spatial perception, and is used for jobs requiring spatial visualization, such as design engineer and architect. Apparently women also score less well on this test (see testimony of Dr Barrett, p 4334, and that of Dr Bordeleau, p 3695; also refer to the scores for the battery of tests taken by apprentices).

However, we cannot conclude, on the basis of the evidence produced, that the battery of tests used for apprentice positions is discriminatory, since the abilities required for these apprentice positions seem different from those for other non- traditional entry- level positions.

If use of the Bennett test has been discontinued at Canadian National, it appears from the testimony of Dr Piché that a review of hiring practices, including aptitude tests, has been under way since 1979 for all blue- collar entry- level positions.

This task force is headed by Dr Louise Piché, who since 1979 has been in charge of corporate policies and practices in the area of recruitment, hiring, transfer, promotion and placement. Dr Piché holds a doctorate in industrial psychology from the University of Montreal (see Exhibit R- 1 and TT, p 1347).

Dr Piché has three assistants: one holds a doctorate in psychometry, one holds a doctorate in industrial psychology and one is a graduate student in industrial psychology (TT, pp 1347- 1348).

The main reasons advanced for this in- depth review of hiring practices are the lack of uniformity of hiring practices in CN's various regions and the negotiation with the unions of a three- people crew. The latter would reduce the number of brakemen on a train from two to one, which would mean better selectivity for these positions (see pp 2907- 2909).

In her testimony, Dr Piché explained how CN had gone about establishing a new selection procedure for the brakeman position, which was the first job reviewed. She stated that the procedure used for the brakeman position would be used for every entry- level position at CN.

The new procedure was developed in five phases:

1. selection of tools to produce an inventory of a brakeman's tasks;
2. gathering of information using the tools developed in phase 1; 3. means used to assess the requirements of the given job; 4. implementation; 5. monitoring. (See TT, p 2911 and Exhibit R- 57.)

For phase 1, four tools were selected: a) The Physical Demands and Environmental Conditions Questionnaire, designed by Dr Lawshe. This questionnaire determines the specific physical demands (such as pulling, walking, carrying and lifting) and environmental conditions (such as humidity, vibration and dust) involved in the various railway jobs. The questionnaire covers 40 factors: 24 relate to physical demands, 16 to environmental factors (see p 2913).

b) A task inventory, drawn up after a review of the literature on the subject and observation of conditions in the workplace (see Dr Piché, p 2915).

c) An occupational skill questionnaire, developed by the task force. It comprises a range of 133 skills, subdivided into 24 categories, such as arithmetic and memory, covering generic KSAPs (knowledge, skills, aptitudes and personal characteristics).

d) The working conditions form, designed to establish willingness criteria (see p 2924).

For the second phase, regional panels were set up composed of two brakemen, two supervisors and a moderator/ coordinator. The moderator/ co-ordinator was not involved in the content; he merely ensured that the process ran smoothly (see p 2926).

The regional panels review the forty physical and environmental factors.

The data obtained by each regional panel are passed on to headquarters, which brings together the findings in a working document. Then a system panel is set up, consisting of ten regional representatives (five brakemen and five supervisors) and a psychologist, who acts as moderator.

This panel reviews the forty factors and the task inventory. It indicates for each task whether it is performed and, if it is, its frequency, its level of difficulty and whether it can be learned by a simple demonstration or requires formal training.

Then the panel reviews the occupational skills questionnaire. After that the panel establishes a "formal linkage" in both directions, indicating to which task each skill is linked and then drawing up an inventory of the necessary skills for each task. According to Dr Piché, this is the basis for the content validity of the selection process (see p 2939).

The panel then works on the working conditions questionnaire. Finally, they must determine what the percentage of coverage is for the job that has been reviewed (see p 2944).

The third phase involves a statistical compilation of the tasks and skills required.

Dr Piché stated that only what is required for the job is retained, not what can be acquired through training (see p 2958).

The information gathered on physical demands and environmental conditions is used to construct the physical performance test, which is turned over to doctors who determine its requirements (TT, p 2948). This information is also used to establish the working conditions and to evaluate written and oral tests.

Five written tests have been selected:

1. Reading comprehension; 2. Arithmetic; 3. Numerical reasoning; 4. Switching test; 5. Checking tests (car checking, car initial and number matching,

railroad car order test). These tests were first produced by a statistical compilation of the skills defined earlier in terms of the tasks (see p 2958).

A pool of questions is established, from which questions are selected for tests (see p 2963).

The pretests were administered to thirty candidates in Toronto and Montreal (see p 2964). An interview is also being developed on an experimental basis to check a number of factors, such as memory, problem identification, oral communication and personal suitability.

The fourth phase is implementation. This consists of an application form, a self-selection test, the battery of tests introduced in 1982, the oral test introduced in 1983, a medical examination (1981) and physical performance.

All the selection criteria should be established by 1984. The final phase is monitoring (p 2991).

Thus a member of an interview panel will be asked for the reasons for the rejection of a candidate's application. Tests of predictive validity will also be carried out.

This in-depth revision, which, as we have just seen, goes well beyond aptitude tests, is definitely an improvement in that it involves an assessment of the requirements for each job, something that was apparently never done before at Canadian National (see the favourable comments of Dr Lawshe, TT, pp 3442- 3450, Dr Bordeleau, TT, pp 3672- 3677, and Dr Barrett, TT, pp 4281- 4288 and 4320- 4333).

According to Dr Lawshe, it is quite valid to draw up a list of tasks with job experts, that is, those who do the job and those who supervise. In his view, it is desirable to consult both workers and supervisors, since the two complement each other (TT, p 3445). He suggested having a moderator, whose sole function would be to guide the operation of the panel. It is also justifiable to ask the panel members what task requires what aptitude or skill.

According to Dr Bordeleau, it is quite valid to seek information from those who perform the tasks and their supervisors. He agreed wholeheartedly that those who perform the job, not theorists, should be the ones who draw up the task inventory, the task assessment, the skill assessment and the linkage between tasks and skills.

According to Dr Barrett, it is quite appropriate to ask people who actually do the work to indicate the tasks they perform. On the other hand, the assessment of the psychological capacities needed to perform a task is a matter for psychologists, since it is important to ensure that certain elements are not omitted or exaggerated by the respondents. Dr Barrett claimed that one cannot rely solely on what the people say. Thus, in his view, it is important to determine whether the test content produced corresponds with the bulk of the work performed and not just a small part of it.

It is interesting to note that only Dr Barrett expressed an opinion on the validity of the test. The other specialists commented only on the procedure followed.

According to Dr Barrett, the test is not "content valid" because it corresponds with only a small part of the job performed. For example, he found deficiencies in the switching test, which, he claimed, assesses something which has to be learned through training and which is therefore not a prerequisite. Likewise, many tests contain figures when it is not established that this is a prerequisite for a brakeman position.

Similarly, the "cutting score" is used to weed out the maximum number of candidates, not to determine whether a person is qualified.

However, even Dr Barrett considered that, on the whole, the procedure followed was acceptable, without this meaning that the test was therefore validated.

The evidence suggests that this new battery of tests selected by Dr Piché's task force might also be discriminatory in terms of the scores obtained by women, although the statistics provided are hardly conclusive.

