

DECISION RENDERED ON DECEMBER 10, 1980
T.D. 7/80

THE CANADIAN HUMAN RIGHTS ACT

BETWEEN:

The Canadian Human Rights Commission,
(hereafter referred to as the "Commission")

Complainant,

- and -

Voyageur Colonial Ltd.,

Respondent,

- and -

The Canadian Motor Coach Association,

Interested Party.

Before: R. D. Abbott, appointed a Human Rights Tribunal pursuant to
Section 30 of the Act.

Representatives: For the Commission: G. J. C. Van Berkel

For the Respondent and

Interested Party: François Lemieux

Heard in Ottawa, Canada, on March 24 and 25, June 4, and October 1 and
2, 1980.

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DECISION OF TRIBUNAL

Introduction

This Decision constitutes a determination on a complaint by the
Canadian Human Rights Commission against the Respondent. Complaints by
two individuals against the Respondent were also referred to me for
hearing. These individual complaints have not yet been heard. When the
hearing of the Commission's complaint began, it was indicated that the
matter had potential repercussions in the entire business of bus
transportation. Accordingly, on request, I ordered the addition of the
Canadian Motor Coach Association as an "interested party" pursuant to
Section 40(1) of the Canadian Human Rights Act. Mr. Lemieux, counsel
for the Respondent, appeared in addition for the Interested Party.

The Commission's complaint, dated February 20, 1979, reads as
follows:

The Canadian Human Rights Commission hereby initiates a
complaint under section 32(3) of the Canadian Human Rights Act
that Voyageur Colonial Ltd. has engaged in a discriminatory
practice since March 1, 1978 to the present and is continuing
to engage in a discriminatory practice in that it refuses to
employ individuals as coach drivers who are over the age of
35.

The Respondent formally responded to this complaint with a written admission as follows:

The Respondent admits that it is its personnel practice to refuse to consider individuals as bus [sic] new bus drivers who are over the age of 40 years and over [sic] but argues that this is not a discriminatory practice but a bona fide occupational requirement within the meaning of subsection 14(a) of the Canadian Human Rights Act.

Read together, the complaint and admission clearly indicate that what is in question here is the refusal of the Respondent to consider the initial hiring of individuals as bus drivers who are over the age of

40. It will be noted that the complaint refers to age 35. But, clearly the complaint is one of age discrimination and it can be deemed to be amended to allege discrimination against individuals over the age of 40.

It is necessary also to emphasize that the alleged discrimination relates only to the initial hiring of bus drivers. There is no allegation that the Respondent refuses to continue the employment of bus drivers beyond the age of 40. There is unchallenged evidence that many of the Respondent's bus drivers are over the age of 40; in fact, in 1979, three drivers were over the age of 60. Furthermore, this complaint relates only to bus drivers. Individuals are considered by the Respondent for initial employment in other positions; for example, as mechanics, who are over the age of 40.

As I have just stated, this complaint alleges age discrimination. The statutory context of the complaint, drawn from the Canadian Human Rights Act, is the following. Section 3 proscribes grounds of discrimination including, amongst others, age. Section 4 provides that a discriminatory practice may be the subject of a complaint and that anyone found to be engaging or to have engaged in a discriminatory practice may be the subject of an order of a Human Rights Tribunal. Finally, Section 7 provides, in part, that it is a discriminatory practice to refuse to employ any individual on a prohibited ground of discrimination. Obviously, the Commission's complaint alleges that the Respondent is engaged or has engaged in a discriminatory practice, by refusing to employ any individual over the age of 40.

The Respondent's admission argues that its practice is not discriminatory but is a bona fide occupational requirement. Section 14 of the Canadian Human Rights Act sets out a number of exceptions to what would otherwise be discriminatory practices. Subsection 14(a) reads as follows:

14. It is not a discriminatory practice if
- (a) any refusal ... in relation to any employment is established by an employer to be based on a bona fide occupational requirement;
 - (b) ...

Subsection (e) of Section 14 makes an exception for discrimination on the basis of age if it is done in a manner prescribed by the Commission in guidelines pursuant to Subsection 22(2). However, Subsection 14(e) is limited to age discrimination otherwise than in employment. It follows that the Commission has no authority to issue a guideline relating to age discrimination in employment, and I am informed that no such guideline has been issued.

