

Canadian Human Rights Tribunal Tribunal Canadien Des Droits De La Personne

JEAN-RAYMOND AUDET

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN NATIONAL RAILWAY

Respondent

DECISION

MEMBER: Athanasios D. Hadjis 2006 CHRT 25
2006/05/16

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[1] The complainant, Jean-Raymond Audet, alleges that his employer, the Canadian National Railway Company (CN), refused to continue to employ him and did not accommodate him after he had an epileptic seizure on September 10, 2002. He contends that CN thereby discriminated against him on the basis of his disability, in breach of s. 7 of the *Canadian Human Rights Act*.

[2] Both Mr. Audet and CN participated at the hearing and were represented by legal counsel. The Canadian Human Rights Commission did not participate. Prior to the start of the hearing, the Commission reached an agreement with the other parties regarding the "policy issues engaged by this case" in relation to the "application" of the Railway

Association of Canada's *Medical Guidelines*. The details of the agreement were not disclosed to the Tribunal.

[3] For the reasons set out below, I have determined that CN discriminated against Mr. Audet by effectively refusing to continue to employ him, on the basis of his disability, without a valid justification under the *Act*, and that Mr. Audet's complaint has therefore been substantiated.

I. WHAT FACTS GAVE RISE TO MR. AUDET'S COMPLAINT?

A. Mr. Audet's work history at CN

[4] Mr. Audet is 47 years old and resides in Sudbury. He became an employee of CN in May of 1988. By July of 1989, Mr. Audet was working as a "brakeman", based out of CN's terminal in Capreol, just outside of Sudbury. A typical three-person train crew is comprised of the locomotive engineer, the conductor, and the brakeman, who assists the conductor. The brakeman's duties include moving tracks to switch out rail cars from a train and assisting in the marshalling of the various rail cars.

[5] In August of 1989, Mr. Audet suffered a single convulsive seizure while working. He was diagnosed with complex-partial epilepsy, also known as Temporal-Lobe epilepsy. As a consequence of that episode, Mr. Audet has been on anti-seizure medication ever since.

[6] Following the seizure, CN removed Mr. Audet from his position. He received short term disability benefits and employment insurance benefits while off work. In 1992, he was returned to work by CN in the position of yard helper, at CN's MacMillan Yard terminal in Toronto.

[7] In 1995, Mr. Audet suffered an injury to his back while at work. He received disability benefits and on occasion was assigned light duty work. As a result of his injury, the Ontario Workplace Safety and Insurance Board (WSIB) imposed several work-related restrictions, including a requirement that he not work for prolonged periods of time, that he limit his lifting of heavy objects, and that he avoid repetitive back motions.

[8] In 1997, CN's Chief Medical Officer identified certain restrictions relating to Mr. Audet's epilepsy that had to be respected in order for him to regain employment as a brakeman on the main rail line. The Chief Medical Officer observed that Mr. Audet had been seizure-free for more than five years and concluded that his chance of a new seizure was quite remote. The restrictions provided that Mr. Audet was not to work alone, and was to always remain in radio or visual contact with a team partner. His team was to be kept informed of the remote possibility of his sudden impairment. All applicable rules regarding rest periods were to be fully respected. No overtime work would be permitted for Mr. Audet, unless it was in an emergency situation.

B. Mr. Audet's seizure of September 10, 2002

[9] With the issuance of the Chief Medical Officer's letter setting out Mr. Audet's restrictions, he was able to return to work as a brakeman based out of Capreol, in 1998. On certain trains, where crews were only comprised of two persons, he would work as the conductor, a job for which he had been qualified in 1992.

[10] On account of his relatively low rank on the seniority list for CN's Capreol-based brakemen and conductors, Mr. Audet had been placed on the "spare board". As a result, he would be called in to fill vacancies created on the occasions when a regular employee was absent or when none of the regular employees had opted to work on a given shift. Thus, if CN required the services of a brakeman or conductor on a run, Mr. Audet and the other spare board employees would be telephoned on a rotational basis and invited to take

the available run. Mr. Audet was remunerated based on the number of hours worked or miles travelled, depending on the circumstances.

[11] Mr. Audet claims that there was an overall shortage of employees at Capreol in 2002, as a result of which he was called in to work more hours than ever before. He contends that the workload took its toll on him and that by the end of the summer, he was feeling quite tired.

[12] On the morning of September 10, 2002, he returned to Capreol after helping bring in a train overnight from Hornepayne, Ontario. He got into his car at the end of his shift and was going home to rest. He had booked himself a 24-hour rest period. On the way home, he felt what he describes as an aura coming over him, and he realized immediately that a seizure was imminent. He pulled his car over. He had a seizure but does not recall it. He remembers waking up in an ambulance. He was taken to the hospital but was released several hours later.

[13] Mr. Audet went home. He did not notify CN of the incident. During the evening of the following day, September 11, 2002, he received a call from CN's dispatcher calling him in to work on an available run, as was the normal practice. Mr. Audet asked if he could be excused from coming in, claiming he did not feel well. The dispatcher replied that without a note from a physician, he would not be considered to be on sick leave. Mr. Audet testified that since he was not in possession of such a note, he felt that he had no choice but to report for work as requested. He completed his train run that night and returned to Capreol the following day, September 12, 2002.

[14] Mr. Audet's supervisor, Gerald Nadon, who held the position of "trainmaster", confirmed in his testimony that CN views "negatively" any last-minute requests for sick leave that are made to a dispatcher by employees when they get their call to come in to work. The employee's trainmaster usually conducts follow-up inquiries to learn why the employee has booked sick. Employees are expected to inform CN of their unavailability due to illness as soon as possible. Tardy notifications cause logistic difficulties for CN, which in turn result in train delays.

[15] While Mr. Audet was out on his overnight run, Mr. Nadon heard about his seizure from some of the other CN employees at Capreol. Mr. Nadon invited Mr. Audet into his office as soon as he returned to Capreol. When asked by Mr. Nadon directly if the rumour was true, Mr. Audet confirmed that he had indeed experienced a seizure. Mr. Audet testified at the hearing that he had intended to tell CN about his seizure, but only after having first taken the opportunity to be examined by his own family physician and his neurologist.

C. CN removes Mr. Audet from service

[16] Mr. Nadon informed CN's department of Occupational Health Services (OHS) about the seizure. OHS's function within CN is to develop and monitor all policies with respect to health and fitness for duty. The medical component of OHS's functions has been assigned by CN to an outside firm, Medisys. The information provided by Mr. Nadon was reviewed by the Medisys team of health professionals, who in turn sent a message to CN's Crew Management Office directing that Mr. Audet be pulled out of service immediately and not be assigned to work on any more runs, as he was considered unfit for work in his position.

[17] Medisys' determination was based on the Railway Association of Canada's *Medical Guidelines for the Employment of Individuals with Epilepsy or Other Epileptic Seizures*

in a Safety Critical Position in the Canadian Railway Industry (the "RAC Guidelines"). According to Transport Canada's *Railway Rules Governing Safety Critical Positions*, which were developed pursuant to s. 20 of the *Railway Safety Act*, R.S., 1985, c. 32 (4th Supp.), "safety critical positions" are defined as any positions directly engaged in the operation of trains in main track or yard service, or engaged in rail traffic control. CN considers brakemen and conductors as falling into this category.

[18] The *Railway Medical Rules for Positions Critical to Safe Railway Operations* (the "Railway Medical Rules") also developed by Transport Canada pursuant to s. 20 of the *Railway Safety Act*, require that persons working in safety critical positions be assessed by their employers in regard to their medical fitness for duty. If a railway company's Chief Medical Officer, in making an individual assessment of a person's medical fitness for duty, is of the opinion that there exists a threat to safe railway operations, that person may be restricted from occupying a safety critical position, or be otherwise restricted from working or performing certain tasks in a safety critical position (Rule 6.1).

