T.D. 11/93
Decision rendered on June 16, 1993

CANADIAN HUMAN RIGHTS ACT
(R.S.C. 1985 chap. H-6 as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

KEN GANNON

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN PACIFIC LIMITED (CP RAIL)

Respondent

TRIBUNAL: Alfred G. Lynch-Staunton
Gulzar Shivji
Donald Allin Souch

DECISION OF THE TRIBUNAL

APPPEARANCES BY: Robert Lee, Counsel for the Commission
Forest Hume and Michael MacLearn, Counsel for the Respondent

DATES AND PLACE
OF THE HEARING: June 3 to 7
September 16 to 19, December 9 to 12, 1991
and February 3 to 7, 1992
Vancouver, B.C.

MAJORITY
DECISION BY: Donald Allin Souch (with Gulzar Shivji concurring)

DISSENTING
OPINION BY: Alfred G. Lynch-Staunton

The Complainant, Kenneth Gannon, alleges that the Respondent, Canadian Pacific Limited ("C.P. Rail") has discriminated against him in violation of Sections 7(a) and (b) and Section 13.1 (now Section 14) of the Canadian Human Rights Act (CHRA). The Complainant alleges the discrimination is based upon race, colour and family status. The Complainant filed his initial complaint on August 6, 1985, and on August 27, 1985 filed an amended complaint. The complaint as amended alleges that the discrimination occurred from March 1979 to August 19, 1985, which is the date that the Complainant's employment with the Respondent was terminated. The particulars set out by the Complainant in his amended complaint are as follows:

"I have reasonable grounds to believe that Canadian Pacific Limited (CP Rail) has discriminated against me in that I was subjected to different treatment and harassed during the course of my employment and subsequently was terminated because of my race, colour and family status in violation of Sections 7(a)(b) and 13.1 of the Canadian Human Rights Act. I have repeatedly been denied opportunities to fill vacancies for temporary positions for which I was qualified. I had more seniority than the successful candidates and according to our collective agreements, should have had priority over them.

For example, in January 1985 I was denied the opportunity to fill a vacancy for a Relief Plumber, despite having more seniority than the successful candidate, who is white, and is the brother of another plumber. I also believe that I was denied overtime opportunities, and was disciplined more severely than other employees. In addition, I was called "nigger" repeatedly by both co-workers and a supervisor. Although I advised management of this treatment on 14 January 1985, they took no action to stop the name-calling. I complained to the CP Police about discrimination on 29 May 1985 as well as assault on 15 March 1985, but they did not respond to my complaints. In the meantime, I was charged with insubordination and was suspended on 29 May 1985. I returned to work on 21 June 1985, but was again suspended for insubordination on 15 July 1985. I received a letter dated August 19, 1985 notifying me that I have been terminated."

The Complainant, in his evidence at this hearing, expanded upon his complaint referring to other incidents in support of his claim that he has been discriminated against contrary to the CHRA.

The areas of discrimination alleged by the Complainant can be broadly categorized as follows:

(a) Racial harrassment;

(b) Being disciplined more severely than other employees as a result of race, colour or family status;

(c) Termination of employment based on race, colour or family status;

(d) Denial of employment opportunities based on race, colour or family status, including job promotion, relief work and overtime;

The hearing into this complaint lasted about 4 weeks. The Tribunal heard testimony from 27 witnesses including 2 experts. Numerous exhibits were filed. Much of the evidence presented was contradictory and inconsistent. Some of the witnesses appeared evasive and were not entirely forthright in their testimony. The fact that some 6 years had elapsed between the date Mr. Gannon filed his complaint and the start of this hearing created some difficulties in specific recollections of times, places and events. Care had to be taken when assessing the evidence of most of the witnesses, including the Complainant. It was agreed amongst counsel that credibility is a major factor in this case.

The Tribunal finds itself divided in its conclusions. Two of the panel members are in full agreement, while the Chairman has differing views and will set out his decision separately. What follows is the majority decision of the Tribunal in respect to this complaint.

BACKGROUND

At the time of commencement of this hearing in June of 1991, the Complainant was 48 years of age. The Complainant was born in Africville, Nova Scotia, which he described as a predominantly

black village outside of Halifax. He has 3 brothers and 3 sisters, all of whom according to the Complainant are darker than the Complainant. The Complainant is married and has 1 son in his mid-twenties. The Complainant says that his family background is a mixture of East Indian, black and white.

The Complainant has been employed with the Respondent C.P. Rail since 1966 when he began his employment as a linen clerk in Montreal. In 1977 the Complainant was transferred to Edmonton where he worked until being transferred to Vancouver in 1978. According to the Complainant's employment history which was filed as an exhibit in these proceedings, the Complainant's seniority date as a bridgeman commenced March 21, 1978. In January 1979 the Complainant became a painter within the Bridge and Building division of C.P. Rail and has held that position to the present

date except for the period from September 1981 to June 1984 when the Complainant held the position of painter foreman.

The function of the Bridge and Building division (referred to throughout the hearing as "the B & B division or department"), is generally to maintain C.P. Rail's bridges, buildings, culverts and other structures. Within the B & B division there are various job classifications and some jobs pay more than others. Generally the trades such as plumbers and carpenters pay more than jobs as a machine operator, painter or bridgeman. A bridgeman is the lowest classification within the B & B department, at least in terms of pay. The number of B & B employees in the Vancouver and Port Coquitlam shops where the Complainant worked would have likely been under twenty at any one time. The Respondent's counsel estimates the number at twelve to fourteen.

With respect to the organizational structure of the B & B division, there is a B & B foreman to whom all of the B & B employees report. In addition there is sometimes a trades foreman such as a plumber foreman or painter foreman in charge of plumbers or painters as the case may be. The B & B foreman reports to the B & B master who reports to the division engineer. During the period of the alleged discrimination, the division engineer reported to the deputy superintendent who in turn reported to the division superintendent. The division superintendent reported directly to the general manager.

RACIAL HARRASSMENT

In his evidence, the Complainant alleges that he had experienced no discrimination in the workplace in either Montreal or Edmonton. He says that his problem started about 1 week after joining the B & B division in Vancouver. He testified that his foreman, Dave Rogal, had broken into his personal locker and, when he confronted his foreman about this, the foreman said "I can do what I want" and then said according to the Complainant "Incidentally, Gannon, I didn't know you were a nigger." The Complainant said that he presumed that Rogal had come to this conclusion after seeing photos of the Complainant's cousins and sister in a photo album, noting that his cousins and sister are darker than he is. It should be noted that, from an appearance point of view, while it is obvious that Mr. Gannon is not totally caucasian, he does not have all of the normally identifiable characteristics of a negro. As Dr. Graham Johnson stated in his evidence, "If one just sort of looks at Mr. Gannon, and looks at his physical characteristics, it's not immediately apparent that he is black". Nonetheless, Mr. Gannon was part negro and was perceived as being a person of the negro race by most if not all of the employees in the B & B division. He was the only non-white employee working in the B & B division in Vancouver and Port Coquitlam between 1978 and 1985.

Mr. Gannon stated in his evidence that about a week after this incident with Rogal, he contacted the B & B division master, Morris Zakaluk, regarding what had occurred. According to Mr. Gannon, Mr. Zakaluk said that he would take care of the matter, but nothing happened.

In his evidence, the Complainant said that his foreman Dave Rogal was a racist and created a racist climate in the B & B division where he worked. According to the Complainant, Mr. Rogal made racial remarks about the Complainant directly to the Complainant and to others within the B & B division. According to the Complainant, Mr. Rogal would make statements like "We made a mistake with that nigger" and "What does that nigger know about painting". The Complainant also said that Mr. Rogal began calling him "Jackson" and that Rogal said to him "Aren't all niggers called Jackson?".

Although not stating it in his complaint, the Complainant testified that on one occasion Mr. Rogal pointed a broom at him and said "See, Gannon, see how easy it is to get rid of a nigger". The Complainant also alleged that on another occasion Rogal pointed a rifle at him and clicked the trigger while 3 or 4 people were standing around laughing. Mr. Rogal denied pointing a broom and rifle at Mr. Gannon as Mr. Gannon had alleged. None of the other co-workers could corroborate Mr. Gannon's allegations in this regard except for a former employee, David Sarty, who is presently involved in a dispute with the Respondent C.P. Rail, and his obvious dislike and mistrust of C.P. Rail and his unwillingness to answer questions on cross-examination causes the Tribunal to receive his evidence with some caution.

The Complainant in his direct evidence also alleged that he was the victim of racial slurs used by 2 other employees, Gil Baldry, a carpenter, and Gregory Craig who was Mr. Gannon's foreman during part of the period which is the subject of Mr. Gannon's complaint. With respect to Mr. Baldry, Mr. Gannon said that Baldry asked him for "nigger brown paint". With respect to Greg Craig, the Complainant said in his direct evidence that in March 1985 Greg Craig called him "a nigger" and pushed him down some steps into a water cooler following an argument. The Complainant further stated in his evidence that in May 1985 Greg Craig provoked the Complainant when he said "How is my favourite nigger today?" Greg Craig denied both of these accusations.

The Complainant's assertions that Mr. Baldry had asked him for "nigger brown paint" were confirmed by Mr. Baldry who explained that the words "nigger brown" were used to describe a particular colour of paint, that he had no malicious intent or ulterior motive when using these words, and that the words are commonly used in England where he used to live. With respect to Mr. Baldry's explanation, we find that the use of these words

shows considerable insensitivity and indifference on his part in view of the racial slurs which we find were being directed at the Complainant in the workplace. It should have been obvious that these words would be sensitive to Mr. Gannon, would cause friction and perhaps provoke him to retaliate.

In his cross-examination, Mr. Gannon widened the scope of his complaint by stating that virtually every one of his co-

workers in the B & B division has directed racial slurs towards him at one time or another.

The evidence clearly shows that racial slurs were directed towards Mr. Gannon in the workplace by his foremen and co-workers. Evidence of this comes from not only the Complainant but also from many of the Respondent's witnesses. Ray Rollin, a plumber foreman, admitted calling the Complainant "a nigger" and testified that he has heard other co-workers refer to Mr. Gannon as "a nigger". Gil Baldry testified that he heard Dave Rogal and Bob Wallace, another co-worker, use the word "nigger" in reference to Mr. Gannon. Mr. Wallace also testified that he referred to the Complainant as "a nigger". Chris Campbell, another co-worker, testified that other co-workers have referred to Mr. Gannon as "a nigger" and Greg Craig admitted that the Complainant was referred to as "a nigger" and was also called "Jackson". Dave Rogal admitted to calling the Complainant "Jackson" and Ken Kirkpatrick, another co-employee, testified that Dave Rogal has called the Complainant "a nigger".

While conceding that the Complainant has been called "nigger" and "Jackson" in the workplace, the Respondent's counsel has argued that these racial slurs do not constitute harrassment within the meaning of the Canadian Human Rights Act, and specifically Section 13.1 thereof (now Section 14). In particular, the Respondent has argued that Mr. Gannon was a complainer and a troublemaker, a highly antagonistic individual who used racially and sexually offensive language and provoked his co-workers. The Respondent has argued that the slurs directed towards Mr. Gannon were not racially motivated.

There is no doubt the Complainant is guilty of making many racially and sexually offensive remarks to his co-workers. The Complainant admitted under both direct and cross-examination that he uses the word "nigger" himself. Under cross-examination the Complainant also admitted to making the following offensive remarks to some of his co-workers in the B & B division:

1. Referring to his co-workers as "weak, white mother fuckers".

2. Stating that the wives, girlfriends or mothers of his co-workers "fuck niggers".

3. Telling his co-workers that wives, girlfriends or mothers "like nigger dicks".

4. Telling a co-worker, Chris Campbell, to "kiss my black ass".

The Complainant testified that he only used such racially and sexually offensive remarks in response to a racial slur being directed towards him. In other words, he says he was provoked into making these statements. On the other hand, many of his co-workers testified that the Complainant used the word "nigger" extensively himself without any provocation on the part of anyone else. There was also evidence from some of his co-workers that the racial/sexual remarks of the type referred to above were also often made without provocation.

While acknowledging that some of the racial slurs directed at the Complainant were in response to something the Complainant had said, we find that this was not always the case. For example Scott Swanson, a former B & B employee, testified that he heard Clark de Boer, another B & B employee, say to the Complainant "How is the nigger today?" Mr. Swanson stated that Mr. de Boer was the first one to speak and that the statement prompted a retaliatory remark by the Complainant. Randy Walker, another B & B employee, stated that the Complainant often retaliated with a racial slur or obscene language in response to a racial slur made to the Complainant. Ray Rollin testified that he heard Dave Rogal make a racial remark to someone else in reference to Mr. Gannon. It is evident from many of the witnesses who testified that racial slurs were being directed at the Complainant behind his back and therefore without any provocation on the part of the Complainant.

The climate that existed in the B & B division where the Complainant was working can best be described by the following excerpt from the testimony of Scott Swanson:

"A Ken walked into the shop and Clark deBoer said to him as he walked in, he said, "How's the nigger today?"

Q So that Mr. deBoer was the first one to speak?

A Yeah.

Q And how did Mr. Gannon respond to that?

A Ken came up to Clark and he said, "Yeah, I'm a nigger, but your mother fucks niggers." Which I just -- Ken was in working in the Vancouver shop, I had just come to Vancouver, and I remember it very clearly, because this was an incident that -- that kind of language I just hadn't heard before. I have heard

people swear before, but that kind of hostility towards somebody, and the use of the word "nigger" like that, I had never seen before. It stands out in my mind."

Even in those instances where the Complainant may have provoked a racial slur being made against him, we agree with the decision of the Tribunal in Phil Francois v. Canadian Pacific Limited (a decision rendered on January 19, 1988) that provocation is not a defence to discrimination under the Canadian Human Rights Act. There are similarities in facts and issues between this case and the Francois case. In the Francois case, the Complainant was also guilty of using racial slurs. It was suggested in that case, as it was in this case, that the Complainant was either paranoid or himself a racist. Kevin W. Hope, the Chairman of the Tribunal in the Francois case, stated in his decision: "I also agree that Mr. Francois has himself shown that he is guilty of racial slurs. However, his own paranoia or acts of discrimination cannot justify acts of discrimination against him ..... neither are defences under the CHRA." We agree with Mr. Hope.

