T.D. 2/80
THE CANADIAN HUMAN RIGHTS ACT
IN THE MATTER of the complaint of David J. Foreman, Marylin Butterill and I. Cyril Wolfman alleging discrimination in employment by VIA Rail Canada Inc.

APPEARANCES:
Russell G. Juriansz, Esq. - Counsel for the Canadian Human Rights Commission and the Complainants

J.K. Allen, Esq. Counsel for VIA Rail Canada Inc.

A HEARING BEFORE:
Frank D. Jones, Q.C. appointed a Board of Inquiry in the above matters by The Canadian Human Rights Commission pursuant to Section 39 (1) of The Canadian Human Rights Act

>FACTS

A brief outline of the facts will indicate a common basis of complaint amongst the three complainants.

Mr. David J. Foreman applied for employment with VIA Rail as a waiter. His original application was dated January 11, 1979 but was interviewed and tested for mathematical and verbal skills by VIA Rail on March 1, 1979. He passed these tests. He was sent to the supervisor of waiters and porters and, after further interview, was hired on the condition that he pass a medical examination.

He went for the medical examination on March 2 and was found medically unfit because the eyesight in his left eye did not meet the standards set by VIA Rail. His eye problem started approximately five years ago. Returning from a trip to Mexico he consulted an eye doctor in Edmonton and was seven weeks in hospital for internal bleeding of the eye. There is a scar on his left eye. A Dr. Pavlin tested Mr. Foreman and he recorded as follows:

"My examination revealed vision of 20/20 on the right and 20/200 on the left. This could not be improved by refraction. The patient has a myopic astigmatic refractive error which was adequately corrected with his present glasses. He had a history of an episode of inflammation in his left eye in 1970 while attending the University of Alberta. The cause was apparently never

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determined. He was in hospital for seven weeks and treated with Prednisone. His vision remained blurred in

the eye since this time. On examination the patient was found to have an oval area of scarring at the left macula and a few veils in the vitreous. This appeared to be an area of scarring secondary to the previous inflammationary disease, although it is difficult to be absolutely specific as to the diagnosis. It appeared totally quiescent and the right retina was completely clear. Otherwise the ocular examination was within normal limits."

Miss Butterill applied to VIA Rail on September 14, 1978 and obtained employment as a waitress. Prior to taking her medical examination she completed her training period of one week and went on several runs working as a waitress. After approximately two and one-half weeks subsequent to her training programme, during which time she had two runs to Toronto of five days each and one run to Vancouver of six days, working as a waitress, she went for her medical examination. The test was administered and it was reported that she had 20/25 and 20/400 vision. She then went to a Dr. Langer who was an ophthalmologist and whose test indicated that she had a 20/25 minus 2 and 20/400 but a corrected vision of 20/25 and 20/200. She was then told by VIA Rail that she could not be permanently employed because she did not meet the medical standards. Miss Butterill testified that she was born with one "bad eye" and does not wear glasses.

Mr. Zane Wozney was a steward in charge of the crew on Miss Butterill's first trip from Winnipeg to Toronto and as such was responsible for filling out assessment reports for employees. In his assessment report he states that Miss Butterill's appearance is average, her attitude is average, her diligence is average, her cooperation is above average and further states that she was very nervous, tries to rush too much but "give her a couple more trips and she will be very good". (Exhibit C-13)

Mr. Cyril Wolfman worked as a Department of Highways' flagman and also worked for VIA Rail from May, 1973 to September, 1973 as a porter, and from December, 1973 until January, 1974 when he resigned to go back to University. In addition, he worked for VIA Rail from April 16, 1974 to September, 1976 as a full-time employee. His duties were as a porter, pantry man and third cook.

Mr. Wolfman had two medical examinations with VIA Rail at the time he was first applying in May, 1973, and was able to pass the second examination. When he returned to VIA Rail in December, 1973 there was no subsequent eye examination. During the period that he was permanently employed by VIA Rail he went in for periodic medical examinations which consisted of blood tests but no eye examination. During his time with VIA Rail Mr. Wolfman went on

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some 50 to 60 trips working as a porter, pantry man or third cook. In relation to working in a diner, the diners are small and it is a crowded kitchen. One has to be aware of employees on either side and be careful not to break things. (Evidence page 308) During

this period of time Mr. Wolfman had no accidents and received no complaints as to his work.

