T.D./97
Decision rendered on October 16, 1997

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

HUMAN RIGHTS TRIBUNAL

BETWEEN:

BARRY H. CRAMM
Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADIAN NATIONAL RAILWAY COMPANY
(TERRA TRANSPORT)
(herein referred to as CN of the Employer)

Respondent

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
(herein referred to as BMWE or the Union)

Respondent

TRIBUNAL DECISION

TRIBUNAL: Eve Roberts, Q.C., Chairperson
Nancy M. Peers, Member

APPEARANCES: Barry Cramm, on his own behalf

Margaret Rose Jamieson, Counsel for the
Canadian Human Rights Commission

Maeve A. Baird, Counsel for the Respondent
Employer

Rebecca C. Phillipps, Counsel for the
Respondent Union

1. THE COMPLAINTS

Mr. Barry H. Cramm, the Complainant, filed two complaints dated September 4th and September 11th, 1990, against the two Respondents, CN and BMWE, alleging that they had formulated a policy which was discriminatory, contrary to section 10(b) of the Canadian Human Rights Act ("the Act"). Mr. Cramm alleged that CN had discriminated against him and other temporarily disabled individuals by a policy which adversely affected Mr. Cramm and like individuals in the calculation of "Continuous Cumulative Service" ("CCS") which determined rights to Employment Security after the closure of the Newfoundland Railway in 1988.

Similarly, he alleged discrimination by the BMWE in negotiating and entering into the collective agreement containing this definition of CCS that he claimed adversely affected him, Mr. Cramm, and could tend to adversely affect others like him.

The relevant portions of the Act are:

10. It is a discriminatory practice for an employer, employee organization or organization of employers

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination. (emphasis added)

The prohibited ground of discrimination alleged is "disability" under section 3 of the Act.

The policy in question is contained in an Employment Security and Income Maintenance Agreement between the two Respondents, effective July 29th, 1988, as definition G(iii) (Exhibit HR-1, Tab 40b):

"G. "Cumulative Compensated Service" means:

For an employee who renders compensated working service in any calendar year, time off duty, [on] account [of] bona fide illness, injury, authorized maternity leave, to attend committee meetings, called to court as a witness or for uncompensated jury duty, not exceeding a total of 100 days in any calendar year, shall be included in the computation of Cumulative Compensated Service." (emphasis added)

The Commission and the Complainant, Mr. Cramm, argued that this policy was discriminatory firstly, by requiring one day's work in any calendar year, and secondly, by limiting credit to 100 days in cases of bona fide illness and injury.

CN argued that the policy offered an award or bonus for actually working. If the employee rendered one day's work in any calendar year he would receive up to 100 days credit to his CCS if he was ill or injured. BMWE agreed with the interpretation and application of the policy which it had negotiated but also agreed with Mr. Cramm that the policy was discriminatory.

2. THE FACTS

Mr. Cramm began working for CN on August 17th, 1974, as an extra gang laborer. He generally worked seasonally and collected unemployment benefits while laid off. In August of 1980 he became a member of the Union, BMWE, after returning from a normal layoff in or about May, 1980. He had successfully bid on and acquired a job as a track maintainer and welder trainee, and thereby began appearing on two seniority lists compiled by CN for the BMWE. The BMWE kept their brothers informed of their negotiations through local representatives, postings, newsletters and meetings. Unfortunately, Mr. Cramm, being illiterate, a new member of the Union, and working in remote sections of Newfoundland at the time, may not have been aware of such information.

Mr. Cramm was on a motor car or "speeder" with Junior (John) Eveleigh on September 11th, 1980, when a train ran its red flag and collided with the speeder, which was carrying propane and acetylene. There was an explosion that threw Mr. Cramm approximately 150 feet into a pond. Mr. Cramm suffered extensive 1st and 2nd degree burns to 25% of his body and was

transferred to a hospital in St. John's, Newfoundland. He testified that he complained of back pain, while in the hospital. He said his doctors were first and foremost concerned with treating his burns and he was advised to see his family doctor regarding his back once discharged. He was discharged on or about September 27th, 1980. He testified that he complained thereafter of back pain to his family doctors.