While Mr. Gannon himself used offensive language and while his behaviour was at times inappropriate, we believe that this was for the most part retaliatory in nature. This is consistent with the evidence presented by Dr. Graham Johnson, a sociologist called as an expert witness. Dr. Johnson has studied the effects of racial and cultural minorities in the workplace. Dr. Johnson suggested that a person such as Mr. Gannon who is subject to racial name calling can become victimized by such name calling, and then eventually reacts and is often perceived as a complainer and trouble maker. We do not condone the language used by Mr. Gannon, but we are inclined to believe that his hostile attitude was a result of the racial slurs and the poisoned environment that he was working in.

We cannot accept the argument that the slurs directed towards Mr. Gannon were not racially motivated. If language is

not meant to be racially motivated, then why use references to colour or race, particularly derogatory references. As Mr. Hope stated in the Francois case, "The point is that a distinction on the basis of colour is being made when no distinction is necessary ..... this goes to the root of discrimination and racism."

Accordingly, we find that Mr. Gannon has been harrassed in a matter related to employment, contrary to Section 13.1(1)(c) of the CHRA (now Section 14(1)(c)).

DISCIPLINE AND TERMINATION OF EMPLOYMENT

B & B employees are subject to the "Brown system of discipline" described by Mr. John Templeton, who was Deputy Superintendent of the B & B division in 1985. Mr. Templeton indicated, as did Mr. J.S. Craig, the Division Engineer, that demerit points are issued as a form of discipline and an accumulation of 60 demerit points would result in dismissal. Mr. Gannon received 55 demerit points between April 9, 1984 and June 19, 1985, and on August 19, 1985 was issued a further 30 demerit points resulting in his dismissal from employment. Mr. Gannon was reinstated to employment about a year later after an arbitration hearing in Montreal. It should be noted that the Complainant had no significant discipline record prior to 1984.

Mr. Gannon was issued 10 demerit marks on April 9, 1984 for failing to report an accident which occurred on March 7, 1984 while he was driving a company vehicle. On April 23, 1984, he received a further 20 demerit marks as a result of driving in an erratic and unsafe manner on February 9, 1984.

The next incident occurred on March 15, 1985 as a result of which Mr. Gannon received 10 demerit points on April 18, 1985. This incident was the subject of much evidence. Mr. Gannon alleged in his evidence that he was assigned the task of painting on the seventh floor of an office building on March 15, 1985. He indicated to his foreman, Greg Craig, that some filing cabinets would have to be moved and he asked for some help which was denied by Mr. Craig. Mr. Gannon further claims that he had injured his back moving the furniture and subsequently reported it to Mr. Craig, his foreman. Mr. Gannon says that there was an ensuing argument wherein Mr. Craig called the Complainant "a nigger" and

pushed him down some steps into a water cooler. The Complainant said that another employee, Fred Smith, would probably have witnessed this, but Mr. Smith denied seeing anything.

Mr. Gannon says that after being assaulted by Mr. Craig, he phoned for an ambulance and the C.P. police. Mr. Gannon was transported by ambulance to St. Paul's Hospital in Vancouver. Greg Craig denied the whole incident described by Mr. Gannon. Mr. Craig stated that the Complainant had threatened to fake an injury if he did not get any help moving the filing cabinets. Mr. Craig said that he did not push the Complainant into a water cooler. The investigating officer for C.P. police came to the conclusion that the incident that Mr. Gannon described did not occur. An investigation was carried out within the B & B department primarily by Mr. Jeff Craig, the division engineer and father of Greg Craig, the foreman involved in the incident. The Workers Compensation Board came to the conclusion that Mr. Gannon had suffered a back injury as a result of moving the filing cabinet, and consequently Mr. Gannon received 10 demerit points in violation of company safety rules. The company tried to convince the Workers Compensation Board that Mr. Gannon did not suffer any injury but, when the Compensation Board allowed Mr. Gannon's claim, the company accepted that fact and

issued the demerit points.

The next incident arose on May 29, 1985 as a result of a shouting match between Mr. Gannon and his foreman, Greg Craig. Mr. Gannon testified that this incident was precipitated when Greg Craig said to him "How's my favourite nigger today?". Mr. Craig denied making this statement and said that the Complainant shouted obscenities at him. Mr. Gannon was given 15 demerit marks which he appealed by filing a grievance through his Union.

Mr. Gannon was dealt with severely on August 19, 1985 when he was issued 30 demerit marks for insubordination which occurred on July 9th and 10th, 1985. These incidents involved verbal exchanges which took place between Mr. Gannon and Mr. Rogal. Mr. Gannon had been painting his work cabinet in stripes which Mr. Rogal objected to. The Complainant stated that Rogal told him "You're not going to make this no jungle or African haven". Mr. Rogal denied saying this. Mr. Gannon said he responded by stating "I can paint my locker any way I wish, you honky mother". The

next day when Mr. Rogal again reminded the Complainant that he must repaint the cabinet as ordered, Mr. Gannon was alleged by Mr. Rogal to have responded "Rogal, you are a weak mother fucker" or something to that effect. Following an investigation, the Complainant was issued 30 demerit marks which at that time put him beyond 60 demerit marks resulting in his dismissal from employment. Mr. Gannon filed a grievance appealing the discipline.

Mr. Gannon was reinstated into employment by virtue of an arbitrator's decision on September 10, 1986 as a result of appeals by Mr. Gannon. Mr. Gannon was reinstated without compensation.

In his decision, the arbitrator removed the 15 demerit marks received by Mr. Gannon arising out of the May, 1985 incident by coming to the conclusion that, contrary to Article 18.1 of the Collective Agreement governing B & B employees, Mr. Gannon did not receive a fair and impartial investigation due to the fact that the primary investigating officer was the division engineer, Mr. J.S. Craig, the father of Gregory Craig, who was involved in the incident giving rise to the demerit points. The arbitrator also reduced the 30 demerit marks issued on August 19, 1985 to 15 demerit marks, thereby giving the Complainant a total of 55 demerit marks rather than the 60 demerit marks which would have resulted in permanent dismissal. Notwithstanding the fact that J.S. Craig conducted the investigation into the events of July 9th and 10th, 1985, the arbitrator felt that the investigation was fair. The arbitrator also found that there was insubordination by Mr. Gannon towards his immediate supervisor. However the arbitrator felt that mitigating circumstances did not warrant 30 demerit marks.

We find that the incidents that occurred on May 29, 1985 and on July 9th and 10th, 1985 were precipitated by racial slurs directed at the Complainant. We are also inclined to believe Mr. Gannon when he stated that Greg Craig called him a "nigger" on March 15, 1985, although we are not entirely convinced that the events that occurred on that date were entirely as described by Mr. Gannon or Mr. Craig. In any event the tension between these two individuals likely worsened after this incident. We have no doubt that the Complainant shouted obscenities at his foreman on May 29, 1985 and on July 9th and 10th, 1985. However these outbursts by Mr. Gannon were provoked by the racial slurs.

Therefore the real reason for the discipline, the underlying cause, was not Mr. Gannon's insubordination but the racial harrassment that he was continually subjected to. To this extent, the discipline resulting in Mr. Gannon's dismissal was wrongly assessed. Mr. Gannon was singled out and subjected to unfair and differential treatment because of his race.

If discipline had been warranted in respect to the incidents that took place on March 15, 1985, May 29, 1985 and July 9th and 10th, 1985, the question arises as to whether or not the Complainant was disciplined more harshly than other employees would have been in the circumstances. Reference would also have to be made to the incidents for which Mr. Gannon was disciplined in April of 1984. From reviewing the discipline records of other employees and hearing the evidence adduced, it would certainly appear that other employees have received either no discipline or a lesser form of discipline for other comparable offences.

However, it is difficult to do a complete comparison since there were no other examples of insubordination, and consideration would have to be given to the fact that Mr. Gannon was disciplined on five separate occasions within a period of a little over one year.

As a result, we do not feel that we can adequately conclude that the discipline Mr. Gannon received was, comparatively speaking, extreme in the circumstances. However, as indicated previously, Mr. Gannon was wrongfully disciplined and terminated from his employment due to his race with respect to the incidents that occurred on May 29, 1985 and on July 9th and 10th, 1985.

DENIAL OF EMPLOYMENT OPPORTUNITIES

The Complainant alleges, in his amended complaint, that he was repeatedly denied opportunities to fill vacancies for temporary positions despite being qualified and having more seniority than the successful candidates. In his complaint, Mr. Gannon cites an example of being denied the opportunity of filling a vacancy for a relief plumber's position in January, 1985 despite having more seniority than the successful candidate. In his evidence at this hearing, the Complainant gave further examples of what he alleges amount to differential treatment in respect to job promotions within the B & B division, namely:

(a) That John Whammond obtained the position of a carpenter within the B & B division despite having less seniority than Mr. Gannon;

(b) That Clark de Boer was hired as a driver or machine operator despite being junior to Mr. Gannon in terms of seniority;

(c) That Doug Craig obtained a welding position despite having less seniority than Mr. Gannon;

(d) That Gil Baldry was hired as a carpenter despite having less seniority than Mr. Gannon.

Mr. Gannon says that he was not aware of the above positions becoming available until after the fact. Although all job openings are required to be posted in a conspicuous place in the B & B workplace, Mr. Gannon says that he never received any notice nor saw any posting of these positions. The tenor of Mr. Gannon's evidence is that there was favoritism in the awarding of these positions, that most of the successful candidates had relatives working for C.P. Rail and they had inside information. In particular Mr. Whammond and Mr. Craig had fathers who were division engineers within the B & B division of C.P. Rail.

According to his employment history, Doug Craig obtained the position of welder on June 13, 1980 and resigned this position on February 16, 1981. Scott Swanson's employment history indicates that he obtained the position of relief welder on July 16, 1982 and assumed a full time welding position on September 23, 1982. Mr. Gannon claims that the welding position that Doug Craig obtained was not posted and that Doug Craig was junior in terms of seniority. The Complainant further says that when Doug Craig resigned on February 16, 1981, his welding position was abolished as well. The Complainant says that Scott Swanson, whose father occupied a senior position within C.P. Rail, was given Doug Craig's old job which had previously been abolished. In other words, Mr. Gannon says that the welding job was reinstated for the benefit of Mr. Swanson.

Mr. Whammond, according to his employment history, obtained the position of carpenter on July 17, 1980. Mr. Baldry was awarded the carpenter's position in August 1979 while Mr. de Boer became a machine operator in January 1981.

Mr. Gannon stated in his evidence that he had complained to his union about not being aware of these jobs until after they had been awarded. Specifically, Mr. Gannon stated that he spoke to Wally Kirkpatrick and Ray Rollin, his two union representatives. Mr. Gannon said he also complained to Mr. Zakaluk, the B & B master. According to Mr. Gannon, Mr. Zakaluk's reaction was, "Just go slow, don't rock the boat and he

would take care of everything".

The B & B employees are governed by the Collective Agreement between Canadian Pacific Limited and the Brotherhood of Maintenance of Way Employees. According to this Agreement, employees in the B & B division are to be promoted according to both their seniority and qualifications. Evidence from a majority of the Respondent's witnesses would indicate that greater importance is placed on seniority than on qualifications, or at least that is how they understand the system to work.

Upon reviewing the evidence we have come to the conclusion that the Claimant has not been subjected to any differential treatment with respect to job promotions within the B & B division.

The Complainant says that he complained to his union representatives, Ray Rollin and Wally Kirkpatrick, upon learning of these various job positions being awarded. Nowhere in his evidence does he indicate when he approached these two individuals, nor is there any corroboration by these two individuals that they were indeed approached by Mr. Gannon on this subject. Neither Ray Rollin nor Wally Kirkpatrick recall any such complaints by Mr. Gannon. With respect to the Complainant's conversation with Mr. Zakaluk, there was no evidence given by Mr. Gannon as to where and when the conversation took place, and no other details of the conversation were provided other than Mr. Zakaluk's response not to "rock the boat". The only evidence as to when this conversation took place is in a letter from Mr. Gannon to J.S. Craig, the division engineer, dated January 21, 1985 wherein Mr. Gannon stated, "I had asked Mr. Zakaluk about this matter again in November and he told me not to rock the boat these things take time, meanwhile K. Kirkpatrick has received the benifit (SIC) of 2 or 3 years higher rate of pay plus experience

while filling that position." The letter referred entirely to the relief plumber's position.

This would indicate that the discussion with Mr. Zakaluk may have in fact been with respect to the relief plumber's position given to Mr. Ken Kirkpatrick, and that the discussion with Mr. Zakaluk in fact took place in November of 1984 which is the most reasonable date one could assume in the context of the entire letter. We are inclined to believe that Mr. Gannon never complained about any of the previous positions being awarded other than the relief plumber's position awarded to Mr. Ken Kirkpatrick which will be dealt with later.

The promotions that Mr. Gannon was complaining about, with the exception of the relief plumber's position, were all awarded no later than 1982. Yet despite this, Mr. Gannon never made any

formal complaints until he filed his complaint under the Canadian Human Rights Act in the summer of 1985. Although Mr. Gannon was well aware of the grievance procedures set out in the Collective Agreement and could have grieved the appointments if he believed that the jobs were not properly posted, he never initiated any such procedure. None of Mr. Gannon's co-workers who were called as witnesses recall any instance where a job opening was not posted in both the Vancouver and Port Coquitlam shops.

Furthermore, it was generally acknowledged by the Complainant and others that nothing was secretive within the B & B division, and so it is hard to imagine a position coming available without Mr. Gannon knowing of it. Even if the positions were not properly posted and Mr. Gannon had no prior knowledge, he would have become aware of thepositions very soon after they were awarded and could have made formal complaints and utilized the grievance procedures available to him.

Mr. Gannon has failed to satisfy us that he was unaware of the job openings and that he would have applied for these positions had he been aware of them. Therefore, we do not believe that the Complainant was denied the opportunity of job promotion.