In 1979 Mr. Wolfman, who was attending University, again applied to VIA Rail but failed to pass the eye examinations to the standards set by VIA Rail. At this examination the results indicated that without glasses the right eye is 20/100 and the left eye is 20/70 and with glasses it is 20/70 for the right eye and 20/25 in the left. (Exhibit C-15)

Therefore, Mr. Wolfman was not hired in 1979.
It is seen, therefore, that in all three instances, the complainants were refused employment by VIA Rail due to the fact that their eyesight did not meet the standard set by VIA Rail for the job category.

VIA Rail Canada Inc. has a job description for waiters which sets out qualifications, status, general responsibilities and specific duties and responsibilities which was filed as Exhibit C-4. The same type of description was filed for pantry men and sleeping car porters.

Also filed was a CN description of regulations and standards for visual acuity, colour perception and hearing. It is common ground between Counsel that these rules apply to VIA Rail. (Evidence page 30) In relation to visual acuity, there are two standards, one for entrance to service which is:

"Not less than 20/30 in one eye and not less than 20/40 in the other with or without glasses. Near vision #2 with or without glasses. Colour sense required as above."

The second standard relates to promotion or re-examination. These standards are

"Not less than 20/40 in one eye and not less than 20/70 in the other with or without glasses, or 20/30 in one eye regardless of vision in the other, with or without glasses. Near vision #2 with or without glasses. Colour sense required as above."
The Canadian Human Rights Act states in Section 2
"The purpose of this Act is to extend the present laws in

Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:

(a) Every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being

hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, sex, age or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap;"

Section 10 of The Canadian Human Rights Act provides that
"10. It is a discriminatory practice for an employer ...
(a) to establish or pursue a practice ... that deprives ... an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination".

Section 14 (a) of The Canadian Human Rights Act provides
"14. It is not a discriminatory practice if
(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement".

The issue before this tribunal, therefore, is to determine whether the standards set by VIA Rail in relation to visual requirements contravene The Canadian Human Rights Act. I am conscious that this is the first time this issue has been before either a tribunal or the Courts and the decision of this tribunal may have widespread effects with respect to employment throughout Canada. In my opinion, a balance must be struck between undue interference of legitimate employment standards and requirements, on the one hand, and the pursuit of Parliament's intent as evidenced by The Canadian Human Rights Act on the other.

I was greatly assisted in this task by both the oral and written arguments of Messrs. Juriansz and Allen.

DECISION
Statutory Interpretation

What principle should apply in interpreting The Canadian Human Rights Act. Historically three basic approaches to statutory interpretation have been taken by the Courts. Chronologically the first of these was the "mischief" approach. The mischief rule as set out in Heydon's case HC (1584) 3 Co. Rep. 7, represented the extreme in the technological approach to statutory construction and was predicated upon factors unique to early legislation: the eclectic nature of drafting, the express use of statutes to correct individual problems with the Common Law, the lack of a general statutory context into which particular legislation should be slotted. The mischief rule can be summarized in the idea that judges must first divine the mischief towards which a statute was directed; then, notwithstanding the language of the statute, they would hold all that presumably came within the

statute, they would hold all that presumably came within the intent of the enactment to also fall within its letter. In other words the object of the Act was controlling and reference to this object could be had to modify what was actually said by Parliament.

The second approach to construction is what became known as the literal rule. As expressed in Sussex Peerage Case (1844) 11 C.L. and F. 85, this approach reflected the revolt of the Courts against judicial legislation, and occurred at the time of increasing activity by Parliament. The literal rule can be see as stating that only the words of a statute should be examined and if they are clear, they must be given their natural effect, whatever the consequences, the object of a statute may be considered only if the words themselves are unclear.

The third general approach to statutory interpretation is set out in Grey v. Pearson (1857) 6 HLC 61. This approach, the so-called "golden rule" reflected a temporing of the literal approach and resulted from the judicial realization that the bulk of statutory material and the increasing complexity of statutes would occasionally produce errors in drafting leading to inconsistency, conflict and internal disharmony. Hence the "golden rule" counselled judges to give language its ordinary meaning unless inconsistency, absurdity or disharmony would result.