Mr. Cramm was on Workers Compensation until August 1981. At that time Workers Compensation determined that his work related injury had ended 31 May 1981 and that an injury to his thumb, subsequent to his original work injury, was the only reason he was not working. Workers Compensation later

collected an overpayment from Mr. Cramm.

Mr. Cramm did not return to work until 1984 as he claimed his back injury precluded him from working. He testified that the family doctors that he saw between 1981 and 1984 agreed that he was not fit to work. CN's records between 1981 and 1984 showed Mr. Cramm as off work because of illness or injury.

In 1988, CN gave notice that it was closing the Newfoundland Railway. Mr. Cramm fell short of the 96 months of CCS required by the collective agreement to qualify for employment security which would have given him a job or his full wages until age 55. He did qualify for job security and a return of pension, but these benefits were much less than employment security. He continued working for CN on the dismantling of the railway until 1990.

During the course of the hearing the respondents presented the tribunal with a proposed revised version of the definition of CCS which read as follows (Exhibit CN-11):

"G. "Cumulative Compensated Service" means

(iii) For an employee who renders compensated working service in any calendar year, time off duty, account of a bona fide illness or injury or authorized maternity/parental leave, to attend committee meetings, called to court as a witness or for uncompensated jury duty, not exceeding a total of 150 days in any calendar year, shall be included in the computation of Cumulative Compensated Services.

- and -

(iv) For employees who are absent from work as a result of a long term bona fide illness or injury, such as but not limited to, heart disease, diabetes, epilepsy or the loss of an appendage, that results in an absence that extends beyond the 150 days established above, the Assistant Vice-President Labour Relations or his delegate and the System Federation General Chairman or his delegate will jointly determine an equitable number of days to be credited for Cumulative Compensated Service. This computation will be done on a case by case basis and the principle to be used will be to credit, on a day by day basis, each day the employee's seniority and qualifications would have allowed him/her to work, during any calendar year with a maximum of 260 days per year. If the parties are unable to reach an agreement on the number of days to be credited, the matter will be referred [to] the Arbitration for final and binding resolution.

- and -

Article 25.9

25.9a) Provided an employee who renders compensated working service in any calendar year, time off duty, account of a bona fide illness or injury or authorized

maternity/parental leave, to attend committee meetings, called to court as a witness or for uncompensated jury duty, not exceeding a total of 150 days in any calendar year, shall be included in the computation of Cumulative Compensated Services.

- and -

25.9b) For employees who are absent from work as a result of a long term bona fide illness or injury, such as but not limited to, heart disease, diabetes, epilepsy or the loss of an appendage, that results in a[n] absence that extends beyond the 150 days establish[ed] above, the Assistant Vice-President Labour Relations or his delegate and the System Federation General Chairman or his delegate will jointly determine an equitable number of days to be credited for the computation of vacation. This computation will be done on a case by case basis

and the principle to be used will be to credit, on a day by day basis, each day the employee's seniority and qualifications would have allowed him/her to work, during any calendar year with a maximum of 260 days per year. If the parties are unable to reach an agreement on the number of days to be credited, the matter will be referred [to] the Arbitration for final and binding resolution.

3. THE ISSUES

1. Does the definition of CCS contained in paragraph G(iii) of the Employment Security Agreement herein offend section 10 (b) of the Canadian Human Rights Act?

2. Was Mr. Cramm disabled?

3. Does section 10(b) of the Canadian Human Rights Act offer an individual remedy for Mr. Cramm?

4. If there was adverse discrimination by said policy (G(iii)), did the Respondents meet their duty to accommodate?

5. If there was discrimination and no accommodation, what is the appropriate remedy?

4. THE EVIDENCE

Mr. Cramm

Mr. Cramm testified that his injury consisted of both burns and a back injury and that he reported the back injury to the doctors in the hospital where his burns were treated. He said the doctors were more concerned about his burns and told him to report his back problem to his family doctor. He did this throughout the relevant period. He claimed that his back injury prevented him from working until 1984.

