CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1585

Heard at Montreal, Thursday, November 13, 1986

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. J. Menkema, Track Maintenance Foreman, at Cartwright, Manitoba is off work account illness. He has not been allowed to return to service pending approval of the Medical Service Department. The grievor's physician authorized Mr. Menkema fit to return to work April 3, 1985.

JOINT STATEMENT OF ISSUE:

The Union contends that: **(1.)** The restriction the Company has placed on Mr. Menkema is improper and without justification. **(2.)** The Company has violated Section 18.1 to 18.5 inclusive, Wage Agreement No. 41.

Mr. Menkema be returned to his former position, paid for all lost wages and benefits, all reasonable expenses and interest on monies due.

The Company denies the Union's contention and declines payment.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) H. J. THIESSEN	(SGD.) D. A. LYPKA
SYSTEM FEDERATION GENERAL CHAIRMAN	FOR: GENERAL MANAGER, OPERATIONS & MAINTENANCE

There appeared on behalf of the Company:

D. A. Lypka	– Supervisor Labour Relations, Winnipeg
G. McBurney	– Asst. Supervisor Labour Relations, Winnipeg
Dr. M. Grimard	– Chief Health and Medical Services, Montreal
L. Glasheen	– Employee Relations Officer, Montreal
D. Allard	– Training Officer, Montreal
R. A. Colquhoun	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	– System Federation General Chairman, Ottawa
L. DiMassimo	– Federation General Chairman, Montreal
R. Y. Gaudreau	– Vice-President, Ottawa
M. L. McInnes	- General Chairman, Winnipeg
Dr. M. Newman	- Witness

AWARD OF THE ARBITRATOR

Few cases present greater difficulty than those which concern the employability of an individual with a disability. Mr. Menkema is an epileptic. This Board must consider, on the one hand, his interest in equality of opportunity in his employment, including his right not to be discriminated against because of his medical condition. On the other hand it must weigh the interest of the Company to ensure that its railroad operations are protected against any substantial risk to the safety of the grievor, other employees and the general public. This is not a case of discipline. Rather, it involves an alleged violation of the collective agreement by the Company's decision to keep the grievor out of service on account of his illness. The issue is whether the Company has exercised its management rights in keeping with the collective agreement, which in turn involves consideration of the employer's assertion that freedom from the possibility of an epileptic seizure is a *bona fide* occupational requirement for the position of Track Maintenance Foreman.

Epilepsy is a term assigned to various types of recurrent seizures. While the causes of the condition are not known, it is generally manifested, in varying ranges of severity, by changes in electrical potentials within the brain, the emanation of nerve impulses from the brain resulting in involuntary movements and, lastly, the impairment or total loss of consciousness. The latter condition, loss of consciousness with convulsions, generally referred to as "grand mal", is the condition experienced by the grievor. The period of unconsciousness experienced by an individual with this condition seldom exceeds three minutes, although substantial disorientation and loss of memory can be experienced after an attack.

While drugs do not cure epilepsy, certain forms of medication have in some cases been successful in reducing the frequency and intensity of seizures. A number of other factors may contribute to the likelihood of a seizure, including diet, fatigue, alcohol abuse, stress and the impact of other illnesses. Control of an epileptic condition therefore requires an appreciation of these factors and day-to-day habits which eliminate, or at least minimize, their influence.

The grievor's first recorded seizure occurred on February 11, 1977. Although it was initially diagnosed as a grand mal seizure, there was uncertainty as to whether Mr. Menkema's loss of consciousness on that occasion was caused by epilepsy. Following some conflicting medical opinion, the matter was finally resolved in July of 1977. Neurologist Michael J. D. Newman of the St. Boniface General Hospital then expressed an opinion that the grievor's blackout could not be confirmed as epilepsy-related. Following an examination of the grievor, and scrutiny of his medical records, in a letter dated July 5, 1977 Dr. Newman advised the grievor's physician, Dr. W. R. Abell, that the most likely cause of the grievor's seizure was alcohol, a not infrequent occurrence. Having ruled out any serious progressive disease or pre-existing condition within the brain, as well as the likelihood of meningitis or encephalitis as a cause, Dr. Newman judged the seizure to be in all likelihood an isolated incident, and recommended the grievor's return to work. On the basis of that recommendation, and subject to the suggestion of the grievor's Division Engineer that his condition be closely monitored, he was returned to service.