Today, however, Courts are more consistent and uniform in their approach to interpretation. It is recognized that, taken in isolation, none of these distinct approaches reflects the correct method of statutory construction and interpretation. Rather the modern approach results from the recognition that each expresses a different aspect of the same process. In fact the modern approach can be expressed as a synthesis of these rules.

An authority often cited in the decisions of Canadian

Courts is The Construction of Statutes, Dreidger E.A., Butterworths 1974. It is stated at page 2

"The object and purpose of an Act may be invoked not to change what was said by Parliament as was done in the time of Heydon’s case, but to understand what was said. The object of a statute and its factual setting are always relevant and not merely in the case of doubt as in the time of Sussex Peerage. The "rule" in Grey v. Pearson means only that the literal meaning may be modified where that meaning results in some internal disharmony, and not just where it leads to consequences considered to be absurd or unjust".

At page 67 Dreidger states the basic principle that applies today and which is accepted by both Counsel

"Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament".

Section 11 of the Interpretation Act R.S.C. c. i-23 provides

"Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

Turning now to the interpretation of The Canadian Human Rights Act, the object of the Act is expressly set out in Section 2. As such, it is a substantive provision and not merely a preamble or inferred object. Section 2, therefore, must be read as part of reading the Act as a whole. Section 3 sets out a variety of "prescribed grounds of discrimination." It should be noted that such prescribed grounds do not negate all differentiation between individuals. Also even among prescribed grounds there are differences in activity to which the proscriptions apply such as differentiation on the basis of physical handicap which is discrimination only in matters relating to employment.

Section 4 provides that only "discriminatory practices" can be the subject of a complaint under Part III of the Act.

Sections 5 through 13 set out various situations in which differentiation on a proscribed ground will constitute a discriminatory practice.

Certain sections of the Act do, however, stipulate exceptions. These are sections 9(2), 11(3) and 13(2). For example, under section 9(2), if an employee organization discriminates against one of its members by expelling him on the

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basis of age, this will not be considered discriminatory practice if the age in question were the normal retirement age.

Finally Part I of the Act contains a series of provisions which explicitly describe conduct which is not to be considered a "discriminatory practice". Sections 14 through 17 contemplate a variety of situations which are declared to not fall within the provisions of section 5 through 13. It may be argued that these are not to be treated as true exceptions but rather describe situations which simply are not contemplated by the prohibitions set out in sections 5 through 13.

Therefore in construing The Canadian Human Rights Act I adopt the criteria of statutory construction propounded by

Dreidger at page 67 and to which I referred to earlier. In reading the Act as a whole in my opinion the object of the Act is not to create a presumption that differential treatment per se constitutes discrimination and the Act does not prohibit all discrimination, but its object is to prevent and eliminate certain discriminatory practices. Some forms of differentiation, for example those resulting from the invocation of bona fide occupational requirements, are expressly authorized.

In relation to employment, sections 7, 11 & 14 make it clear that the Act is not oriented towards compelling employers to treat all applicants or employees identically. The Act is directed towards ensuring fundamental equality in employment consistent with other goals such as eliminating incompetence, lack of safety, inefficiency and job frustration. The provisions of these sections, as well as sections 8, 9, 10, 16 and 17 illustrate that the Act contemplates the special nature of the employment market place and is structured to take this into account.

ONUS

It was accepted by the Canadian Human Rights Commission through its counsel that the onus of proof in human rights cases is on the Commission to establish, on a balance of probabilities, that a contravention of the Act has occurred. It was common ground that there has been, in the words of section 2 of The Canadian Human Rights Act "discriminatory employment practices based on physical handicap" in the present factual situation. However this is not sufficient to establish that a contravention of the Act has occurred. In order for a contravention of the Act to occur a "discriminatory practice" must have taken place. Pursuant to section 14 it is not a discriminatory practice if

"any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to

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any employment is established by an employer to be based on a bona fide occupational requirement".

In Canadian Human Rights legislation only the Federal and Prince Edward Island Acts expressly place the onus of establishing a bona fide occupational requirement on the employer. In all the other provinces the legislation simply allows an exception for a bona fide occupational requirement without dealing with onus of proof. I find, therefore, that pursuant to The Canadian Human Rights Act there is a statutory onus of proof for the employer to establish "bona fide occupational requirements".