As Mr. Cramm is illiterate, he had to rely on what co-workers told him about his rights. He understood that in order to protect his seniority (which has no bearing on the calculation of CCS, but which he understood

did), he had to "bid" on jobs as posted from time to time during the period he was injured. This he did.

He testified that he brought the complaints because he thought it was wrong that the collective agreement required him to render one day's service to acquire benefits when he was not capable of working even one day. He wanted the policy changed for other employees and he wanted his own remedy.

Patrick Brace

Mr. Brace reviewed Mr. Cramm's workers compensation file. Medical reports on file dated 1981 and 1982 from Dr. Poole and Dr. Kilmartin, Mr. Cramm's family doctors, referred to a back injury, although not immediately following his accident. Dr. Peckham, a WCC doctor, filed a report that in her opinion, Mr. Cramm was capable of working as of 1 June 1991.

Mr. Cramm attempted to have his WCC decision reviewed in January 1992, but there was no formal appeal process at that time and any review was done by the same individuals who made the original decision.

Mr. Barry Williams and Mr. Alan Sunter

Mr. Barry Williams compiled data and statistics of workers compensation benefits paid from 1985 to 1995, which Mr. Alan Sunter, an expert statistician, analyzed on behalf of the Commission. Applying the one day component and then the 100 day component of definition G(iii) of the Respondent's policy to those statistics, as if that definition were applicable for the determination of an employee's seniority, it was his opinion that both components had an adverse effect on ten percent of the population examined. Hence, if these rules were applied to another population it was probable that they would have a similar adverse effect on at least ten percent of that population. Statistically the policy in question tended to adversely affect an identifiable class of persons for qualifying for employment opportunities whether seniority, job security or employment security. No expert, statistical analysis was given to rebut this evidence by CN or BMWE.

Dr. Poole

He and other medical witnesses testified that Mr. Cramm's family doctors' medical records had been destroyed before the hearing.

Carl McInnis

Mr. McInnis is the General Chairman of the BMWE for the Atlantic Region. He testified that the Union's position was that the definition of CCS was

discriminatory, but that compromises had to be made to reach a collective agreement.

He explained the role of the union in dealing with its members at the time of the close of the railway and the efforts he had made when contacted by Mr. Cramm to have his CCS calculation changed by CN. When he was

unsuccessful he referred Mr. Cramm to the Canadian Human Rights Commission.

Alan Cramm

Alan Cramm is a brother of Barry Cramm and was employed by CN. He testified that Mr. Cramm complained of a back injury from the time of his accident.

Junior Eveleigh

Mr. Eveleigh was also injured in the accident. He visited Mr. Cramm some six to eight months after the accident and noted that Mr. Cramm was jittery and still sore. He gave evidence of the options available to CN workers who had sufficient CCS to qualify for employment security; they could work or receive wages up to age 55 or they could take a severance package of $65,000 - $70,000 and a refund of pension.

Donna Nugent

This witness is the manager of Commercial Affairs for CN and she introduced documents from Cramm's personnel file. She testified that the collective agreement in force at the time that the railway closed allowed employees who had 96 months of CCS to obtain employment security.

In response to a question as to what constituted "compensated service", she testified that normally it meant working for a day, but explained that if an employee worked only 1/2 a day or even five minutes, the employee could be credited with a day's compensated service. In some cases a supervisor could give a day's pay even if the employee was absent with a minor illness and did not come to work at all.

Mr. Roy

This witness did an investigation of the complaint for the Canadian Human Rights Commission. He stated that CN told him it based its conclusion that Cramm was ready to return to work at the end of May 1981 on the fact that the WCC ended its payments then.

Mr. Burry

Mr. Burry was the CN employee charged with recovering from Mr. Cramm the overpayment paid to WCC. He testified that Mr. Cramm had signed an agreement to repay the overpayment. He testified that he knew when WCC terminated Mr. Cramm's benefits.