The new battery of tests was administered to 620 people. Of these, 192 out of 563 men passed, whereas only 7 out of 57 women passed. Thus the pass rate was only 1 woman in 8, whereas 1 man in 3 passed (see Exhibit R- 57, p 71).

It should be noted that the tests were not compensatory; a passing score had to be obtained on each of the tests.

It is noted that in this particular situation there was "adverse impact." However, since only a small number of women took these tests, it is difficult to determine with certainty whether the tests really had an adverse impact on women.

According to Dr Piché, this poor performance by women can be explained by two factors. First, almost all the female applicants had been recruited aggressively, that is, although they applied for non- traditional jobs, they had not chosen the job of brakeman (TT, p 3114).

Another hypothesis is based on a comparison between the educational backgrounds of the men and women who took the tests. Thus, 13% of the men and 30% of the women had only Grade 10 or less, and 29% of the men and 42% of the women had only Grade 11 or less (see Dr Piché, TT, p 3014, and Exhibit R- 57, p 72).

Furthermore, the tasks were assessed solely by those who performed them. Thus there was a possibility of overassessment, which would create a further difficulty for women's access to this job.

It should also be noted that in December 1981 only 24 of the 6,500 brakemen at Canadian National were women. There was only one woman on the

various panels. Dr Barrett suggested (TT, p 4311) that the procedure might therefore constitute a "self- selection instrument." In his opinion, care should be taken not to describe the job in such a way as to discourage a particular group, such as women. This would be an "unfair description" (see TT, p 4311). Over- evaluating certain negative aspects, such as the physical difficulty of performing certain tasks, dirty conditions and scheduling problems, might discourage women from applying for such jobs.

Subject to these reservations, this process, when applied to all the positions covered by the complaint, could be in accordance with the Act. Dr Piché claimed in her testimony that the

complete new procedure should be ready by the end of 1984. This approach is to be taken for all entry-level positions.

Much was said at the hearing about the physical test required at the time of the complaint for the job of brakeman.

Previously it had been required that male and female applicants be at least five foot six inches (5'6") tall and weigh at least 140 pounds. This requirement was dropped in favour of a new physical test involving lifting, carrying and replacing a "knuckle." This knuckle, weighing 83 pounds, must be carried for a distance of about 80 feet. The applicant must also climb the ladder on the side of a car in order to apply a handbrake. The applicant must pass each of these tests (see testimony of Dr Piché, TT, pp 1419, 2424 and 2454). This test was designed in the light of the panels' findings.

One may wonder how representative this test is with regard to the duties of a brakeman. The test that involves carrying, and especially lifting, the knuckle seems difficult (see testimony of Mrs Collot, TT, p 4032, and Mrs Leclercq, TT, p 4142) and does not appear to be representative of the efforts which a brakeman must make. This operation is not frequent and is carried out by two people, who use a broom handle to carry the weight more easily (see testimony of Mr Clark, TT, pp 3226 and 3906, and Mrs Leclercq, TT, pp 4166 and 4171).

Although some women did pass the test (see testimony of Mrs Leclercq, p 4139, and Mrs Collot, p 4032), it is quite probable that the test had an adverse impact. According to Dr Messing, a number of studies show that women are generally less able than men to lift such an 83-pound weight (see Exhibit A- 25 and TT, pp 4063- 4067).

If the revised hiring procedure for brakemen retains the physical test, CN will have to prove that this test is closely related to the job; otherwise, there is a strong possibility that it may be found discriminatory (see the following American cases: Beckman v City of New York, 31 FEP Cases 767 (1983); Nance v Union Carbide Corporation, 397 F Supp 436 (1975)).

f) The interview with the foreman As we have already mentioned, the employment office did not do the actual hiring, but referred candidates that it selected to the foreman. The foreman made the actual decision as to whether or not to hire the candidate (see testimony of Miss Nemeroff, TT, p 208, Mrs Beauchamp, TT, p 568, and Mr Toutant, TT, p 1603).

According to Mr Toutant, the foremen were aware of CN's policy of hiring women for non-traditional jobs (TT, pp 1523 and 1607).

Mr Toutant claimed that when women referred to the foreman were not hired, he enquired into the reasons for the decision. However, he did not exercise any real control over these decisions. According to Mr Toutant, the foreman was supposed to choose the best qualified person.

It emerged from Mr Noel's testimony that the superintendent considered the foreman to have authority and that it was the foreman alone who decided whether or not to hire. Once this power had been delegated, it could not be taken back. This would explain why the superintendent of

rolling stock, Mr Pasteris, supported the decisions of his foremen (see testimony of Mr Noel, p 3992).

There is no real control at Canadian National over the standards, if any, used by the foremen; in the past this left room for a great deal of arbitrariness (see testimony of Mrs Piché, p 1451, and Mrs Wallace, p 375).

Thus the foreman was able to exercise a great deal of discretion. We saw an example where a foreman made a female applicant for a coach cleaner job lift a brake shoe as a physical test. Mr Noel intervened and managed to persuade the foreman to disregard the applicant's failure on this test, since male applicants were never required to take a physical test (TT, p 3987).

Given the non-compulsory nature of the policy promoting the hiring of women and the general "don't rock the boat" attitude, CN's awareness seminars for foremen and executives were not enough to change the situation (see Mr Girard's admission, p 4879).

According to Dr Piché, the arbitrary nature of the interview with the foreman will disappear, since in future there will be objective standards. The interview will be conducted by two persons: a representative of the employment office and a representative of the department to which the applicant is to be sent. Once the applicant has successfully completed all the hiring procedures, the foreman will no longer have the discretionary power to reject him (TT, pp 3135- 3137).

g) The negative attitude of some departments Mrs Gagnon testified that some departments were reluctant, to say the least, to hire women. She gave the specific example of the engineering department. The transportation and rolling stock departments, on the other hand, were relatively open (TT, pp 2133- 2136).

This argument was corroborated by statistics, which clearly show that the engineering department was closed to women (see Exhibit R- 38).

To the extent that Canadian National tolerated this attitude on the part of some of its departments, which had the effect of preventing women from obtaining positions in those departments, we have an obvious form of systemic discrimination.

Acceptance in the workplace The workplace was not really prepared to accept women. No one thought to give seminars for the workers themselves (see testimony of Mrs Gagnon, TT, p 2087). The arrival of women was perceived as a disturbing development. Women themselves were sometimes considered "job stealers" (see testimony of Miss Nemeroff, TT, p 201). Apparently CN did not have the support of the union either, since the union representatives themselves came from a background which for the most part did not want women in the workplace (see testimony of Mrs Gagnon, TT, p 2162, Miss Nemeroff, TT, p 210, and Mrs Beauchamp, TT, p 572).

Resistance from the workplace and the unions cannot exonerate CN. Contrary to its claims, CN can exercise control over the conduct of its employees. This was the case with measures against sexual harassment.

Because the male workers were not prepared for the coming of women, there were incidents of sexual harassment, including sexist remarks, threats of rape and off- colour jokes (see testimony of Miss Nemeroff, TT, pp 215 and 201, and Mrs Brunelle, TT, p 518). However, such sexual harassment does not appear to have been widespread. For there to be systemic discrimination, there must be more than isolated incidents (see *Cormier v PPG Industries Inc*, 519 F Supp 211 (1981) and *Friend v Leidinger*, 588 F (2d) 61 (1978)).