[19] The RAC Guidelines reaffirm the principle espoused in Transport Canada's Railway Medical Rules that employees working in safety critical positions must be physically and mentally fit. They underscore the fact that impaired performance due to a medical condition could result in an incident affecting the health and safety of employees, the public, property or the environment. Section 4 of the RAC Guidelines sets out a series of "criteria" to be considered in assessing "medical fitness for duty". In the case of someone diagnosed with epilepsy who has been treated with antiepileptic drugs, the criteria specify that the person must not have experienced any seizures for a period of five years. Also, the person must not exhibit any "epileptiform activity" in a series of "electroencephalograms" (EEGs) performed over the same period.

[20] Upon learning of Mr. Audet's September 2002 seizure, and based on these criteria, CN immediately decided that his removal from service in any safety critical position would remain in effect for the five year evaluation period. He was effectively removed from his position of brakeman/conductor for a period of five years.

[21] As of October 2005, when the hearing before the Tribunal into Mr. Audet's human rights complaint took place, he had yet to be called back into service by CN, be it in a safety critical or non-safety critical position. He was in receipt of disability benefits until the end of June 2005. CN has not formally dismissed Mr. Audet.

[22] Mr. Audet experienced three more seizures after the seizure of September 10, 2002, (one each in June, September, and November 2003). After the last of these seizures, his medication was changed and he has not had any seizures since.

D. Mr. Audet's dealings with CN following his removal from service

[23] Mr. Audet testified that following his removal from service, he was frequently in contact with Medisys. He signed a form authorizing Medisys to view his hospital records. On November 1, 2002, his neurologist completed a form issued by the Railway Association of Canada, relating to the evaluation of epilepsy or isolated epileptic seizures in individuals occupying safety critical positions. The form is essentially a medical report. Mr. Audet passed the form on to Medisys.

[24] About one week after being released from service, Mr. Audet contacted his union representative, Glenn King, to report the seizure incident and to look into how he could be accommodated in his employment. Mr. Audet testified that after being removed from service, he would still visit the Capreol facility on a regular basis, asking CN

management personnel there if they could accommodate him in another position. One of the persons he spoke to was Brian Gillies, a trainmaster at the Capreol facility. Mr. Audet claims that Mr. Gillies advised him to contact CN's management offices in Toronto to inquire about the possibilities for accommodation. Mr. Audet followed his suggestion and telephoned the Toronto office many times between 2002 and 2005. He was always told that someone would look into his situation and get back to him to discuss his case. No one ever did.

[25] After September 12, 2002, Mr. Nadon never spoke to Mr. Audet again about his employment or any accommodation. According to Mr. Nadon, it was not his responsibility to engage in such discussions. That was the task of CN's human resources department and CN's risk management office.

[26] Mr. Audet was frequently in touch by telephone with June Sheppard, a registered nurse working for Medisys, who was handling Mr. Audet's file. Mr. Audet kept her up to date with respect to his medical condition, including the three seizures that he experienced in 2003. He testified that he frequently asked her what could be done about accommodating him. She always said that she would look into the matter, but he was never given any information about the outcome of her inquiries.

[27] As the months passed, Mr. Audet claims that he did not get any response from CN, so on August 21, 2003, he filed the present human rights complaint alleging that he had not been accommodated.

E. CN invites Mr. Audet to be tested for the position of Intermodal Dispatch Coordinator - December 2003

[28] According to Mr. Audet, it was only in December 2003, almost four months after filing his human rights complaint, that he first received any word from CN regarding accommodation. Richard Theberge, who was CN's Risk Management Officer for the Northern Ontario Zone, contacted Mr. Audet requesting that he attend an interview and complete a test for a bilingual "intermodal dispatch coordinator" position at Toronto's MacMillan facility. Mr. Audet was not consulted in advance about this position. His views about his suitability for the job were never sought. Nonetheless, as Mr. Theberge noted in a follow-up memo to Mr. King, Mr. Audet seemed eager to attend the interview and participate in the testing.

[29] Mr. Audet travelled to Toronto to be interviewed and tested. He testified that he was given a "general aptitude" test to complete, containing elements that he described as "clerical" or "secretarial". For instance, his typing skills were assessed. Mr. Audet had no previous work experience in any positions that required such skills. He had trouble with the testing, but not just because it related to areas in which he lacked experience and skill. He claims that he was also feeling headaches and pressure around his eyes that day. He was having trouble focussing on the questions, even though he could tell that some of them were simple. His hands were trembling.

[30] His test results were very poor, falling between the first and fifth percentiles. The minimum score required for this type of position was the 25th percentile. He was therefore not offered the job. The person who administered the test wrote in her follow-up report to CN's human resources department that Mr. Audet had remarked a number of times during the testing that he felt the medication he was taking at the time was affecting his performance.

[31] Shortly after the testing, a different neurologist took over Mr. Audet's treatment, and immediately changed the dosages of the medication being administered. On February 28, 2004, the neurologist wrote a note, which was forwarded to Medisys, stating that Mr. Audet's difficulties during the testing were related to his medication at the time. The neurologist urged CN to consider re-administering the test since those difficulties had now been "resolved". Mr. Audet testified that CN did not react in any way to the note. He did not receive any offer of additional testing until May 2005, some five months after the Commission had referred the human rights complaint to the Tribunal.

F. CN offers Mr. Audet the position of Train Movement Clerk - July 2004

[32] On July 19, 2004, Mr. Theberge sent a letter to Mr. Audet offering him the position of Train Movement Clerk (TMC) at the Administrative Building in MacMillan. Mr. Theberge noted that the job was being offered pursuant to CN's Disability Management Program. The position involved "sedentary work", which would be supervised by the Program's "Return to Work" team, made up of Medisys nurses and doctors, as well as kinesiologists. Attached to the letter was a description of the physical demands and working conditions associated with the position. It indicates that a TMC may spend up to three hours per shift driving a vehicle.

[33] On July 21, 2004, Mr. Audet replied in writing to Mr. Theberge's letter. Mr. Audet explained that he did not possess a valid driver's licence at the time. Following his seizure of November 2003, the Ontario Ministry of Transport had suspended Mr. Audet's driver's licence, on the advice of his neurologist. He was not eligible to regain his licence until early in 2005. Mr. Audet added in his reply that he hoped Mr. Theberge "can take these factors into consideration". Mr. Audet concluded his letter by providing his telephone number and asking Mr. Theberge to contact him if he had any questions.

[34] Mr. Audet testified that he did not get a response to his letter, so he placed a call to Mr. Theberge. They spoke on October 4, 2004. According to Mr. Audet, Mr. Theberge claimed, during their conversation, that CN had waived the driving requirement in Mr. Audet's case, and that Mr. Audet has been notified of this waiver previously. Mr. Audet replied to Mr. Theberge that on the contrary, he had never been informed of any such waiver. Mr. Audet then asked, if indeed the driving requirement had been waived, whether the position was still available. Mr. Theberge answered that it was not.

G. CN invites Mr. Audet to undergo clerical testing - May 2005

[35] CN did not contact Mr. Audet again about employment possibilities until May 2005. CN invited him back to MacMillan Yard in Toronto to undergo testing. Suzanne Fusco, CN's human resources manager for Eastern Canada, testified that this was simply "clerical testing", which did not relate to any specific position. The testing was administered on May 25, 2005, and according to Mr. Audet, it concentrated on secretarial skills even more than the first round of testing in December 2003. Typing ability was again assessed, and many portions of the testing were timed. Several weeks afterwards, Mr. Audet received a call from a representative of CN informing him that he had performed poorly on the test, without giving any further details. No follow-up report of the results was provided to him.