Finally, to conclude this introduction, it bears repeating that the Human Rights Tribunal, of which I am the sole member for the purpose of hearing and determining this complaint, is entirely independent of the Canadian Human Rights Commission. The sole intervention of the Commission was to select me from a panel of prospective members of Human Rights Tribunals which had previously been established and maintained by the Governor in Council pursuant to Subsection 39(5) of the Canadian Human Rights Act. Throughout these proceedings, the Commission, represented by its counsel Mr. Van Berkel, has acted as an adversary party, the Complainant, and whatever influence it has had on my decision has been exercised properly and exclusively through the Commission's participation in the public hearings conducted by me in accordance with Subsection 40(6) of the Act. I emphasize this in order to dispel any misapprehensions that a Human Rights Tribunal is somehow an arm of the Commission or that it is intended to play the role of a conciliator between the Commission and the Respondent. Clearly, the intention of the Act is that a Human Rights Tribunal is to adjudicate upon the basis of what is presented to it in an open and public manner, standing impartially between the parties to the case.

The Respondent's admission and the evidence subsequently tendered established beyond question that the Respondent has, since March 1, 1979, or before, refused to employ as new bus drivers individuals over the age of 40. Thus, the onus swung to the Respondent to establish that this refusal was a bona fide occupational requirement. The Respondent's

position is, first, that its operations in intercity transportation place on its bus drivers a heavy responsibility for public safety. Secondly, the safe operation of a bus calls for certain psychological characteristics such as emotional stability, concentration, alertness and so on. Thirdly, a new driver starting his employment with the Respondent possesses no seniority and is governed by the "spare board system". Fourthly, low seniority and the spare board system result in certain social, economic and personal sources of stress. Fifthly, the ability to cope with these sources of stress decreases with age. Sixthly, if these stresses are not coped with successfully, there results a severe potential danger to public safety. Seventhly, considering its obligation to do all possible to protect public safety, the Respondent had to establish some test to eliminate, to the extent possible, anyone who might not cope with the stresses produced by low seniority and the spare board system. Finally, the upper limit of age 40 was honestly selected as a test of ability to cope with those stresses, having a view to the practical realities of the bus driver's work.

It will be observed that the essence of the Respondent's case is that the beginning bus driver must cope with the stresses produced by low seniority and the spare board system and a beginning driver under the age of 40 is more likely to cope successfully.

The issues raised by the Respondent's position are several. First, is the nature of the Respondent's operations, involving intercity bus driving, such as to require certain psychological characteristics of its bus drivers? Secondly, do a beginning driver's low seniority and his functioning under the spare board system result in sources of stress? Thirdly, does the ability to cope with these sources of stress decrease with age? Fourthly, is there a danger to public safety if these stresses are not coped with successfully? Fifthly, was the Respondent obliged to attempt to eliminate potential bus drivers who might not cope with these stresses successfully? Sixthly, did the Respondent establish the 40-year-old upper limit as a bona fide test of ability to cope, with a direct relationship to the practical realities of the bus driver's work?

If the answer to each of these issues is positive, then it must follow that the Respondent's practice of not hiring new bus drivers who are over the age of 40 was a bona fide occupational requirement and not a proscribed discriminatory practice.

It must be observed that the physical capacity of beginning bus drivers is not in issue. The evidence clearly established that the Respondent is obliged by law, both of Canada and of the United States, to subject its candidates for employment as bus drivers to a battery of

physical tests. Physical testing is repeated at intervals throughout a bus driver's career. The Respondent does not assert that applicants above the age of 40 are excluded by reason of their deemed physical incapacity. For this reason, previous decisions in human rights cases which dealt with the exclusion from employment of individuals by reason of their presumed physical incapacity due to age are of limited assistance in deciding the present case. What I am concerned with here is the somewhat more difficult assessment of whether age has a sufficient bearing on the ability to cope with the stresses of the early years of employment as a bus driver with the Respondent to justify the non-hiring of individuals beyond a certain age.

Evidentiary Problems

When the issues are delineated as I have done, certain evidentiary problems emerge. I am quite satisfied from the evidence before me that physical capacity can be measured in relation to the work to be performed. A witness for the commission, C. D. Métivier, whose field of expertise and Ph.D. work concerned physiology, testified as to his production of a screening test for the Ottawa Police Force. But his testimony, and a perusal of the test he produced, lead me to conclude that the most that can be stated with any assurance is that, as I have said, physical capacity can be measured and predicted in relation to the

work to be performed. But this conclusion cannot help in determining whether the ability to cope with psychological stress can be measured and predicted in relation to the work to be performed.