This onus is not a criminal onus but should represent a high degree of balance of probability due to the fact that if invoked it deprives an individual of his or her right to work.

MEANING OF BONA FIDE OCCUPATIONAL REQUIREMENT

Turning now to the very difficult problem regarding what constitutes a bona fide occupational requirement I adopt the

decision of Urie J in Re Harris (1976) 1 FC 84 (Fed. C.A.) wherein he was interpreting the Female Employees Equal Pay Act and stated at page 94

"The fact that the legislation may be viewed as remedial in no way affects the proposition that the natural, literal and grammatical meaning ought to be attributed to the words of the section ..."

In considering what meaning should be given to the words "bona fide occupational requirement" I adopt the following passage of R.L. MacKay, Esq., Q.C. which was approved by Mr. Justice Arnup of the Court of Appeal of Ontario in the case of Re Ontario Human Rights Commission and City of North Bay (1977) 17 O.R. (2d) 712.

Mr. MacKay stated in his inquiry decision
"'Bona fide' is the key word. Reputable dictionaries whether general (such as Oxford and Webster) or legal (such as Black) regularly define the expression in one or several of the following terms, viz, honesty, in good faith, sincere, without fraud or deceit, unfained, without stimulation or pretense, genuine. These terms connote motive and a substantive standard. Thus a person may honestly believe that something is proper or right even though, objectively, his belief may be quite unfounded and unreasonable. Applying this solely subject standard I have no doubt whatsoever that the Corporation in enacting by-law 2085 and negotiating the collective agreement upon which it is founded were acting honestly, as opposed to maliciously, deceitfully or for some oblique or ulterior purpose in disguise.

However, that cannot be the end of the matter or the sole meaning to be attributed to 'bona fide' for otherwise

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standards would be too ephemeral and would vary with each employer's own opinion (including prejudices) so long as it is honestly held, of the requirements of a job, no matter how unreasonable or unsupportable that opinion might be. Thus an airline may sincerely feel that its stewardesses should not be over 25 years of age. However if it requires such a limitation as a condition of employment or continuing employment I would have no doubt that such limitation would not qualify as a bona fide occupational qualificational requirement under the exemption created by section 4(6). Why? Because, in my opinion, such a limitation lacks any objective basis in reality or fact. In other words, although it is essential that a limitation be enacted or 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 should emphasize in the strongest of terms that in the present situation there is no allegation that VIA Rail were acting "maliciously, deceitfully or for some oblique or ulterior purpose in disguise". On the contrary, in my opinion the evidence clearly shows quite the opposite.

Therefore, one must examine the evidence in relation to the above definition and ascertain whether or not VIA Rail has established a "bona fide occupational requirement" based on the practical reality of the work-a-day world and of life. The testimony of Mr. Alex McQuaid who was a Supervisor of Employee Services, On-board Services Department, Department of Human Resources, VIA Rail and who had many years of experience in the railroading industry, both with the CN and with VIA Rail illustrates one of the fundamental problems in relation to the standards set by VIA Rail.

Q. Am I correct in my understanding of what you have said? It is not the medical Department which makes up the standards?

A. No.
Q. But administers them.
A. They administer them.
Q. These standards are made up by some other department.

A. Right.

Q. The Operations Department?
A. With regard to the working conditions, yes. The medical standards were established some time ago. I would not want to, at this time, say who actually established them - whether it was the Canadian National Medical Department or who. I could not say.

Q. Could you find out for us and will you be here tomorrow?

A. I will, yes.
Q. But these standards were adopted by VIA Rail when it came into being?

A. It was.
Q. Now, were they looked at, at all; were they examined?

A. I could not really say. I think they would have been examined but there again, I could not say.

Q. Well, are you aware of any medical studies which were done?

A. No.
Q. Any survey of current medical literature?
A. No.
Q. Were any ophthamologists retained as consultants?
A. I could not say.
THE CHAIRMAN: I am sorry, I did not hear your answer.
THE WITNESS: I could not say.
BY MR. JURIANSZ:
Q. Were any comparisons made with other industries, similar industries, in their eyesight requirements?