H. CN offers Mr. Audet the "Rule 42 Foreman" position - October 13, 2005

[36] On October 13, 2005, just four days before the Tribunal began its hearing into the complaint, legal counsel for CN sent a letter to Mr. Audet's counsel stating that CN had an employment position available that could accommodate his various restrictions. The

position is called a "Rule 42 foreman", and the work location was to be in the Greater Toronto Area and in the Great Lakes District. Some testing would be required before Mr. Audet could obtain the position.

[37] On October 14, 2005, Mr. Audet's counsel replied that the position was "unsatisfactory". The work location was a great distance from his home terminal in Capreol, at substantially less pay than he formerly enjoyed. There was also some concern that the hours and duties of the job may be in violation of Mr. Audet's restrictions, established by CN's Chief Medical Officer in 1997. In addition, it was a position that fell into another bargaining unit, which was represented by a different union than the UTU. His ability to keep his seniority rights would depend on the cooperation of the new union. Mr. Audet's counsel underscored his client's "reasonable" expectation that CN would make greater efforts to accommodate his disability. But it was also pointed out that Mr. Audet was not refusing the offer of employment outright.

[38] By the close of the hearing, Mr. Audet had not as yet formally rejected the offer, but during final submissions, Mr. Audet's counsel reiterated his above mentioned reservations regarding the position being offered.

II. WHAT MUST BE PROVEN TO ESTABLISH DISCRIMINATION IN THIS CASE?

[39] It is a discriminatory practice to refuse to continue to employ an individual on the basis of his or her disability (s. 3 and s. 7 of the *Act*). A disability is defined in s. 25 of the *Act* as any previous or existing mental or physical disability. This definition has been interpreted to mean any physical or mental impairment that results in a functional limitation, or that is associated with a perception of impairment (see *Desormeaux v. Corporation of the City of Ottawa* 2005 FCA 311 at para. 15). CN unquestionably perceives Mr. Audet's epilepsy, which resulted in his experiencing seizures, as impairing his ability to function in a safety-critical position. I am satisfied therefore that his condition constitutes a disability within the meaning of the *Act*.

[40] The employer's conduct will not be considered discriminatory if it can establish that its refusal in relation to any employment is based on a *bona fide* occupational requirement (BFOR) (s. 15(1) of the *Act*). For any practice to be considered a BFOR, it must be established that accommodation of the needs of the individual or class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost (s. 15(2) of the *Act*).

[41] The Supreme Court of Canada articulated the approach to be followed in determining whether a BFOR has been established in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 ("*Meiorin*"). The complainant has the initial burden of establishing that the standard or policy adopted by the respondent is *prima facie* discriminatory.

[42] Once a *prima facie* case of discrimination has been established, the respondent may justify the impugned standard by establishing the following, on the balance of probabilities:

- (1) The respondent adopted the standard for a purpose rationally connected to the performance of the job;
- (2) The respondent adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose;
- (3) The standard is reasonably necessary to the accomplishment of that work-related purpose. To show that the standard is reasonably necessary, the respondent must demonstrate that it is

impossible to accommodate the complainant without imposing undue hardship on the respondent. It is incumbent on the respondent to show that it considered and reasonably rejected all viable forms of accommodation (*British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 ("Grismer")).

A. The *Prima facie* case

[43] Although CN never formally dismissed Mr. Audet, it unquestionably pulled him from service as a brakeman or conductor immediately after learning of the seizure that he experienced on September 10, 2002. CN decided to restrict Mr. Audet from his position for a period of five years, after which he could return, provided he remained seizure-free. CN did not assign him to any other position or duties in the meantime.

[44] I am satisfied that Mr. Audet has established *prima facie* that CN effectively refused to continue to employ him, on the basis of his disability. It is therefore incumbent upon CN to establish that its refusal to employ Mr. Audet was justified.

B. CN's justification

[45] CN contends that its standard and ensuing course of conduct were justified. In light of Mr. Audet's significant medical restrictions, which included not only those related to his epilepsy but to his back injury as well, CN claims that it was unable to individually accommodate him without incurring undue hardship.

C. Application of the *Meoirin* test

(i) Was the standard adopted by CN for a purpose rationally connected to the performance of the job?

[46] CN considers the positions of brakeman and conductor as safety critical. These workers are directly engaged in the operation of a train. As indicated in the RAC Guidelines, if the performance of persons in safety critical positions is impaired due to a medical condition, it could result in a significant incident affecting the health and safety of employees, the public, property or the environment. Individuals who hold such safety critical positions are therefore required to be medically fit to perform their duties.

[47] CN applied a standard that it derived from the RAC Guidelines, according to which, in cases like Mr. Audet's, where epilepsy is being treated by antiepileptic drugs, an employee will be considered medically fit for a safety critical position if he or she has been free of seizures for a period of five years. The employee is subject to ongoing monitoring of his or her condition.

[48] In my view, there is an obvious rational connection between the purpose of avoiding incidents affecting the health and safety of employees, the public, property or the environment, and the performance of the jobs of brakeman and conductor. The safe operation of the rail system is certainly a concern for CN. The prevention of an incident that could affect the health and safety of employees or the public is rationally connected to the performance of such safety critical jobs.

(ii) Did CN adopt the standard in the good faith belief that it was necessary for the fulfillment of the purpose?

[49] I am satisfied that CN adopted this standard in good faith, in the belief that it was necessary to ensure the safe operation of its rail system.

(iii) Has it been demonstrated that the accommodation of Mr. Audet is impossible without imposing undue hardship on CN?

[50] To show that a standard is reasonably necessary (the third step of the *Meiorin* test), an employer must demonstrate that it is impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship upon the employer.

a) Was Mr. Audet individually assessed?

[51] The Supreme Court, in *Meiorin* at paragraph 64, counsels courts and tribunals to be sensitive to the various ways in which the individual capabilities of employees may be accommodated. An employer should inquire into the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose. The skills, capabilities and potential contributions of the individual complainant and others like him or her must be respected as much as possible.

[52] These considerations are also reflected in the RAC Guidelines themselves. While s. 4 of the RAC Guidelines provides the general criteria for medical fitness in cases of epilepsy, s. 6 specifies that the employer should not conclude that an individual is unfit for duty without having first conducted an individual assessment with regard to the individual's particular position:

6. Individual assessment

Individuals with epilepsy or other epileptic seizures must be assessed with regard to their suitability for a particular position. The nature of the duties and responsibilities associated with their specific Safety Critical Position must be closely evaluated before any final determination of their fitness for duty.

[53] What efforts did CN make to individually assess Mr. Audet regarding his suitability to work as a brakeman or conductor? There was no evidence of any attempt by CN to make any such assessment until December 10, 2003, almost four months *after* Mr. Audet had filed his human rights complaint with the Commission, and precisely 15 months after experiencing his seizure. On that date, Dr. Claude Lapierre, CN's Chief Medical Officer, wrote a letter to Dr. Guy Rémillard, a neurologist in Montreal, asking his "professional opinion on the nature of the seizure disorder that [Mr. Audet] is suffering from and [Dr. Rémillard's] recommendation on his fitness for duty in a safety critical position".

[54] Dr. Rémillard did not meet or examine Mr. Audet personally, nor was he asked to do so. Jackie Anderson, a nurse on CN's Medisys team, testified that the "standard protocol" is to conduct a "paper review" of the medical condition of an employee with epilepsy. The assessment is made based on information from the employee's treating physicians and specialists. Ms. Anderson added that the assessment is usually made in consultation with CN's Chief Medical Officer. In some "complex cases" such as Mr. Audet's, the advice of a specialist on the medical condition is sought, in order to determine if Medisys' assessment is correct.