Furthermore, in 1982 CN took effective measures in this regard by issuing clear guidelines on sexual harassment (Exhibit R- 45). These guidelines were posted in the workplace (see testimony of Mrs Leboeuf, TT, p 3542). They defined sexual harassment and indicated that severe penalties would be imposed on offenders (see testimony of Yvon Masse, TT, pp 2292- 2293).

It seems clear that these guidelines had an effect. Pornographic photographs disappeared from the workplace and relations with men were considered good by Mrs Leboeuf (TT, pp 3542- 3543).

This proves that, if it really wants to, Canadian National can take measures to change attitudes in the workplace.

Nevertheless, other forms of discrimination may persist because they are more subtle. For example, there was the attitude of a foreman toward Miss Nemeroff, who, despite her experience in mechanics, was relegated to a labourer job because her superiors refused to allow her to complete training for a helper hostler position (TT, pp 209- 216).

However, this lies outside the scope of this case since it involves promotion, not hiring, which is the subject of this complaint.

V. AFFIRMATIVE ACTION PROGRAMS IN GENERAL

Since there are hardly any examples in Canadian law of the imposition of an affirmative action program such as that suggested by ATF and the Canadian Human Rights Commission, we think it is important, before considering the appropriateness of ordering CN to adopt such a program, to indicate the legal basis of affirmative action programs and to look at some examples of them. Accordingly, we will draw a comparison between the Canadian Human Rights Act and American legislation and then look at the American experience in imposing such programs. Lastly, we will give a few examples of voluntary affirmative action programs in Canada.

Comparison between American and Canadian legislation

The history of affirmative action programs in the United States and the major decisions that preceded them were explained well by Professor Jane Picker, a professor of law and a specialist in sexual discrimination law at the Cleveland State University College of Law, and Daniel E Leach, a partner in the New York law firm of Chadbourne, Parke, Whiteside and Wolff and former vice- chairman and acting chairman of the US Equal Employment Opportunities Commission.

Mr Leach explained that in the United States the concept of affirmative action developed from two different sources - legislation and an executive order. The first legal reference to the concept of affirmative action is found in Title VII of the Civil Rights Act of 1964. This Act was passed in the wake of the measures that followed the civil rights movement in the United States (TT, pp 2567- 2580).

Section 706(g) of Title VII provides: "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(1972 Amendments: Subsections (1) through (g) of Section 706 were amended by P. L. 96- 261, effective March 24, 1972, empowering the EEOC to prevent any person from engaging in any unlawful employment practice described in Section 703 or 704; extended procedures through conciliation efforts; outlined enforcement procedures where no voluntary compliance; when an action may be brought by Federal Government, and an aggrieved party.)"

Section 703(j) of Title VII provides: "(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor- management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Professor Picker explained that Title VII does not define affirmative action. It simply refers to "reinstatement, back pay or any other equitable relief" which a court may order if it judges that an employer has committed an illegal employment practice. The setting of goals, targets or quotas is not based on explicit language in the statute itself but rather has been developed through judicial interpretation (TT, p 802).

Professor Picker also indicated that the apparent contradiction between section 706(g) and section 703(j) of Title VII resulted in major litigation which has made it possible to define what may be done by way of affirmative action (TT, p 802).

Mr Leach testified that Title VII was adopted in 1967 and that the Equal Employment Opportunity Commission (EEOC) was set up to administer this statute. However, it was not until 1972 that the EEOC was given the authority to enforce its administrative decisions through the courts. Before 1972, private litigants had had this right, but the EEOC could only exercise moral suasion, based on its authority to investigate complaints made to it, to hold hearings and to make determinations as to the rights of the parties (TT, pp 2576, 2870- 2871).

Mr Leach also indicated that the second type of affirmative action in the United States is not based on legislation but on a 1965 executive order (Executive Order 11246) issued by President Lyndon Johnson. This executive order formed the basis for the Contract Compliance Program of the Department of Labour. This program was designed to use the government's contracting power to persuade private companies not to discriminate against blacks and to implement affirmative action programs to make employment in such companies more accessible to blacks. All companies wishing to receive contracts from the US federal government must comply with this program in order to do business with the government (TT, pp 2577 and 2646). The executive order was amended in 1968 to include sex and later handicap discrimination (TT, p 2574). We will describe later on the affirmative action programs set up under the Contract Compliance Program.

It should be pointed out that in Canada there exists no program comparable to the American Contract Compliance Program.

The Canadian Human Rights Act of 1977 uses the term "special program" rather than "affirmative action," but the meaning is the same. Special programs are mentioned in two sections of the Canadian Human Rights Act - section 15(1) and (2) and section 41(2)(a):

15. (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status or physical handicap of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

(2) The Canadian Human Rights Commission established by section 21 may at any time (a) make general recommendations concerning desirable objectives for special programs, plans or arrangements referred to in subsection (1); and (b) on application, give such advice and assistance with respect to the adoption or carrying out of a special program, plan or arrangement referred to in subsection (1) as will serve to aid in the achievement of the objectives the program, plan or arrangement was designed to achieve.

41. (2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to subsection (4) and section 42, it may make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

a) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future; (b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice; (c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and (d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice. We will describe later on the special programs that may be adopted under the Canadian Human Rights Act.

Affirmative action programs in the United States

In his testimony, Mr Leach gave details regarding the various types of affirmative action programs in the United States (TT, pp 2639- 2652). The Contract Compliance Program has significant repercussions on American employers. Programs that may be adopted under Title VII of the Civil Rights Act may be voluntary, negotiated or court- imposed.

a) The Contract Compliance Program This program was established under Executive Order 11246 and responsibility for it was assigned to the Department of Labour. In 1972, the order was substantially amended to provide more detailed instructions on the terms of affirmative action programs.

Thus the government can use its contracting power as leverage in pursuing national policy objectives - in this case, the inclusion of minority groups in the workplace. Every American employer that has fifty or more employees and that wants to bid on a government contract for \$50,000 or more must demonstrate that it has > 140 adopted a policy of non- discrimination in employment and that it has an affirmative action program that is in accordance with the detailed instructions issued by the Department of Labour (TT, p 2646).

Mr Leach explained that this program is intended to ensure that, when a contract is obtained and new jobs are created, a fair share of such jobs are distributed equally among workers in the area where the contract is to be carried out. If an inspector from the Department of Labour judges that an employer is under- utilizing a group protected by the Act on the basis of race, sex or national origin, then the employer must adopt an affirmative action plan. This plan must be in operation if a company wishes to bid on a government contract. This program is subject to periodic review and audit by the Department of Labour. If a contractor cannot meet the requirements of this affirmative action program, the Department of Labour has the authority to remove that

company's name from the list of bidders. If the employer has already obtained a contract, the contract will be cancelled. Most American companies have complied with the terms of the order and there have been very few court decisions on this point. The US Supreme Court has never had to render a judgment on this matter (TT, pp 2647- 2650).

b) Affirmative action programs under Title VII of the Civil Rights Act

There are two types of voluntary affirmative action program that an employer may undertake to enhance its image in the community. The first may involve changing hiring practices in order to provide equal opportunities for employment to all groups in the community; engaging in a public information program to disseminate the details of this policy throughout the community; and establishing outreach contacts with community groups (TT, pp 2639- 2640).