Mr. Everard

He was CN's manager of Human Resources during the relevant period. He testified that when an employee was finished with WCC, CN would assume that the worker was fit to return to work and would send the worker for a medical by the Regional Medical Officer.

He testified that in 1991, after Mr. Cramm had laid this complaint, he directed that three months CCS credit be deleted from Mr. Cramm's record because he was of the opinion that Mr. Cramm was not off duty on account of a bona fide illness or injury between 31 May, 1991, and the day he returned to work.

He testified that he was the Newfoundland representative on the rehabilitation committee between 1980 and 1984 for the Atlantic Region and he did not remember Mr. Cramm as being on the list of rehabilitation employees. He could not recall who was the union representative.

He testified that Cramm's personnel record has in it a letter of recommendation that described him as "loyal, dependable and trustworthy".

Ms. Watt

This witness is the manager of Employment Legislation with CN. She contradicted her colleague, Ms. Nugent, and testified that an employee had to work at least four hours in a day to be credited with one day's CCS.

She first testified that, according to CN payroll records, Mr. Cramm had 88 months of CCS and according to CN's staff forms, he had 90 months of CCS. On two occasions during her testimony she presented revised calculations of

Cramm's CCS which differed from those given to him in 1988, first changing his total to 90 months, then to 91 months.

She testified that the proposed wording of CCS presented to the Tribunal to correct the allegation of systemic discrimination does not put a cap of 100 days annual credit of CCS and an employee would no longer have to render a day of compensated service in order to be eligible. The agreement would come into effect on the resolution of this hearing and would not be retroactive in its application.

She also gave evidence that Mr. Cramm should have been on CN's rehabilitation list.

Dr. Dufresne

This witness is the chief medical officer for CN. He brought with him Cramm's CN medical file. A medical report dated January 1984 noted that Cramm said he had "back trouble, sciatica or lumbago" ... "accident 11 September 1980". A notation under "work restrictions" was "back injury better".

Carl McInnis (testifying a second time)

He testified that when an injury was work related, usually CN put the employee on the rehabilitation list and when non-work related, usually the union did.

He gave evidence about the grievance procedure and said that someone from CN should have visited Cramm in hospital about his WCC claim.

He testified that when an employee fails to show up for work, CN sends him a notice that there is work available and he is recalled. An employee who is ill does not have a company medical until he is "released by your own doctor to come back".

4. ANALYSIS

1. Does the definition of CCS contained in paragraph G(iii) of the Employment Security Agreement herein offend section 10(b) of the Canadian Human Rights Act?

The Commission must establish under section 10(b) of the Act that the particular policy, the definition of CCS contained in paragraph G(iii) of the Respondents' agreement, firstly, deprives or tends to deprive; secondly, an individual or class of individuals; thirdly, of employment opportunities; and, fourthly, because of disability.

It is clear and uncontested that the definition and application of CCS affects employment opportunities and in particular was determinative of employees' rights to Employment Security when the railway closed in 1988. Only those employees with 8 years of CCS were ensured employment on the mainland and/or their wages to normal retirement at age 55. The definition also affected employees' eligibility for Job Security benefits, which, in this case, Mr. Cramm did qualify for and receive, together with his pension contributions, when he ultimately ceased all employment with CN in 1990.

The application of the definition of CCS almost certainly deprived Mr. Cramm of Employment Security. The only way he would not have received three months CCS credit in each of 1982, 1983 and 1984 if the requirement of rendering one day's compensated service was omitted from the definition was if there was not three months work available in each year. There was no evidence that there was no work available to Mr. Cramm in those years. If the limit of 100 days credit had not been in the definition, Mr. Cramm would have received some CCS; whether he would have received 12 months in each year or a lesser amount based on the number of months work that would have been available to him, we do not know.