[55] After reviewing the file, Dr. Rémillard discussed the matter with Dr. Lapierre, who in turn documented the content of their conversation in a follow-up e-mail message to Ms. Sheppard at Medisys. Apparently, at the core of the two physicians' discussions was the question of whether Mr. Audet's seizure was provoked by the deprivation of sleep associated with the requirements of his position. The RAC Guidelines provide that where the seizure is "provoked", the employee can be deemed fit for duty in a safety critical position as early as one year following the seizure. In Dr. Rémillard's opinion, Mr. Audet's seizure was not provoked by sleep deprivation but came about instead as a recurrence of his epilepsy. Thus, as a person with epilepsy who had experienced a

seizure, Mr. Audet was not fit to work in a safety critical position for a period of five years, based on s. 4 of the RAC Guidelines.

[56] There is no evidence to indicate, however, whether Dr. Lapierre or Dr. Rémillard ever "closely evaluated" the nature of the duties and responsibilities associated with Mr. Audet's specific safety critical position, as provided for in s. 6 of the RAC Guidelines. Instead, based on the finding that the seizure was not provoked, Dr. Lapierre apparently felt that no further inquiry was warranted and he sent Mr. Audet's file back to Medisys.

[57] I am not persuaded, from the evidence adduced in this case, that CN made any efforts to individually assess Mr. Audet with a view to determining whether his medical condition prevented him from performing his duties and responsibilities in his positions of brakeman and conductor. CN's sights seemed focussed on determining whether it was responsible for having provoked Mr. Audet's seizure due to of his workload over the summer of 2002. In this respect, it is very telling that one of Dr. Lapierre's final remarks in his e-mail is that "Mr. Audet has very little chance of convincing any tribunal that he only had provoked seizure [*sic*]". There is no mention about whether Mr. Audet, as an individual, could still safely perform his job, and if not, how he could be accommodated.

[58] There may be an additional explanation for why CN's attention was drawn to the question of whether the seizure was provoked by his workload, apart from the need to determine whether Mr. Audet's removal for service should be for one year or five. Evidence was led with respect to a prolonged dispute at the time between CN and the UTU about the workload of "running trades" employees, including brakemen and conductors. The debate centred on the employees' right to book rest periods after their runs. The UTU had taken the position that the employer had been pressuring its employees not to exercise this right to the fullest extent, with the objective of making them available sooner to take on their next run. The employer disagreed and argued that it was merely preventing excessive and abusive booking of rest periods by some employees. I suspect that these lingering issues may have influenced CN in the positions that it adopted following Mr. Audet's seizure, and may help explain why CN seemed so concerned with ensuring that it had not provoked the seizure, rather than concentrating on accommodating its employee.

[59] Whatever CN's motives may have been, the fact is that there is no evidence of any individual assessment of Mr. Audet having been conducted in order to determine his suitability for his specific safety critical position. It is apparent to me that once CN learned that he had experienced an epileptic seizure, it applied the criteria set out in s. 4 of the RAC Guidelines in a routine, mechanical fashion, without any consideration of his individual circumstances or condition. CN simply decided that Mr. Audet would be restricted from working in his safety critical position for a five-year period, without any further examination into his individual suitability for his position.

[60] CN contends that it was not necessary to assess Mr. Audet's individual suitability. The nature of a brakeman's and conductor's duties are such that any person who experiences an epileptic seizure, like Mr. Audet, is immediately medically unfit to perform these safety critical duties.

[61] I am not persuaded by this argument. To permit an employer to invoke opinions about its employees' disabilities that it views as somehow self-evident, would hand to the employer too facile a justification for conduct that may be otherwise discriminatory. As the Supreme Court noted in *Grismer* at paragraph 19, the reason why accommodation

must be incorporated into a standard is to ensure that each person is assessed according to his or her own personal abilities, instead of being judged against presumed group characteristics, which are frequently based on bias and historical prejudice. An individual assessment of the employee is therefore an essential step in the accommodation process (see *Grismer* at paras. 22 and 30; *Meiorin* at para. 65).

b) Did the employer consider and reasonably reject all viable forms of accommodation?

[62] Even if CN's opinion regarding the necessity to conduct an individual assessment in Mr. Audet's case was valid, however, the question that would still have to be addressed is whether CN, having determined that Mr. Audet was medically unfit to work in his position, considered and reasonably rejected all other viable ways of accommodating him. In my opinion, CN has failed to establish that it satisfied this requirement.

[63] Mr. Audet testified that he and Mr. King had repeatedly asked CN to cooperate with him in finding some sort of accommodation that would allow him to return to work at CN. These attempts were in fact documented in the log that Ms. Sheppard kept of activity in Mr. Audet's Medisys file. As early as September 17, 2002, Ms. Sheppard noted, after having spoken to Mr. Audet, that he was concerned about the "future outcome" of his case and his "ability to work". There are several references to Ms. Sheppard's conversations with Mr. King regarding his attempts at contacting CN to find Mr. Audet some form of accommodation. Ms. Anderson testified that she had reviewed the notes in Mr. Audet's file and she agreed that he had "definitely" spoken to Ms. Sheppard about having his disability accommodated.

[64] How did CN react to these requests? What efforts did it make to accommodate Mr. Audet? CN has established certain guidelines that are to be followed when accommodating employees with special needs (the "Accommodation Guidelines"), excerpts of which are found in Tab 31 of Exhibit C-1. The Accommodation Guidelines provide that even where the supervisors and managers of the employee are aware that the employee needs to be accommodated, they have a responsibility to initiate the procedure for accommodation, even if the employee has not requested it (para. 7.12.3). CN's managers and supervisors were obviously aware of Mr. Audet's need for accommodation; it was they who had removed him from his job in the first place because, in their view, his disability rendered him unfit to work in a safety critical position.

[65] What procedures for accommodation did CN initiate? Paragraph 7.12.4 of the Accommodation Guidelines provides that the "first thing" for the employer to do is to meet with the individual employee and allow him or her to present the problem or need. The employer representative should ask questions to the employee in order to fully understand the request, and both persons should then together discuss possible solutions.

[66] Mr. Audet's evidence in this regard is uncontroverted. No CN representative met with him at any time, let alone as "the first thing", to discuss his disability, ask questions, or discuss possible solutions. Mr. Audet sought as much information and assistance as he could obtain from CN, but it was all to no avail. After removing him from service, Mr. Nadon never spoke to Mr. Audet again about his job or any form of accommodation. Another trainmaster, Mr. Gillies, redirected Mr. Audet's inquiries to CN's Toronto office. The Toronto office promised to call Mr. Audet back, but did not.

[67] In fact, there is no evidence to suggest that CN ever discussed with Mr. Audet the possibilities for his accommodation at any time prior to his filing the human rights

complaint in August 2003. Some four months after the human rights complaint was filed, the risk management officer, Mr. Theberge, finally contacted Mr. Audet, but not to seek his input on the disability or to discuss possible solutions, pursuant to the Accommodation Guidelines. Mr. Theberge telephoned Mr. Audet to present him with just one option - come to Toronto to be interviewed and tested for one specific position. There was no discussion with Mr. Audet about whether he had any of the skills or qualifications to work in a clerical position, like dispatch coordinator.

[68] Although this was the first accommodation option to actually be presented to Mr. Audet, did CN at least examine other accommodation possibilities prior to this point, albeit without the knowledge of Mr. Audet? The evidence indicates that CN's efforts, even in this respect, were minimal at best.

[69] Ms. Anderson, the Medisys team leader, explained that it is not the responsibility of Medisys to find an accommodated position for disabled CN employees. The Medisys team's role in this regard is merely to contact CN's human resources department, the risk management officer and the employee's supervisors, to place a request that an accommodated position be found for the employee.

[70] As I mentioned earlier, Ms. Sheppard, who had charge of Mr. Audet's Medisys file, kept a log documenting the activity in his file. Ms. Sheppard did not testify at the hearing. Her initial entries in the log following Mr. Audet's removal from service relate to the various documents and other information gathered with respect to his medical condition as well as the treatments and medication he was receiving. CN acknowledges that Mr. Audet always provided Medisys with all requested medical and other documents without delay.