The next seizure of which the Company became aware occurred on March 7, 1985 while the grievor was at work. On that occasion he was found unconscious inside a bunkhouse which he had entered momentarily to place a telephone call. While the Company was not aware of any seizures having occurred since July of 1977, a letter dated March 28, 1985 from his family physician to the Company's insurance carrier relates, in part: "I referred Mr. Menkema again to Dr. Newman as in the first two months of this year, he has had four further seizures, not associated with alcohol, though one was associated with high blood pressure. In view of these further seizures, I have made a tentative diagnosis of epilepsy ...". Confusion arises, however, from a subsequent letter from Dr. Newman to Dr. Abell, dated April 3, 1985, only a few days later. According to Dr. Newman's account, following the initial seizure in 1977 the grievor experienced a second seizure in 1978, a third in 1982, a fourth in the Christmas period of 1984 and the final seizure, while at work, on March 7, 1985. While these accounts might be interpreted as suggesting a total of nine seizures between 1977 and 1985, it appears to the Arbitrator on closer scrutiny that both physicians were under the impression that the grievor suffered a total of five seizures during that period. Were it necessary to choose between them, I am satisfied that the account of Dr. Newman, the specialist who closely reviewed Mr. Menkema's history, is to be preferred. For the purposes of this arbitration, therefore, the grievor should, on the balance of probabilities, be viewed as having experienced a total of five epileptic seizures between February 11, 1977 and March 7, 1985.

Dr. Newman, who testified at the arbitration hearing, confirmed the preliminary diagnosis of epilepsy. He prescribed continuous treatment through medication, specifically by placing the grievor on the anti-convulsant drug Dilantin. It appears that the grievor has not suffered a seizure since March 7, 1985, having remained on continual medication since that time.

Dr. Newman testified that two recent studies have found that epileptics who maintain adequate levels of medication will frequently never experience a recurrence of seizures, in some cases even after they have stopped taking the medication. He conceded that no firm prediction could be made in the grievor's case, save that the likelihood of any seizure would be substantially reduced by the faithful taking of Dilantin as prescribed, the avoidance of alcohol abuse and the elimination of circumstances that could cause fatigue. By fatigue, Dr. Newman does not mean the tiredness brought on by strenuous exercise, so much as the kind of fatigue that would be occasioned by a lack of sleep.

According to Dr. Newman, the passage of time without any recurrence of seizures further enhances the likelihood that an individual will not suffer another seizure. He noted that after 12 months without another seizure, given the maintenance of medication and control of other contributing factors, the risk of a seizure, although still within the realm of possibility, must be viewed as reduced in terms of its probability.

While Dr. Newman expressed the general opinion that the grievor could safely return to work, he qualified that answer during his cross-examination. When it was suggested to him that the grievor might have occasion to drive a truck, Dr. Newman indicated that he was unaware of that, and that in his view the grievor should not be entrusted with driving a truck at work. It is common ground that the grievor now has a standard Manitoba driver's licence, although he did have a restricted licence for a period of time following his seizure in March of 1985. When confronted with the possibility of the grievor working alone as a track maintenance foreman in the inspection of tracks, roadbed, switches and other equipment, Dr. Newman foresaw no appreciable increase in risk that would justify holding the grievor out of service in respect of those functions. While he did not attempt to quantify the risk of a seizure for Mr. Menkema in mathematical terms, he conceded that it would be somewhat higher than the likelihood of a heart attack or some other disabling mishap, all things being equal. Dr. Newman stressed, however, that in his experience 50 percent of persons with epilepsy similar to the grievor's who stick to their medication and control other contributing factors will never have another seizure.

On behalf of the Company, Dr. Michel Grimard, Chief of Health and Medical Services for Canadian Pacific Limited, gave a more conservative prognosis. Acknowledging that the concept of risk is a statistical, and not a medical, notion, Dr. Grimard emphasized that averages based on the circumstances of large groups may have little bearing on the quantification of risk for a single person within the group. He suggested that the comparison of the chance of being struck by lightning, alluded to by Dr. Newman in his testimony, is not a useful analogy. In this regard he stressed the substantial difference between risks that are unknown and risks, however small, whose existence is known.