With respect to the relief plumber's position, Mr. Gannon says that he was denied an opportunity to fill the position for a relief plumber and made known his displeasure in correspondence

to J.S. Craig, the division engineer, and Mr. Zakaluk in late 1984 and early 1985. The position Mr. Gannon was referring to was awarded to Ken Kirkpatrick, who had less seniority than Mr. Gannon. However, both Mr. Kirkpatrick's testimony and his employment record disclose that Mr. Kirkpatrick had held the relief plumber's position for over two years prior to Mr. Gannon complaining about this to Mr. Craig and Mr. Zakaluk. When Mr. Kirkpatrick first obtained this position in 1982 he was a painter whose foreman was the Complainant, Mr. Gannon. In fact Mr. Gannon was foreman for Mr. Kirkpatrick during all of the periods that Mr. Kirkpatrick had acted as relief plumber and so was obviously aware of the relief position being filled by Mr. Kirkpatrick.

Mr. Kirkpatrick testified that, as his foreman, Mr. Gannon would have had to consent to his working as a relief plumber and that Mr. Gannon had given him his permission to do so. This evidence was corroborated by Ray Rollin, the plumber foreman and was not denied by the Complainant. Both Mr. Kirkpatrick and Mr. Rollin also indicated that Mr. Gannon only became interested in the relief plumber's position when he discovered that it was going to pay more money than his present job as a painter.

At no time prior to his letter to Mr. Craig and Mr. Zakaluk did Mr. Gannon make a complaint or make known his desire to have

that position, nor did he file a grievance in accordance with the procedures set out in the Collective Agreement between C.P. Rail and the Brotherhood of Maintenance of Way Employees, of which Mr. Gannon is a member. When Mr. Gannon did complain by letter to Mr. Craig, the division engineer, in December 1984 he indicated that he was requesting the position because he would like to take advantage of the higher rate. There is no evidence that any relief plumber positions were offered subsequent to the date of Mr. Gannon's letter indicating his interest in this position, so we fail to see what complaint Mr. Gannon could have. As a matter of fact, according to his employment record, the last time Mr. Kirkpatrick held the relief plumber's position was between April and August of 1984.

We have concluded that Mr. Gannon was not denied the opportunity to fill the relief plumber's position as alleged in his complaint for the following reasons:

(a) We believe that Mr. Gannon was aware at all times that Mr. Kirkpatrick was working as a relief plumber and that Mr. Gannon had given him his permission to do so;

(b) We find that Mr. Gannon only became interested in the relief plumber's position in 1984 when he discovered that it was going to pay more money. If Mr. Gannon was genuinely interested in becoming a relief plumber and learning the plumber's trade, he should have expressed an interest when the position was first offered and there is no evidence to suggest that he did, nor did he exercise the grievance procedures available to him;

(c) Mr. Gannon wrote a letter to Mr. J. Craig in December of 1984 requesting permission to work as a plumber's helper in the future, stating that he would like to take advantage of the higher rate. No evidence was adduced to suggest that any relief plumber's positions were offered subsequent to the date of the letter and that Mr. Gannon had been denied the opportunity of applying for such positions.

We now turn to the Complainant's assertion that he was denied the opportunity to work overtime.

The Complainant has failed to prove to this Tribunal that he has been subjected to any differential treatment in the awarding of overtime. The Complainant's own evidence is that he rarely accepted overtime even when it was offered to him. Furthermore, Mr. Gannon failed to describe any specific occasions where he was denied overtime. The only occasion that we were made aware of was brought to our attention by the Respondent. This occurred in 1983 when the Complainant and Dave Rogal filed a joint grievance

claiming they were bypassed for certain overtime work in favour of more junior employees. That grievance was settled by arbitration under the Collective Agreement.

CONCLUSION

In summary, we find that the Complainant has been the victim of discriminatory practices pursuant to Section 14(1)(c), Section 7(a) and Section 7(b) of the Canadian Human Rights Act. The discrimination comprises the following:

(a) Racial harrassment;

(b) Being wrongfully disciplined because of race;

(c) Being terminated from employment because of race.

The issue to determine now is whether or not the Respondent, as employer, is liable within Sections 48(5) and 48(6) of the CHRA (now Sections 65(1) and (2)).

There is no doubt that the racial slurs were the acts of the Respondent's employees. It remains then to determine whether or not the employer is absolved from liability pursuant to Section 48(5) (now Section 65(2). The three basic elements to be satisfied by an employer to avoid liability as set out by the Tribunal in the Francois case and adopted by the Tribunal in Leon Hinds v. Canada Employment & Immigration Commission, a Canadian Human Rights Tribunal decision rendered on October 11, 1988, are as follows:

1. That the employer did not consent to the commission of the act or omission complained of;

2. That the employer exercised all due diligence to prevent the act or omission from being committed; and

3. That the employer exercised all due diligence subsequently to mitigate or avoid the effect of the act or omission.

Prior to filing his complaint with the Human Rights Commission, Mr. Gannon had complained to Mr. Zakaluk, the B & B master, both verbally and in writing. It is hard to believe that Mr. Zakaluk was not aware of the racial slurs, and we accept that he was. (It should be pointed out that Mr. Zakaluk never testified at this hearing.) Despite his obvious knowledge of the racial climate that existed in the workplace, Mr. Zakaluk failed to take any corrective action. As part of management, Mr. Zakaluk

should have taken steps to eradicate the racially offensive language from the workplace when he first became aware

of it. Instead he chose to ignore the situation. Nothing was done, the harrassment continued and the situation deteriorated to the point where Mr. Gannon's employment was terminated in August of 1985.

Mr. Gannon also complained of racial harrassment to the C.P. Police on two separate occasions in 1985 and complained to the division engineer, Mr. J.S. Craig, when he was conducting his investigations into the incidents that occurred on March 15, 1985, May 29, 1985 and July 9th and 10th, 1985. Despite all of this, management ignored Mr. Gannon's complaints. Mr. Craig, the division engineer, together with Mr. Templeton, the deputy superintendent, carried out the investigations into the last three incidents prior to Mr. Gannon's dismissal with the sole purpose of seeking Mr. Gannon's dismissal from employment. Either Mr. Craig and Mr. Templeton knew what was going on and were part of a conspiracy to get rid of Mr. Gannon or else they were misled by Mr. Zakaluk and others as to what was occurring within the workplace. In any event, they took the position that the real problem in the B & B division was not the racial harrassment that precipitated Mr. Gannon's rebellious behaviour, but Mr. Gannon himself. The investigations carried out by Mr. Craig and Mr. Templeton were far from being fair and impartial. Memos written by Mr. Templeton to Mr. Craig revealed the fact that the sole object of the investigation was not to seek the truth but to discredit Mr. Gannon. It is interesting to note that during one of the investigations a statement was taken from Ray Rollin denying that he ever heard any B & B employee refer to Mr. Gannon as a "nigger". This statement is completely contrary to what Mr. Rollin testified to at this hearing. Similar statements were taken from Greg Craig and Clark de Boer contrary to their evidence presented at the hearing. Greg Craig is the son of J.S. Craig, the division engineer, which raises suspicions of bias since Greg Craig was involved in two of the last three incidents which resulted in Mr. Gannon's dismissal.

We conclude that the Respondent, as employer, failed to exercise all due diligence to prevent the racial slurs from being directed at the Complainant. The Respondent's management attempted to deal with the unrest by getting rid of the

Complainant, rather than taking immediate steps to ensure that the workplace was free of racial harrassment.

The Respondent then is in effect vicariously liable pursuant to Section 65(1) of the CHRA.

We dismiss Mr. Gannon's complaint that he was denied the opportunity of obtaining the relief plumber's position, of receiving job promotions and of working overtime. Although we find that Mr. Gannon was wrongfully disciplined, we are unable to find that he was disciplined more severely than other employees would have been in the same circumstances had discipline been

warranted.

It was agreed at the outset of this hearing that the Tribunal would only consider at this time the issue of whether or not any discrimination had occurred as alleged by the Complainant. Since we have now substantiated Mr. Gannon's complaint, at least in part, it is now in order for the Complainant or the Canadian Human Rights Commission to make application to the Tribunal for the purpose of determining what orders, if any, should be made pursuant to Section 53 of the Canadian Human Rights Act.

Dated this ____ day of April, 1993.

_____
DONALD ALLIN SOUCH

_____
GULZAR SHIVJI

THE CANADIAN HUMAN RIGHTS ACT
R.S.C. 1985, c. H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BEFORE: Alfred G. Lynch-Staunton
Gulzar Shivji
Donald Allin Souch

BETWEEN:

KEN GANNON

Complainant

- and -

COMMISSION CANADIENNE DES DROITS DE LA PERSONNE

Commission

- and -

CANADIAN PACIFIC LIMITED (CP RAIL)

Respondent

DISSENT

ALFRED G. LYNCH-STAUNTON

Ken Gannon filed a complaint with the Canadian Human Rights Commission dated August 6th, 1985 (Exhibit HR-1) alleging discrimination from March 1979 and continuing and an amended complaint dated August 27th, 1985 (Exhibit HR-2) alleging discrimination from March 1979 to August 1979 both on the basis of race colour and family status contrary to Section 7 (a) and (b) and Section 13.1 (now Section 14) of the Canadian Human Rights Act (CHRA).

Exhibit HR-1 states "I believe that I have been a victim of differential treatment in the course of employment, contrary to Section 7(b) of the Canadian Human Rights Act on the basis of race, colour, and family status. I have repeatedly been denied opportunities to fill vacancies for temporary positions for which I was qualified. I had more seniority than the successful candidate and according to our collective

agreements, should have had priority over them. For example, in January 1985 I was denied the opportunity to fill a vacancy for a relief plumber, despite having more seniority than the successful candidate, who is white,

and is the brother of another plumber. I also believe that I have been denied overtime opportunities, and have been disciplined more severely than other employees because of race, colour, and family status. In addition to the above statement, I believe I have been subjected to harassment contrary to Section 13.1 of the Canadian Human Rights Act because I am black. I have been repeatedly called "nigger" by both co-workers and a supervisor.

Although I advised management of this treatment on 14 January 1985, they have taken no action to stop the name calling. I have complained to the CP Police about discrimination on 29 May 1985 as well as assault on 15 March 1985 but they have not responded to my complaints. In the meantime, I was charged with insubordination and was suspended on 29 May 1985. I returned to work on 21 June 1985, but was again suspended for insubordination on 15 July 1985."

Exhibit HR-2 states "I have reasonable grounds to believe that Canadian Pacific Limited (CP Rail) has discriminated against me in that I was subjected to different treatment and harassed during the course of my employment and subsequently was terminated because of my race, colour and family status in violation of Sections 7(a)(b) and 13.1 of the Canadian Human Rights Act. I have repeatedly been denied opportunities to fill vacancies for temporary positions for which I was qualified. I had more seniority than the successful candidates and according to our collective agreements should have had priority over them. For example, in January 1985, I was denied the opportunity to fill a vacancy for a relief plumber, despite having more seniority than the successful candidate, who was white, and is the brother of another plumber. I also believe that I was denied overtime opportunities, and was disciplined more severely than other employees. In addition, I was called "nigger" repeatedly by both co-workers and a supervisor. Although I advised management of this treatment on 14 January 1985, they took no action to stop the name calling. I complained to the CP Police about discrimination on 29 May 1985 as well as assault on 15 March 1985, but they did not respond to my complaints. In the meantime, I was charged with insubordination and was suspended on 29 May 1985. I returned to work on 21 June 1985, but was again suspended for insubordination on 15 July 1985. I received a letter dated August 19th, 1985, notifying me that I have been terminated."

Mr. R.F. Lee appeared as Counsel for the Commission and Mr. F.C. Hume and Mr. R.M. McLearn appeared as Counsel for the Respondent, Canadian Pacific Limited (CP Rail). The Complainant, Ken Gannon was not represented but took part in the proceedings intermittently aside from giving evidence.

Mr. Lee indicated that the Complainant was not represented by Counsel but that he, Mr. Lee, had carriage of the case and the interest of the Commission and the Complainant were the same. Mr. Lee advised that there

was no Solicitor-Client relationship between he and the Complainant. I ruled that because the interests of the Commission and the Complainant were identical the Complainant's legal interest would be safeguarded by Commission Counsel as well as by this Tribunal. Mr. Hume was concerned about the possibility of double cross examination and I indicated that it would be appropriate that any questions the Complainant would have of any witness would be directed through Mr. Lee. This understanding was substantially adhered to throughout the proceeding but as this case unfolded this Tribunal found it necessary from the point of view of fairness and the perception of Justice being done to allow the Complainant on occasion to also cross examine. No prejudice was suffered by the Respondent. It was agreed that no evidence would be called concerning damages or remedies, if any, until a decision was rendered as to whether the Complainant was successful in his complaint, as amended, and whether it was found any of the prohibited grounds of discrimination existed. The Tribunal was advised that the Complainant had filed a further complaint, dated October 3rd, 1990, being Exhibit R-11 filed by the Respondent alleging discrimination from May 11 1990 and ongoing on the grounds of race and colour but that it was still under investigation. The particulars stated "Canadian Pacific (CP Rail) discriminates against me by treating me in an adverse differential manner in the course of employment, on the grounds of race and colour, contrary to Section 7 of the Canadian Human Rights Act. I am black. As a result of a previous complaint filed with the Canadian Human Rights Commission (WO5401, dated August 27th, 1985), I was reinstated as a painter with CP Rail in 1986. On May 9, 1990, I was provoked into having a verbal altercation with a co-worker, Mr. G Baldry.

As a result of this exchange, I was pulled out of service on May 11, 1990, and reinstated on May 24, 1990. In addition, on June 2, 1990, I was assessed 30 demerit points for this incident. Mr. Baldry did not receive any discipline over the matter. Other employees have not been disciplined as harshly for similar or lesser infractions. On June 14, 1990, I initiated a grievance concerning the assessment of 30 demerits in addition to an 8-day suspension. The matter has not yet been resolved. I continue to be singled out for more strenuous jobs than other employees. For example, in June 1990, three new employees were hired for the summer.

These employees were scheduled to assist everyone but me. On or about August 20, 1990, I was assigned to paint the interior of a three-floor Diesel shop by myself, whereas three men were assigned to paint four concrete road dividers. In addition, I am isolated from working with other employees on an ongoing basis."

Pages 7-30, volume 1, of the transcript deals with the discussion by Counsel and this Tribunal concerning Mr. Hume's application that this latter complaint be heard in conjunction with the original complaint and amended complaint. It was unanimously agreed by the parties and members of the Tribunal that it made eminent sense that evidence concerning this complaint should be heard but reluctantly I ruled that we were statutorily barred from doing so except on a similar fact basis. Mr.