If I were dealing with the issue of whether age is an appropriate measure of physical capacity, then I would expect there to have been submitted evidence of a scientific and statistical nature to show the relation of age to physical capacity. Alternatively, or in addition, I would have expected there to have been evidence based on experience: the observations of bus drivers of their own and others' ability to cope with the physical demands of their work as they increased in age. But in the present case, there was no reliable scientific or statistical evidence produced to establish the relationship, if any, between age and the ability to cope with psychological stress. Nor was there satisfactory evidence of an experiential or observational nature regarding this matter. There was evidence that the Respondent in 1976 hired some new bus drivers who were over the age of 40 to cope with the temporary increase in demand for bus transportation generated by the Olympic Games in Montreal. I treat this evidence as of no assistance for the following reasons: the sample of over-40 new bus drivers was too small to lead to any reliable

observation of their ability to cope with stress; the bus drivers hired on that occasion were taken on for a short period only and could not have had the long-term career expectations and stresses of a new driver hired for an indefinite term; and, the working conditions of the temporary drivers were not identical to, or even very similar to, those of new drivers having low seniority and operating under the spare board system. (For example, the temporary drivers were not faced with the uncertainty and instability of not being able to choose their home port and vacation time.)

Likewise, there was evidence that the Respondent, upon occasion, has had to resort to the rental from other bus companies of their buses, which are driven by the other companies' drivers. These other drivers might or might not have been first hired when over the age of 40 and might or might not be operating under a spare board system or suffer the disabilities of low seniority. Whatever observations could be made of these drivers of the rented buses, because of the surrounding circumstances of those observations, they could lead to no reliable inferences in deciding the present case.

Finally, there was evidence that some of the Respondent's bus drivers who are over the age of 40 voluntarily work under the spare board system. At first glance, it would appear that this group would provide a sample on which to base an inference as to the ability of the over-40 driver to cope with the stresses of the spare board system. But such is not the case. It also was in evidence that the over-40 driver who chooses to work under the spare board system does so with considerable regard for his own seniority. As a more senior driver he

can refuse to go on undesirable runs, leaving them for less senior drivers; the more senior driver even while on the spare board still can

draw on his seniority for other purposes such as choice of vacation, home port and days off; under the system of bidding for fixed runs he can, if he so chooses, get off the spare board after no more than three months on the spare board. Finally, some senior drivers over 40 choose to go on the spare board at certain times of the year in order to take desirable long distance charter runs, for example, charter runs to Florida lasting several weeks at a time. As a result, I cannot treat the observation of drivers over the age of 40 working in the spare board

system as providing a valid basis for determining whether drivers of that age are able to cope with the stresses of that system to which a new driver must be exposed.

My evidentiary problem now becomes obvious. While there was evidence of a scientific nature, consisting of the opinion of experts, that the ability to cope with stress in general decreases with age, there was no scientific evidence regarding the ability to cope with the

specific stresses of low seniority and working on the spare board system. There was no reliable evidence based on experience and/or observation regarding the ability of new drivers over the age of 40 to cope with those stresses. What I am left with is evidence in the form of expert opinion that there are psychological and social changes with increasing age which may decrease an individual's ability to cope with stress in general; expert opinion, confirming common experience, that in middle age an individual usually has a greater need for stability, sense of accomplishment, and so on; and, testimony based on experience that low seniority and the spare board system do create stresses of a sort which directly or indirectly have or may have adverse effects on the individual. That any conclusions I reach must be based on rather tenuous chains of reasoning from incomplete evidence cannot be blamed on the parties' counsel in this case. The fact is, that the evidence on which to base more secure conclusions is simply not available, and that is the nature of this case.

The Evidence

The testimony of four persons was tendered in evidence. Mr. Antony Kerkhof, who testified for the Respondent, is Safety Co-ordinator for the Respondent. He started as a bus driver with the Respondent in 1953 and for the following twenty-four years worked in the spare board system and on regular runs. For the next three years he worked as a personnel officer with additional responsibility for safety in the Ottawa area. He now is Safety Co-ordinator for the whole system of the Respondent.

His testimony as to the nature of bus driving, the impact on the individual of low seniority and the spare board system, and his experience in safety training of drivers, was unchallenged, and I

accept
it in its entirety.