Dr. Grimard noted that in any individual the quantity of risk is not solely based on the history of seizures, nor can it safely rest on assumptions about a patient's compliance with his or her doctor's orders. In other words, variables such as an individual's failure to adhere to medication, to avoid fatigue, alcohol abuse or other precipitating factors will themselves increase the degree of risk in ways that cannot be controlled or monitored by an employer. Dr. Grimard expressed the view that in the grievor's case there must always remain some probability of a seizure which could incapacitate him during the performance of his work. He stressed that that reality is also acknowledged in Federal transport regulations which would prohibit the grievor from working as the pilot of a commercial aircraft or driving a commercial transport truck, no matter what may be the particulars of his condition or treatment.

What are the principles that govern in the determination of a grievance of this kind? Arbitrators have, in the past, been required to apply collective agreements which themselves contain articles prohibiting discrimination and, occasionally, incorporate by reference the terms of a human rights code (*see, e.g.* **Re Peterborough Civic Hospital and Ontario Nurses' Association** *(1982), 3 L. A. C. (3rd) 21 (Ellis)*). Moreover, even absent such a non-discrimination clause, a board of arbitration must construe the rights and prerogatives of management under a collective agreement as implicitly limited by the provision of overriding human rights legislation. Accepting that there cannot be one law for the courts and another for boards of arbitration, the terms of a collective agreement must be construed in a manner consistent with the requirements of public statues.

This approach was perhaps best expressed in the award of the Arbitrator in **Re Wentworth County Public Board of Education and Canadian Union of Public Employees, Local 1572** (1984), 14 L. A. C. (3rd) 310 (Devlin). In that case the grievor, a clerk-typist, alleged discrimination in that she had been denied a particular work assignment because of her confinement to a wheelchair. The Arbitrator was required to determine whether the exercise of the employer's management rights had been contrary to **Ontario's Human Rights Code**, 1981. She concluded that it was, and that the collective agreement, which must be construed subject to the **Code**, had therefore been violated. At p. 322 the Arbitrator made the following observations:

> Despite any reservations as to whether decisions of management pursuant to the management rights clause must meet a general test of fairness or reasonableness, the right of management to assign job duties ought not to be interpreted in a way which would enable management to conduct its affairs in a manner that is either contrary to public policy or to a public statute. In **McLeod et al. v. Egan et al**. (1974) 46 D. L. R. (3D) 150, (1975) 1 S. C. R. 517, 5 L. A. C. (2D) 336n sub nom. **Re U.S.W., Local 2894 and Galt Metal Industries Ltd.**, 74 C.L.L.C PARA, 14,220, the Supreme Court of Canada determined that the **Employment Standards Act** in prescribing maximum hours of work had superseded the right of an employer to require an employee to work beyond such hours except with the agreement or consent of the employee. It was found that a provision in the collective agreement giving the employer the right to schedule its operations in its discretion did not constitute the necessary agreement or consent. In allowing the appeal, the Supreme Court of Canada restored the lower court order of the Honourable Mr. Justice Morand who had held that while overtime could normally be demanded as a management right, that right had been limited by the Employment Standards Act prescribing a maximum total work week. It is also of note that Chief Justice Laskin in concurring with the majority stated that while similar deference will not be accorded to an arbitrator's interpretation of the collective agreement, an arbitrator must not refrain from construing a stature involved in the issues which have been brought before him.

I am satisfied that the foregoing passage correctly states the applicable law and arbitral principles. It is not disputed that under the instant collective agreement management retains the right to hold out of service temporarily, or terminate, of an employee who is physically incapacitated from performing work assignments which fall under the collective agreement. In the instant case the Company has judged that the grievor's epileptic condition creates an unacceptable hazard to himself, to other employees and the public, and has found him unfit to perform any job within the bargaining unit. The issue then becomes whether that course of action is in violation of the provision of the **Canadian Human Rights Act**.

It is contrary to the **Act** to discriminate against an individual in his or her employment because of a physical handicap. It is noteworthy that in the first version of the Act, promulgated on July 14, 1977, "physical handicap" was expressly denied, in section 20, as including epilepsy. That proscription is still contained in the **Act**, although by a recent amendment the broader concept of "disability" has been substituted for "physical handicap". The **Canadian Human Rights Act** now contains the following:

> 2.(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 wished 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, age, sex, marital status, family status, **disability** or conviction for an offence for which a pardon has been granted;
> ...
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> ...
>
> 10. It is a discriminatory practice for an employer, employee organization or organization of employers
> (a) to establish or pursue a policy or practice,
> or
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

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

...

l4. 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;

...

