TD- 8/ 86 DECISION RENDERED NOVEMBER 27, 1986.

IN THE MATTER OF: The Canadian Human Rights Act, S. C. 1976- 77, C. 33, as amended;

AND IN THE MATTER OF: A Hearing before a Human Rights Tribunal Appointed under S. 39 of the Canadian Human Rights Act.

BETWEEN: MICHAEL NOWELL, complainant, - and

CANADIAN NATIONAL RAILWAY LTD., respondent.

DECISION OF THE TRIBUNAL

HEARD BEFORE: JAY C. PROBER

APPEARANCES:

Rene' Duval and Anne Trottier, Counsel for the Complainant and the Canadian Human Rights Commission.
Donald Kruk and Paul Antymniuk, Counsel for the Respondent, Canadian National Railway Ltd.

Heard in Winnipeg, October 21, 22, 23, 31 and November 1, 20, 21, 22, 1985 and January 22, 1986.

> This decision relates to a complaint launched by Michael Nowell against Canadian National Railway Ltd. on October 31st, 1979 alleging discrimination on the basis of a physical handicap, contrary to the Canadian Human Rights Act.

The decision will be rendered under the following headings: 1) Facts; 2) Issues; 3) Positions of the Parties; 4) Findings. 1. FACTS

Michael Nowell, 34 years of age, has been employed with Canadian National Railway Ltd. (hereinafter referred to as "C. N. R.") for 15 years. He began full time employment in June, 1971 as a trainman. On December 13th, 1971 he was diagnosed as a diabetic and from that point on he has been on a diet of 2100 calories a day balanced by 30 unites of lente insulin. It is

significant that he is an insulin taking diabetic. As a result of this condition, Mr. Nowell was advised by his employer that he could not continue as a trainman. However, he continued his employment with C. N. R. as a clerk. At the time of the hearing of this matter, he was a senior Clerk in the Intermodal Department of C. N. R.

Mr. Nowell requested, by letters dated April 23rd, May 14th, June 13th and August 30th, 1979, to the General Superintendant Transportation, the Regional medical officer, the Vice- President and the President of C. N. R. respectively, that he be allowed to return to work as a trainman. He was refused on the basis of his medical condition.

> - 2 He then lodged his complaint against C. N. R. pursuant to the Canadian Human Rights Act on October 31st, 1979 alleging discrimination on the basis of a physical handicap.

Mr. Nowell was an impressive witness. He gave his evidence in a straightforward and forthright manner. His evidence and his appearance gave the impression of a physically fit man who was capable of looking after his 2 young children, who played soccer, did a lot of swimming and gardening.

In testifying about the effects of his medical condition on him, Mr. Nowell said that he had never in 15 years as a diabetic suffered a severe reaction. He had never fainted, never had a loss of memory and had never been hospitalized as a result of his being a diabetic. He suffers mild hypoglycemic reactions which he can anticipate and control.

Mr. Nowell gave the impression of a well- controlled diabetic who, in 15 years as a diabetic, has never been incapacitated in any way. In giving evidence, he was articulate, alert, intelligent and sensible.

Linda Nowell, the wife of the complainant, also testified. She corroborated the fact that her husband was a well- controlled diabetic who had not, to her knowledge, experienced any instances of fainting, loss of balance, seizures or confusion due to his diabetes. Mrs. Nowell also testified that she never had to help her husband with respect to his diabetes.

Mr. Nowell's physical fitness was further supported by an expert in physiology and fitness. Dr. Elizabeth Ready, a Professor of Physical Education at the University of Manitoba tested Mr. Nowell, and ranked him in about the 62nd percentile in terms of physical fitness (based on the Canadian Standardized Test of Fitness Operations Manual). She testified that this meant Mr. Nowell was slightly above average for his age group in the

> - 3 Canadian population. In other words, he did as well as 62 out of 100 males of his age. Dr. Ready also commented on the energy expenditure in kilocalories required to perform certain of the functions of a trainman. She explained how that expenditure could be compensated by the intake of carbohydrates. While her evidence was qualified by thorough cross- examination, she was not shaken in her assessment of Mr. Nowell's

physical fitness being slightly above average. However, she did admit that she had never done any physical fitness studies dealing in particular with diabetics.