The second type of voluntary program, according to Mr Leach, is based on the voluntary affirmative action guidelines issued by the EEOC in 1978. These guidelines advocate that employers examine their workplace much as a court might examine it had a lawsuit been brought, in order to ensure they are not discriminating against a class of individuals protected by law. The methodology suggested through the guidelines is that the company's employee relations department compare the company's work force with the surrounding labour market. The company should thereby be able to identify any significant under- representation of people of a certain type. If there is under- representation, the employer should decide whether this phenomenon can be explained or justified for legitimate reasons. If it cannot, the statistical evidence may show that at some point in the history of the company barriers were erected to keep certain types of individuals out.

If this is the case, the employer is encouraged to correct any perceived problem which may exist. The employer is motivated by the knowledge that if the issue is taken to court by the EEOC, an individual or a class of individuals alleging discriminatory practices, ensuing legal or administrative proceedings could be extremely costly (TT, pp 2640- 2642).

According to Mr Leach, the second type of voluntary affirmative action program established under the auspices of the EEOC involves negotiated settlements, that is, agreements between the employer, the EEOC and/ or one or more employees who have filed a complaint of discrimination. Employers faced with a compelling factual situation that cannot be justified would rather settle the complaint than go through costly, drawn- out court battles (TT, p 2652).

Finally, there is a different type of affirmative action involving programs which are court imposed under section 706(g) of Title VII, pursuant to which the court may "order affirmative action as may be appropriate."

In her testimony, Professor Jane Picker underscored the fact that there had been few American court decisions imposing true quotas, if quotas were understood to mean an inflexible number to which the employer had to adapt. However, case law indicated a tendency toward flexible solutions in determining what the distribution of employees by category should be in order to achieve equitable representation (TT, p 872).

Mr Leach felt that one of the primary misunderstandings concerning affirmative action programs imposed under Title VII was the perception that an employer who wished to meet the goals and timetables imposed by the court had to lower his standards and hire less competent or less skilled people, or applicants less qualified than those who would normally have been given the jobs. This was not, in his view, in keeping with American law. Affirmative action programs implied that only qualified applicants should be hired.

For her part, Professor Picker noted that the procedure for implementing mandated affirmative action programs had been illustrated in a number of decisions (TT, pp 872- 877). In particular, she cited the case of EEOC v. Cook Paint and Varnish Co, 26 EPD 31935 (W D Mo 1981), in which the defendant was found guilty of contravening Title VII for the following reasons:

"(1) Failing or refusing to hire female applicants for employment in production and technician job classifications; (2) Failing or refusing to transfer female employees into production and technician job classifications; (3) Failing or refusing to assign female employees and/ or applicants for employment to production and technician job classifications; (4) Maintaining sexually segregated job classifications." (P. 21202)

Consequently, in its decision the court justified hiring goals and temporary quotas:

"Regarded as a more extraordinary remedy, hiring quotas may be directed where necessary to overcome the lingering effects of past discrimination. Similar remedies, less intrusive, more readily ordered, and appropriate where strict quotas are not required to insure future compliance with Title VII, are imposed in the form of "hiring goals". "A hiring goal lapses when a specified number or ratio is achieved, whereas a quota involves a relatively permanent use of a specified hiring ratio". Ass'n Against Discrimination v. City of Bridgeport (21 EPD 30321), 20 FEP Cases 985, 996 (D. Conn. 1979), aff'd in relevant part, No. 79- 7650 (2d Cir. April 8, 1981). It is well established that different forms of affirmative action, including quotas more favorable to one group than to another, may be mandated, at least where discrimination has previously been shown. E. g., EEOC v. Contour Chair Lounge Co., (19 EPD 9189), 596 F. 2d 809 (8th Cir. 1979). (p. 21204)

The court used the following criteria to determine the quotas to be imposed:

"Technicians. The Company work force is now integrated at a level of 25% female technicians. This may possibly have resolved the imbalance created by past discrimination against women, in that the percentage of women applicants for technicians jobs during the four year test period after suit was filed has not materially exceeded 25%, and in two of the years (1977 and 1978) the percentage of women applicants for such jobs was considerably below 25%. Imposition of quota hiring to push the percentage of women technicians past 25% presents a material danger of Court imposed reverse discrimination, in the sense that the Court might be forcing the Company to use targets for employment for women technicians which would not be achieved in a completely open and nondiscriminatory setting. The assumption that a 25% level of women technicians is normal for the work in this Company will be reconsidered if the applicant ratio changes during the course of remedial proceedings. In any event, the Company should be very careful to avoid

using 25% or any other figure as a "cap" on employment of women. The law does not seek any long term balance; nondiscrimination is the ultimate objective.

Production. Women comprise approximately 12% of the production workforce. This figure clearly evidences a carry over of discriminatory impact from the period for which liability has been found. Women applicants for production jobs have averaged about 25% of the applicants for such jobs during the four year test period. A target of 25% of women production workers, before integration may be considered to be at a normal level, is suggested by this applicant pool. The target is probably a modest one, in that the percentage of women applicants has been rising each year, 16% in 1976, 22% in 1977, 25% in 1978 and 30% in 1979. It is further noted that the newly presented figures show a 31% application rate and a 34% hiring rate in 1980. Continued increases in the percentage of women applicants for production jobs may cause revision of the 25% target. Achievement of the stated goal requires employment rates for women in excess of 25% in the immediate future, so that reasonably prompt correction of the current imbalance caused by past discrimination may be achieved. An overall annual ratio of a minimum of one female hired for production work for every two men hired (a 33 1/3% quota) would assist such a transition, and appears to be a very mild remedy easily achieved without undue discriminatory impact upon qualified male applicants, in light of the 25% and 30% application rates for women in 1978 and 1979 and the 34% hiring rate in 1980." (TT, pp. 21205- 21206)

The court also noted that monitoring was essential to the effectiveness of the decision and that the court should "retain jurisdiction to review the progress of the effectuation of all relief ordered herein, and to assure compliance with the recordkeeping procedures" (p 21206).

Professor Picker also pointed out that, during implementation of the affirmative action program, the court retained its authority and could make modifications in the conditions of the program, so that if the statistics concerning job applications changed markedly during that period of time, in either direction, the court could raise or lower the ratio (TT, p 878).

In cases where the court did not retain jurisdiction during program implementation, the complainant had the right to go back to the Federal Court and file a motion for contempt if the program ordered by the court had not been followed (TT, pp 877- 878).

Professor Picker also cited another affirmative action program adopted in *United States v City of Philadelphia*, 499 F Supp 1196 E D Pa 1980. This case involved a complaint of discrimination on the basis of sex in the hiring of police officers. In this instance, the court set an annual hiring goal to lapse when the number of women specified in the decision had been hired as police officers:

"4. Subject to the availability of qualified female applicants on the then- current police officer eligibility list, the City of Philadelphia shall adopt and seek to achieve a thirty percent (30%) annual hiring goal for females in the hire of the next 2,670 persons for the position of police officer in the Philadelphia Police Department.