20. In this Act,...

"disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug. (emphasis added)

The Company maintains that freedom from epileptic seizures is a *bona fide* occupational requirement for persons employed in its maintenance of way operations, and specifically for a track maintenance foreman. The issue of the employability of an epileptic and other employees, such as diabetics who are at risk of losing consciousness, has been the subject of consideration in previous cases by both this office, other boards of arbitration and the Canadian Human Rights Commission. The first principle that emerges is that there is little room for any blanket policy generally prohibiting persons with any particular disability from pursuing employment. The factors that govern the employability of a disabled person are many, and each case must be determined on its own merit. In considering these factors, an arbitrator must obviously give substantial weight to the uncontradicted evidence of a medical expert (**CROA 929, 1012** and **1513**). **CROA 1513** concerned a B&B Bridgeman working within the instant bargaining unit who had suffered two episodes of epileptic seizures. In that case the Arbitrator accepted the evidence of Dr. Grimard that the risk of employing the grievor was too great, given his vulnerability to further epileptic seizures. In that award the Arbitrator made the following observation:

> The problem I am confronted with in the grievor's situation is a lack of medical evidence to neutralize and dispel the ostensibly legitimate concerns that were raised by Dr. Grimard. Since the onus rested on the trade union to adduce that evidence, it was incumbent upon it to call either Dr. Bowker and/or a physician from the Toronto Neurological Clinic to establish, that an employee, in the grievor's circumstance, despite his requirement to take Dilantin, represents on the balance of probabilities, a minimal safe risk. It has not done so. As a result, I am left with the uncontradicted concerns that were advanced by Dr. Grimard. And, in his opinion, the grievor continues to remain an unacceptable risk.
>
> As a result, because of the trade union's failure to satisfy the onus of establishing the grievor's medical fitness to resume the functions of a B&B Bridgeman the grievance must be denied.

As will be noted below, because a contrary approach respecting the burden of proof has been taken by the Courts and Human Rights tribunals, the above comments in **CROA 1513** are subject to re-examination.

The Canadian Human Rights Commission has had at least two occasions to consider the employability by Canadian Pacific Railways of persons suffering epileptic seizures. The first case concerned employee Glen Smith, who was employed as a frog welder in the instant bargaining unit, also on the Prairie Division. Mr. Smith was discharged following a single epileptic seizure suffered at work on August 13, 1979. Subsequent investigation disclosed "a two-year history of episodes of impairment of consciousness". It appears from the case analysis of the Human Rights Commission that Mr. Smith's earlier difficulties were due in part to his failure to control his condition, particularly in respect of the use of alcohol and fidelity to his medication.

The Commission's Investigator noted that the duties of a frog welder involve working in pairs, with one of the two employees keeping watch for oncoming trains, which could arrive with as little as one minute's warning. Part of the responsibility includes waking 3,000 yards down the track to warn trains in the event of a fault in a switch that would cause a derailment, although this was described as seldom arising. The complaint in that case also had occasion to travel in a Company truck to the site of a repair, although he always let his partner do the driving. The Commission found that Mr. Smith had been seizure-free for some 14 months after the seizure which prompted his release. Thereafter, however, he relapsed into further seizures. In all of the circumstances the Commission concluded

that the evidence supported the Company's view that it is a *bona fide* occupational requirement that frog welders in the grievor's circumstances not suffer from neurological convulsive disorders. On that basis, on September 16, 1981 the Canadian Human Rights Commission dismissed the complaint.