The duties of a trainman were well presented by C. N. R. 's counsel, primarily through 2 films and the evidence of Mr. Ted Randles, Trainmaster of the Assiniboine Region. Those duties are quite rigorous and physically demanding. They could include flagging, coupling and uncoupling traincars handling heavy equipment, walking great distances, braking, and climbing side ladders on moving box cars. These duties become particularly strenuous in the sub- zero temperatures of the Canadian winter. Often times the hours are irregular.

Trainmen must submit to a medical examination every two years. According to the evidence of Dr. Eggertson, C. N. R. 's medical officer, Mr. Nowell was never examined or tested by C. N. R. to determine if he were physically capable of doing the job of trainman.

The thrust of the Respondent's case on the facts was presented through Dr. Clayton Reynolds, an expert in diabetes. Dr. Reynolds explained diabetes mellitus. He explained the difference between Type 1 (insulin dependent) and Type 2 diabetics. He discussed hypoglycemia and hyperglycemia explaining the difference.

> - 4 Through Dr. Reynolds several medical studies were introduced dealing, inter alia, with the various reactions and symptoms that diabetics can suffer. He explained the difference between adrenergic symptoms (the less severe early warning symptoms) signalling hypoglycemia and the more severe neuroglycopenic symptoms. Instances of severe hypoglycemic reactions were primarily due to patients' errors, that is, too little food for the amount of insulin injected without adjusting for other factors.

Dr. Reynolds testified that 8 - 26% of diabetics on insulin are "subject to" major insulin reactions. He did not testify that they in fact suffered those severe reactions, but were only "subject to" such reactions.

Dr. Reynolds clearly understood the duties of a trainman. He was of the view that the erratic hours of a trainman, the possibility of varying weather conditions, and the inaccessability of food seriously impaired the ability of a diabetic trainman to control his diabetes.

It was made clear by Dr. Reynolds that control of diabetes was the key factor in assessing whether a diabetic was suitable to perform a particular function in industry. In a study entitled "Controlled Diabetics Make Functional Workers" the author Lain Tetrick stated:

"Control is the key word in trying to fit the diabetic into the work force. Without control, or with secondary complications, the diabetic is a serious employment risk."

It is significant to note again that Mr. Nowell appeared to be an extremely well controlled diabetic who was extremely fit. There was no evidence to the contrary whatsoever.

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- 5 2. ISSUES (1) IS C. N. R. 'S POLICY, WHICH EXCLUDES INSULIN DEPENDENT DIABETICS FROM THE POSITION OF TRAINMAN, DISCRIMINATORY AND THEREFORE CONTRARY TO SECTIONS 7 AND 10 OF THE CANADIAN HUMAN RIGHTS ACT?

Section 7 of the Canadian Human Rights Act provides: "It is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ an individual or, (b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination." Prohibited grounds of discrimination, according to Section 3(1) of the Act include race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted.

Although the complaint in this case alleges discrimination on the grounds of "physical handicap" it is, more accurately discrimination on the basis of a purported disability which is being considered.

Section 10 of the Canadian Human Rights Act is also relevant It provides:

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

(a) to establish or pursue a policy or practice, or > - 6 (b) .....

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

(2) IS C. N. R. 'S POLICY OF EXCLUDING INSULIN DEPENDENT DIABETICS FROM THE POSITION OF TRAINMAN NOT A DISCRIMINATORY PRACTICE BECAUSE IT IS BASED ON A BONA FIDE OCCUPATIONAL REQUIREMENT?

The test of whether any refusal or exclusion in relation to any employment is a bona fide occupational requirement is set out by the Supreme Court of Canada in the case of Ontario Human Rights Commission V. Borough of Etobicoke (1982), 132 DLR(3d) 14. In speaking for the Court Mr. Justice McIntyre held:

"To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interest of the adequate performance of the work involved with all reasonable dispatch, safety and economy

and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition, it must be related in an objective sense to performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

The answer to the second question will depend in this, as in all cases, upon a consideration of the evidence and of the nature of the employment concerned." (at pages 19 - 20)

It is important to note that in the Etobicoke case the Supreme Court of Canada made it clear that a human rights tribunal, or a human rights inquiry and a court must consider whether the evidence adduced indicates there

> - 7 is a sufficient risk of employee failure in the category of employees being discriminated against to justify the discriminatory practice as a bona fide occupational requirement. The sufficiency of the risk is therefore an issue.