A. There again, I could not say.

Q. Was the railroad industry in the United States contacted and comparisons made with what their requirements are?

A. I could not say.
The testimony of Dr. Walker who was an expert witness of VIA Rail

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and who stated on cross-examination was as follows:
Q. Now, can you tell us where these standards came from?

A. Well, as far as I know, they were originated in Montreal, which is our regional head-quarters. Doctor Bond, is the Regional Medical Officer in that area - - the date on it is 1967 as far as I know, there has been no changes since that time. So he and a panel of doctors there, presumably ...

Q. Is it possible that these standards existed before, and ’67 was simply a new ...

A. I have no idea. I don’t know if they were revamped or not.

And further on in his testimony
Q. Up to that point you had not turned your mind to the appropriateness of the rules?

A. Certain rules, probably. Yes. Not necessarily visual rules, and not necessarily visual rules here. But, I think that anything that we were considering, really didn’t have any bearing on Mr. Foreman’s case.

Mr. Martin Cahill was called by VIA Rail. His position was Manager, Services Design, On-board Services, VIA Rail Canada. Mr. Cahill had a total of 34 years experience in the railway industry. In his examination in chief Mr. Cahill testified as follows:

Q. Did you give any consideration to up-grading or reviewing the visual medical standards -- if I could use that term, that were in effect prior to the transfer?

A. No. On-board Services medical standards are not part of our responsibility. Strictly the service end. The rules and regulations that pertain to service.

Dr. McCulloch, who was called by VIA Rail, gave no information as to how these standards were initiated or why they were at their present level. The last expert that VIA Rail called was Dr. Octavius Eggerston who was the Regional Medical Officer for Canadian National Railways, VIA Rail, for the Prairie Region. He testified that in his opinion basically the standards were set in relation to standards that had been set by the AAR, the American Association of Railways, and by their medical - - by the medical section of the AAR which is a body of physicians in the railway transportation business. Dr. Eggerston thought the standards were reasonable but in cross-examination he thought a requirement of

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20/50 in both eyes was also reasonable for the jobs involved. He went on to say in cross-examination that a requirement of 20/40 in one eye and no vision in the other was worthy of study.

In my opinion, therefore, there is no satisfactory evidence as to how the standards were inaugurated and whether or not they have been updated recently or whether or not tests were evolved in consultation with ophthamologists in relation to the medical standards as they exist.

Taking the standards as they exist, are they "bona fide" as defined above in relation to the "occupational requirement"?

One should not underestimate the demanding nature of the job as waiter and pantryman and porter on board a passenger train. One works long hours on a moving train with very little sleep and in close quarters as part of a team serving the public all the while carrying trays up to four car lengths. There are certain dangers to passengers inherent in the job such as when the waiter is pouring hot coffee or assisting passengers embarking or disembarking. It is obvious that in order to do the job, one has to have a certain level of vision - the problem is are the levels set by VIA Rail "bona fide" in the sense used by Professor MacKay based on the practical reality of the work-a-day world?

Evidence was adduced as to the importance of binocular vision in relation to depth perception at close distances which was defined as distances of less than 20 feet. It was ascertained that the standard test used by VIA Rail was the Snelle chart and that this test does not in fact test binocular vision.

Dr. John Crawford was called on behalf of the Human Rights Commission. His qualifications were impressive and his particular field of expertise is in the specific area of ophthalmology and depth perception. Dr. Crawford testified that, in his opinion, individuals who have adapted to a monocular vision situation have essentially as good depth perception as binocular individuals.

Q. So, as I understand, if I have got one eye, and I need two eyes to help judge distance, I can get some of that effect by moving my head?

A. That is right.

Q. And you are saying that somebody who has had one eye from birth, or who has got used to having one eye, learns to do that automatically, and subconsciously, so we might not even notice.

A. That's right; you wouldn't even notice them doing it; and they wouldn't have any difficulty in

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judging distance and depth.
Q. All right. Now, have there been any studies, or in your expert opinion, well, how much of depth perception is made up of binocular vision, in the clues that we have to judge distance, depth perception? How much of those clues are binocular, how much are light, shade, size and these other clues?

A. Certainly by far the largest proportion of our depth perception are monocular dues that we have learned. You know, I would say that the people -- the binocular clues form a very small percentage part of our depth perception. It works more for close, your binocular clues, than for far.