The Tribunal finds that the requirement to work one day in a calendar year is adversely discriminatory. It discriminates against those who cannot work at all in excess of a calendar year. (The denying of one month's CCS to an employee who works less than 11 days in a calendar month may also unfairly and arbitrarily differentiate between him and another employee who is ill the same length of time, but whose illness may span the end of one month and the beginning of another.) Employment benefits, other than those prescribed by law, do not have to be granted. If they are granted, they cannot discriminate against the disabled, nor should they differentiate between classes of persons who are disabled. The employer has the option, after a reasonable period of time, of dismissing an employee who is unable to work at all or who cannot be accommodated.

The question of whether the 100 day limit of CCS is discriminatory is more problematic. Again, an employer does not have to grant benefits and may negotiate them with the union. Once negotiated, they must not be discriminatory within the meaning of the Act. But may there be reasonable limits to the benefits? If so, is 100 days in a calendar year reasonable? We have concluded that such a limit is discriminatory because it treats those with a short term disability differently than those with a long term

disability. Again, an employer may terminate an employee who cannot work or be accommodated after a reasonable period of time. Further, no benefit need be given a disabled employee who would not be working due to unavailability of work.

The evidence of Mr. Sunter, a statistician and the Commission's expert, identified a potential class of individuals who could tend to be affected in the same way as Mr. Cramm, if unable to render any compensated service during a calendar year or if absent for more than one hundred days due to illness or injury. Only those individuals who suffered from long term illness in excess of 100 days or could not work at least one day in any year, would be adversely affected.

The Tribunal finds the definition therefore adversely discriminatory against individuals unable to work because of disability as it tends to exclude persons with a long term illness, injury and complicated pregnancies who could not render at least one days compensated service during a year or who were absent in excess of 100 days by virtue of their disability.

2. Was Mr. Cramm disabled?

Weighing the evidence of Barry Cramm, Alan Cramm, Dr. Poole's records, Dr. Kilmartin's records, CN's medical file, CN's staff records and Barry Cramm's income tax records, against the only contradictory report, that of Dr. Peckham who was employed by the Workers Compensation Commission, the Tribunal finds, as fact, that Mr. Cramm was disabled from September 11th, 1980 until his return to work in March of 1984. The policy in question does not distinguish between work related or on the job injuries and off the job injuries. Whether or not Mr. Cramm qualified for Workers' Compensation benefits throughout this time frame is not necessarily relevant and should not be the only deciding factor. Both Respondents and the Commission agreed that there should be no distinction between work related and off the job injuries; provided that such were bona fide and disabling, the employees would be treated the same.

3. Does section 10(b) of the Canadian Human Rights Act offer an individual remedy for Mr. Cramm?

CN submitted that it was prepared only to respond to a policy complaint and said that it relied upon the Commission counsel's representations that it was not seeking an individual remedy for Mr. Cramm. (CN seems not to have been in touch with Mr. Cramm in his individual capacity). Hence disclosure

of its records which might have been relevant to Mr. Cramm's individual claim was not made. Although there was no malice or overt non-disclosure on the part of CN, the disclosure was not forthcoming or complete. CN had exclusive possession and control of such evidence. Mr. Cramm's medical file with the Company had to be subpoenaed by the Tribunal itself during to the Hearing. During the course of the Hearing it became apparent that other evidence, which may have been pertinent, had been destroyed by CN just months before this Hearing was scheduled to commence. CN knew or should have known that with this complaint ongoing, any information concerning Mr. Cramm should have been retained. The Tribunal had questions concerning the taking of a statement in June of 1991 from Mr. Cramm by Mr. Colpitts on behalf of CN. This statement had been inadvertently omitted from the information first disclosed to the Commission

and its investigator. In all such matters there must be immediate and full disclosure. (our emphasis added)

S. 10(b) of the Act speaks of individuals as well as classes of individuals, and the legislation is not clear on its face that this in any way limits the Tribunal in considering any remedy for an individual adversely affected by such policy discrimination. S. 50 of the Act automatically makes any Complainant a separate Party before the Tribunal with rights to notice, to appear, to give evidence and to make representations before the Tribunal.