[71] Ms. Sheppard's log documents the numerous communications with CN initiated by Mr. Audet, Mr. King and herself, requesting accommodation for Mr. Audet. The requests were ultimately to no avail.

[72] On November 13, 2002, Ms. Sheppard wrote in her log about a discussion she had with a risk management officer regarding the need to find an alternate position for Mr. Audet, given his restriction from working in a safety critical position for five years. On December 4, 2002, she recorded in her log that she had sent an e-mail message to the risk management officer, in which she reminded him of Mr. Audet's restriction to non-safety critical work and requested that he check "if any accommodation [is] available".

[73] On February 26, 2003, Ms. Sheppard apparently spoke about Mr. Audet's case to a senior adjudicator of the Great West Life Assurance Company, which was CN's disability benefits provider. Ms. Sheppard noted that the adjudicator undertook to contact CN and request if there was a non-safety critical position that Mr. Audet could fill.

[74] A few days later, Ms. Sheppard made a similar effort herself. She recorded in her log that she sent an e-mail to the human resources department, the risk management officer, the Director of the OHS department and Mr. Audet's immediate supervisor, advising them of Mr. Audet's restrictions and current benefit status. She requested feedback from them on "any possible job offers". There is no indication in Ms. Sheppard's log of whether anyone responded to this request, nor was there evidence led at the hearing of any such response.

[75] On March 14, 2003, Mr. Audet apparently telephoned Ms. Sheppard. She recorded in her log that she advised him to ask CN directly if there were any non-safety critical positions available for him. One day later, on March 15, 2003, Ms. Sheppard noted that

she had a discussion with Mr. King, the UTU representative, who told her that he would try to assist Mr. Audet in being accommodated "somewhere at CN".

[76] By July 30, 2003, however, it is obvious that the accommodation issue had not been resolved. Ms. Sheppard wrote that she had "discussed again" with Mr. King the matter of accommodating Mr. Audet. Mr. King said that he was going to speak to the risk management officer about the issue.

[77] The results were evidently not fruitful. On September 15, 2003, Ms. Sheppard wrote that she had spoken on several occasions to Mr. King again, regarding the possibility of accommodation from CN, adding that there had been "no response from the company".

[78] On November 10, 2003, Ms. Sheppard wrote that she again spoke to Mr. King, who told her that he was trying to contact Mr. Theberge, the risk management officer, regarding the possible accommodation of Mr. Audet.

[79] On November 18, 2003, Ms. Sheppard received an e-mail message from Paul Bourque, who was the human resources manager for Mr. Audet's area. The e-mail was also sent to several other persons, including Mr. Theberge, Mr. Nadon, and workers' compensation coordinator Louise Smolska. Mr. Bourque informed them that Mr. Audet had filed a human rights complaint. In order to prepare a response to the Commission, Mr. Bourque asked them to provide any information regarding their efforts to accommodate Mr. Audet since September 11, 2002, and in particular, to indicate any jobs that had been identified for accommodation.

[80] Ms. Smolska's reply to Mr. Bourque's e-mail message was produced at the hearing. She said that "no jobs were identified" from her group. There is no evidence of any reply from the other persons who received Mr. Bourque's e-mail message.

[81] On December 5, 2003, Mr. Bourque sent an e-mail message to several individuals within CN, who were involved with Mr. Audet's case, advising them that two positions had been found (Dispatch Coordinator and TRS Clerk) that were suitable for someone with his restrictions. Mr. Bourque requested that plans be made to have Mr. Audet tested for these positions. There is no indication if Mr. Audet or Mr. King were consulted in any way before this decision was made. The testing referred to in the e-mail message was the testing administered to Mr. Audet in Toronto in December 2003, in respect of which he did not obtain a passing mark, due in part, he claims, to the dosage of his medication at the time.

[82] On April 13, 2004, Ms. Sheppard sent an e-mail message to Mr. Theberge and others, conveying Mr. Audet's communication to her that his medical condition had stabilized and that he would be able to be more successful in testing. Ms. Sheppard asked if there was any possibility of accommodating him in a non-safety critical position. Mr. Theberge simply replied that "as far as any other position [is concerned], there is nothing available in Capreol".

[83] What evidence is there of CN's attempts, if any, to find Mr. Audet work at his home terminal in Capreol? Mr. Nadon testified that he was not familiar with the requirement in CN's Accommodation Guidelines that the employee's managers meet with him to discuss the problem and possible solutions. Mr. Nadon acknowledged that no such meeting took place. In Mr. Nadon's view, accommodating Mr. Audet was the responsibility of the human resources department and the risk management office.

[84] Mr. Nadon recalled that he was contacted to "see if we had any work or position available for [Mr. Audet] and we had nothing in our department". He added that Medisys

and the human resources department had approached him to see if "we had any duties that could accommodate Mr. Audet". In light of the restrictions that prevented Mr. Audet from working in safety critical positions, Mr. Nadon said, "We knew we could not modify the position [of brakeman or conductor] to accommodate him. That was obvious". He did not consider providing training to Mr. Audet that would enable him to become qualified to work in positions for which he was not yet qualified. He did not consider taking a number of tasks from several positions and bundling them together to create a new position, to accommodate Mr. Audet. Mr. Nadon acknowledged that in sum, his role in accommodating Mr. Audet was to "keep his eyes open" for any potential vacancies at Capreol that would respect Mr. Audet's restrictions.

[85] Mr. Nadon's limited role in accommodating Mr. Audet raises an additional issue. In *Meiorin*, the Court alluded to the practical usefulness, in conducting the accommodation analysis, of considering the appropriateness of the *procedure* that the employer adopted to assess the issue of accommodation (see *Meorin* at para. 37).

[86] The evidence supports Mr. Audet's submission that CN failed to even observe the procedures outlined in its own Accommodation Guidelines, and, in so doing, neglected to accommodate him procedurally. For instance, neither Mr. Nadon nor anyone else at CN met with Mr. Audet to discuss his disability and explore possible solutions, as indicated in the Accommodation Guidelines.

[87] The Accommodation Guidelines also state that it is "extremely important" to keep records of these meetings with the employee, the various solutions proposed and the arguments used to accept or reject each option. There are of course no records of any meetings with Mr. Audet, as none were ever held. CN did not, however, even produce satisfactory records regarding solutions that CN may have analyzed internally and rejected on its own, without Mr. Audet's involvement.

[88] Ms. Fusco filed in evidence an "engineering bulletin", dated October 17, 2005. It consists of a list that sets out the available positions in the Great Lakes region of Ontario, at the time of the hearing. Mr. Audet contends that he could have been accommodated in the "flag person" position, which was available at that time. CN argues that none of the positions on the list were suitable for Mr. Audet. For instance, the flag person position involves regular overtime work, which would have been in breach of his restrictions.

[89] It is, however, noteworthy that CN did not produce any engineering bulletin or similar report from any point prior to October 2005. There is no document in evidence demonstrating that following Mr. Audet's removal from service, CN looked at and analyzed any positions other than the TMC and Dispatch Coordinator positions. Furthermore, even if any other positions were in fact considered during this time, there was no record produced documenting the reasons why they were ultimately rejected.

[90] CN's Accommodation Guidelines state that one way in which the employer can accommodate disabled employees, "without creating undue hardship", is by providing them "special training [...] to reintegrate into the workforce". CN never offered Mr. Audet the possibility of retraining. Ms. Fusco claims that CN would have offered Mr. Audet training for the dispatcher position, had he passed the initial testing phase. But I have found that the testing was centred on clerical skills, which he clearly lacked. He needed training in those very clerical skills being assessed, which would in turn have given him a better chance at passing the qualifying tests for the alternative positions. Ms. Fusco

acknowledged in her evidence that the union representing the employees in the dispatcher positions would not have objected to Mr. Audet's getting training prior to testing.