Hume advised this Tribunal that notwithstanding the ruling he would be questioning the Complainant and his witnesses, if any, and the witnesses for the Respondent as to this complaint in order to assess the Complainant's credibility and behaviour concerning this complaint as it deals with the same matters in substance as are dealt with in the original complaint and amended complaint. P26.

I have found it necessary to review the evidence in lengthy detail for the following reasons:

a. The length of these hearings being four one week periods.

b. The number of witnesses, 27 in all including two experts.

c. The number of exhibits being 120 in all, many being voluminous.

d. Lengthy argument by both Counsel.

e. The contradictory nature of the evidence.

f. The additional allegations made by the Complainant over and above the allegations made in the complaint as amended.

g. The vagueness of pin pointing the time at which events took place.

h. The inordinate lapse of time between the happening of events and the complaint herein and the hearing of evidence thereof.

i. The separation of evidence as it relates to the complaint as amended and the complaint dated October 3, 1990.

j. Credibility of the Complainant's evidence (which is referred to later), his witnesses, and the witnesses for the Respondent.

It was necessary throughout the proceedings to make many evidentiary rulings due to objections by Counsel. It was also necessary to rule that the Complainant was not required to disclose his medical history notwithstanding that he testified, in chief, that he had been under the care of three psychiatrists, one each in the Cities of Montreal, Edmonton and Vancouver. The standard of proof required is that which obtains in a civil matter which is that the one who makes an allegation must prove the allegation on a balance of probabilities. The jurisprudence establishes that in Human Rights case, a Complainant, if believed, is only required to establish a prima facie case of discrimination where upon the onus shifts to the Respondent to prove justification. It was common ground that credibility was the essence of this case. In order to determine whether a

prohibited ground of discrimination exists one must assess the evidence on an objective basis rather than subjectively. Aside from a similar fact point of view it is necessary to exclude any evidence pertaining to the complaint dated October 3, 1990, because of the provisions of S50(1)CHRA which states in part "enquire into the complaint in respect of which it was appointed". In rendering my decision I am, of course, obliged to keep in mind the object and intent of the Canadian Human Rights Act, R.S.C, 1985, CH-6 as amended and was urged by Commission Counsel to also keep in mind the objects and intent of the Canadian Multiculturalism Act SC CH24 (4th Supp) which was assented to July 21, 1988, almost three years after the filing of the complaint and amended complaint. Commission Counsel submitted in argument "a book of authorities" and a "book of documents" (referring to tabs 5 and 6) setting out a number of cases and the principles to be applied.

It came to the attention of this Tribunal (not by way of evidence) that there was more than one investigation into this matter and that the reports thereof came to different conclusions. The Tribunal assured Counsel that this information would have no bearing on our decision. I should point out that a letter dated June 5, 1991, from Valmond Romilly, Barrister and Solicitor, National President Hrambee Centres Canada and addressed to Secretary, Canadian Human Rights Tribunal, Court Room 2 -16th Floor, 700 West Georgia Street, Vancouver, B.C., was brought to our attention which I have read. No one appeared on behalf of Hrambee Centres Canada. No reply was made to this letter as we took the position that it being written by a Barrister and Solicitor who had notice of this hearing this organisation could well appear and make any representation it wished. At the time of drafting this decision in September 1992 I had the advantage of reading a draft of the decision by Mrs. G. Shivji and now have had the advantage of reading a draft of the majority decision by Mr. Souch.

In dealing with the evidence concerning the complaint and amended complaint I am very conscious of the fact that all witnesses are testifying in 1991 concerning events that took place during the period of March, 1978, to August 27, 1985, being a period of eight and one half years. This evidence is being given anywhere from 6 to 13 years after the happening of the event.

The elements of the complaint, exhibit HR-1, are that the complainant:

1. was the victim of differential treatment and harassment in the course of his employment from March 1979 and continuing; that he has been called by the word "nigger" by co-workers and a supervisor.

2. has been denied opportunities to fill vacancies for temporary positions for which he was qualified and senior to the successful candidates.

3. has been denied overtime opportunities.

4. has been disciplined more severely than other employees in the workplace.

5. advised management of this treatment and management took no action to stop the name calling.

6. alleges that the CP Police did not respond to his complaints about discrimination May 29, 1985, and an alleged assault March 15, 1985.

7. was twice suspended for insubordination (it must be inferred "for no reason" otherwise the allegation does not make sense).

8. alleged that family status was a factor concerning the opportunity to fill a vacancy for a relief plumber's position.

The amended complaint, Exhibit HR-2, involves additional elements as follows:

1. it now states that the alleged discrimination and harassment occurred between March 1979 and August 19, 1985.

2. S7(a) of the CHRA is cited in support which is not done in Exhibit HR-1.

The testimony given by and on behalf of the Complainant, alleges additional complaints as follows:

1. He was disciplined for injuries while others were not.

2. Mr. Dave Rogal pointed a gun at him and pulled a trigger.

3. The Respondent opposed his Worker's Compensation Board claim for compensation in 1985.

4. His Union did not represent him fairly.

5. That job bulletins were not posted at Port Coquitlam properly in accordance with the collective agreement resulting in lost opportunities to bid on positions.

6. He was denied bulletin positions.

7. Mr. Dave Rogal broke into his private locker.

With regard to items 3, 4, 5 and 6 the Complainant insinuated racism was the causative factor.

The Complainant was born and raised in Africville, Nova Scotia, of according to his evidence "a mix between East Indian, Black and White".

He took employment with the Respondent in Montreal in March 1966 being employed as a linen clerk, car checker, freight checker, checker storeman, warehouseman and driver moving to Edmonton, in August 1977 and transferred to Vancouver in March 1978 as a bridgeman in the bridge and building department. On arrival in Vancouver he joined a crew of some 10 or 11 employees of which David Rogal was the foreman. He lost any seniority he had acquired in Edmonton as he was moved to another region. The crew he joined consisted of bridgeman, carpenters, bench carpenters, welders, plumbers, drivers and the like. He testified that the individuals whom he joined on arrival in Vancouver where David Rogal, Gregory Craig, Brian Kodalak, John MacLeod, John Mullen, Wally Kirkpatrick, John Fleur, Fred Smith, Bob Wallace, and Ray Rollin. The Complainant remained in Vancouver with the same crew for about 2 years, then transferred to a crew at Port Coquitlam, later transferring back to Vancouver. While in Port Coquitlam

he testified his co-workers were foreman Ken Michel, Neil *, Norm Lavoie, Gil Baldry, Randy *, and David Sarty. On his return to Vancouver his co-workers were Dave Rogal, Wally Kirkpatrick, Ken Kirkpatrick, Ray Rollins, Gregory Craig, Bob Wallace and John Fleur. He testified that the B & B Master was M Zachaluk and listed other more senior people in the Respondent's hierarchy. For a time the B & B Department was split between Vancouver and Port Coquitlam when eventually the whole department was relocated to Port Coquitlam. The Complainant was employed, Exhibit R-48 as follows:

21 March, 1978 - 6 July, 1978 Bridgeman
7 July, 1978 - 20 July, 1978 Machine Operator
21 July, 1978 - 22 August, 1978 Bridgeman
23 August, 1978 - 28 September, 1978 Machine Operator
29 September, 1978 - 1 October, 1978 Relief B & B Foreman
2 October, 1978 - 26 December, 1978 Bridgeman
27 December, 1978 - 27 December, 1978 Relief B & B Foreman
28 December, 1978 - 28 January, 1979 Bridgeman
29 January, 1979 - 21 September, 1981 Painter
22 September, 1981 - 10 June, 1984 Painter Foreman
11 June, 1984 - Present - Painter

The Complainant testified he had not been subject to any

discrimination by the Respondent in Montreal or Edmonton. He testified that upon arrival in Vancouver "everything was fine for about a week," page 64, and on cross-examination by Mr. Hume stated his troubles began on his arrival in Vancouver, page 207.

In dealing with the original complaint, I observe that the Complainant makes no mention that his troubles commenced in March 1978 but alleges in Exhibit HR-1 that the Respondent engaged in discriminatory practice on or about March 1979 and continuing. I find this strange, to say the least, having regard to the Complainant's allegations, discussed below, concerning an alleged break-in of his private locker. I also observe that there is no explanation by the Complainant as to why he filed an amended complaint. I find it troublesome why the Complainant did not include in the complaint or amended complaint the allegations he made on the stand as they would have been much fresher in his mind at the time. The question, arises then, whether these additional allegations are true.

Additional Complaints

1. In reference to the first additional complaint a referral to Exhibit R-48, the Complainant's employment history, filed on consent by Commission Counsel shows that there were injuries suffered by the Complainant on 21 May 1975, 6 September 1978, 22 April 1981 and 10 July 1984 all with no discipline. The first disciplinary action taken by the Respondent was in relation to an incident occurring on 15 March 1985 in which the Complainant suffered an alleged back injury while moving a filing cabinet in connection with his painting duties. (This incident was the subject of much evidence and investigatory statement taking which will be referred to below). The discipline assessed was not for the injury but for not taking preventative measures to avoid the injury which is a key distinction. The evidence of David Sarty, called by the Complainant, on cross-examination indicated that he had been disciplined twice for not taking preventative measures to avoid an injury. Mr. Sarty, a white male, obviously wanted to support the Complainant as he too has an axe to grind against the Respondent. Mr. J.A.G. Templeton, who was Deputy Superintendent in 1984 and 1985 in Vancouver produced in evidence, Exhibit R-85, over 70 Form 104s (which are forms required to be completed when an injury is suffered) which disclosed that the Respondent's policy is to discipline employees for failing to take preventative measures to avoid injuries where appropriate. The evidence of Bob Wallace, pages 738-39, Stephen MacVittie pages 796 and 797 and Ray Rollin pages 531-532 indicate that the

Respondent did not impose any discipline when injuries occurred as there was no evidence of failing to take preventative measures. There is evidence that many employees other than the Complainant received discipline for violating safety rules resulting in injuries. The experience of the Complainant in receiving discipline for at least 4 injuries is similar to other employees. I find that the awarding of discipline for injuries received was due to the Respondent's policy of awarding discipline for not taking preventative measures and not following safety measures and has nothing to do with the complaint of racial discrimination. The discipline received by the Complainant was appropriate in the circumstances.

2. In reference to the second additional complaint, the Complainant testified, in chief, "well, Mr. Rogal is a gun collector and he used to bring weapons to work from time to time in Vancouver ----

one time also he brought a cross-bow, he pointed a rifle at me and just "click" like that and then everybody would laugh. I think it was three or four people at the time who were in the room would laugh and things of that nature." Page 73. As Mr. Hume, Counsel for the Respondent said "this bald allegation came like a thunderbolt out of the blue" and was the subject of sensational newspaper coverage (of this hearing) and was the first time that members of the Respondent had heard any such thing. There is absolutely no corroboration of this allegation.

The Complainant used the term "who would laugh" indicating that this event happened more than once. There is no evidence, that there was more than one occurrence. There is no evidence, as to who were the "three or four people" notwithstanding that the Complainant's co-workers gave evidence. This allegation was emphatically denied by Rogal who testified, page 413, in chief, by saying "that incident did not happen" and in answer to a question whether anything similar happened "never at any time did I ever do anything like that" and in answer to whether he owned a crossbow, page 414, stated "I've never owned a crossbow, I have never had a crossbow in my hands." Rogal explained that the company's policy was a prohibition of firearms in areas where employees sleep in bunk houses and boarding cars. He testified that in the general work place he has brought in air rifles to control the pigeon population in the round house with his supervisor's permission. This was confirmed by Rollin, page 543, who also testified that he did not witness this alleged incident.

None of the many witnesses who testified concerning the workplace have indicated that any such thing happened. In the same vein Sarty's claim that Rogal raised his hands like a rifle and said "I could shoot the nigger from here" is categorically denied by Rogal, page 416. The Complainant, at page 73, when asked whether Rogal made any gestures with his hands in this regard said "I can't remember". (As an aside I find that the

Complainant does not remember many things when pressed.) As it was well known that Rogal was a gun enthusiast, it is not surprising that Sarty would make the unsupported allegation he did. Likewise it is not surprising that the Complainant would also make a similar allegation. W A Kirkpatrick, at page 1041, confirms that Rogal is a gun handling expert and a gun enthusiast. It is extremely doubtful that a gun

expert/enthusiast would handle a rifle as the Complainant alleges. Sarty tried to convince this Tribunal that Rogal was in the habit of bringing firearms in the work place, page 146. It is obvious he is attempting to bolster his allegation concerning Rogal raising his hands like a rifle. I put no weight whatsoever on Sarty's evidence. It was painfully obvious that Sarty had an axe to grind against the Respondent. He was very emotional on the stand particularly when dealing with his own complaint and a review thereof by the Federal Court of Canada which dismissed his application. It is significant that other witnesses have confirmed that the incident described by Sarty did not take place. If there was any substance to this allegation I then wonder why Gannon did not report it to either management, CP Police or the RCMP. I likewise wonder why a serious matter like this was not included in the complaint. I find that this allegation is unfounded.

3. The third additional allegation by the Complainant, pages 133 and 134, involved a claim for compensation concerning an alleged injury due to the moving of a filing cabinet and contact with a water cooler. The Complainant said that management stated that he, the Complainant was lying and did not injure himself. It is not necessary, at this juncture, to detail the circumstances concerning this injury except to say that much evidence was heard from the Complainant, co-workers and two CP Police who investigated both events. From the evidence, I conclude that the circumstances of the injury concerning the moving of a filing cabinet are suspicious and that the alleged injury concerning the water cooler did not occur. Two witnesses, Kenneth Lloyd Carson, and F C Wirrell, General Claims Agent and Assistant General Claims Agent, respectively, for the Respondent, both of whom do not know the Complainant, testified at length as to the established criteria in determining whether this particular claim should be investigated. This policy is applied to every claim in British Columbia. They described in detail whether the Claimant's claim should be investigated. They testified as to the amounts of money the Respondent pays in claims on a yearly basis and also the average number of claims the Respondent opposes on a yearly basis which is 40-50% of those they actually investigate. It is not surprising at all, that the Complainant's claim would be investigated and opposed when there is a suspicion concerning whether an injury occurred or not. These two

witnesses are consummate professionals with many years experience in the claims field. They have testified, under oath, that the Claimant's claim was handled in the same manner as any other claim. Their entire evidence is not refuted in any particular by the Complainant or by the Commission. I find the Claimant's allegation of racism in this regard is untrue.