Mr. Kerkhof testified that the Respondent is engaged in the business of inter-city bus transportation in Canada and the United States. It provides both scheduled "regular" runs and charter runs. The regular runs operate every day of the year under all kinds of weather and traffic conditions, with a required high degree of dependability. Under the pressure of unexpectedly high demand, the Respondent's policy is to lay on additional buses on short notice so that passengers are not forced to wait for the next scheduled bus.

Bus drivers, whether on regular or charter runs, are in sole control of the vehicle, unassisted by anyone on board similar to the co-pilot of an airplane. Each has his "home port" where he reports for duty but his runs may be such as to necessitate spending nights or other off-duty hours away from his home port. Home ports are assigned every

three years as a driver chooses except that when the Respondent's operation requires a change of home port, seniority determines whether or not a driver's choice is accommodated.

Runs are allocated to drivers on a "bidding" system. At regular intervals throughout the year, the runs are made available for choosing by the drivers. In the event that more than one driver bids for a run, the allocation is made in accordance with seniority by applying a rather complicated procedure set out in the pertinent collective agreement between the Respondent and the union representing its drivers.

The Respondent's operation is beset by a number of uncertainties which have to be coped with. As noted earlier, under the pressure of unexpected demand, additional buses may have to be supplied for regular runs or for unpredictable charter runs. Furthermore, drivers on regular runs may be absent for various reasons including scheduled days off. Drivers who have not been allocated regular runs (usually because of their low seniority) are placed on the spare board. Drivers on the spare board are the ones who are called upon to meet contingencies such as unexpected demand or absence of regular run drivers. As work assignments of this sort become available during the day, spare board drivers are allocated to those assignments according to their seniority; that is to say, a more senior driver may refuse the assignment so that it is passed on to a more junior driver.

The operation of the spare board system is unpredictable in its impact on the individual. This unpredictability was described by Mr. Kerkhof in the following terms:

It is a fact of life in the operation of the spare board that a spare board driver does not know from one day to the next when he will be working that day, which run he will be assigned, where he will be that night because his day's work

may end away from his home port, the extent of time he will be away from home and the salary he will be making because drivers are paid on a mileage basis.

Mr. Kerkhof went on to point out that, for the individual, the spare board system not only produces total unpredictability but also leaves to the most junior drivers the least desirable trips from the monetary and other points of view.

It can be concluded from Mr. Kerkhof's testimony that low seniority has a very severe impact on the individual in terms of his work assignments. The least senior drivers will be placed on the spare board and will end up with the least desirable assignments. Mr. Kerkhof estimated that it would take a newly-hired driver from 10 to 15 years to get off the spare board and be assigned a regular run. Low seniority

has a number of other impacts on the individual which can only be alleviated by acquiring seniority through service of varying lengths of time. Pursuant to the pertinent collective agreement, seniority governs the following:

- choice of home port (It may take ten years of service before a new driver can get his own preference.);
- choice of days off (twenty to twenty-five years to obtain one's preference);
- choice of vacation time (eighteen years to obtain one's preference);
- earnings (drivers with low seniority may not receive an assignment under the spare board system on some days, or may receive low-mileage assignments);
- lay-offs (inter-city bus transportation is highly seasonal, so that large numbers of drivers have to be laid off for quite long periods of time. Laying-off is done according to seniority.)

Mr. Kerkhof certainly painted a gloomy picture of the working conditions of the newly-hired driver. He also pointed out that the Respondent's operations were not expanding so that in some years no new drivers are hired. This means that even drivers who have served with the Respondent for several years may find that they still have low seniority. It is only in the long-term that the driver can look forward to a predictable and reasonably secure working existence.

Mr. Kerkhof testified that the Respondent has a strong concern with public safety. This concern is reflected in Mr. Kerkhof's work as Safety Co-ordinator. Since he took up the position in 1977, there has been a marked improvement in the incidence of accidents. However, it was Mr. Kerkhof's experience that younger drivers responded more positively to the safety training he gives them. He finds them to be

more adaptable and more amenable to changing their ways. He described various characteristics he looks for and encourages in drivers such as alertness, concentration, ability to foresee threatening situations; judgement, courtesy, and stability. He noted that there is a very close connection between these characteristics and the safe operation of buses.

I am quite prepared to conclude from Mr. Kerkhof's testimony, in relation to the issues before me, as follows. The nature of the Respondent's operations requires a number of psychological characteristics of its bus drivers. A newly-hired bus driver, due to his low seniority and the operation of the spare board system, is

exposed to unpredictability and instability in his working conditions. Finally, the Respondent is concerned with public safety and this concern

is intimately and quite properly an essential of its business of inter-city bus transportation.