In K. S. Bhinder and the Canadian Human Rights Commission v. C. N. R. (1986), 7 C. H. R. R. D/ 3093 the Supreme Court of Canada further refined and discussed the concept of a bona fide occupational requirement. Mr. Justice McIntyre, speaking for the majority, rejected the idea of individual application of a bona fide occupational requirement. A bona fide occupational requirement is not susceptible to individual application he held. Mr. Justice McIntyre stated:

"A condition of employment does not lose its character as a bona fide occupational requirement because it may be discriminatory. Rather, if a working condition (emphasis mine) is established as a bona fide occupational requirement, the consequential discrimination, if any, is permitted - or probably more accurately - is not considered under S. 14(a) as being discriminatory."

It is particularly important to note that Mr. Justice McIntyre in the Bhinder case is dealing with a "working condition" as a bona fide occupational requirement.

In the case at bar this is not the situation. The so- called occupational requirement in the case at bar excludes a whole class of individuals from performing a certain occupation. It does not establish a working condition as such.

There is a difference between an occupational requirement which sets down a particular working condition (i. e., wearing a certain piece of equipment on the job) that applies to all employees and an occupational requirement which excludes a whole group of individuals from a particular job because of a certain physical disability.

> - 8 In the case before this tribunal, the occupational requirement is not directed at establishing a working condition for the job per se, but rather to a specific or identifiable group.

In Bhinder, the job requirement or working condition (as Mr. Justice McIntyre called it) did not vary, that is, everyone was required to wear a hard hat.

However, where the occupational requirement excludes a whole class of individuals with varying degrees of disability within the class (according to the medical evidence) there should be, in the interests of fairness and justice, individual assessment within the group that is excluded to determine if there is sufficiency of risk to justify the exclusion of that particular employee from the job.

In the Bhinder case Mr. Justice McIntyre in rejecting the individualization of bona fide occupational requirements held further that:

"To conclude then that an otherwise established bona fide occupational requirement could have no application to one employee, is not to give S. 14(a) a narrow interpretation; it is simply to ignore its plain language. To apply a bona fide occupational requirement to each individual with

varying results, depending on individual differences, is to rob it of its character as an occupational requirement and to render meaningless the clear provisions of S. 14(a)."

It is understandable that an occupational requirement which establishes a "working condition" should not be applied individually. In the Bhinder case the job requirement was not directed at Sikhs; it established a "working condition" (namely, the wearing of hard hats), which was applicable to all employees.

However, in this case C. N. R. 's occupational requirement is directed at > - 9 all insulin dependent diabetics as a particular group. It does not establish a working condition as such in the same sense as the Bhinder case. It rather excludes a group of individuals from a certain occupation because of a particular medical condition.

The bona fides of the occupational requirement, in the Bhinder case can be established objectively by considering the validity of the job requirement or "working condition" itself. The bona fides of the occupational requirement in this case or in any case which excludes a whole group or class of so- called "disabled" persons cannot be assessed or established without assessing or establishing that each individual member of that group or class presents a "sufficient risk" to justify the exclusion.

Bhinder lays down the principle that once you establish the bona fides of the occupational requirement it should not be applied individually. But you cannot establish the bona fides of an occupational requirement which excludes a whole class of individuals from a job unless and until you make an individual assessment. Therefore, this case is different than Bhinder.

Suggesting that there need be such an assessment is not to suggest that there is a duty to accomodate. There is, however, a duty to establish the bona fides of the occupational requirement by assessing the degree of risk of each individual. This is necessary because there is such a wide variation of the risks and abilities between the individuals within the class or group excluded. The safety factor varies so much between individuals within the

group according to the medical evidence. > - 10 3. POSITIONS OF THE PARTIES

(1) Position of the Complainant, MICHAEL NOWELL The complainant argued that C. N. R. 's blanket policy of excluding insulin dependent diabetics from the position of trainman was a prohibited discriminatory practice within the meaning of the Canadian Human Rights Act. It was further argued that whether C. N. R. intended to discriminate was irrelevant.