4. The fourth additional allegation is that his Union did not represent him fairly. It must be taken that the Complainant is referring to R. Rollin and Wally Kirkpatrick his union representatives. Both testified that the Complainant had been fairly represented by the Union. Wally Kirkpatrick is a very impressive witness, very independent and no one tells him what to do. He would not allow anyone from management to influence his representation of members of the union. He has clearly demonstrated that the Complainant was properly and fairly represented by the Union. He is also very knowledgeable concerning the wage agreement of the Brotherhood of Maintenance of Way Employees (which includes the B & B Department), Exhibit R-37, and Grievance Procedures thereunder. When it was suggested to Kirkpatrick, in chief, that he and Rollin, as Gannon's Union Representatives, had been discriminatory in their treatment of the Complainant he stated at page 2118 "I find that hard to believe" and indicated he gets along with the Complainant "real well". Kirkpatrick then detailed an incident pursuant to the filing of a joint grievance concerning overtime by the Complainant and Rogal. The Complainant testified that he was not allowed to attend an arbitration hearing in Montreal, pages 140 and 141, despite his insistence that he be there because of his view that his Union had not fairly represented him in the past.

The Complainant recognized he must be at the hearing, insisted on being there and fought for the right to be there to the extent that he consulted a labour lawyer and threatened to file a grievance against the Union. At pages 282-288 he testified that the Union provided him with a plane ticket. After being supplied with a plane ticket he chose not to go and now comes before this Tribunal years after the event with an allegation that the Union did not treat him fairly. Kirkpatrick testified that the Arbitration Hearing was fair. The Complainant did not take any proceedings against his Union under S37 (Formerly S136.1) of the Canada Labour Code despite his obvious awareness of his right to do so as disclosed by his own evidence, page 140. In answer to a question posed by me as to whether the Complainant was "getting a fair shake, same as the rest of you" Kirkpatrick replied "I believe so". Mr. K E Webb an employee in Labour Relations

testified that under S37 an employee has the opportunity to appeal or grieve arbitratory, discriminatory or bad faith actions of his Union on his behalf. The Complainant did not file a grievance. The Complainant represented that he was

unsophisticated in Union and Collective Agreement matters. To bolster this allegation the Complainant tried to represent to this panel in response to a question by Mr. Lee that he couldn't read. This allegation is absolutely false. There were many instances in this hearing in which the Complainant had no difficulty whatsoever in reading quite legal and involved paragraphs of the Wage Agreement as well as taking voluminous notes during this hearing. He had no trouble reading a newspaper on several occasions during the proceedings. On a number of occasions during this hearing when the Complainant was asked if he had any questions of a witness he would do so from his notes. How someone who can't read can accomplish this strains credulity.

The Complainant, on examination by this panel and after giving rebuttal evidence, tried to explain why he indicated he couldn't read by saying he can't read for long periods of time as he goes cold. This explanation is patently weak. The Complainant, in his earlier testimony stated that he kept a very detailed diary which is contradictory. I dismiss the allegation that the Complainant was not fairly represented by his union.

5. The Complainant's next two additional allegations were that job bulletins were not posted at Port Coquitlam and that he was denied bulletin positions. These two allegations seemed to be one of the major thrusts of the Complainant's testimony. It is significant that no mention of either of these allegations were made in his complaint or amended complaint. R. Rollins, who is a foreman, at page 544, in response to "do you know of any incidences where a job would be posted in Vancouver but would not be posted in Port Coquitlam" answered "I don't know any incidences such as, no". Wally Kirkpatrick, page 1003, testified in answer to this question "-- with respect to posting of positions and the making of bids on positions, where does this posting take place when a new job is opening up for bid?" stated "we've only had one in about 6 years, but usually it is sent from the office down to the foreman and is posted on a bulletin board --" and stated that the bulletin board would be where people changed and would eat lunch. The bulletins would be posted where

everybody is going to have access and the bulletins would go to all foremen. Mr. J Templeton testified, page 573, that a bulletin would go out stating a vacancy which would be posted for 15 days and the bulletin would describe the particulars of the position. Mr. Webb testified that the bulletining and awarding of positions is a matter specifically dealt with in the Wage (Collective) Agreement and that this is a matter between the Respondent and the Union of which the Complainant is a member.

Exhibit HR-7, a letter dated January 31, 1985, written by the Complainant to M Zakaluk, the B & B Master, alleges that the agreement has been violated with respect to exercising his seniority concerning a number of positions. The Complainant did

not advise the dates on which the alleged violations occurred.

Exhibit HR-8, a letter dated February 5, 1985, from Zakaluk to the Complainant explained that pursuant to Section 18.6 of the Agreement the employee shall present a grievance in writing, being step 1, 28 calendar days from the date of the cause of the grievance and advised that the file would be kept open for the Complainant to provide dates until February 28. There is no evidence that the Complainant did so. It is obvious that the dates would pre-date the date of his letter Exhibit HR-7. Why would the Complainant wait for four and a half years to now complain about positions he allegedly bid on but were not awarded. I suggest that the conclusion is that he did not bid or if he did that the matter was not of sufficient importance to him to complain. It is clear from the evidence, including that of the Complainant, that if job bulletins were not posted, the Complainant would have had almost instant knowledge of the fact.

The Complainant himself testified that nothing in the B & B Department was confidential. I find the Complainant had ample notice of any job postings. He took no action to launch a grievance . In any event his remedy, if any, has long since expired. Both allegations are dismissed.

6. The last of these additional allegations is that Rogal broke into the Complainant's private locker. It is this allegation that the Complainant alleges is the root of all his problems in that he accused Rogal of seeing a photograph of the Complainant with some of his family which indicated African characteristics. The

evidence is quite clear that there are two types of lockers - one being private and personal and the other being a company locker.

The private and personal locker is just that - to house personal possessions. The other is for the housing of equipment used by an employee. Rogal emphatically and vehemently denied ever breaking into anyone's personal locker or cutting the lock thereof of any of the 40 people or so who have worked on the gang in the last 15 years. He explained that often at times it was necessary to cut the lock on a company locker to obtain tools and equipment in the absence of an employee. On crossexamination by Mr. Lee as to whether there was a difference between a personal locker and a company locker, Rogal answered "there certainly is".

Gannon also testified that as a result of breaking open his locker Rogal must have seen a photo album showing Gannon's sisters and cousins who were much darker than he which set every one off on a course of racism and discrimination. Gannon offered no corroboration for this allegation not even the alleged photograph. The evidence clearly shows there was no break-in of Gannon's personal locker and is equally clear that he attempted, to mislead this Tribunal in not making the critical distinction between a personal locker and a company locker. I reject this allegation.

Elements of the Complaint

I now turn to the nine elements of Gannon's complaint.

Firstly he claims that he was the victim of differential treatment and harassment in the course of his employment between March, 1979, and August 1985, and that he has been called nigger by co-workers and a supervisor. There is no doubt that the Complainant has been treated differentially. It is clear that he was treated preferentially in a substantial manner. The evidence is that Bridgemen in the B & B department were required to do all sorts of jobs in the maintenance of bridges and buildings much of it being hard, nasty, dirty, physical work in all sorts of weather. It was quite common that co-workers in other trades were also required to do these jobs. It was in this context that the Complainant was given preferential treatment. G. A. Baldry indicated, page 475 to 477 that the Complainant is not required to do anything but paint, such as working on a bridge, and that Rogal, the foreman, does not require the Complainant to help others. The Complainant is left alone to paint so as not to be

given any cause to stir up trouble. Baldry explains that this causes resentment particularly by people who are senior to the Complainant such as Fred Smith. The evidence of Greg Craig, page 644, in answer to the question if he was aware of the Complainant being discriminated against in the workplace stated "I think Mr. Gannon overall receives a better treatment than the normal employee on the Bridge and Building crew" and in answer as to why stated "I think the railway tends to cater to Mr. Gannon because I believe the railway, at the level I'm working at, does not wish to become involved in his mind games that he plays with the company". It must be kept in mind that Greg Craig considered himself a friend of the Complainant and probably closer to the Complainant than others which lends credence to his testimony in this regard. Rogal at, page 432, indicated that the Complainant would, if given the opportunity, undermine Rogal's job. There is also evidence that the Complainant when a painter foreman would attempt to undermine other foremen. Rogal indicated that "I'm not big on confrontations with people. If anything, if I'm having a problem with an individual, I would tend to shy away or give the gentleman his instructions and try to leave it at that". Rogal gave the Complainant less attention than the rest of the crew. Fred Smith, page 718, in answer to Mrs. Shivji stated "hands off" and explained he is a bench carpenter and the Complainant is junior to him but notwithstanding this fact he, Smith, is pulled off a job to work on Pit River Bridge, a distasteful job, while the Complainant is not. Baldry at page 476 indicates that if Gannon doesn't want to do something he stirs up trouble and most of the men don't want to work with him. He is left alone. Mr. Lee would argue that Gannon is being excluded, isolated and marginalised by Rogal and that these

racists at the B & B are doing everything they can to exclude Gannon. The fact is, on the evidence, Gannon is a troublemaker, a disruptive influence, moody, explosive and a manipulator. He causes such a problem when requested to do a distasteful job that his co-workers simply do not bother with him anymore. The Complainant has given evidence that he is forced to work alone, change his clothes alone and eat lunch alone. When Gannon was a bridgeman, on his own evidence, he worked with others. At page 66, in chief, he speaks of work assignments and uses the phrase "we were paired off". There is also the evidence of Greg Craig, Gannon's closest friend, who referred to the fact of he, John Fleur and Ken Gannon, in New Westminster, building retaining walls, repairing stoop blocks or loading ramps page 621. Greg Craig also testified, page 626-7, that Gannon isolated himself from the beginning and told Greg Craig that he would rather work by himself. This evidence, which was not refuted, I accept.

When he was a foreman painter he was in charge of his own work assignment.

Since reverting to a painter, due to a reduction in the workforce, the nature of his job requires that he works alone as he is the only painter.

There is evidence, which I accept, that often Gannon would be encouraged or invited to lunch or to change clothes along with the other co-workers.

Gannon declined because he preferred being alone. On the social side there is evidence that he was always included in any notice of a function but with some exceptions did not attend. The Complainant was not being ostracised or marginalised - he is simply left alone to do his job and because of it is often assigned to areas where he has to be alone. Mr. Gannon also alleges harassment in the workplace but does not identify what kind of harassment or in what context it occurred. I presume, therefore, that he is referring to name calling and alleged racial slurs. On his own evidence the only two names that were used in the workplace were that of "nigger" and "frog". The former in relation to Gannon and the latter in relation to Ray Rollins. Ray Rollins, a French Canadian, used to be the plumber foreman and is presently president of local 167 of the Brotherhood of Maintenance of Way Employees. He related, page 521, that in 1978 or so he had an unpleasant experience with Gannon who had been assigned to Rollins for the day to work with Rollins' crew to move material. Rollins was unable to help out right away as he had other business to attend to.

Gannon became upset and walked into Rollins' office and said "why the hell" or "why the fuck you're not working with us outside" or "helping us moving the pipes, your own material". Rollins became upset and furious, he being the foreman, and told Gannon to go back to work and called Gannon a nigger.

Ten minutes later Gannon returned and said "your mother fucks niggers". Rollins said "fine, o.k., that's it." Then Gannon went back to work" and that was the end of the incident. Rollins testified that he is referred to as frog and has been for many years as it is a nickname in the shop and in most cases it is used on a friendly basis although at one stage it did bother him in years past. He now has a figure of a frog on his desk. Gannon has alleged that many of his co-workers use the term nigger either to his face or otherwise. When pressed he admitted that only 3 co-workers used the term nigger. There is evidence to suggest that the term nigger was only used on occasion. There is also evidence to suggest that the term

nigger was used by co-workers only in retaliation to the many uncalled for sexual/racial remarks of a highly offensive nature that Gannon would make concerning co-workers' wives, mothers and girlfriends. These remarks in brief are as follows:

a. Greg Craig page 622 stated "and Ken Gannon used to bother John Fleur about his girlfriend sucks big black nigger dicks and stuff in that nature, and that was a frequent occurrence."

b. Bob Wallace pages 735 - 36 "It was kind of a shocking one, so I sort of recall it. The flatdeck operator was complaining about his back, and Mr. Gannon said, 'T'll give you the big black dick up your ass, that'll straighten your back out.'"

c. Dave Rogal page 408 "....'witch', big black buck is fucking your mother today, or wife'."

d. Gil Baldry page 473 "...'Is your mother fucking a big nigger now, Rogal?" and at page 474 "...'You weak white motherfucker'."

e. J.J. Mullen page 815 "...'You weak white motherfucker'."

f. Greg Craig page 625 "weak whitie" and page 647 "is it true your girlfriend sucks big black dicks?"

g. R.J. Wallace page 735 and Chris Campbell page 1064 indicate Gannon said 'T'll give you the big black dick up your ass, that'll straighten your back out."

h. R.J. Wallace at page 735 'T'm the big nig, and your mother fucks niggers."

i. Clark deBoer page 773 "white honkey"

There is no doubt that these remarks, over the years, initiated by Gannon were made without any provocation. There is uncontradicted evidence by many co-workers that Gannon constantly referred to himself as nigger by using such expressions as "how come us niggers got to do all the work and you white motherfuckers just stand around and do nothing". The evidence of Clark deBoer, MacVittie, Mullen, Swanson, and Chris Campbell is overwhelming in this regard.

Mr. Lee would have us believe that Gannon used these slurs because everyone of his co-workers were racist and out to get the Complainant. I do not agree. I have the definite impression that the Complainant is obsessed or at least pre-occupied by matters of a sexual/racial (black) nature. It is no wonder that Gannon's co-workers reacted and began occasionally referring to him as nigger. It must be

remembered that the B & B crew of 10 or 11 men had been together for years where nicknames were common. Gannon also accused Rogal of using the term "Jackson". There is evidence Gannon had placed in his locker a poster of a black singer by the name of Michael Jackson. There was no evidence as to

the significance of this poster or Michael Jackson. The evidence establishes that Gannon refers to himself as Jackson. I am satisfied from the evidence that the word nigger was used only by three co-workers and not by everyone in the B & B as Gannon originally testified. On cross-examination when pressed by Mr. Hume he stated that only 3 B & B employees had used the term nigger. I am also satisfied that the use of this term was initiated and acquiesced in by the Complainant.