Dr. Alan Campbell, another witness for the Respondent, is a medical practitioner who is one of the physicians to whom the Respondent refers applicants for bus driver employment for their initial medical testing. I am satisfied that Dr. Campbell, through his connection with the Respondent, has acquired a thorough knowledge of the Respondent's operations and their impact on individual drivers. Since the age discrimination admitted by the Respondent is not based on any presumption as to physical incapacity, I will not summarize those parts of Dr. Campbell's testimony in that regard. For example, Dr. Campbell testified extensively as to the physical deterioration that is coincident with increasing age. This is not material to the issues before this Tribunal.

It was Dr. Campbell's opinion that
There is no acceptable hiring test or combination of tests that is totally accurate in differentiating individuals who may develop potentially serious health implications whether they be physical or emotional.

He went on to state, in effect, that physical testing cannot be used as a means of predicting future performance, so that an age limitation becomes the only means of excluding those who have the potential to be unsafe due to physical deterioration. Again, I must disregard this evidence as to physical deterioration, since it is not material to the issues before me.

More pertinently, Dr. Campbell testified as to the non-physical "elements of middle age [40 to 65] in which general trends do occur." He stated that social roles tend to become more rigidly established due to responsibilities to family, community, friends, church and country. People, by middle age, have collected material possessions to which they have responsibilities of maintenance. They may face extraordinary financial burdens and pressures. New emotional and mental problems increase, reflected in rising suicide rates and depression states. Only

the last assertion was supported by Dr. Campbell by reference to authorities; his opinion in that regard must be treated as that of an expert and given due weight. His other assertions are, with all respect, merely confirmative of generally-held opinion. In other words, I cannot treat his opinion as to economic and social matters as being "expert" or "scientific", though they do deserve high regard, especially since they confirm what I think is generally accepted as being true.

Dr. Campbell drew on his knowledge of the Respondent's operations to relate his opinions as to the impact of aging to the ability to perform as an inter-city bus driver. He said that the working conditions of a new driver, involving unpredictability and instability, as described by Mr. Kerkhof, would create stresses in the areas of marriage, home, job, community and activities.

The ability to adapt to such stresses decreases with age. Failure to adapt may result in symptoms of anxiety, alcoholism, asthenia [defined as loss of strength, debility], poor efficiency, low morale and unconventional behaviour. He pointed out that for the new bus driver, his working conditions could predispose or precipitate nervous or mental disorder. These conditions were identified by the doctor as dissatisfaction, insecurity, poor incentive, unpredictability of work assignments and irregular hours. In sum, on this matter, Dr. Campbell connected the physical and mental demands of the spare board system to stress, fatigue, and anxiety, and those in turn to emotional difficulties. Because ability to adapt to stress, and physical capacity, decreases with age, and because of the other aspects of middle age, Dr. Campbell was of the opinion that an age limit of 40 was a reasonable way to secure drivers most likely to cope with the stresses of the early years of employment with the Respondent.

It is fairly apparent that Dr. Campbell's testimony, on the one hand, deserves considerable weight because of his experience with patients in general and his sound appreciation of the nature of inter-city bus driving and the demands of the spare board system. On the other hand, as I have said, much of his testimony, which was, of course, opinion evidence, appears to be based not on his medical

qualification but on his personal observation of the general population.

On this score, in the absence of contrary testimony or scientific and statistical evidence, I am willing to reach the following conclusions from Dr. Campbell's testimony. First, the spare board system and low seniority do create sources of stress for the individual bus driver. Secondly, stress, together with fatigue and anxiety, can lead to emotional difficulties. Thirdly, the ability to cope with stress reduces with age. Fourthly, the ability to cope with stress of the sort generated by low seniority and the spare board system is especially low in middle age, defined by Dr. Campbell as the years between 40 and 65.

A very important opinion expressed by Dr. Campbell, and confirmed by other witnesses, was that there now exists no scientific test on which to base a prediction of the future behaviour of an individual. More pertinently, it is not possible to predict with any reliability how

a person will react in the future to stress. It is possible to measure the physiological manifestations of particular stressors, for example, through analysis of blood and urine samples. But this can only measure

the ability to cope with stress of the particular type at one point in time. It is not possible to apply a test which can be the basis of a prediction of future ability to cope.