[91] In my view, these are just a few examples that demonstrate how CN did not accommodate Mr. Audet procedurally, having failed to even conform to the basic provisions laid out in CN's own Accommodation Guidelines.

[92] Overall, therefore, what accommodation efforts did CN make in the three-year period between the occurrence of the seizure on September 10, 2002, and the start of the hearing, on October 17, 2005? CN put forth a total of four proposals for the accommodation of Mr. Audet's disability:

- (1) December 2003 - An invitation to complete a test that would enable Mr. Audet to qualify for the position of intermodal dispatch coordinator at MacMillan Yard in Toronto.
- (2) July 2004 - An offer of a Train Movement Clerk position at MacMillan Yard in Toronto.
- (3) May 2005 - An invitation to undergo clerical testing.
- (4) October 2005 - An offer of a Rule 42 Foreman position at MacMillan Yard in Toronto.

[93] Do these efforts demonstrate that CN considered and reasonably rejected all viable forms of accommodation? In my view, the answer is no.

[94] Ms. Fusco was called by CN to testify as to its efforts to accommodate Mr. Audet. In her examination in chief, she stated that CN had actively looked for any suitable vacancies from September 2002 onwards. Yet, in cross-examination, she confirmed that she was not involved in any attempts to accommodate him prior to 2004, so she could not really speak to any previous accommodation efforts. She also acknowledged that she had not kept records or notes of accommodation efforts in which she did participate. Mr. Nadon, as I have already mentioned, testified that he did not make any real attempts at accommodating Mr. Audet other than basically "keeping his eyes open" for vacant positions. In Mr. Nadon's view, it was up to the human resources department and the risk management officer to arrange for Mr. Audet's accommodation.

[95] CN did not consider offering training to Mr. Audet to enable him to qualify for other positions. There is no evidence that CN considered re-bundling a number of job tasks to enhance employment opportunities for Mr. Audet.

[96] Yet, CN still argues that between 2002 and 2005, the positions that were offered to him were the only jobs that Mr. Audet could have filled, given his restrictions, which included the WSIB restrictions relating to his 1995 back injury.

[97] As recently as July 2005, however, the UTU proposed a number of positions to CN for which Mr. Audet was qualified and which were consistent with his WSIB restrictions as well as the restrictions related to his epilepsy. These positions included those of Utility Person and Fire/Safety Watch. CN contended at the hearing that these positions were no longer available when the UTU proposed them. CN did not, however, explain why they were not offered to Mr. Audet when they *were* available.

[98] One of the other positions that the UTU proposed in 2005 was that of Traffic Coordinator. Ms. Fusco testified that Mr. Audet could not be assigned to this position because it was considered to be safety critical. She acknowledged, however, that CN gave no consideration to modifying the duties of this position to conform to Mr. Audet's restrictions. She acknowledged that CN has in the past modified safety critical positions to accommodate an employee's restrictions.

[99] One employee in particular was diagnosed with epilepsy while employed with CN in the safety critical position of conductor, just like Mr. Audet. As a form of

accommodation, CN assigned him to the safety critical position of traffic controller at the Capreol terminal. His duties were modified to accommodate him. Traffic controllers belong to the same UTU bargaining unit as Mr. Audet.

[100] In my view, it is evident that many viable forms of accommodation were left unexplored by CN in Mr. Audet's case. Moreover, it is clear that what little exploration CN did engage in commenced only after the human rights complaint was filed by Mr. Audet in August 2003. Prior to this point, the efforts made to accommodate him were essentially non-existent.

[101] Counsel for CN suggested in his final submissions that CN's delay in initiating its efforts to accommodate Mr. Audet was due to the uncertainty related to the nature of his disability. Until Dr. Lapierre's opinion was obtained, it was not clear whether or not Mr. Audet had experienced a provoked seizure.

[102] This "uncertainty" is, however, beside the point. Whether or not the seizure was provoked, the fact is that as of September 12, 2002, CN had removed Mr. Audet from service because of his disability. From that moment forward, CN had a duty to actively seek out ways to accommodate its employee. A delay was not justified. If CN needed to learn what the implications of Mr. Audet's epilepsy and seizure were, it could have started by at least meeting and discussing his situation with him. Mr. Audet had supplied Medisys with his medical file. CN had more than sufficient information to commence its accommodation efforts. Besides, the basic restriction imposed on Mr. Audet was that he not be employed in safety critical positions. CN could easily have begun searching for non-safety critical work for him to perform. Yet, there is no evidence of any such attempts prior to December 2003.

c) Would accommodating Mr. Audet have imposed undue hardship on CN?

[103] Although I have found that several options for Mr. Audet's accommodation were not considered by CN, s. 15(2) of the *Act* provides that an employer may nonetheless justify its refusal to employ an individual by showing that accommodating the individual's needs would impose undue hardship on it, considering health, safety and cost. CN argued that health and safety concerns prevented Mr. Audet from working in any safety critical positions. Assuming that these concerns are legitimate, on what basis does CN argue that accommodating Mr. Audet, in a manner that would not place him in a safety critical position, would impose undue hardship? How would bundling several non-safety critical job tasks into one position or offering Mr. Audet retraining, for instance, impose undue hardship on CN, based on the only consideration still available under s. 15(2), cost?

[104] There is no evidence before me of the cost implications of offering these forms of accommodation to Mr. Audet. Ms. Fusco testified that in Mr. Audet's case, money or cost was not a barrier to CN's accommodating him. Mr. Audet filed into evidence a Canadian Press wire story from the July 21, 2005, edition of the *North Bay Nugget* newspaper, which reported that CN's profit in the first six months of 2005 had "surged" to \$715 million, up from \$536 million for the same period in 2004. CN's revenues in the first half of 2005 were \$3.54 billion. CN's president is quoted in the article as having said, "Our employees are performing strongly and we expect to continue to deliver solid benefits to shareholders."

[105] In *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489 at para. 62, the Supreme Court pointed out that the size of an employer's

operation may influence the assessment of whether a given financial cost is undue. CN is certainly a large employer. Ms. Fusco indicated in her evidence that Medisys alone is responsible for 5,000 CN employees. CN has developed an internal infrastructure to address the particular needs of its employees. Formal guidelines have been adopted that give direction on how to accommodate those needs. Ms. Fusco testified that at any given time, Medisys is actively involved in the files of up to ten percent of those 5,000 employees.

[106] It is incumbent upon CN to demonstrate in real, concrete terms how the costs associated with accommodating Mr. Audet would impose undue hardship on CN. The Supreme Court of Canada, in *Grismer* at paragraph 41, recognized that in some circumstances, excessive cost may justify a refusal to accommodate those with disabilities. Impressionistic evidence of increased expense will not, however, suffice. The Court cautioned that one must be wary of putting too low a value on accommodating the disabled, for it would be too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment.

[107] In the present case, there was essentially no evidence presented, impressionistic or otherwise, regarding the costs associated with accommodating Mr. Audet and their effect on CN and its operations. CN has not, therefore, established that accommodating Mr. Audet's needs would impose undue hardship on CN.

d) Did Mr. Audet hinder CN's accommodation efforts?

[108] CN claims that it has made all reasonable efforts to accommodate Mr. Audet and that it is his own inflexibility that has prevented a solution from being found. The Supreme Court of Canada, in *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 at paras. 43-44, stated that a complainant has a duty to facilitate the search for accommodation. Thus, in determining whether the duty to accommodate has been fulfilled, the conduct of the complainant must be considered. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed.

[109] What aspects of Mr. Audet's conduct allegedly demonstrate that he caused a reasonable proposal to founder?