But, there are an awful lot of people in the world are monocular. These children that I was telling you about that have crossed eyes, and we straighten them out, most of those children never learn to use their eyes together; and they use one eye at a time. They just use one and shut off the other. They go back and forth. They do not have any difficulty. They could get to be good tennis players; and do fine work. ...

Q. Now, I do not want to press you, on an earlier question, I asked you how much of our clues as to depth were binocular, and you said, 'a large part'. Can you qualify that a little more?

A. Duke-Elder states that probably 20% of our clues are binocular and the rest of them are monocular.

Q. Who is Duke-Elder?
A. Duke-Elder is a textbook written by Duke Elder.

Q. A standard ophthalmology ...
A. A standard ophthalmology text.
Dr. Crawford then went on to give examples of dentists who practise their profession who have only one eye, surgeons and indeed eye surgeons who perform intricate operations with only one eye.

Dr. Crawford went on to testify that he had read the job descriptions of waiter/waitress, pantryman and porter and there were no duties there that in his opinion a one-eyed person could not perform.

Turning back to the definition of "bona fide" referred to above, and applying the words "based on the practical reality of the work-a-day world and of life" in Professor MacKay's definition,

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Dr. Crawford testified
Q. I am now showing you a booklet entitled "Canadian CN Regulations and Standards", part of which deals with visual acuity, and on page 18, are set out the standards for waiters, porters and pantrymen, car checkers and other positions, but on entrance to service the requirement is:

"20/30 in one eye and not less than 20/40 in the other, with or without glasses; ..."

In your opinion, are those reasonable standards for the positions?

A. Not for that position, no. I mean, I think that is too strict.

Quite properly, VIA Rail, through its witnesses, indicated that a safety factor has to be built into standards due to the fact that they apply to many hundreds of applicants. The testimony indicated that the present standards were "safe". However, in my opinion, that does not answer the underlying question before this Board of Inquiry. Obviously standards which required perfect eyesight for every job would also be "safe". The question to be answered is whether or not these standards are "bona fide" based on the practical reality of the work-a-day world. In my opinion, there is no evidence to establish that this is the case. The experts testifying on behalf of VIA Rail would merely state that they were "reasonable" but there was no scientific basis to back up this contention. Also, expert testimony was heard on behalf of the Human Rights Commission that the standards were too strict.

Dr. John Clement McCulloch, who was testifying on behalf of VIA Rail is an ophthalmologist and is the head of the Toronto General Ophthalmology Department and head of the University Ophthalmology Department. In cross-exmination he agreed with Mr. Juriansz, Counsel for the Human Rights Commission, that the person with monocular vision who has adapted to that condition with no experience on a train, would be safer than an experienced person working on a train who had recently lost one eye.

Q. Well, we will assume that the person with one eye from birth has never worked as a waiter but has ridden on buses and on subways and has had experience in a waiting room in a restaurant. But, he is 24, 25 years old, he has lived an ordinary life and wants a job as a waiter on the train.

The other fellow may have worked for one year on the train, but just recently lost the eye, the week before.

A. You know, as a clinician I would sort of judge the

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individual. If he was just on a re-examination category and he came within this -- I thought I should short of declare him. In that sense I would probably look at him and say, he meets the re-examination category or he does not meet the re-examination category.

Q. Well, I do not know if you understood me. You can only hire one person. Who would be safer? The person who was born with one-eye and has no experience on the train, or the person who has experience on the train and recently lost one eye?

A. I am sure the personnel would probably choose the man with experience.

Q. The personnel?
A. You are sort of saying, are apples nicer than oranges? It depends on whether you like apples or oranges. I mean ...

Q. Whose vision would be better -- depth perception?
A. You see, the one man wouldn’t have any vision in one eye so I think his visual acuity and so forth -- presumeably the other guy would be all right. You see it just becomes a matter of ... You see how -- he has only got one eye. He can’t have any stereopsis.

Q. No, neither one of them would have any stereopsis, but they would have varying degrees of depth

perception. I am suggesting that the person with the adapted vision, who has grown up having one eye would have more depth perception, because he has learned to use ...