S. 53 of the Act provides that if a Tribunal finds a discriminatory policy under s. 10 of the Act, it may make an Order as it considers appropriate, including the compensation of and the direction to make available such rights and opportunities as were found to be denied by virtue of the discriminatory policy, to the "victim." This section does not refer to the "Complainant" or to the "Party", but rather to the "victim".

In Canadian Human Rights Commission and Canadian Armed Forces and Swan, June 16, 1995, F.C.C. (Trial Division), Denault, J., said:

"This reasoning is erroneous in light of section 4 of the CHRA which clearly states that discriminatory practices, as described in sections 5 to 14, may be made subject to an order provided in sections 53 and 54, including compensation for lost wages pursuant to 53(2)(c) of the Act.

...

The respondent further argued that the commission and the complainant were not pursuing remedies under sections 7 and 10 and therefore the jurisdiction of the tribunal was limited to section 14 of the CHRA. The respondent referred to a letter from the commission's previous counsel, dated June 16, 1993, indicating that lost wages were not an issue given the dismissal of the allegation under section 7 of the CHRA. This letter cannot have the effect of removing the tribunal's jurisdiction in the matter. It is trite law that jurisdiction cannot be conferred by consent of the parties as it cannot be removed by a party." (at pages 4 and 5)

The Supreme Court of Canada has been clear in its consideration of the Canadian Human Rights Act, that a broad and liberal interpretation should be given of this legislation and of its intent, that human rights should pervade the workplace.

Therefore this Tribunal finds that Mr. Cramm is entitled to an individual remedy as a "victim" of this discriminatory policy.

4. If there was adverse discrimination by said policy (G(iii)), did the Respondents meet their duty to accommodate?

Section 53 (4) of the Act provides that this Tribunal must consider whether CN and the BMWE could have accommodated the needs of Mr. Cramm and like individuals without costs or business inconvenience constituting undue hardship.

The Employer, CN, had the means and ability to best keep track of disabled

employees and could have and should have known of Mr. Cramm's circumstances. With very little effort or expense, it could have attempted to accommodate him in the work place by providing light duty or a job such as a watchman or security guard, which he ultimately did obtain after the railways closure while the railway's infrastructure was being dismantled. In such a large corporation as CN it is impossible to believe that nothing could be done to attempt to accommodate Mr. Cramm.

The only evidence before the Tribunal of CN's attempt to accommodate anyone affected by the definition of CCS because of temporary but long term illness or injury, was its rehabilitation program. There was no evidence of costs of such accommodation or any argument of any business

inconvenience constituting undue hardship. There was no explanation for the fact that Mr. Cramm was not on the rehabilitation committee's list.

With respect to the union, BMWE, the Tribunal acknowledges that it negotiated in good faith and relied heavily upon the records and information supplied to it by CN, to keep track of its own membership and disseminate information to the employees.

Witnesses suggested that CN's records were often inaccurate. The BMWE cannot escape responsibility entirely by saying it relied on the employer's records that might not have been accurate. The Union was in receipt of union dues from Mr. Cramm, and it is clear that other employees with union positions, such as Mr. Eveleigh, knew of Mr. Cramm's situation. It is no excuse for the union not to keep its own accurate records and to not follow up on its own.

Both Respondents are large entities. There was no evidence before the Tribunal as to how many collective agreements, beside those between the Respondents, contain the same or similar definition, how many victims there may be or what would be involved in addressing all such claims. The Tribunal was given evidence of Mr. Cramm's individual damages and evidence that on the balance of probability there is a class of individuals who could likewise have been adversely affected by this policy because they were disabled from working.

CN argued that it did not expect to address Mr. Cramm's claim for compensation, and was prepared only to respond a "policy question" under s.10 of the Act. The duty to accommodate is not restricted to individual claims under s. 7 of the Act and CN being an experienced Respondent should have foreseen that such evidence would still be relevant under section 53(4) of the Act. CN should have been prepared to provide such evidence to the Tribunal.