The evidence also establishes that other racial slurs were used by the Complainant such as "white motherf---", "whitey", and that these and other slurs used by Gannon were not provoked. I find it significant that Gannon testifies that he only used the term "weak, white motherfuckers" "as many times as they have used it to me" (meaning nigger,) three or four times during the period 1978 to 1985. How can the use of the term nigger three or four times during the period 1978 - 1985 be classed as harassment. There is no harassment concerning the use of the word nigger. The evidence establishes conclusively that the Complainant used slurs far and away more than three or four times. The Complainant denied under cross-examination that he had ever said "how come us niggers have to do all the work around here". When reminded that he was under oath he immediately indicated "I have no recollection". (I have observed that the Complainant, on many occasions, has used this "no recollection" tactic). This was an attempt at deceit. I believe that the Complainant is not the helpless harassed individual he would have us believe. In my view he is the harasser and not the victim. Certainly Gannon has been called "nigger" and "Jackson" in the workplace but on the evidence he is the one who constantly initiated their use and regularly referred to himself as nigger. Some co-workers admitted using these expressions which is not easy to do.

Gannon did not admit anything until pressed. While not to be condoned the use of the word nigger is understandable as against Gannon in these circumstances. The continued use of nigger by Gannon became infectious.

Its use is not harassment within the meaning of the CHRA absent believable evidence of its repetitious use by co-workers. I have the impression from Gannon's evidence that he feels the investigation, interviewing and statement taking by the Respondent is the harassment complained of. He equates the process of investigation of various incidents, accidents, and

allegations of racism, as harassment. This process was of much more concern to him than the use of the term nigger. See page 348 et seq in answer to questions by the tribunal. He complains of the investigatory process. How else is the truth ascertained. Surely Gannon must realise if he makes an allegation then an investigation will result. If there was no investigation of an allegation made by Gannon he would be the first to complain. He may not like the business of interviewing and statement taking (as is evident that others don't) but it is a process that he must accept. It is also his responsibility as an employee to co-operate in legitimate investigation.

Dealing with the second element of the complaint the evidence of J.A.G. Templeton, Superintendent, and K.E. Webb indicates that there is no obligation on the part of a foreman to choose the most senior employee for temporary positions of a duration of less than 45 days; only the senior qualified employee immediately available. The authority for this is the Wage Agreement, exhibit R-37, clause 14.4. The evidence discloses that Gannon was awarded temporary positions which is reflected in his employment record Exhibit R-48. In any event, if a temporary position was improperly filled that is a matter to be determined in accordance with the Wage Agreement by way of taking a grievance. Gannon is a member of the union and testified he is familiar with the provisions thereof page 263, 270 and 271. There is no evidence that he took a grievance. Mr. Templeton indicated that the most qualified person would normally be awarded the temporary position. There is no evidence of favouritism in the awarding of temporary positions except the Complainant's bald statement. Gannon did not show that he qualified for a temporary position for which he bid. He complained at length in his testimony that by not being given the opportunity to assist in various positions he was precluded from gaining qualification in another trade. The evidence of Mr. Webb indicated that the onus is on the employee to become qualified and obtain a certificate of qualification at a trade school or attend an apprenticeship program that is unique to the railway. There is no apprenticeship program to become a tradesman in the B & B department. Mr. Webb further testified that one cannot have seniority in a trade until a qualification is obtained. There is correspondence between the Complainant and J.S. Craig, Division Engineer, being exhibits HR-4, HR-5 and HR-6 dated December 2, 1985 (which must be read as 1984) January 9, 1985 and January 21, 1985 respectively concerning his application as a plumber's helper. It is noteworthy that the Complainant did not allege racial discrimination and there is no evidence that he filed a grievance. Exhibit HR-5 indicates that K.H. Kirkpatrick was employed as a plumber not as a plumber's helper and that the Complainant was not considered to be qualified as a plumber. Other

correspondence being exhibit HR-7 and exhibit HR-8 dated January 31 and February 5, 1985 respectively between the Complainant and M Zakaluk, the B & B Master, indicates the Complainant advised he was filing "grievance of discrimination" as he was denied his right to exercise his seniority as a carpenter on two occasions, a welder on two occasions and as a plumber or plumber's helper. Zakaluk replied advising the Complainant that he must grieve the alleged occasions within 28 days of the happening. Zakaluk advised that his file would remain open until February 28, 1985, to give the Complainant an opportunity to provide dates. There is no evidence the Complainant did so or that he filed a grievance. I reject this allegation.

Element number 3 alleges that Gannon has been denied overtime opportunities. Overtime is dealt with in the wage agreement. Evidence was given by Webb and Templeton. Overtime arises when it becomes apparent that employee(s) are needed to complete a task after hours and applies to those that have ordinarily been employed on the task. There is plenty of

evidence by Greg Craig, Wally Kirkpatrick and Randy Walker that the awarding of overtime is fair and that those who are able and willing to work overtime are eligible. There is evidence including that of the Complainant that he did in fact work overtime in earlier years but that later he repeatedly declined to work overtime when asked until the point was reached that he would no longer be asked. Gannon complains that he should have been asked irrespective whether he would accept or not. In any event the Complainant's proper remedy is to file a grievance not complain under the CHRA, which the Complainant knew full well. He and Rogal on one occasion filed a joint grievance concerning overtime in 1983. The grievance was unsuccessful but the decision of the Arbitrator, Exhibit R-12, shows that the awarding of overtime is in accordance with the Wage Agreement, that Gannon is well aware of the Wage Agreement and his right to grieve and clearly shows, despite Gannon's indications to the contrary, that he is fully supported by his Union. There is no evidence to support a finding of discrimination in this respect.

The fourth element of the complaint alleges that Gannon has been disciplined more severely than other employees. Discipline by its very nature is an individual process and is very much dependant on the facts of each individual case. It is much like sentencing in the ordinary course as practised by the Courts. It is also discretionary, aside from any legislative requirement, and is influenced by many factors including the severity and circumstance of the offense, mitigating factors, the record of the offender, and the policy of the employer. Discipline is specifically provided for, again, in the Wage Agreement, and if a person

feels aggrieved by the assessment of discipline, that person has every right and every opportunity to take advantage of the provisions thereof.

In fact with regard to two incidents of insubordination on May 25, 1985 and July 9 and 10, 1985 Gannon sought his remedy by grieving. In the former case the Complainant was successful and 15 demerit marks were stricken from his record while in the latter case his grievance was dismissed but 30 demerits were reduced to 15 because of mitigating factors. It is evident from the Exhibits R-13 and R-67 being the Arbitrator's decisions in each of these cases and Templeton's evidence describing the brown system of discipline, exhibit R-17, that the Respondent's procedures, the Brown system and the Wage Agreement were followed completely. A review of the employment histories of all Gannon's co-workers being exhibits HR-11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 26, and 27 which included a record of discipline assessed as well as a review of Gannon's discipline record, exhibit HR-48, does not support this allegation. It is important to note, in dealing with Gannon's discipline record, to comment concerning an incident that occurred on February 9, 1984, involving a motor vehicle operated by the Complainant in which the RCMP had submitted a report to the Respondent that the vehicle in question had been reported by another motorist to have been driven in an erratic fashion. On being interviewed by Zakaluk, Gannon stated page 127 "I can assure you I was not driving the vehicle". However a day or two later he recanted and indicated to J.S.

Craig in a supplementary statement, exhibit R-45 on April 16, 1984, "I now wish to state that I do recall the incident and that I was the driver of the company vehicle ----"whereas in a previous statement to J S Craig on April 13, 1984, exhibit R-44 he stated on being shown an RCMP letter describing the erratic driving "no I have no recollection of this incident". Also concerning to discipline, Gannon alleged that two employees entered company premises after hours having consumed liquor and broke a locker with an axe and weren't disciplined. The evidence is that the matter was not reported to management, i.e. Zakaluk, although the employees knew about it. No one wanted management to conduct an investigation and no one reported the matter including Gannon. How can he now complain? Another factor regarding discipline is Gannon's insubordinate behaviour. The behaviour was tolerated by his foreman, Rogal, and overlooked for a long time page 400, 432, 435 where he said "fuck you, you weak whitey, I don't have to do that" page 436. The evidence of Baldry, page 475 and 476 indicates Gannon was uncooperative and stirs up trouble if there is something he is doing that he doesn't want to do. Rogal also testified at page 400 "sometimes open defiance". Templeton has confirmed that the discipline assessed was no more severe than that

which would have been assessed to any other employee. It is note worthy that discipline awarded to Gannon was carefully assessed and in fact on two occasions was altered. This system was working. There was a lot of discussion by Mr. Lee concerning exhibit HR-28, being Templeton's memo to J.S. Craig, regarding and statement given by Gannon alleging bigotry by co-employees in the use of the word nigger, in connection with his statement concerning the alleged back injury and violation of a safety rule. Templeton indicated that Gannon should be discredited by further interview and questioning. Somehow, Mr. Lee, submits that this shows that management were out to get Gannon. What this shows is that Templeton wanted Craig to subject Gannon to the rigours of cross-examination. There is nothing wrong, whatsoever, with this approach. The judicial system permits this approach in order to elicit the truth of an allegation.

Management wanted to confirm the facts particularly when it was G.J. Craig who had indicated in his statement that Gannon had stated the day prior to the alleged back injury that he, Gannon, would fake an injury. Mr. Lee also made much of the fact that many statements taken by J.S. Craig utilised the same wording. Nothing turns on this. The significant point is that individuals signed the statements. A final observation in dealing with this discipline allegation is that if it is found that any statement taking was not fair and impartial in the strict sense, that doesn't mean Templeton and J.S. Craig have discriminated against Gannon because of race, colour or family status. It means that the statement taking could have been done better. I dismiss this allegation.

In dealing with element number 5, it is not correct to say that management took no action to stop the name calling. There were filed, CP rail employment guide book, exhibit R-38, CP Rail code of business conduct, Exhibit R-39, and the employment equity policy, exhibit R-40. At page 682,

Greg Craig in questions from me, gave honest and forthright answers albeit not particularly sophisticated, as follows;

The Chairman: "Mr. Craig, in your experience, was there any kind of publication or directive or policy statement by the Company or some of your superiors as to racial slurs or discrimination based on race or colour?"

Mr. Craig said: "It is a fact that on the place I work, it is a fact that it's not tolerated, any discrimination. I'm, almost on a daily basis, working with Chinese, East Indian, Italian and if you're discriminatory, it is a known fact that the Company will be issuing, as a

first offence, 30 or 40 demerits. So, it is a practice that the Company will not tolerate and they let us know, they let it be known. But, to tell the truth, when Mr. Gannon was returned after his leave for a year, one of the supervisors did tell us that whatever happened, we have to have it stopped. He did not go into-- he said "If there was any racial remarks, you stop them". I mean, the Company never really came out with any direct stuff, direct reports on dealing with racism. I've never in my career had anything like that come across in the form of official correspondence, verbal or in writing."

The chairman: "But having said that, is it your feeling or your understanding that in the normal course of every day duties, the Railway and your co-workers and your superiors are conscious of not engaging in anything that could be discriminatory?"

The answer: "If there is a discriminatory action, the Company will immediately -- it is brought -- a lot of times a trouble is kept within certain of the employees themselves with the fear of having an investigation, but if it comes to the attention of say a bridge master and it's legitimate, then that person who is making these remarks or being whatever, is issued the strictest -- it's common knowledge that you work properly with the employees, and if you do have any negative feelings, then you keep it to yourself."

It is important to note and it is reasonable to suggest that Gannon had lost credibility with his co-workers given his own quite unacceptable racial/sexual remarks, over the years, his disruption of the work place, insubordination, manipulation and lying. I dismiss this allegation.

With regard to element number 6, I find it incredible that Gannon would make such an allegation. There is evidence from Constable Langston that he interviewed Gannon at the B & B facility on March 15, 1985, concerning the alleged assault which is the water cooler incident. Langston's report was available to and in fact considered by a number of investigatory department personnel. In so far as Gannon's allegation of discrimination on May 29, 1985, is concerned it was former Superintendent Eggett's evidence that his department did not get involved with such complaints as a matter of policy which applies to everyone. This is

confirmed by Langston. The CP Investigation Department responded to Gannon's complaint about Randy Walker breaking the Company Locker that Gannon was using (it was necessary that Walker do so) which is a further

example of Gannon being disruptive. There was no reason for Gannon to complain which patently could have had an adverse affect on Walker, a quite, gentle person. When the CP Investigation Department found out why Walker broke the lock to get painting supplies they didn't lay charges but it is not correct to say they didn't respond. I dismiss this allegation.

In dealing with insubordination, the seventh element, I refer to the two decisions by an Arbitator, CROA 1561 and CROA 1562 given on September 10th 1986, and entered as Exhibits R-67 and R-13 respectively.

These decisions, referred to above in dealing with the fourth element, have been dealt with in the majority decision. Exhibit R-13 shows the Arbitrator found Gannon was insubordinate on July 9th and 10th 1985, when Gannon told his foreman on July 9th that he could paint his locker "any way he choose" and on July 10th "Rogal you are a weak motherfucker". Exhibit R-67 shows the Arbitrator allowed Gannon's grievance solely on the ground of the perception of fairness. The incident on May 29 consisted of Gannon telling G.J. Craig "kiss my black ass" in retaliation to an alleged racial slur by G.C. Craig which was denied. It is significant that the Arbitrator did not make any finding as to the allegation and counter allegation by Gannon vis-a-vis G.J. Craig. Evidence in this regard was called in this hearing. Credibility, again, is the issue. I accept the evidence of G.J. Craig and K.H. Kirkpatrick as opposed to that of Gannon. Insubordination by Gannon did take place. I agree with Mr. Hume who states page 2181 "clearly, there was insubordination." Insubordination is a most serious offence.

Lastly Gannon alleges family status was a factor with respect to his opportunity to fill a vacancy for a relief plumber's position. There is no evidence that Gannon applied for a relief plumber's position but there is evidence that he is not qualified as a plumber. The evidence in this regard are two letters written by Gannon both dated January 31, 1985 to J.S. Craig and M. Zakaluk being Exhibit HR-6 and HR-7 respectively.