5. The City of Philadelphia shall immediately adopt and put into effect a recruitment program designed to inform females of opportunities to apply for and fill the position of police officer in

the Philadelphia Police Department, for the purpose of securing sufficient numbers of qualified female applicants to ensure that the City meets the thirty percent (30%) annual hiring goal for females set forth in Paragraph 4, supra. Such recruitment program shall include, but need not be limited to: advertisements of employment opportunities placed through television, radio stations, newspapers and other types of mass media for the purpose of emphasizing to females the availability of employment opportunities in the position of police officer, and the active recruitment of females enrolled at high schools, technical and vocational schools, and colleges in the Philadelphia area." (p. 1204)

In another case cited by Professor Picker, *James v Stockham Valves & Fittings Co*, 559 F 2d 310, 5th Cir 1977, the court found that:

"... the district court should grant the plaintiffs injunctive relief against present discriminatory policies and practices at Stockham." (p. 354)

"(13) Injunctive relief against discriminatory selection and training practices and procedures for craft and supervisory positions is also necessary. The district court should enjoin the use of the high school education and age requirements for apprenticeship training until the requirements have been validated by Stockham. *Watkins v. Scott Paper Co.*, 530 F. 2d at 1182 and n. 31. The company must show that such screening devices are essential to the safety and efficiency of the plant. *Pettway v. American Cast Iron Pipe Co.*, 494 F. 2d at 245, citing *United States v. Bethlehem Steel Corp.*, and at 250. See also *Stevenson v. International Paper Co.*, 516 F. 2d 103 at 116." (p. 355)

"(18) Where found to be appropriate by the district court, relief such as red circling and special training for discriminatees may be awarded. Other relief may include "an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order 'necessary to ensure the full enjoyment of the rights' protected by Title VII". (footnote omitted). *Teamsters*, 97 S. Ct. at 1867. Also the court may establish goals and set timetables in order to bring about Stockham's earliest possible compliance with Title VII. See *Morrow v. Chrysler*, 5 Cir. 1974, 491 F. 2d 1053, 1056- 57, cert. denied, 419 U. S. 895, 95 S. Ct 173, 42 L. Ed. 2d at 139." (p. 356)

c) Reverse discrimination According to Mr Leach and Professor Picker, the potential conflict between sections 706(g) and 703(j) of Title VII was the subject of the decision by the United States Supreme Court in *United Steelworkers of America v Weber*, 443 US 193 (1979). This was the only Supreme Court decision which dealt with the imposition of quotas as part of an affirmative action program. However, this decision concerned a voluntary, not a court- imposed, program (TT, pp 2642- 2645 and 881- 882).

Justice Brennan wrote the following opinion for the Court:

"Challenged here is the legality of an affirmative action plan collectively bargained by an employer and a union - that reserves for black employees 50% of the openings in an in- plant craft- training program until the percentage of black craftworkers in the plant is commensurate with the percentage of blacks in the local labor force. The question for decision is whether

Congress, in Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. section 2000e et seq., left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories. We hold that Title VII does not prohibit such race-conscious affirmative action plans.

In 1974, petitioner United Steelworkers of America (USWA) and petitioner Kaiser Aluminium & Chemical Corp. (Kaiser) entered into a master collective-bargaining agreement covering terms and conditions of employment at 15 Kaiser plants. The agreement contained, inter alia, an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces. Black craft hiring goals were set for each Kaiser plant equal to the percentage of blacks in the respective local labor forces. To enable plants to meet these goals, on-the-job training programs were established to teach unskilled production workers - black and white - the skills necessary to become craftworkers. The plan reserved for black employees 50% of the openings in these newly created in-plant training programs.

This case arose from the operation of the plant at Kaiser's plant in Gramercy, La. Until 1974, Kaiser hired as craftworkers for that plant only persons who had had prior craft experience. Because blacks had long been excluded from craft unions, few were able to present such credentials. As a consequence, prior to 1974 only 1.83% (5 out of 273) of the skilled craftworkers at the Gramercy plant were black, even though the work force in the Gramercy area was approximately 39% black.

Pursuant to the national agreement Kaiser altered its craft hiring practice in the Gramercy plant. Rather than hiring already trained outsiders, Kaiser established a training program to train its production workers to fill craft openings. Selection of craft trainees was made on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black until the percentage of black skilled craftworkers in the Gramercy plant approximated the percentage of blacks in the local labor force. See 415 F. Supp. 761, 764.

During 1974, the first year of the operation of the Kaiser-USWA affirmative action plan, 13 craft trainees were selected from Gramercy's production work force. Of these, seven were black and six white. The most senior black selected into the program had less seniority than several white production workers whose bids for admission were rejected. Thereafter one of those white production workers, respondent Brian Weber (hereafter respondent), instituted this class action in the United States District Court for the Eastern District of Louisiana.

The complaint alleged that the filling of craft trainee positions at the Gramercy plant pursuant to the affirmative action program had resulted in junior black employees' receiving training in preference to senior white employees, thus discriminating against respondent and other similarly situated white employees in violation of section 703(a) and (d) of Title VII. The District Court held that the plan violated Title VII, entered a judgement in favor of the plaintiff class, and granted a permanent injunction prohibiting Kaiser and the USWA "from denying plaintiffs, Brian F. Weber and all other members of the class, access to on-the-job training programs on the basis of race." App. 171. A divided panel of the Court of Appeals for the Fifth Circuit affirmed, holding that all employment preferences based upon race, including those preferences, incidental to bona fide affirmative action plans, violated Title VII's prohibition against racial

discrimination in employment. 563 F. 2d 216 (1977). We granted certiorari. 439 U. S. 1045 (1978). We reverse.

The only question before us is the narrow statutory issue of whether Title VII 'forbids' private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser- USWA plan. That question was expressly left open in McDonald v. Sante Fe Trail Transp. Co., 427 U. S. 273, 281 n. 8 (1976), which held, in a case not involving affirmative action, the Title VII protects whites as well as blacks from certain forms of racial discrimination. ...

... respondent's reliance upon a literal construction of 703(a) and (d) and upon McDonald is misplaced. ... It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, not within the intention of its makers". ...

The prohibition against racial discrimination in 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose. ...

... an interpretation of the sections that forbade all race- conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected." (pp. 197 to 202).

d) Monitoring of affirmative action programs Decisions imposing affirmative action programs usually included a provision for monitoring by the court. In this area, there was a great deal of flexibility, so that appropriate measures could be found for each situation. The court usually preferred to have the complainants (rather than the court) monitor the implementation of affirmative action. Reporting on program progress was done monthly or quarterly, depending on the frequency of the company's administrative reports (TT, p 918)

e) Employers' attitude toward affirmative action programs In his testimony, Mr Leach noted that, in the United States, employers were now complying voluntarily with the provisions of Title VII, preferring "preventive maintenance" to court battles. Before reaching this point, there was a long period of interpretation to determine the contours of the law. This period was now past in the United States, with two exceptions. One of these cases involved the use of statistics to prove employment discrimination. In this area, the trend was in the direction of requiring greater specificity on the part of both complainants and respondents (TT, pp 2797- 2798).