A. You are really meaning in life, he would do a little better. That's what you mean. Stereoscopic tests multiply ...

Q. But in life you would do better?
A. That is what you are saying.
Q. Yes.
A. I guess they would. ...

In summary, therefore, the expert medical evidence before

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the Tribunal did not establish, to my satisfaction, that based on the practical reality of the work-a-day world - in this case the duties of a waiter/waitress, pantryman and porter, that the standards set up by VIA Rail had been set up in such a way as to ensure that they were "bona fide". In the case of two of the complainants they had actually worked as a waiter/waitress and porter and fulfilled the job satisfactorily. The test used by VIA Rail does not test for binocular vision nor does it take into consideration any adaptation in relation to monocular vision. The standards themselves set forth a dual criteria, one for entrance requirements and another for promotion and re-examination. The explanation given was that the experienced person would perform adequately and safely with a less stringent eyesight requirement. However, an expert called by VIA Rail, Dr. McCulloch, on cross-examination quoted above does not agree with this thesis.

DECISION AND ORDER
I find that VIA Railway Canada Inc. have contravened The Canadian Human Rights Act specifically paragraphs 2 and 14(a) in that they have refused to hire the complainants based on a physical handicap and that the standards set by VIA Rail are not "based on a bona fide occupational requirement". The fact this was not the intention of VIA Rail is not relevant if "discriminatory practices" have in fact taken place. (See A.G. Alta. v. Gares (1976) 67 D.L.R. (3d) 635) The onus in such a situation falls upon VIA Rail to justify their standards as "bona fide occupational qualifications" and I find that they have not done so.

Considering all circumstances of this case I do not think it appropriate to award general damages. The essential remedy is for VIA Rail to comply generally with The Canadian Human Rights Act and to comply specifically with respect to the complainants.

Order
For the foregoing reasons this Board of Inquiry orders that VIA Rail

(a) initiate a review of the visual standards in relation to requirements for waiter/waitress, pantryman and porter in conjunction with qualified experts in the field and using current scientific data available.

VIA Rail's expert, Dr. McCulloch, suggested in his testimony that this is what he would advise.

Q. Looking at the standards before you, would you without further ado recommend a change at this time?

A. No, I would not touch that at all, as it is. In

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the sense of you asking me quickly, what will I do. I wouldn't reply at all. What I would advise you was to set up -- shall I say find two or three people who are knowledgeable in this field, and ask them to perform a Board or a group and get your personnel to put in input as to what the current job descriptions are and then say, what the current experience was and whatever other data was available. Over the course, there is quite a time in looking at all aspects, to come to a decision if you want to change the standards.

Q. In other words, you would not arbitrarily reduce that standard, without considerable amount of research?

A. I would look it over carefully. I might very well reduce it, or change it, but -- or make it -- I don't think it likely. I think that is a good standard so I don't think I'd be likely to make it tougher, but certainly would look it over and get what total input I could to make the decision.

Q. Does that standard, that exists now, strike you as being far too severe for someone who might want to get engaged in that type of activity?

A. I don't know, but I think it would be worthy to look it over again and see.

(b) It was suggested by Mr. Allen in his argument that if I were to find a breach of The Canadian Human Rights Act VIA Rail would be left without any standards. Therefore, I would order that the standard as presently exists in relation to promotion and re-examination be applied in all cases until the results of the re-examination ordered in paragraph (a) are determined. This would be consistent with Dr. Crawford's expert testimony that monocular individuals who have adapted

would be quite capable of performing the duties of waiter/waitress, pantryman and porter. This would also be consistent with Dr. McCulloch's testimony as quoted earlier. This also would not, in my opinion, impair the "safety factor" nor present a danger to the public.

(c) In relation to Marylin Butterill, VIA Rail be ordered to offer her a job as a waitress upon the next position becoming available in Winnipeg, provided that she is able to pass the visual standards currently in force in relation to promotion and re-examination.

(d) With respect to Mr. Cyril Wolfman, that VIA Rail offer him a position as porter for the summer months provided that he is able to pass the visual standards currently in force in relation to promotion and re-examination.

(e) In relation to Mr. David Foreman, that VIA Rail offer him a job as pantryman/waiter provided that he is able to pass the visual standards currently in force as they relate to re-examination and promotion.

DATED at Edmonton, Alberta, this 9th day of April, 1980.

F.D. Jones, Q.C.
Chairman