The complainant's position was that the discriminatory practice could not be defended as a bona fide occupational requirement in part because C. N. R. failed to assess Michael Nowell's capability to do the job as an individual. It was pointed out that in 15 years, Mr. Nowell never had an incapacitating reaction; that he was not a safety risk; and there was no sufficiency of risk in terms of the Etobicoke case so as to justify the occupational requirement as being bona fide.

The complainant argued he was entitled to damages, being the difference between what he earned and what he would have earned as a trainman (based on the average salary) from April,

1979 to the date of this tribunal's decision (if it were decided in favour of the complainant). The complainant also requested punitive damages and that he be reinstated to the next available position of trainman if he were successful in his argument that the exclusion was not a bona fide occupational requirement.

(2) Position of the Respondent, C. N. R. The Respondent argued that the limitation or restriction in relation to employment in this case is a bona fide occupational requirement pursuant to Section 14(a) of the Canadian Human Rights Act. In balancing the rights of individual employees with the safe transportation of people and goods, C. N. R.

> - 11 honestly believed that the exclusion of insulin dependent diabetics was necessary.

Counsel for the Respondent argued that the position of trainman is a hazardous one and as such a Type 1 diabetic in performing the duties of trainman posed a sufficient risk to justify the job restriction. He argued that the Respondent adduced medical evidence to support this proposition.

On the question of damages, the Respondent agreed with the complainant that the measure of damages should be based on the average salary of trainmen as set out in the evidence less what the Complainant earned as a clerk with the provision that a sum should be deducted because the complainant failed to mitigate his damages. Counsel for the Respondent argued that Mr. Nowell had been advised that he would be considered fit for work as a baggageman, a trainman on a passenger train, a towerman or a car retarder operator. He argued that there was an obligation on the part of Mr. Nowell to follow up this "job offer". The Respondent also argued there should be no award for

punitive damages; no legal interest awarded; and any award of damages be made subject to any applicable income tax regulations.

> - 12 4. FINDINGS (1) DOES C. N. R. PURSUE A DISCRIMINATORY POLICY CONTRARY TO THE CANADIAN HUMAN RIGHTS ACT?

There is no question that C. N. R. pursued and pursues a discriminatory policy, contrary to Sections 7 and 10 of the Canadian Human Rights Act in excluding all Type 1 diabetics from the position of trainman. However, this discriminatory practive was not and is not pursued recklessly or with any dishonest or adverse motive or intention.

The real issue in this case relates to whether or not the job exclusion is a bona fide occupational requirement.

(2) IS C. N. R. 'S PRACTICE PERMITTED WITHIN THE CANADIAN HUMAN RIGHTS ACT AS A BONA FIDE OCCUPATIONAL REQUIREMENT PURSUANT TO SECTION 14(a) OF THE ACT?

There is not sufficient evidence to support the proposition that C. N. R. 's discriminatory practice of excluding insulin dependent diabetics is a bona fide occupational requirement.

Considering the evidence (particulary the medical evidence) and the nature of the employment concerned, the so- called occupational requirement is not reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public (in the words of McIntyre, J. in the Etobicoke case). The evidence adduced does not justify the conclusion that there is sufficient risk of employee failure in this particular case to warrant his exclusion from the position of

> - 13 trainman in the interests of his safety, the safety of his fellow employees or the safety of the general public. The sufficiency of risk was not proved in this case. There was no evidence of the likelihood of Mr. Nowell's suffering an incapacitating reaction because of his diabetes. In fact, the evidence was to the contrary. In 15 years as a diabetic, he never suffered an incapacitating reaction. He is a well- controlled diabetic who is physically fit to do the job of trainman.

These findings are made in accordance with the principles set out by the Supreme Court of Canada in the Etobicoke and Bhinder cases, discussed supra.

The occupational requirement in this case and in Bhinder are fundamentally different. In Bhinder, as Mr. Justice McIntyre points out, the occupational requirement established a "working condition". That condition must apply to everyone equally without varying results. If there is consequential discrimination so be it. Hard hads were to be worn by everyone - everyone has a head with presumably more or less the same vulnerability to injury. The occupational requirement was not specifically directed at the Sikhs.