Mr Leach also felt that large fines and the imposition of measures concerning backpay, sometimes in the millions of dollars, constituted the most compelling force behind the establishment of affirmative action programs. The publicity surrounding this type of trial also led to settlements involving the adoption of voluntary programs. Under American law, employers had the opportunity to conciliate confidentially and to enter into private agreements with the EEOC. As a result, there was no publicity at all with respect to such conciliation agreements (TT, pp 2843- 2844).

f) Union attitudes toward affirmative action programs According to Professor Picker: "... in the litigation in which I have been directly involved, a very large proportion of it has had unions as well as employers as defendants, and I find that in dealing with very large corporations that often, beneath it all, the problem of the union is the more difficult to solve than the problem of the employer ... We see enormous problems as far as union resistance is concerned." (TT, p. 900).

If the setting up of an affirmative action program threatened to provoke a strike, Professor Picker felt that:

"... the union would very promptly be made, if necessary, an involuntary party to the litigation, and the strike would become a matter for the Federal Court to consider the legality of it, because the strike would almost certainly be viewed as a coercive tactic on the part of the union to prevent compliance with the antidiscrimination legislation, and I have no doubt that strike would be enjoined under those circumstances." (TT, p. 902)

3. Affirmative action programs in Canada Affirmative action programs in Canada have been set up on an informal, voluntary basis rather than on the basis of the American model of court-imposed or legislated programs. Although programs such as the one to encourage bilingualism in the federal public service and the government's hiring policies during and after the Second World War cannot be classified as affirmative action programs, they nevertheless served to increase the participation of certain groups in the work force.

Dr Ruth Pierson, a professor of history at the Ontario Institute for Studies in Education, clearly described to the Tribunal both the programs used to increase the participation of women in the work force during and after the Second World War, and the postwar programs designed to integrate returning veterans (TT, p 4340).

According to Dr Pierson, the number of women in the work force doubled, rising from 638,000, on the eve of the war, to one million, and reached 1.2 million by the fall of 1944 (TT, p 4343). She attributed this considerable increase to the need to make up for the shortage of labour which occurred in 1941- 1942 (TT, p 4344).

The sector most affected by this shortage, the Armed Forces, began actively recruiting women in the summer of 1941 (TT, p 4344).

According to her testimony, this shortage became critical by late 1941 and the early part of 1942. A study conducted by the Department of Labour concluded that the growing demand for workers could only be satisfied by women. In March 1942, the government created the National Selective Service. One of the Service's primary objectives was to recruit women for industrial jobs (TT, pp 4344- 4345). The methods used in its recruitment campaigns included radio broadcasts over the CBC/ Radio- Canada network, newspaper and magazine articles and posters (TT, p 4346).

Dr Pierson gave some examples of steps taken by the federal and provincial governments to encourage more women to enter the work force:

"One of the first one was an amendment to the War Tax Act which was carried out in the Summer of nineteen forty- two (1942). What this did was make it possible for the married man to continue to receive the full married status exemption which at the time was a thousand two hundred dollars (\$ 1,200), regardless of how much his wife earned working out in a paid labour force. Before that was changed, the women could earn up to seven hundred and fifty dollars (\$ 750) before the husband lost the full married status exemption. (TT, p. 4365)

"... Another policy that was implemented was what was called the Dominion Provincial War Time day nurseries program. The Federal Government was authorized, the Department of Labour was authorized to form an agreement, with any province, to bring about on a fifty/ fifty (50/ 50) cost sharing basis, government supported day care for the children of mothers principally working in war industry. By nineteen forty- four (1944), in fact, that would be changed, ... because as it was pointed out, all of the women that were being recruited into the labour force were in fact doing work of national importance." (TT, p. 4366)

Dr Pierson noted that day care facilities were set up in Quebec and Ontario (TT, pp 4366- 4367).

Measures designed to exclude women from the work force were also suspended during the war. In Quebec, an order in council suspended a legislative provision preventing women from working at night (TT, p 4364). A provision setting a maximum number of working hours for female employees was also set aside; similar action was taken in the mining industry.

"Then, a critical shortage of male labour in mining operations in a number of provinces also prompted the suspension of protective legislation. So, to circumvent the mine regulations in Ontario which prohibited:

"Any girl or woman in or about any mine except in a technical clerical or domestic capacity."

So, that meant surface miners as well, there were a lot of jobs that women were kept out. The Dominion Cabinet, starting in August, nineteen forty- two (1942), issued a series of orders in Council which permitted specific, and then would be named, Ontario Mining companies, like the International Nickel Company of Sudbury and in Port Colburn to extend, that is to suspend the protective legislation for the duration and to extend the employment of the women to some fifty (50) more occupations and they all were still above ground ..." (TT, pp. 4385- 4386)

According to Dr Pierson, countermeasures were introduced immediately after the war in order to encourage women to leave the work force so as to make room for returning veterans (TT, pp 4368 and 4371).

As a result, day care in Quebec was abolished in less than a month. Similar action was taken in Ontario, although some facilities were able to survive through provincial government and municipal support (TT, p 4368).

Similarly, tax laws were changed to discourage married women from working.

The federal government took other action aimed at ensuring that women would have no choice but to leave their jobs.

At the same time, positive action was taken to facilitate the hiring of veterans: "So all of those women who had moved into what were in essence replacement jobs were, by law, required to step out, to make room now for the returning veterans.

... .. there was another rehabilitation measure for veterans and that was the Civil Service Act which stated that preference should be shown ... to veterans who had known active service overseas or service on the high seas ..." (TT, pp. 4371- 4372)

Although 7,000 of the 50,000 women hired by the Armed Forces served overseas, the provision for veterans' benefits was applied only to men (TT, p 4372).*

In her testimony, Dr Pierson pointed out the radical effect these programs had on the number of women in the work force. After climbing from 24.4% in 1939 to 33.3% in 1944, the percentage began to tail off in 1945. By 1946, it had fallen to 25.3%, which was roughly the 1939 level (TT, pp 4380- 4381).

* French unclear - literally reads: Although 7,000 of the 50,000 people hired by the Armed Forces were sent overseas, the provision for veterans' benefits was applied only to men. (TR)

The testimony of Raynald Masse provided information on the programs designed to increase Francophone participation:

(Translation) In 1965, when I came back to the St Lawrence Region, most of the department heads were unilingual Anglophones, including the regional vice- president.

Naturally, English played a very big part in our internal business relations, in a region where a good portion of the population was French- speaking.

In 1966, I headed up a study on all of CN's departments in Quebec; I remember very clearly sitting around a conference table with a group of Francophones, and as soon as the conversation came round to railways, we started speaking English, it was so much a part of our work.

Generally speaking, CN became aware at that time, when the Parent report came out, of the concern for bilingualism, and began taking appropriate action. Francophones were trained. More and more Francophones and bilingual people were hired, and language courses were given so that gradually, by the fall of 1977, the company was in a position to say in its language policy...

I am referring to "Management Guide Bulletin 19.30" entitled "The Official Languages - Measures to ensure equality of status". At that time, the company announced that, in Quebec, French would be the language of work in the St Lawrence Region.