The foregoing evidence is obviously very material to the decision on this complaint. The evidence is, in part, expert opinion, in which Dr. Campbell drew on his medical background. It is, in part, simply general observation of a sociological or psychological nature. I find little in the Commission's evidence which challenges Dr. Campbell's opinion in this regard and some that confirms his opinion. Furthermore, his opinion is, I think, in accord with "common sense" and common experience. Therefore, I can conclude that the Respondent did not and does not have available to it a scientifically verifiable means of selecting inter-city bus drivers based on a prediction of their ability to cope with the stresses resulting from low seniority and the operation of the spare board system.

The last witness for the Respondent, testifying in reply, was Mr.* R. F. Musten, holding a Ph.D. in psychology and practising as an industrial psychologist. He has no connection with the Respondent, other than acting as an expert witness on its behalf at the request of counsel for the Respondent. His academic qualifications and experience are in areas directly relevant to the issues before this Tribunal, more particularly, the areas of

*I trust that Messrs. Musten and Métivier will appreciate the necessity to entitle them here as "Mr.", to distinguish them from the one medical doctor who testified, even though, in other circumstances, they would rightfully be addressed as "Doctor".

work-related psychological disorders and selection methods for the Armed Services of three countries. Furthermore, he had the opportunity to review the testimony of Mr. Kerkhof and Dr. Campbell concerning the nature of the Respondent's operations, inter-city bus driving, and the spare board system. I am satisfied that his opinions, within the field of his expertise, deserve high regard.

Mr. Musten was of the opinion, confirming that of Dr. Campbell, that the ability to cope with certain kinds of stressors, especially abrupt changes in working conditions, decreases with increasing age. Before Mr. Musten testified, there had been testimony from Mr. Métivier for the Commission concerning the screening test administered to applicants for the Ottawa Police Force. Mr. Musten assessed this test

as being one which does not test the social context or the career consequences in their impact on the ability to cope with stress. It is a purely physical test, not a test which takes into account social and working conditions which may affect work performance.

On this aspect, the nature of the Ottawa Police Force Screening Test, Mr. Musten's opinion must be accepted. I have looked over the test and can conclude that it is purely a physical test. Mr. Métivier admitted that applicants for the Ottawa Police Force are subjected

to a psychological test, administered in Toronto. He could say nothing about this latter test.

Mr. Musten went beyond his assessment of the Ottawa Police Force Screening Test to give his opinion that there exists no test that could predict whether or not a 40-year-old applicant could cope with the stresses of the spare board system. Furthermore, there would be severe difficulties in developing such a test. He pointed out that a reliable hiring test has to be based on a fairly large sample, the incoming applicants, whose performance is monitored and matched against whatever prediction of performance was made based on the test. Over a period of time, perhaps seven years, one might have a sufficiently large sample to arrive at a conclusion as to the reliability of the test. But any test is subject to errors, excluding some who should be hired and hiring some who should have been excluded. In advance, there is no way of knowing that the chance of error is greater or lesser with a test different from the simple test consisting of an age limit. But the testing of the reliability of the alternative test, over a period of years, exposes the public to the risk that the test is wrong, all this assuming that an alternative test could be developed, which Mr. Musten doubted. In the result, considering the stresses of the spare board system, accepting that mistakes in selection will occur using any test, considering that the ability to cope reduces with age, Mr. Musten was of the opinion that 40 years of age was a reasonable cut-off age for inter-city bus drivers initially hired by the Respondent.

Mr. Musten confirmed that the inability to cope with stress has several detrimental effects on the individual: drug abuse, including alcohol, absenteeism, apathy, sabotage, and psychosomatic symptoms. A 40-year-old person would be more susceptible, more unable to cope with the stresses of the spare board system.

In cross-examination, Mr. Musten agreed that the reaction to the stresses of the spare board system might be ameliorated by other surrounding circumstances such as prior experience in bus driving with exposure to its stresses, and prior knowledge of what is entailed by the spare board system. But the spare board system would still have a serious impact on a new driver over the age of 40.

With great respect to Mr. Musten and his testimony, I must say that

it is largely confirmatory of the testimony of Dr. Campbell. In some respects, however, I would give it greater weight than the testimony of Dr. Campbell, because it is so clearly based on Mr. Musten's personal experience with selection standards for employment. I am quite prepared to conclude from Mr. Musten's evidence that it is questionable whether there could be developed a test, alternative to an age cut-off, on which a prediction could be made as to an individual applicant's ability to cope with the stresses of low seniority and the spare board system. It is questionable whether such a test would be any more reliable than an age cut-off test, and the development of such a test would be fraught with difficulties and dangers to the public.