In this case, the occupational requirement is specifically directed to a group of individuals with the same condition, diabetes mellitus, who are insulin dependent. It does not establish a working condition as in Bhinder. Therefore, to determine the bona fides of the occupational requirement in this case, one must look to determine whether the individual should be excluded because he belongs to the group. The group includes such a wide variety of individuals with varying degrees of capability and varying degrees of their disease that it is impossible and would be most unjust to determine the bona fides of the occupational requirement without regard to individual assessment.

> - 14 Assessing or testing an individual to determine whether he or she can perform the function in question is different than applying a general requirement which establishes a working condition to each individual. Applying an occupational requirement to each individual with varying results is different that testing or assessing each individual to see if he comes within the requirement.

It is imperative, both in the interest of determining the bona fides of the occupational requirement in this case and in the interest of justice, to determine whether an individual such as Mr. Nowell can perform the function of trainman from which he is excluded (by virtue of a discriminatory practice) without risk to himself, his fellow employees or to the general public. In doing so, it is clear from the evidence that Mr. Nowell does not pose a sufficient risk of employee failure to justify his exclusion from the position of trainman.

(3) Order (a) The award of damages is based on what the parties agreed to: the measure was the difference between what the average trainman's salary was and what Mr. Nowell earned as a Clerk. The average trainman's salary for most of the relevant years is set out in Exhibit R- 23.

It is therefore ordered that C. N. R. pay the Complainant damages as follows:

(1) For 1979 - $6,069.85 being two thirds (2/ 3) of the difference between average trainman and Nowell's salary:

$25,090.62 Average trainman -15,985.84 Mr. Nowell's salary $ 9,104.78 x 2/ 3 = $6,069.85.

It is 2/ 3 of the difference because the complainant alleges the discrimination from the end of April, 1979.

> - 15 (2) For 1980 - $8,526.65 being the difference between the average

trainman's salary and what Mr. Nowell earned: $26,416.96 Average trainman

-17,890.31 Mr. Nowell's salary $ 8,526.65

(3) For 1981 - $7,920.42 being the difference between the average trainman's salary and what Mr. Nowell earned:

$28,044.74 Average trainman -20,124.32 Mr. Nowell's salary $ 7,920.42

(4) For 1982 - $8,711.51 being the difference between the average trainman's salary and what Mr. Nowell earned:

$36,066.44 Average trainman -27,354.93 Mr. Nowell's salary $ 8,711.51

(5) For 1983 - $14,697.98 being the difference between the average trainman's salary and what Mr. Nowell earned:

$40,077.61 Average trainman -25,379.63 Mr. Nowell's salary $14,697.98

(6) For 1984 - $11,701.00 being the difference between the average trainman's salary and what Mr. Nowell earned:

$41,855.79 Average trainman -30,154.79 Mr. Nowell's salary $11,701.00

TOTAL DAMAGES to the end of 1984: $57,627.41. The same calculations will have to be made for 1985 and 1986 (to the date of this Order). Therefore, to the amount awarded herein, namely,

1979 $ 6,096.85 1980 8,626.65 1981 7,920.42 1982 8,711.51 1983 14,697.98 1984 11,701.00

$57,627.41 > - 16 should be added an amount of 1985 and 1986. I expect the parties should be able to agree on these amounts. If not, they can come before me and they will be set in accordance with the above formula.

The damages should of course be paid in accordance with the appropriate Income Tax law and regulations. Legal interest will not be awarded. This is not a case for punitive damages. Mr. Nowell was not dismissed. Furthermore, Mr. Nowell was not in a position to mitigate his damages any more than he did by continuing to work as a clerk. There was no alternative employment offered to him. Therefore, there will be no reduction in the award on account of Mr. Nowell's alleged failure to mitigate damages.

(b) It is also ordered that C. N. R. return Mr. Nowell to the job of trainman as soon as possible and at the very least, offer to him the next available open position as trainman out of Winnipeg. In the alternative, Mr. Nowell must be provided with employment of equal value, that is, where he could earn the same salary as a trainman.

DATED at Winnipeg, this 17th day of November, 1986. (signed) Jay C. Prober