I think that in view of the situation I have described to you... over a period of ten to twelve years, this is a striking example of cultural change, if there is such a thing as cultural change, this is an example... (TT, pp 2228- 2230).

Mr Masse also adduced as evidence Exhibit R- 39, the annual report of September 31, 1981, concerning the evolution of bilingualism at CN. This report was forwarded to the federal Minister of Transport. Mr Masse noted the following highlights of this report:

(Translation) At the regional level, of a total of 79 senior managers, 72.1% are Francophone, and 27.9% Anglophone or other; 93.7% are functionally bilingual.

At head office, 100% of the senior managers are bilingual. In the middle management categories, 77% are Francophone and 23% Anglophone or other; 83.6% are bilingual. Among both unionized and non- unionized employees, the percentages reflect Quebec's population (79.5% Francophone, 20.5% Anglophone); we do not have any information on their linguistic capability at this time (TT, p 2231).

The first time affirmative action programs were recognized in legislation was in 1977, when the Canadian Human Rights Act and sections 15 and 41(2), mentioned earlier, were passed.

In 1980, the Canadian Human Rights Commission published a document entitled "Special Programs in Employment: Criteria for Compliance" (Exhibit C- 3). This manual outlines the criteria for establishing special programs. It also describes how to identify the need for such programs and details the stages of implementation.

Catherine Burr, chief of the Commission's Systemic Discrimination Unit, testified that the unit had been established in 1981 to advise and assist employers and Commission staff with respect to systemic discrimination and special programs, commonly referred to as affirmative action (TT, pp 1028- 1029).

The purpose of a special employment program is clearly defined in the manual:

The purpose of a special program in employment, as intended by the Canadian Human Rights Act, is to provide the conditions which will nurture the growth of equal opportunity for minority group individuals, the physically handicapped, and women within the working environment.

The extent to which an organization's labour force is representative can be determined by its comparison with the available labour pool. 1 Equitable representation will be achieved by changing the composition of the internal labour force such that any under- utilization or over- concentration of groups within that labour force is corrected.

There are three essential steps in developing a special program: - To identify as problems, areas within the organization in which the labour force is unrepresentative. - To determine how the problem(s) relate to organization policies, practices and procedures, both formal and informal.

- To formulate solutions which aim to remove existing barriers and to forward equitable representation.

1 The term "labour pool", in the context of this paper, will refer to those persons with the requisite skills or potential to acquire the skills necessary to perform the functions of given occupations, within the geographical area from which an employer might reasonably be expected to acquire workers. (Exhibit C- 3, p 12).

The criteria which indicate the need for a special program are also outlined in this document. They include:

- observable absence of members of certain groups in particular job categories, or in the organization as a whole;
- existence of particularly high unemployment rates among certain groups;
- internal complaints and/ or grievances from employees; - external complaints by individuals or groups; - inability of the organization to recruit or retain employees (high turnover);
- complaints filed with the CHRC alleging discriminatory practices. Although none of these indicators may "prove" that a special program is required, they point to the need for an organization to undertake a more comprehensive analysis of its labour force.

A credible analysis uses a statistical approach to determine the degree to which the existing and potential labour force accurately reflects the relevant outside labour pool, and to identify the area(s) in which groups may be at a disadvantage, measured by the extent to which they are under- represented or over- concentrated within the organization. (Exhibit C- 3, p 13).

The manual also outlines the following stage as part of the recommended procedure:

Having identified areas of under- utilization and over- concentration, the next step for the organization is to determine the relationship between the composition of its existing labour force, and the elements of its employment system. Organizational policies, procedures and practices concerning employment must be examined to determine how and to what extent they contribute to an unrepresentative labour force.

This causal assessment is complex and requires thoroughness and depth. Disadvantage may be caused at many stages in the process of formulating, interpreting or implementing an employment related policy, procedure of practice. For example: in formulating the requirements for an occupational category, physical standards might be set which are not intrinsically related to the performance of the job, and may tend to eliminate members of shorter races. In interpreting an occupational requirement for geographical mobility, recruiters screening applications could assume that members of certain groups, such as married women, would be unable to meet the requirement...

The composition of the present labour force may be affected by the consequences of past policies, practices and procedures. For example, an organization may have, in the past, excluded the members of certain groups from application at entrance level positions. Even though no longer in force, this will have left a heritage of a disproportionately low number "qualified by company experience" for promotions into more senior positions...

All of these causal analyses will provide the organization with information regarding the extent to which its employment system contains discriminatory practices contributing to a non-representative labour force. The organization is then in a position to select the areas which could most appropriately be addressed through the mechanism of a special program. (Exhibit C- 3 p 14).

Mrs Burr informed us that, to date, no Canadian human rights tribunal had ever imposed a special program in response to a complaint. However, several federal agencies, including the RCMP, the Canadian Armed Forces, Correctional Services Canada and Transport Canada, had introduced voluntary special programs. These programs were established with the Commission's help in order to increase the participation of women and Native persons in such agencies (TT, pp 1096- 1098).

VI AN ORDER CONCERNING THE ESTABLISHMENT OF AN AFFIRMATIVE ACTION PROGRAM

AT CN

In their argument, counsel for CN maintained that the labour pool was insufficient to warrant a significant increase in the number of women in blue-collar jobs. They also argued that this type of employment was not desirable for a woman for such reasons as the obligation to travel, the nature of the work, and the hours, to name but a few. It is our view, however, that the number of applications by women for non-traditional jobs at CN has been artificially reduced because of the following factors, all of which constitute an integral part of CN's hiring policy. The similarity with *Kohne v Imco Container Co*, (21 FEP Cases 535), is striking. The major factors include: sporadic posting of vacant positions, recruitment by word of mouth, inconsistency of the qualifications required for the position, and discriminatory treatment in the workplace (Miss Nemeroff's testimony on this subject was particularly enlightening). Another factor which tends to perpetuate the situation is the fact that women employees find that they are practically the only females in their work unit. Layoffs in recent years have done little to improve this situation, since the few women who are hired are the first to go because of their lack of seniority:

"If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly just as clearly by an employer's actual practices, by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups...

International Brotherhood of Teamsters vs. United States et al, 431 U. S. 324 (p. 365).

We are also fascinated by the correlation between the increased hiring of women in 1981 and the appointment of this Tribunal. "The correlation between the dates of filing of the charge and this suit and the increasing hiring is notable and actions taken in the face of litigation are equivocal in purpose, motive and permanence" (EEOC v Cook Paint and Varnish Co, 26 EPD, 21201, at page 21203).

It will be difficult in the case of CN to remedy the marked disparity resulting from years of discriminatory practices. It is to be hoped that, with time, the imbalance will be reduced. However, it is our view that this will not be possible without the imposition of an affirmative action program:

"Voluntary choice of traditional "women's work" or "men s work" is an unregulated aspect of personal freedom. While recognizing that "supply side" limitations may exist in this case, the Court should avoid treating the attitudes of recent decades as immutable. In the Nineteenth Century, for example, it seems probable that male secretaries predominated, or that such work was almost universally performed by men. During the same period, a considerable portion of factory work may have been predominantly performed by women (and children). The influx of women into factory work during World War II as a familiar item of history. So the Court must seek a sensible solution in creating a remedy which takes into account indications of current employee preferences, but also recognizes that "times changes" ...