Exhibit HR-6 refers to a plumber's helper position and not to a plumber's position and indicates that Gannon is advising J.S. Craig that he is filing a grievance and a charge of discrimination. Exhibit HR-7 refers to a plumber's helper position and not to a plumber's position and indicates that Gannon is filing a grievance. Reading both Exhibits seems to indicate that Gannon's complaint refers to not being able to exercise his seniority on alleged vacancies which were said to have become available some two to three years earlier. In any event there is no evidence that family was a factor with respect to Gannon. The evidence indicates that the behaviour of these employees who are sons of supervisors are scrutinised much more closely than others. See the testimony of G.J. Craig, Volume 6a page 651 and 2. Certainly being the son of a Vice-President did not assist Scott

Swanson when he received a total of 25 demerit points, two written cautions and three letters for tardiness. See Exhibit HR-26. There is evidence that some of the employees obtained their employment through a family connection but others had no family connection. There is absolutely nothing wrong in having a family connection. Mr. Lee and Gannon have advanced a conspiracy theory of family status that works to the detriment of Gannon in that they would have this Tribunal believe that the Respondent concentrates on seeing that supervisors children or brothers are treated more favourably than Gannon because of his race or colour. It is suggested that Gil Baldry is treated preferentially to Gannon because Baldry's wife works as a secretary in the legal department. A necessary result of this theory would have to be that these family members would have to be bigots which is nonsense. This theory does not explain how Gannon obtained his employment nor does it explain how other members of the B & B who have no relatives in the Railway obtained their employment. One of these employees, Foreman Ray Rolan (who had chosen Ken Kirkpatrick for the position for relief plumber because Kirkpatrick was a good employee with a proven ability to do the job) has no family in the Railway page 526 to 528.

In my view there is not a scintilla of evidence that would suggest that Gannon was prevented from exercising all of his rights as an employee or was denied any job opportunity or other benefits based on family status. I will be referring, further to the question of family status from a legal point of view below.

Aside from my remarks made above in reference to credibility I will deal with other credibility items which arose in the evidence in point form.

1. Gannon alleged that Baldry asked him for "nigger brown paint".

This is categorically denied by Baldry page 503. Mr. Baldry, in my view, is an honourable man, and very credible. He testified that he was trained in England as a carpenter by a black man named Ivan from Mauritious and that when he operated a pub he had two employees who were Zulu-Irish, a brother and sister, named Lionel and Ilene and enjoyed a good relationship with them. He has been employed with the Respondent since May 1979 and presently holds a position as a bench carpenter in B & B. He has accumulated no demerit points, is heavily involved as a United Way Representative, instructs in first aid and is a serving brother in the Order of St John for his service in the field of First Aid. He is involved in instructing in Back Power (a method of safeguarding against back injuries) and has been a member of Foster Parent Plan of Canada for 10

years and assists a Sudanese boy named Thabbit Mohammed and his family. In his duties as an instructor, he instructs many minority groups including a large number of East Indian people employed by the Respondent with whom he enjoys a good working relationship. Gannon alleges that Baldry asked him for "nigger brown paint". In fact Gannon at page 331 stated "Mr. Baldry would always use that terminology". Baldry emphatically denied this allegation by saying "I've never asked Mr. Gannon for nigger brown paint".

Baldry explained that in reference to a cabinet he had built many years ago that he remarked how well the colour had stood up and said it was a nigger brown paint. See Baldry's evidence below. He explained this is a colour of paint used in England and then by using it in reference to the cabinet was merely a slip of the tongue which is in this context understandable.

In fact, Mr. Hume in argument indicated his research showed that nigger brown was listed in the British Colour Code and that the Concise Oxford Dictionary of current English defines "nigger brown" as "a dark shade of brown and in the sub definition of the word "nigger" it has "brown, dark shade of brown". In any event the evidence indicates that this term was only used once in all the years Baldry and Gannon worked together. The evidence indicates that Baldry had little or nothing to do with Gannon.

Gannon also stated under cross-examination that the reason he threatened Baldry on May 9, 1990 (a completely different occasion occurring years later referred to in Exhibit R-11) that "..yes. He questioned me about nigger brown paint again" page 33. However in his statement to Mr. Mitchell concerning this threat incident, Gannon made no such allegation.

If this allegation was the precipitating factor why wouldn't Gannon indicate this to Mr. Mitchell. Gannon explains that he didn't mention this to Mitchell as he was afraid of losing his job because he alleges, which I do not accept, on page 331, Mitchell said "If you don't tell me what I want to know, Ken, I'm going to have you up for insubordination. It is clear that the use of the term "nigger brown paint" is an expression used to describe colour, was not used for the purpose of being derogatory and was used once by Baldry.

2. Gannon denied saying that he would fake a back injury. Greg Craig testified Gannon did say this page 629. I accept the evidence of Greg Craig in this regard.

3. Gannon testified he requested help in moving a filing cabinet. Again Greg Craig categorically denies this page 630. Again I accept the evidence of Greg Craig.

4. Gannon stated that he had not suffered a back injury prior to March 15, 1985 page 251 and 254. The fact is that exhibit R-10, Canadian Pacific Preliminary Report of Accident dated May 31, 1976, and Exhibit R-48, Employment Record of Gannon, show that he did.

5. Gannon indicated that he only referred to himself as "nigger" three times. This is patently false. The evidence is overwhelming that Gannon constantly referred to himself as nigger.

6. Gannon characterised things as "lies". I refer to pages 301 and 365 where Gannon specifically refers to questions put to him by Mr. Hume and Mrs. Shivji, respectively, as lies.

7. Gannon, who put into issue, by his own evidence, his mental state, claimed not to know the names and addresses of various psychiatrists

from whom he received treatment including his family doctor whom he had been seeing for at least 3 or 4 years and more probably as long as 10 years. I find this doubtful. In any event it was obvious he made little or no attempt to locate the names and addresses of these Doctors when asked to do so by Counsel for the Respondent and this Tribunal.

8. Gannon claimed not to know what medication was prescribed.

9. Gannon claimed to have documented occasions of alleged discrimination in a book, pages 279 and 280. No such book was produced.

10. Gannon's recollection of events was selectively vague. He was clear concerning anything he says was done to him but had no recollection or was vague concerning his own behaviour.

11. Gannon claimed virtually everyone in the B & B department were liars pages 303 to 305, and Exhibit R-52, a statement given by Gannon to J.C. Craig on March 21, 1985.

12. Of all of Gannon's fellow employees, none testified on his behalf, except David Sarty, himself a discharged employee with a complaint against the Respondent which failed.

13. Gannon chose to wait years before alleging Human Rights violations despite meticulous recording of events in his alleged diary.

14. Gannon testified under oath that he would pass by Chris Campbell's house on the way from his home to the work site. The evidence is clear that in order to drive by Campbell's home Gannon would have had to detour some 14 blocks to be in that vicinity.

15. Gannon denied he parked his car outside Campbell's house page 243. Campbell tells a much different story page 1072, 1073 and 1077.

16. Gannon alleged under oath, in chief, that Norman Lavoie had made discriminatory remarks against him when testifying as to trouble he had with Lavoie concerning the rental of property. But on re-examination by Mr. Lee, page 334, question "You have no complaint of racial discrimination against Lavoie, I take it?" answer "Not that I know of, no I can't remember anyway."

17. Gannon alleged in his complaint dated October 3, 1991, Exhibit R-11 that he had been reinstated as a painter with CP Rail in 1986 as a result of a previous complaint filed with CHRC. This is obviously untrue as he was reinstated as a painter because of the award of the Arbitrator. See Exhibit R-13.

18. Early in his testimony Gannon stated, page 71, in reference to Rogal "Like, we made a mistake with that nigger" and "What does that nigger

know about painting?" things like that, of that nature". This testimony was given in the context of his early days with B & B. A careful examination of the evidence indicates that at this stage, Gannon would still have been engaged as a bridge man not a painter. Obviously this allegation is untrue.

19. Gannon testified in relation to the locker incident which happened during the first week of arriving in Vancouver that Rogal said "Incidentally Gannon, I didn't know you were a nigger" and then testified that he heard Rogal say on the telephone to Mr. Zakaluk "You'd better come down here and see about your french frog" which happened in his second week in Vancouver. He then stated "Then I knew that this man was a true racist." I question how Gannon can come to that conclusion when he had heard these remarks, if made, only twice within the first two weeks of arriving in Vancouver.

20. Much of Gannon's testimony lacked corroboration. He indicated a photo album in relation to the locker incident but did not produce it. He stated that he kept a detailed diary but did not produce it. In relation to his alleged back injury, on March 15, 1985, he did not call any medical evidence whatsoever. Concerning his testimony that he saw three psychiatrists, one each in Montreal, Edmonton and Vancouver, for "nerves" he did not produce any medical evidence thereof. Notwithstanding that Mrs. Gannon accompanied her husband and sat through most of these proceedings he expressly told this Tribunal he was not calling her as a witness. One would think that her evidence would have been of assistance to Mr. Gannon concerning such matters as diary, photo album, names of doctors, medical condition of Gannon, socialisation of co-workers and other events.

21. If there was such animosity between Gannon and Rogal, and Rogal was such a "racist", I wonder why Gannon requested from Templeton, a transfer from Vancouver to Port Coquitlam where Rogal at that stage was the B & B Foreman. It would also not seem that Templeton was bent on "getting" Gannon when he acceded to Gannon's request.

22. Gannon has testified that he was employed with the Respondent for 14 years in Montreal, and for the better part of 1 year in Edmonton. He stated he has high praise for CP and that "they have treated me very decent". He has alleged that his only complaint is against the B & B department. He testified he requested and was given a transfer from Montreal to Edmonton and then Edmonton to Vancouver. He is familiar with the Wage Agreement and grievance procedure. He is a well experienced and older employee. He does not give the impression of being a meek person. On the contrary he is aggressive and self possessed. He has consulted a labour lawyer. If he was being discriminated against as he alleges, by Rogal and Zakaluk, and Kirkpatrick and Rollins, his Union representatives, why didn't he go to someone else in the Union or in Management or take grievance procedures.

I now deal with some of the more "legal" issues again in point form.

1. Gannon says in his complaint "I am a black person" and on this basis alleged discrimination based on race and colour. Notwithstanding this outright assertion he stated at page 57 "My family background, as far as I can remember or ascertain its a mix between East Indian, black and white". Doctor Graham Johnson an expert witness called by Mr. Lee testified that Gannon was not apparently black and did not have the features of a person of the negro race. Other witnesses have said the same

thing. Baldry did not know Gannon was black prior to these hearings. My own observation does not disclose that Gannon is black. Mr. Gannon, legally speaking, has the onus of proving that he is black and has not satisfied that onus.

2. Gannon swore that the Respondent "treated me very decent". He also stated that he does not know whether any of the alleged racial discrimination is because of race, colour or family status. On this basis, then, the evidence does not support a finding of discrimination.

3. Family status became a proscribed ground of discrimination on March 30, 1983, but was not a proscribed ground under the CHRA prior to that time. Gannon alleges family status in connection with the awarding of a temporary position of plumber to Ken Kirkpatrick. It is not clear, from Gannon's evidence, as to when this allegation occurred. The allegation as to family status appears to have grown as time progressed to a general smear against the Respondent including its history of hiring and awarding positions to family members. Considerable effort was taken by Mr. Lee to prove that Kirkpatrick, Swanson, Greg Craig, Doug Craig, Gil Baldry, etc. had relatives working for the Respondent. Mr. Lee advanced a conspiracy theory around all of this. He submitted that allowing the hiring of relatives of employees, the Respondent was prima facie discriminating. The error in this submission and allegation is that the family status referred to in the CHRA refers to the family status of the Complainant and not to co-employees or anyone else. In my view this is obvious in reading S3(1) of the CHRA. The other proscribed grounds of discrimination being race, national or ethnic origin, colour, religion, sex, marital status, disability and conviction for which a person has been granted a pardon, all refer to a Complainant. Family status must, in like manner, refer to the Complainant.

4. The question of laches is very troubling. S41 of the CHRA states "Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of the Complainant it appears to the Commission that

a. the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available:

b. the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this act;

c. the complaint is beyond the jurisdiction of the Commission;

d. the complaint is trivial, frivolous, vexatious or made in bad faith; or

e. the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint. 1976-77, c.33, s.33.

The complaint must be brought within one year unless the time is extended where appropriate. This provision, in my view, is necessary to ensure that complaints filed with the Commission are dealt with fairly so that a Respondent having to defend a complaint would have a fair opportunity to do so and that witnesses would have a fresh recollection of events and documents are available. Gannon alleges harassment relating back to 1979, 6 years before the complaint and 12 years before this Tribunal hears the matter (the lapse of time from the filing of the complaint to this hearing is not, of course, the fault of the Complainant). It is very difficult for a Respondent to adequately reply to a complaint after such time. Records are destroyed such as Constable Langston's notes. It must have been extremely difficult for the Respondent to adequately prepare concerning the posting of job bulletins, awarding of positions and name calling and I think did a credible job in amassing its material. Aside from any prejudice, a Respondent may suffer, it is obvious, this Tribunal suffered serious prejudice in assessing credibility and determining the facts.

If Gannon is to be believed, then it follows that he is asking this Tribunal to accept that the following people have lied, at least in part, or are conspiring against him i.e. Dave Rogal, Foreman, Gil Baldry, a very impressive and credible person, Ray Rollins co-worker and Union representative, John Templeton, Deputy Superintendent, now retired, also impressive, Greg Craig, co-worker, and close friend of Gannon, Fred Smith, Bob Wallis, Clark deBoer, Steve MacVittie, John Mullen, Ken Kirkpatrick, all co-workers, Scott Swanson, former co-worker, Steve Gegorus, CP Constable, Doug Craig former co-worker not employed by the Respondent, Wally Kirkpatrick co-worker and Union representative, completely believable and impressive, Chris Campbell co-worker, Randy Walker former co-worker, not employed by the Respondent, John MacLeod, former co-worker, not employed by the Respondent, Todd Langston CP Constable, Robert Whitworth, CP Investigator now retired, Ken Carson and Frank Wirrell, Claims Agents, Ken Webb Labour Relations Officer, all with no contact with Gannon and all three professionals, impressive and credible, and Geoff Craig, Divisional Engineer, who arranged the typing of many statements by Gannon by someone else so that his secretary wouldn't have to type the scurrilous remarks

made by Gannon. Mr. Lee categorised the Respondent's people as being racist and Mr. Hume quite properly indicated his resentment. I do too and reject this submission.