The Tribunal therefore finds that CN, the Employer, did not meet its duty to accommodate.

5. If there was discrimination and no accommodation, what is the appropriate remedy?

LOST WAGES

The Tribunal Orders that the Respondents, CN and BMWE, jointly and individually cease the application of the definition of CCS, in so far as

that definition requires one day of compensated service in any given calendar year by any employee absent due to bona fide illness, injury or maternity leave to qualify for an employment opportunity, such as employment security, or in so far as it applies to an employee absent from the work place due to injury, illness or maternity leaves for more than 100 days in any calendar year. The Act does not authorize the Tribunal to substitute an acceptable policy, however it does allow, under s. 16(1)(2), a person to adopt an arrangement designed to prevent disadvantages and states that the Commission may give advice and assistance on the formulation of such a policy. It is suggested that the respondents and the Commission work together on a new policy.

Mr. Cramm should be in the same position he would have been had the discriminatory policy not applied. To determine his compensation, CN will need to recalculate his CCS to give him credit for the years of 1981, 1982 and 1983 as if the requirement to render one day of compensated service was not in the definition. This clearly would entitle him to at least 96 months of CCS and thus Employment Security.

CN shall forthwith pay to Mr. Cramm 100% of the wages he would have earned under Employment Security as a track maintainer from October 28, 1988, to the date of payment, less his CN earnings in 1989 and 1990, less the job security benefits he received from CN and less any unpaid pension contributions for that time. Prejudgment interest on the balance shall be paid from October 28, 1988, to the date of payment at the prime rate as set out from time to time by the Bank of Canada (Canada v. Morgan, 85 D.L.R. (4th) 85 (FCA), followed in Koeppel and the Human Rights Commission and the Department of National Defense, (Human Rights Tribunal, June 4, 1997, unreported). From the date of payment CN shall pay Mr. Cramm his regular Employment Security benefits or employ him in a position equal in pay schedule to that of a track maintainer until he reaches the age of 55. When Mr. Cramm dies or reaches the age of 55, whichever is sooner, CN shall calculate the sum required to fund his pension as if he had qualified for and elected Employment Security in 1988. From this sum shall be deducted the sum of $9,839.99, and his pension, or that of his widow, if applicable, shall be calculated on the remaining balance.

No award is made for Mr. Cramm's loss of earnings incurred to attend the hearing (Koeppel and the Human Rights Commission and the Department of National Defense, supra)

SPECIAL COMPENSATION

The Tribunal finds no evidence that CN or the BMWE acted willfully or with malice in the implementation of the discriminatory policy. However, during the time frame involved, both acted recklessly in their conduct toward Mr. Cramm. The Union seemed to have lost all contact with him during his injury. CN kept him listed as "absent due to an illness or injury" and accepted his bids on jobs until seven years later, after the complaint was laid, when it did an about face and claimed he had been absent without leave. It made no effort to determine if his thumb injury was a bona fide illness or injury. Neither did anything to require him to have a medical or to put him on the rehabilitation list or to accommodate him. Further CN was not able to do a final calculation of Mr. Cramm's CCS until the last

days of the hearing, and then only after earlier incorrect calculations. Therefore the Tribunal finds that an appropriate amount to compensate Mr. Cramm for hurt feelings is an Order that CN and the BMWE each pay Mr. Cramm $1,500.00.

COSTS

Although we have stated that CN should have been more forthcoming and complete in its disclosure, its failures do not appear to have been truly considered, or purposeful, therefore the Tribunal Orders that each Respondent and the Commission bear their own costs herein.

Commission Counsel and Mr. Cramm asked that an award be made for Mr. Cramm's costs and expenses such as travel, accommodation and meals and like expenses associated with pursuing and participating in this complaint. The Tribunal finds their request to be reasonable in the circumstances of this case and orders CN to pay such costs and expenses.

Dated this 2nd day of October, 1997.

EVE ROBERTS, Q.C.

NANCY M. PEERS