One person testified on behalf of the Commission, Mr. Guy Métivier. His qualifications are these: a B.Sc. in physical education, a Master's degree, and a Ph.D., the thesis for the latter relating to the effect of physical work on blood cells and cholesterol. His post-doctoral research was in endocrinology, experimental surgery, and the biochemistry and the endocrinology of physical work. His teaching has been in the fields of physiology, anatomy, physiology of work and aging, growth and development. His university research has been in assessment of people for physical conditioning and stress testing, the effects of exercise on aging, especially in endocrinology and physical work capacity. He is the author of the Ottawa Police Force Screening Test referred to earlier.

There is no question but that Mr. Métivier is exceptionally well-qualified in his fields. In particular, I was impressed with his precise relating of work performance to physical demands and the testing of individuals for their ability to meet those demands. Undoubtedly, his development of a work-related set of tests for the Ottawa Police Force has the potential to achieve a fair and equitable method of selecting candidates for admission to that Force without regard to age or sex, based on a reasonable prediction of their physical capacity to do the job.

The difficulty is, that that is not what is in issue here. It bears repeating that the Respondent's exclusion of over-40-year-old candidates for employment as bus drivers is based on an assumption as to their psychological ability to cope with the stresses of low seniority and the spare board system. The Respondent retains in its employ many drivers over the age of 40. Their physical capacity to do the job was assessed prior to their hiring and is re-assessed regularly thereafter. The Respondent would place itself in a most embarrassing position if it were to assert that persons over the age of 40 are physically unable to do the job and it has emphatically disavowed that position.

Mr. Métivier was able to testify that psychological stress has physical manifestations that can be measured.

But he was prepared to admit that such measurement could not form the basis of a prediction as to an individual's ability to cope with stress, especially the stresses of low seniority and the spare board system, in the future. This would be so, even if one could measure the present ability to cope with those stresses. In these opinions, Mr. Métivier corroborated the opinions of Dr. Campbell and Mr. Musten, at the same time admitting the limitation imposed by the fact that he is not a psychologist. His professional restraint is to be noted and commended.

Thus, while expressing great respect for Mr. Métivier's qualifications and opinions, I am forced to disregard them. They relate to the physiology of job performance, the physical aspects, and that is not what is in issue here.

Decision on the Complaint

As I stated earlier, the onus was on the Respondent to establish that its age discrimination against candidates as new bus drivers who are over 40 years old was a bona fide occupational requirement. I adopt the test of bona fides propounded by Professor R. S. Mackay, Q.C., acting as a Board of Inquiry under the Ontario Human Rights Code, R.S.O.

1970, c. 318, in *Re Cosgrove and the City of North Bay* (1976, unreported), approved by the

Ontario Court of Appeal when it dismissed an application for leave to appeal from the judgement of the Ontario High Court, Divisional Court

[(1977) 81 D.L.R. (3d) 273 Div. Ct.]; leave to appeal refused, (1977) 81

D.L.R. (3d) 544 (C.A.)]. The Court of Appeal stated, "... we agree with the test of bona fides as stated by the board of inquiry" [viz. Professor Mackay]. Professor Mackay's test was, initially, a subjective one, connoting honesty, good faith, sincerity, absence of fraud or deceit, unfeigned, lacking simulation or pretence, genuineness. In the present case, there is no evidence whatever that the Respondent's adoption of the 40-year age limit was a method of achieving some ulterior purpose or was anything else but the means of carrying out its expressed intent of protecting public safety. I find that the Respondent's employment practice was bona fide in the subjective sense expressed by Professor Mackay.

Professor Mackay went on to hold that bona fide has an objective element. Not only must the employment practice be imposed honestly or with sincere intentions, it must, in addition, be supported in fact and reason based on the practical reality of the work-a-day world and of

life. I would respectfully adopt the same additional connotation of the term bona fide in the present context. For the purposes of this decision, the "practical realities" are, first, that a newly-hired bus driver with the Respondent has to cope

with the stresses of low seniority and the spare board system in the interests of the safety of the travelling public, and, secondly, that the ability to cope with these stresses decreases with age and is especially low in middle age, i.e., after the age of 40. I am satisfied on the basis of the evidence available to me, that these two practical realities have been established. Do they support the imposition of a 40-year cut-off?