1. Mr. Audet's reaction to the July 2004 TMC job offer

[110] Much was made of Mr. Audet's reaction to CN's July 2004 offer of the Train Movement Clerk position, at MacMillan Yard in Toronto. CN contends that this was a reasonable proposal, which Mr. Audet should have accepted. But did Mr. Audet refuse the offer in fact? He did not say that he was refusing it in his July 21, 2004, letter to Mr. Theberge. Mr. Audet simply disclosed the fact that he did not possess a driver's licence. The document setting out the physical demands and working conditions for the TMC position, which Mr. Theberge had sent to Mr. Audet, clearly stated that the position involved working "in a vehicle (driving)". The environmental conditions for the position stipulated that "depending on tasks, [the employee] may spend up to 3 hrs [per 8-hour shift] in vehicle driving around yard".

[111] In my view, it was perfectly reasonable for Mr. Audet, having viewed these working conditions related to the proposed position, to have alerted CN about a legal impediment to his performing the job duties. He was not being uncooperative. On the

contrary, his disclosure of this fact to CN served to ensure that efforts would not be wasted in accommodating him in a job that he was legally prevented from performing. What good would it have done for Mr. Audet to have accepted the position, in the knowledge that he clearly lacked one of the necessary qualifications?

[112] CN appeared to suggest that it had waived the requirement for a driver's licence in Mr. Audet's case, but CN led no evidence of its own to support this contention. Instead, it was Mr. Audet himself who reported in his testimony that Mr. Theberge had made this assertion during a telephone conversation with him in October 2004. Mr. Audet denies ever having been told that the requirement to drive had been waived in his case, until that October 2004 telephone conversation, when it was already too late. His evidence is uncontroverted. Mr. Theberge did not testify and there is no evidence to support this assertion.

[113] If CN's intention had indeed been to waive the driving requirement, why did Mr. Theberge not simply write back to Mr. Audet and advise him that he was mistaken? In his letter, Mr. Audet had, after all, invited Mr. Theberge to contact him if there were any questions. Mr. Audet even provided his telephone number. Mr. Theberge did not show the courtesy to even place a call to Mr. Audet. I do not consider Mr. Audet's reaction to the July 2004 job offer to have caused the proposal to founder. If anything, the failure of the proposal is due to its inappropriateness as a form of accommodation, and CN's failure to respond and address the concern raised by Mr. Audet in his letter.

2. The UTU's alleged failure to facilitate the accommodation

[114] CN also argued in final submissions that the UTU had hindered the implementation of accommodation in Mr. Audet's case. Reference was made to the union's five proposals for possible accommodation put forward in July 2005. CN contends that the union did not make any similar proposals prior to this point, and that its failure to do so demonstrates somehow that the union (and by extension Mr. Audet) did not fulfill their duty in the search for his accommodation.

[115] This argument is obviously based on a misreading of *Renaud*. The Supreme Court was quite clear in this regard. The duty on the complainant to do "his or her part" does not mean that the complainant has a duty to originate a solution. The employer is in the best position to determine how the complainant can be accommodated without imposing undue hardship on the operation of the employer's business. It is only once an employer has initiated a reasonable proposal that the complainant has a duty to facilitate its implementation (*Renaud* at para. 44).

[116] How can the UTU and Mr. Audet be accused of failing to fulfill their duty to facilitate accommodation proposals when CN did not put forth a single accommodation proposal until December 2003, and did not make a single formal job offer until July 2004, almost two years after Mr. Audet was removed from service? I find it disingenuous on CN's part to suggest that Mr. Audet and the UTU were somehow tardy in addressing accommodation, when the evidence is clear that Mr. Audet and Mr. King had been imploring CN to engage in the accommodation process since 2002, while CN on the other hand had not shown any reaction or initiative whatsoever until well after Mr. Audet had filed his human rights complaint.

3. Mr. Audet's reaction to the offer of the Rule 42 Foreman position

[117] While CN may have failed to address the issue of accommodation for an extended period, can it nonetheless be argued that Mr. Audet's decision not to immediately accept

CN's most recent offer (Rule 42 Foreman), made on October 13, 2005, constitutes a breach of his duty to facilitate the search for accommodation?

[118] First of all, I am not certain that this offer sheds any light on the question of whether CN accommodated Mr. Audet to the point of undue hardship. It seems to me that this job offer should more appropriately be characterized as a settlement offer, coming as it did just days before the hearing commenced. Second, as of the last day of the hearing, Mr. Audet had not as yet formally rejected the offer. Furthermore, in my view, the concerns raised by Mr. Audet are not unreasonable. For instance, it was not abundantly apparent from CN's offer whether the job's working conditions satisfied Mr. Audet's work restrictions. Indeed, CN was itself only able to confirm on the very last day of the hearing that the position complied with his work restrictions.

[119] Mr. Audet's reaction to the offer of the Rule 42 Foreman position is not in my view indicative of his having hindered CN's accommodation efforts.

III. FINDING OF DISCRIMINATION

[120] For all these reasons, I find that Mr. Audet was removed from service on account of his disability, in breach of s.7 of the *Act*. CN has not established that its refusal to continue to employ Mr. Audet was justified based on a *bona fide* occupational requirement, pursuant to s. 15 of the *Act*. Mr. Audet's complaint has therefore been substantiated.

IV. WHAT REMEDIES DOES MR. AUDET SEEK?

A. An order that CN review its accommodation policy

[121] Mr. Audet requests an order, pursuant to s. 53(2)(a) of the *Act*, that CN take measures, in consultation with the Commission, to redress its failure to properly accommodate its employees, as evidenced in his own case. Mr. Audet acknowledges that CN has a policy on accommodation, i.e. the Accommodation Guidelines, and that it may in fact be a "good" policy, but argues that it is clearly not being applied or implemented properly.

[122] I have referred in my decision to the Accommodation Guidelines, and have determined that those at CN responsible for their implementation indeed failed to follow them in Mr. Audet's case. In my view, Mr. Audet's request is justified.

[123] I therefore order CN to take measures, in consultation with the Commission on the general purposes of the measures, to review its accommodation policy and ensure that it is complied with by the individuals and groups responsible for its implementation.

B. Return to active service

[124] Mr. Audet seeks an order, pursuant to s. 53(2)(b) of the *Act*, directing CN to return him to active service in his position of brakeman/conductor, with any necessary modifications to the duties of that position that would allow him to perform his job safely and within his restrictions. There is evidence that other employees in similar circumstances have been accommodated, including a Capreol employee with epilepsy who was accommodated with modified duties in his otherwise safety critical position.

[125] After learning of Mr. Audet's seizure in September 2002, CN applied the RAC Guidelines in a mechanical fashion, and removed Mr. Audet from service without assessing his individual medical fitness to work in his specific position, as provided for in the RAC Guidelines and CN's Accommodation Guidelines. Section 53(2)(b) of the *Act* states that where the Tribunal finds the complaint is substantiated, it may order a respondent to make available to the victim of the discriminatory practice, on the first

reasonable occasion, the rights, opportunities or privileges that were denied the victim as a result of the practice.

[126] In order to provide this remedy in the present case, Mr. Audet must first be returned to his job. I therefore order CN to return Mr. Audet to active service in his position of brakeman/conductor, based out of the Capreol terminal. CN is further ordered to cooperate fully with Mr. Audet and his union, the UTU, in conducting the individual assessment that was denied him at the time, in order to determine which of his duties, if any, require modification to ensure that he is able to perform his job safely and without risk to himself, other persons, property or the environment.

[127] If Mr. Audet, CN and the UTU determine that he cannot be accommodated in this fashion, I order CN to cooperate fully with Mr. Audet and the UTU to accommodate him, on the first reasonable occasion, in a different position based in Capreol. If it is determined that no such option is available in Capreol, then CN is ordered, on the first reasonable occasion, to work with Mr. Audet and the UTU to look for an appropriate accommodation position outside of Capreol.

[128] With regard to all of these accommodation efforts, priority is to be placed on positions that come within the same bargaining unit as Mr. Audet's.