There is one matter that is of concern and that is that Mr. Zakaluk, B & B Master, was not called as a witness as it appeared that he was a key player. Mr. Hume simply indicated that he chose not to call him and stated that Mr. Lee had the right to call Mr. Zakaluk but didn't. He further advised that Mr. Zakaluk had been interviewed by a Human Rights Investigator and presumably Mr. Lee would have knowledge of evidence that could be given by Zakaluk. In like manner, presumably, Mr. Hume would have knowledge of any evidence that Zakaluk might give. Keeping in mind that this is an enquiry and not a trial, the conclusion I draw is that any evidence Zakaluk might give would not be of assistance to either party to these proceedings otherwise, why not call him?

Two expert witnesses testified, Dr. Graham E. Johnson called by the Commission and Dr. H. Davies called by the Respondent. Dr. Johnson is a trained Sociologist, an Associate Professor in the Department of Anthropology and Sociology, University of British Columbia, holds a Doctorial degree in Sociology in Chinese studies from Cornell University and has authored many books, chapters, articles and book reviews, in all some 102 and some 27 papers and other unpublished material. He has taken a deep interest in Canada and Canadian society, in particular the nature of ethnic and racial relationships in Canada. He testified his evidence has been accepted in a number of Courts in both Canada and the USA. His curriculum vitae was entered as Exhibit HR-30 and is impressive. Mr. Lee advised this Tribunal that Dr. Johnson was given a summary of the investigation leading to this enquiry and prepared a report as a consequence which was entered as Exhibit HR-31. Mr. Lee further advised the Tribunal that his testimony would deal with the dynamics, inter-relationships, inter-personal relationships of various men, working in a particular environment similar to the B & B and how an outside person who joins that group is treated, if that person is not exactly like that group. Dr. Johnson's evidence adduced in this hearing is based entirely on the results of the investigation and some observation of Gannon's evidence in chief while he (Dr. Johnson) was in Court.

Dr. H. Davies is a Psychiatrist in private practice, Psychiatrist at the Department of Psychiatry, St Paul's Hospital and Clinical Assistant Professor, Department of Psychiatry, University of British Columbia all in Vancouver. He holds a number of degrees and diplomas and is a Fellow of the Royal College of Physicians of Canada. His curriculum vitae is also

impressive which was entered as Exhibit R-87. Dr. Davies prepared a report dated December 9, 1991, based on a review of the transcripts of Gannon's evidence, and entered as exhibit R-88 along with an article of delusion (paranoid) disorder entered as Exhibit R-89.

I found the evidence and report of Dr. Johnson to be interesting and instructive but with the greatest of respect to his expertise, of little assistance concerning the credibility of the evidence I have heard particularly that of Gannon. On the other hand, the evidence and report of Dr. Davies, which was given "in camera", is of considerable assistance. Dr. Davies prefaced his remarks by emphasising that it would have been far more preferable to have evaluated Gannon personally in a psychiatric evaluation - to have done a formal mental status evaluation. He testified it would have been most appropriate and in fact essential to have had Gannon's past history including the reports of the three Psychiatrists Gannon had consulted, collateral personality tests and information from people who knew him such as friends, family members and people with whom he had worked. Notwithstanding the lack of this background information, he was able to form preliminary opinions based on the information he received. Gannon's first documented psychiatric illness occurred when he moved from Africville to Montreal where he required psychiatric contact on December 22, 1976 when aged 33. Dr. Davies testified the age and the move is important. The age group of 30s to 40s is very important as far as any diagnosis is concerned. Gannon's next psychiatric contact was in Edmonton when mention was made of schizophrenia. Exhibit R-6 and Exhibit R-7, being copies of claims for group weekly indemnity benefits, show the Psychiatrist statement as "emotional disorder" and "schizophrenia" respectively. Gannon's next psychiatric contact was in Vancouver. Dr. Davies testified these 3 moves were very significant. Dr. Davies then testified as to all the problems to which Gannon had testified. Based on the information regarding co-workers, the Union, grievances filed, accusations of directing obscenities, charge of discrimination, feelings of discipline, by the B & B, (whom he felt was a secret society) claims of verbal assault, sons of management taking away jobs and weapons pointed at him, and that all these were meticulously recorded by Gannon in his diary although his own action and verbal assaults were not noted, came to the conclusion that Gannon was exhibiting or suffering from a paranoid disorder currently called delusional disorder. He testified that paranoid behaviour implies suspiciousness or a feeling of being victimised, harassed, conspired against or persecuted. The essential feature of this disorder is the presence of a persistent, non bizarre delusion (fixed belief) of the persecutory type. Small slights may be exaggerated and become the focus of

a delusional system and the focus of such a delusion may be an injustice, which has to be remedied by legal action. The age at onset of this paranoid disorder is generally in the late 30s or early 40s. The underlying personality is intact so that impairment in daily functioning is rare, there is no intellectual deficit and they may appear normal in their behaviour to others. Predisposing factors include immigration and other severe stresses. Gannon required psychiatric contact when moving from Africville to Montreal then to Edmonton and then to Vancouver. Dr. Davies testified that the accusations or slurs and harassment made against Gannon were made in response to provocation on Gannon's part with retaliatory gestures by fellow workers. Gannon felt slighted or conspired against and

to prove a point reacted in such a way as to invite recrimination. Recognizing that this opinion offered by Dr. Davies is not based on a full evaluation, as testified to by Dr. Davies, it is a fact that the testimony of Dr. Davies remains completely uncontradicted by the Complainant and the Commission. Corroboration of Dr. Davies' diagnosis is found in the testimony of J B Eggett, retired Superintendent CP Police, Steve Gregoris, an Investigator with CP Police, Gil Baldry and the Complainant himself which is related below. Eggett testified page 933 and seq that sometime in June 1985, at lunchtime when in his office there was a loud banging on the back door of the police office and Gannon was admitted into the office by an investigator. Eggett continued at page 934 "and before the other chap came to get me out of my office I could hear a lot of yelling and screaming and carrying on in the back room. Anyway, the Investigator came to get me after that point, and said I'd better deal with this thing. So I went out and talked with Mr. Gannon, and at that time he was ranting and raving, there was no question about it, to the point where you couldn't settle him down. Then finally he admitted to me that he had problems with one of his foreman for discriminating against him and calling him names. I think the name was Rogal, a foreman or an employee Rogal. And anyway, this went on for quite a bit of time, where he was doing this yelling and screaming, and finally he was able to settle down, and I told him that we didn't investigate discrimination matters, that he should be taking that up with his superintendent. And it was shortly after that that he left and went on his way." On cross examination by Mr. Lee, Eggett testified page 937 and 938 in relation to several witnesses testifying that Gannon was called "nigger" at work was that he heard that from Gannon. Steve Gregoris testified while he was in uniform in an unmarked patrol car around the 9 or 10 August 1984 he arrived at CP Rail's intermodal terminal in Port Coquitlam and was speaking to a security guard at the gate. He noted Gannon operating a yellow CP Rail vehicle pick-up truck with a canopy leaving the terminal. Gregoris testified that he was wearing sunglasses

and looked over towards the vehicle when he was 20 feet away. At that point Gannon, whom Gregoris did not know, "asked me what I was staring at?". In answer Gregoris stated "I'm not staring at anything" and Gannon stated "What did you say?". In answer Gregoris stated "and I says, I started to say that I didn't say anything, and he says "What did you call me? Did you call me nigger?. You called me nigger" -- so I says "I didn't tell you anything like that" "Yeh, you called me nigger didn't you?" and then in answer to "what's your problem? If you've got a problem state your problem, otherwise, you know, leave". Gannon stated "Oh you guys are all the same" and left. Gregoris testified he followed this incident up by speaking to a foreman, Greg Craig, who informed Gregoris that there were certain problems with Gannon that were being handled internally and that Craig was not surprised. Gregoris left matters at that. He then testified concerning a second encounter with Gannon which was the incident described by Eggett. Gregoris indicated that Gannon was upset and wanted to lay a complaint against Rogal as Rogal had called him various names. Gregoris explained to Gannon that the CP Police do not investigate civil matters and that Gannon should file a grievance or see his boss. Gannon then became

very upset when told this. Gregoris then handed Gannon over to Eggett. Gil Baldry testified in relation to the nigger brown paint matter referred to above that when he, Baldry, in the locker room, was describing the finish to a cabinet as nigger brown that Gannon who was one flight of stairs down on a lower level, came rushing in and said "Are you talking about me?". On Baldry saying "No, I wasn't" Gannon replied "Well, if you're talking about me, I'm going to do something about this". Baldry said "We weren't talking about you" page 468. Baldry then testified as to an incident occurring on May 9, 1990 which resulted in Baldry writing a letter to the B & B Master, C Tompson dated May 9, 1990 and giving a statement to R E Mitchell dated May 14, 1990 both being entered as Exhibits R-15 and R-16 respectively as similar fact evidence. Exhibit R-15 is reproduced below in its entirety:

To B & B Master.
C Thompson. 9 May 1990

On May 9 1990, after the safety meeting, I was told by foreman D. Rogal to drive K. Gannon to his work site. I waited in the shop for Gannon to tell me when he was ready to go. After a period of time, not seeing Gannon, I walked outside to the truck Gannon was sitting in the vehicle. I said "I didn't know you were ready to go, why didn't you call me?" Gannon replied "I don't have to tell you fuck all, if you want to know something ask the foreman". Then he got out of the front seat and sat in the back. I drove

off. As we approached the crossing I said "Where are you working?" He replied in an angry voice "If you don't know go the fuck back to the shop, I don't want you to talk to me at all, ever". I assumed that he was working at the Diesel Shop and drove there. He got out and slammed the door.

On the following morning 9 May, Gannon used the truck then came back to the shop. I went up to the office and asked foreman Rogal if he would ask Gannon if he was ready to go to his work site as Gannon didn't want me to talk to him. As I left, Gannon came upstairs and said to Rogal "Who's taking me over?" Rogal replied "Gil" and added "Ken, you don't have to talk to Gil". Gannon exploded saying "Why are you harassing me?" I heard an exchange take place with Gannon doing most of the shouting. Present in the office were B & B Master C. Thompson, R. Rollin and D. Rogal. Then Gannon stormed down the stairs and got into the truck. I walked over and got in beside him. As we drove Gannon shouted at me "I don't have to put up with this shit just because you hate blacks, I hate whites, if you don't like it go back to England, this is Canada. We'll take it to Human Rights, see what they say, fuck you, fuck Rogal. fuck Chuck and you can tell them I said so, I don't give a fuck". Grabbing the handle of his tool box, he added "If you say one word to me you bigot, I'll smash this tool box in your face right now, fuck you".

During this outburst I did not speak. He ranted and raved about Human Rights and not having to put up with this shit. I dropped him at his job

site and returned to the shop, having said nothing to him during this whole incident.

I believe Gannon is a dangerous and unstable person, and as he has threatened, could at some point use physical violence against me. Wishing to avoid this, I respectfully request that I have nothing further to do with him, including driving him to job sites.

Respectfully yours
Gil Baldry 515338

There is one legal issue remaining and that is concerning the use of the terms "nigger" and "frog". There is no evidence, as to the legal or even the dictionary meaning of these two words. I am not convinced, of the meaning or consequence concerning the term "frog". There is evidence that many nicknames were used such as limey, polack, peanut, etc. No evidence was adduced as to whether there is any racial or discriminatory connotation

to be inferred and I make no observation thereof. With regard to the use of the word nigger no evidence was adduced as to its derogatory or discriminatory meaning or effect except that Dr. Johnson indicated the use of the term to be offensive. Whether this term is offensive must be viewed in the context of its use and to whom it is directed. I observe that this word has often been used on television in this Country in the context of humour, drama, entertainment or by way of documentary presentation. Of necessity it was used at length in these proceedings. In any event I am of the view that the use of the term nigger, in this case, does not extend to the point that its use can be termed to be harassing. I have indicated that the test to be applied in determining whether discrimination exists must be an objective one contrary to Dr. Johnson who stated the test is subjective. This view, if I understand the evidence correctly, is also the position of the Commission. With respect I cannot agree. If the test is subjective then the way is open to a plethora of complaints which cannot be tested. A subjective test may come into play when considering the question of damages and compensation but at this stage I make no comment.

To summarise I agree with the majority decision that much of the evidence was contradictory and inconsistent, that care had to be taken in assessing the Complainant's evidence, that the Complainant did not appear to be forthright, that he was evasive and that in regard to his evidence on cross-examination in referring to co-employees wives, daughters and mothers in a sexual way he was clearly contradictory when in rebuttal he completely denied using such language.

I find as follows that:

1. The racial slur of Nigger was used by some co-workers

including Gannon's immediate supervisors, Greg Craig and David Rogal, but at best only occasionally.

2. The Management of the Respondent, in the person of the B & B Master Zakulak, was aware of this racial slur and Gannon's complaint thereof but apparently did nothing.

3. Gannon was not denied an opportunity for promotion.

4. Gannon was not denied the opportunity to work overtime.

5. Gannon was not disciplined more severely than other employees having regard to the nature, circumstances and date of the particular offence compared with offenses by other

employees.

6. The use of the racial slur of nigger by co-employees did not amount to harassment or result in an unhealthy and poisoned environment.

7. The specific complaints by Gannon were not related to race or colour.

8. The proscribed ground of family status has no application.

9. Gannon repeatedly referred to co-workers and their wives, girlfriends and mothers in a sexual, racial, offensive way and referred to himself as "nigger" and "Jackson".

The use of the word "nigger", in present day Canadian society is offensive and is not to be condoned. Its use by the Complainant's co-workers in the circumstances of this case is not related to any of the specific complaints alleged by the Complainant. The use of this language by the Complainant and his co-workers will be the subject of an appropriate remedy under the CHRA which will be dealt with in a later hearing concerning damages, compensation and remedies, if any, which hearing will be at my call once appropriate arrangements are made.

.....

A G Lynch Staunton