Here I am assisted by a fairly recent decision of a Federal United States Court. I find this decision highly persuasive (though, of course, not binding on me). The case is *Hodgson v. Greyhound Lines, Inc.*, (1974) FEP Cases 917 (U.S. Ct. of App., 7th Circuit). In that case, age discrimination in the non-hiring of inter-city bus drivers over 40 was in issue. The Court's holding, as accurately set out in the headnote to the case, is, in part:

While company must demonstrate that it has rational basis in fact to believe that elimination of its maximum hiring age will increase likelihood of risk of harm to its passengers, it need demonstrate only minimal increase in risk of harm, since it is enough to show that elimination of challenged hiring policy might jeopardize life of one more person than might otherwise occur under that policy.

The Court supported this holding by pointing first to the distinction between discrimination based on sex, where the prime concern is the welfare of the job applicant, and discrimination where the concern is with the well-being and safety of the public. This distinction was established in *Weeks v. Southern Bell Telephone and Telegraph Co.* (1969)

1 FEP Cases 656, (U.S. Fed. Ct. of App., 5th Cir.) and leads to the conclusion that the burden of proof resting on the employer accused of discrimination is lighter where public safety is involved.

The Court in *Hodgson* went on to adopt a second principle. The statute there in question required that a bona fide occupational requirement be "reasonably necessary to the normal operation of that particular business or enterprise." The quoted words do not, of course, occur in the Act governing the present case. The Court interpreted those words as imposing on Greyhound the onus of showing that the hiring practice was one which, if not applied, would undermine the "essence" of its operation. It must not merely be "tangential" to that essence. The Court found that the essence of Greyhound's operation was the safe transportation of its passengers, so that demonstrating even a minimal

increase in risk of harm to them would be enough.

Of course, it is possible to find factual and statutory distinctions between the *Hodgson* case and the present case; for example, whether the "extra-board system" there is the same as the spare board system here. However, the principles adopted by the United States Court

are well-supported by its reasoning, and I would respectfully adopt them for application here. In the present case, I would hold that because the Respondent's hiring policy is one honestly directed at achieving public safety, the burden of proof of the bona fides of its occupational requirement is correspondingly lighter. Furthermore, I am satisfied that safe transportation is indeed the essence of the Respondent's operation. Has the Respondent demonstrated that elimination of its age limit would produce even a minimal increase in the risk of harm to the public?

The foregoing question is not easily answered. I must draw on several conclusions which I reached earlier in this decision. First, low seniority and the operation of the spare board system create stresses with which a person over the age of 40 is likely to have difficulty in coping. Secondly, there now exists no way of predicting a person's capacity to cope with those stresses. Thirdly, the one reasonably reliable predictor of ability to cope with those stresses now available is age. It can be concluded that if the 40-year age limit were eliminated, in the absence of a more reliable test which could be substituted, the likelihood would be greater that a number of new bus drivers, over the age of 40, would be unable to cope with the stresses of low seniority and the spare board system, and the risk of harm to the travelling public would increase. The second Hodgson test has been satisfied, adequately, in this case.

Summary and Conclusion

Briefly, I am prepared to answer positively each of the issues which I posed earlier as questions. First, the nature of the Respondent's operations requires certain psychological characteristics of its drivers. Secondly, a beginning driver's low seniority and his functioning under the spare board system do result in sources of stress. Thirdly, the ability to cope with these sources of stress decreases with age. Fourthly, there is a danger to public safety if these stresses are not coped with successfully. Fifthly, the Respondent, due to the nature (the essence) of its operation, was obliged to attempt to eliminate potential bus drivers who might not cope with these stresses successfully. Sixthly, the Respondent has established that the 40-year limit is a bona fide test of the ability to cope, having a direct

relationship to the realities of the bus driver's work. While the burden of proof resting on the Respondent has only adequately been tipped in its favour on each of these issues, I am sufficiently satisfied that it adopted its age limitation honestly, in good faith, in pursuance of its professed desire to protect public safety. That limit is supported in fact and reason, based on the practical reality of the work-a-day world of inter-city bus driving and of the life of the middle-aged person. It follows that the Respondent's practice of not hiring new inter-city bus drivers who are over the age

of 40 has been a bona fide occupational requirement and not a proscribed discriminatory practice. Accordingly, the complaint of the Commission in this case is dismissed.

The individual complaints arising from the Respondent's hiring practice are to be set down for hearing at a mutually convenient time unless earlier withdrawn.

Ottawa, Canada, December 1, 1980.
For the Human Rights Tribunal,

(R. D. Abbott)