C. Compensation for lost wages

[129] I order CN to compensate Mr. Audet for all wages and benefits that he has lost since his removal from service on September 12, 2002, pursuant to s. 53(2)(c) of the *Act*. The parties undertook at the hearing to engage in discussions with a view to reaching an agreement regarding the calculation of the sum for this compensation, in the event that the Tribunal would issue such an order. The parties will take into account all relevant factors, such as the disability benefits received by Mr. Audet during this period, and any interest due on the sums owing to him.

[130] Mr. Audet testified as to the efforts he has made to look for other work since 2002, while waiting for CN to accommodate him. He claims that he has made "hundreds of job applications", and has been interviewed "dozens" of times. He is frequently asked at these interviews why CN removed him from service. When he discloses that it was due to an epileptic seizure, employers typically thank him for showing interest in the job they are trying to fill, but opt not to employ him. Earlier in his working career, Mr. Audet gained the qualifications to work in Ontario as a "Registered Nursing Assistant" and an "Emergency Medical Care Assistant". He testified that despite holding these certifications, he was unable to find work anywhere in the Sudbury area.

[131] In my view, Mr. Audet's efforts at mitigating his damages have been reasonable, especially when considering that CN has never formally dismissed him. It was reasonable for him to have expected that CN, pursuant to its own guidelines and policies, would make a proposal for accommodation to him at some point following his removal from service.

[132] The parties are therefore instructed to assume, in their discussions regarding the calculation of Mr. Audet's lost wages and benefits, that he has fulfilled his duty to mitigate his damages.

D. Compensation for pain and suffering - s. 53(2)(3) of the Act

[133] Mr. Audet testified as to the emotional impact he felt as a result of his removal from service and the subsequent failure by CN to accommodate him. His wife, who is a registered nurse, became the family's main financial provider. After Mr. Audet's

disability benefits ended, she had to begin working on a full-time basis, which involved taking on 12-hour shifts. Their family is made up of two minor children and a 16-year old niece who is under their care. The strain on Mr. Audet's wife of having to provide for all of the family's financial needs on her own took a "heavy toll" on their marriage. He has needed to take sessions with a "counsellor". He testified as to his feeling of abandonment after being denied work by CN. It lowered his self-esteem and made him feel like a "nobody". Taking into account all of these circumstances, I order CN to pay Mr. Audet \$10,000 in compensation for his pain and suffering.

[134] Mr. Audet contends that his seizure of September 10, 2002, was provoked by an excessive work load, for which he blames CN. Mr. Audet's legal counsel argued that the compensation for pain and suffering should be augmented to take this factor into account. I disagree.

[135] To begin with, I do not understand why Mr. Audet's pain and suffering should be assessed differently, depending on whether the seizure was provoked or not. It would appear to me that the objective assessment of a victim's pain and suffering should not vary on account of the alleged blameworthiness of the respondent's conduct.

[136] Moreover, on the balance of probabilities, I am not convinced from the evidence adduced at the hearing that the seizure was indeed provoked. No medical expert testified, but copies of reports prepared by various physicians were produced by Mr. Audet and CN, which alternately concluded that the seizure was or was not provoked. It is worth noting that while the strain of the workload seems to have caused Mr. Audet to take a 96-hour leave from work in June 2002, it was not established that the workload in the months following was extraordinary. In addition, as Dr. Remillard and Dr. Lapierre noted, the three seizures that Mr. Audet experienced 9 to 14 months after being removed from service would appear to at least cast some doubt as to his claim that the seizure was provoked. Taking all of these factors and considerations into account, I am not persuaded that the September 10, 2002, seizure was provoked.

E. Special compensation - s. 53(3) of the Act

[137] Section 53(3) of the *Act* provides that the Tribunal may order a respondent to pay up to \$20,000 in compensation to a victim of discrimination if the respondent engaged in the discriminatory practice wilfully or recklessly. Mr. Audet's legal counsel argued that CN was "completely reckless" in this case. He cited the "unbelievable" lack of communication between the various departments, the "lack of any leadership", and the failure to involve Mr. Audet and the UTU in the accommodation process, as evidence in support of this submission. He also referred to the fact that it took 15 months before CN made any effort to accommodate him, and that over a period of three years, only two offers of employment were made. Mr. Audet was not qualified for the first job offered, Train Movement Clerk, for lack of a driver's licence. The second job offer was essentially put forth by CN during the hearing. Mr. Audet is requesting that CN be ordered to pay the maximum amount of compensation under this head.

[138] I agree that CN's conduct in this case was reckless. It is clear that CN was familiar with its duty to accommodate its disabled employees. It had adopted an accommodation policy, in the form of the Accommodation Guidelines, which set out the procedures to be followed with respect to any employees having "special needs" who required accommodation. Yet, the persons at CN who were responsible for the management of Mr. Audet's case ignored their responsibilities under the policy and did not make any efforts

to accommodate him for months on end, until he finally forced their hand by filing his human rights complaint. After being put on notice that their conduct was to be examined against the *Act*, CN's accommodation efforts were still meagre at best. This course of action was, in my view, reckless.

[139] In the circumstances, I order CN to pay Mr. Audet the sum of \$10,000 in compensation, pursuant to s. 53(3) of the *Act*.

F. Costs

[140] Mr. Audet seeks an award for his legal costs, either on a solicitor/client basis or alternatively, on the Federal Court scale. He bases his claim principally on the findings in two relatively recent Tribunal decisions, *Brown v. Royal Canadian Mounted Police*, 2004 CHRT 24, and *Brooks v. Canada (Department of Fisheries and Oceans)*, 2005 CHRT 14. Both decisions were brought before the Federal Court for judicial review. At the time of the hearing into the present complaint, the Federal Court had not as yet issued a judgment in either case.

[141] After the close of the hearing, the Federal Court released its judgment in *Brown* on December 13, 2005, (2005 FC 1683), and more recently in *Brooks*, on April 21, 2006, (2006 FC 500). In both cases, the Court set aside the Tribunal decisions.

[142] Mr. Audet's legal counsel suggested, during final arguments, that the determination of the issue of costs could be deferred at least until such time as the judicial reviews of the Tribunal decisions are completed. In my view, this is a sound course to follow. Considering the outcome of the judicial reviews, additional submissions from the parties would be welcome. To minimize delay, I have rendered my decision to the extent possible. The parties are invited to submit to the Tribunal any follow-up submissions at their convenience. As I indicate below, I will retain jurisdiction to deal with any remedial issues that may subsequently arise, which includes the question of legal costs or expenses.

[143] In the meantime, as Mr. Audet's legal counsel had also suggested, the claim for legal costs could be added as a topic for discussion between the parties, along with the calculation of the lost wages and benefits.

G. Interest

[144] Interest is payable in respect of all the awards made in this decision (s. 53(4) of the *Act*). The interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the Bank Rate (Monthly series) set by the Bank of Canada. With respect to the compensation for pain and suffering (s. 53(2)(e) of the *Act*) and the special compensation (s. 53(3)), the interest shall run from the date of the complaint. As I indicated earlier, however, the parties have undertaken to engage in discussions regarding the calculation of the interest owed on the lost wages and benefits.

H. Retention of jurisdiction by the Tribunal

[145] The Tribunal will retain jurisdiction to receive evidence, hear further submissions and make further orders, if the parties do not reach an agreement, with respect to the issues I have left to them to discuss, and with regard to any other issues or difficulties arising from the interpretation or implementation of the remedies ordered. As I have also indicated, I will likewise retain jurisdiction to deal with Mr. Audet's claim for legal costs.

"Signed by"

Athanasios D. Hadjis

OTTAWA, Ontario
May 16, 2006

PARTIES OF RECORD

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APPEARANCES:	
Denis Ellickson	For the Complainant
(No one appearing)	For the Canadian Human Rights Commission
J. Curtis McDonnell	For the Respondent