A similar conclusion was reached in the subsequent case of Mr. Glen Yuhas, who was working for Canadian Pacific Railways as a Tie-Gang Roadmaster when he experienced a seizure at work on April 26, 1983. Mr. Yuhas occupied a non-unionized supervisory position. The medical evidence reflected a history of seizures dating from 1971, generally related to an excess of alcohol intake. His condition apparently abated between 1977 and 1983, when a further seizure was thought to have been occasioned by influenza and related medication. Like the grievor in the instant case, he was placed on Dilantin indefinitely. The Commission's Investigator found that his duties involved relaying train times to his work gang, being in command in emergency situations, being able to take over the operation of machinery as needed, and inspecting track on his own, either by operating a track motor car or on foot. It was noted that he might also be required to drive other employees in a Company van or truck. The Commission's Investigator found that the risk of Mr. Yuhas suffering from seizures while performing his job "is ongoing and ever present". In that case, even though the grievor undertook to abstain from alcohol and to be faithful to his medication, the Commission concluded, "Even if he were to follow that routine, there is no guaranty that convulsions will not reoccur. The last convulsions seem to have been precipitated by influenza". The Commission further found that the work performed by the complainant was not such as to allow for accommodation for his condition. Lastly, it noted that a seizure on the job "could have drastic consequences to life and property". For those reasons, on December 18, 1985 his complaint was dismissed by the Canadian Human Rights Commission.

Decisions by the Canadian Human Rights Tribunal, under the **Canadian Human Rights Act**, have also considered the principles that apply in respect of the employability of the disabled in general and of epileptics in particular. A significant issue in the cases is whether the complainant's disability can be accommodated in the workplace or, conversely, whether freedom from the disability is a *bona fide* occupational requirement (BFOR). For example, it has been held that epilepsy is a condition which can be accommodated in the employment of a telephone operator (see **Sandiford v. Base Communication Ltd.**, (l984) 5 C.H.R.R. D/2237)

At least one case concerning an epileptic in the employment of a railway has been reported; **David C. Rodger v. Canadian National Railways** (l985) 6 C.H.H.R. D/2899 (Lederman). In that case, Mr. Rodger was hired as a trainman/yardman for CN Rail in 1975. On April l2, 1979 he suffered two grand mal seizures in his sleep at home. His epileptic condition was diagnosed as caused by several factors, including an earlier head injury, fatigue, alcohol consumption the day prior and the effect of sleep.

As a result of his condition Mr. Rodger was removed by the Company from any work on or around moving trains, was prohibited from driving a Company vehicle, working at heights, being near any heavy moving equipment or engaging in any activity where he might be working alone. Within those limits he was approved for restricted service as a car retard operator or as a switchtender. The restriction on his working alone was ultimately removed and he was assigned work in a tower as a switchtender. Over time the employee's repeated requests to be restored to his former position were denied by the Company's medical officers. In June of 1981, he was assigned work in the position of baggage man, restricted to working in a central traffic-controlled territory, with no involvement in flagging or working on or near moving trains. Following a brief period in that position he was laid off, and upon recall was reinstated as a switchtender. The decision notes that Mr. Rodger was denied entry into a yardmaster's course because of his medical condition.

By the summer of 1981 Mr. Rodger had been without medication for some 18 months, and had experienced no recurrence of his original seizures. That condition obtained until July of 1982. When the Company refused to change his employment status the employee resigned in December of 1982, subsequently filing a complaint with the Canadian Human Rights Commission.

Adjudicator Lederman carefully reviewed the complainant's medical history as well as the evidence concerning the duties and responsibilities of a trainman/yardman. Reference was made to a study published in the *New England Journal of Medicine* on August 26, 1982, entitled "**Seizure Recurrence After a First Unprovoked Seizure**". The findings of the study suggest that there is little risk of recurrence of seizures in a patient who is free of them for a period of three years, in situations where factors such as alcohol, trauma and physical stress are not causes of the initial seizure. As in the instant case, in respect of the particular circumstances of Mr. Rodger there was conflicting medical opinion adduced in evidence. Dr. Neelan Pillay, a neurologist and specialist in epilepsy at the Health

Services Centre of the University of Manitoba, expressed the view that the grievor should be considered for employment as a trainman, although he had reservations about his working as a yardman. His opinion, and optimistic prognosis, was based on his belief "that persons who are completely seizure-free should be able to participate in any employment setting, and those with a tendency to recurrence should avoid certain occupations that involve use or operation of motor vehicles, climbing or altitude work or heavy machinery". The Company's medical department held a more conservative view.