... Temporary, imposition of a quota, however, has been found the most effective means of relief and is permissible where "it seems reasonably calculated to counteract the detrimental effects a particular, identifiable pattern or discrimination has upon the prospects of achieving a society in which the distribution of jobs to basically qualified members of sex and racial groups is not affected by discrimination."

"EEOC vs. Cook Paint and Varnish Co., supra, pp. 2104- 2105). The Canadian Human Rights Commission, in document C- 3, from which passages were quoted earlier, defined the objectives of special employment programs. These objectives, together with the implementation criteria proposed, will be used to determine the content of the special program we feel must be imposed on CN if, realistically, the proportion of women in blue- collar positions at CN is to be the same as that of women in similar positions across the country, namely 13%.

The objectives of a special program are as follows: The primary objective of a special program is to increase the representiveness of the organization's labour force in some specific way.

In setting objectives specific to the organization, the following factors must be considered;

- objectives should be quantitative, that is, they should state the expected incidence of change in composition of the labour force in measurable terms, as targets or goals;
- objectives aim to correct under- utilization or over- concentration where they occur in an organization;

- objectives must be specific as to target group and should also specify job category and geographical area;
- the objectives must be attainable within specific and reasonable timeframes. A special program is intended to be a temporary measure that should never outlive the identified problem of disadvantage, although the achievement of objectives will result in permanent organizational changes;
- objectives should realistically reflect the ability of the organization to respond to change. For example, objectives must be set in relation to the size and relative growth potential of the organization;
- objectives must take into consideration the continuing rights of individuals, especially employees, not belonging to designated target groups;
- the objectives will be framed with care to be sensitive to the feelings and expectations of staff, including members of the target group(s). (Exhibit C- 3, p 15)

Certainly, there are, first and foremost, fundamental differences in that these objectives were set within the framework of a voluntary, not a court- imposed, program.

In order to clarify this matter, we should point out that, in this case, the objective is to increase to 13% the proportion of women in non- traditional jobs at CN in the St Lawrence Region. Once this goal has been reached, the special program, as imposed by this Tribunal, may be terminated. The Tribunal hopes, however, that the program will bring about permanent organizational changes and that a voluntary program will enable CN to follow any future evolution of Canadian women in non- traditional jobs.

ORDER

FOR THE ABOVE REASONS this Tribunal, concluding that there are in the St Lawrence Region of CN certain hiring policies or practices that are discriminatory for the purpose of section 10 of the Canadian Human Rights Act, and that these practices are not based on bona fide occupational requirements for the purpose of section 14 of the said Act, makes the following order, according to the powers conferred upon it by section 41:

PERMANENT MEASURES FOR NEUTRALIZATION OF CURRENT POLICIES AND PRACTICES

1. CN shall immediately discontinue the use of the Bennett test for entry level positions other than apprentice positions, and, within one year of the time of this decision and for the same positions, shall discontinue all mechanical aptitude tests that have a negative impact on women and are not warranted by the aptitude requirements of the positions being applied for.

2. CN shall immediately discontinue all practices pursued by foremen or others in which female candidates undergo physical tests not required of male candidates, mainly the test which consists of lifting a brakeshoe with one arm.
3. CN shall immediately discontinue the requirement for welding experience for all entry level positions, with the exception of apprentice positions.
4. CN shall modify its system for the dissemination of information on positions available. More specifically, within the period of one year it shall take the most suitable measures to inform the general public of all positions available.
5. CN shall immediately change the reception practices in its employment office to give female candidates complete, specific and objective information on the real requirements of non-traditional positions.
6. CN shall immediately modify its system of interviewing candidates; in particular, it shall ensure that those responsible for conducting such interviews are given strict instructions to treat all candidates in the same way, regardless of their sex.
7. Should CN wish to continue to grant foremen the power to refuse to hire persons already accepted by the employment office, it shall immediately issue a specific directive to the effect that no one shall be rejected on the basis of sex.
8. CN shall continue to implement the measures already adopted in its directive on sexual harassment with a view to eliminating from the workplace all forms of sexual harassment and discrimination.

SPECIAL TEMPORARY MEASURES

1. Within the period of one year and until the percentage of women in non-traditional jobs at CN has reached 13, CN shall undertake an information and publicity campaign inviting women in particular to apply for non-traditional positions.
2. Whereas we feel that the process of change in CN's St Lawrence Region must be accelerated and preferential measures for women are required;
 - Whereas the employer must be given a certain measure of flexibility in view of the uncertainty surrounding the question of how many qualified female workers are available;
 - Whereas ideally, in order to create as soon as possible a critical mass that would allow the system to continue to correct itself, we would be inclined to require over the coming years, until the objective of 13% is achieved, the hiring of women to fill at least one non-traditional position out of every three;

- Whereas for the sake of giving more latitude and flexibility to CN in the methods employed to achieve the desired objective, we feel that it would be more prudent to require a ratio lower than one in three for the hiring of women for non- traditional positions at CN;

ACCORDINGLY, Canadian National is ordered to hire at least one woman for every four non- traditional positions filled in the future. This measure shall take effect only when CN employees who have been laid off but who are subject to recall have been recalled by CN, but not before one year has elapsed from the time of this decision, in order to give CN a reasonable length of time to adopt measures to comply with this order. When it is in effect, daily adherence to the one- in- four ratio will not be required, in order to give the employer more choice in the selection of candidates. However, it must be complied with over each quarterly period until the desired objective of having 13% of non- traditional positions filled by women is achieved.

3. Within a period of two months of this decision, CN shall appoint a person responsible with full powers to ensure the application of the special temporary measures and to carry out any other duties assigned to him by CN to implement this decision.

SUBMISSION OF DATA CN SHALL SUBMIT TO THE COMMISSION:

1. Within 20 days of the introduction of the above- mentioned special temporary measures, an initial inventory of the number of blue- collar workers in the CN's St Lawrence Region, by sex and by position.

2. Within 20 days of the end of each quarterly period after the above- mentioned special temporary measures have begun to be applied, and for the entire duration of the said measures, after forwarding a copy to ATF, a report containing:

a) a list indicating the name, sex, title and duties, date hired and employment sector of every person hired in the St Lawrence Region during the previous quarter;

b) a detailed statement of the efforts made by CN to recruit female candidates for non- traditional positions during the previous quarter;

c) a breakdown, by sex, of: the total number of persons who applied for non- traditional positions at CN during the previous quarter; and the total number of persons who completed, underwent or failed every test or written examination to fill a non- traditional position. This list shall include the score and rank of every person who passed the test or examination; d) the name, sex and changes in titles and duties, or changes in status of every employee hired for non- traditional positions after the special temporary measures come into force.

3. A statement giving the name, official title and date of appointment of the person in charge of applying the above- mentioned special temporary measures, within twenty days of his or her appointment.

MONTREAL, this 30th day of July, 1984

(signed) Denis Lemieux, Chairman

(signed) Joan Wallace

(signed) Nicole Duval Hesler