Chairman Lederman reviewed the case law and concluded that the onus was upon the plaintiff to establish a *prima facie* case of discrimination. If such a case were established, the onus would then shift to the employer to justify the discriminatory practice, presumably on the basis of the existence of a *bona fide* occupational requirement. In support of those principles, which this Arbitrator accepts, reference was made to the decision of the Supreme Court of Canada in **Ontario Human Rights Commission v. Borough of Etobicoke** (1982) 132 D.L.R. (3RD) 14 (S.C.C) at p. 19 and **Ward v. Canadian National Express** (1982) 3 C.H.R.R. D/689. Any inconsistency between what was expressed regarding the onus of proof in **CROA 1513** and these human rights adjudications must, in my view, be resolved in favour of the approach taken by both the courts and the human rights tribunals. Once a *prima facie* case of discrimination is established, the onus is upon the employer to establish a *bona fide* occupational requirement.

In considering the merits of the case, the adjudicator quoted with approval the following passage from Tarnopolsky, **Discrimination and the Law**, 1982, at p. 311:

> Anti-discrimination legislation does not compel employers or those who provide accommodation services and facilities to disregard the disabilities of handicapped individuals or to make substantial modifications in order to allow disabled persons to participate. It does, however, require that persons with a handicap should receive **individualized assessment**, treatment and reasonable accommodation to such a person's handicap.

Applying those general principles, the Tribunal concluded that the complaint could not succeed. Assessing the case on an individual basis, it was found, as expressed in the **Etobicoke case**, that even a "very low" threat to public safety justified a disability-based restriction. (See also **Foucault v. Canadian National** (1982) C.H.R.R. D/677). Mr. Lederman accepted the uncontradicted evidence that Mr. Rodger was more likely than the average person to have a further seizure, concluding that a seizure on the job "could easily have drastic consequences to life and property ...". He emphasized that society cannot accept simplistic and generalized assumptions about the employability of the handicapped, and that in imposing BFOR's employers must carefully consider the most authoritative medical and statistical information in light of the particular circumstances of each individual. The chairman concluded,

> Given the absence of reliable information on the risk of recurrence of seizures in persons like Rodger, and given the public safety element in his position which reduces the acceptable level of risk, one cannot readily conclude that the position taken by CN was unreasonable. Thus there does not appear to be any sound basis for interfering with its judgment in this regard. Accordingly, the complaint must be dismissed.

A subsequent case involving the instant employer provides what must be the most helpful and thorough analysis to date on the general principles governing the employability of the disabled under the **Canadian Human Rights Act**. In **Wayne Mahon v. Canadian Pacific Ltd.**, Professor Peter A. Cumming adjudicated the complaint of a trackman dismissed from his position because of his condition as an insulin-dependent diabetic. In that case the employee was diagnosed as a "stable diabetic" who had suffered only mild hypoglycemic reactions which he could control by ingesting sugar, which he kept at hand at all times. In his seven years as a diabetic he had never suffered a serious reaction involving loss of consciousness or severe incapacity. The adjudicator accepted that there was a risk that Mr. Mahon could experience a severe reaction without warning. The chance that this might happen, firstly while he was at work, and secondly in circumstances that could prove dangerous to himself, fellow employees or the public, was quantified at approximately one in ten thousand. On that basis the tribunal concluded that the Company's policy of refusing to hire insulin-dependent diabetics as trackmen was a discriminatory practice and that in the specific case of the grievor no *bona fide* occupational requirement was established. The complaint was allowed and the Company was ordered to reinstate the grievor into a trackman position.

In arriving at that conclusion, Professor Cumming conducted an impressive review of the evolution of law and policy respecting discrimination against the handicapped. In doing so, he noted the guidelines issued by the Canadian Human Rights Commission pursuant to para. 14(a) and subsection 22(2) of the **Act** (issued as guidelines SI/82-3, January 13, 1982) dealing with the BFOR defence. These include the following:

> 7. For the purposes of paragraph 14(a) of the Act, where an employer refuses an employment opportunity to a handicapped person, since the person's handicap would create a safety hazard to the employees of that employer or to the general public, the refusal is deemed to be based on a bona fide occupational requirement.
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> 8. Where an employer finds that the performance of a job by a handicapped person would create a safety hazard to his or her employees or to the general public and before he or she refuses an employment opportunity based on a bona fide occupational requirement, the employer shall support his or her findings by establishing that the safety hazard has been evaluated on the basis of
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> (a) the probability of the occurrence of accident as a result of the performance of the job by the handicapped person;
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> (b) evidence that the safety hazard is significantly greater than if the person were not a handicapped person; and
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> (c) the relation of the safety hazard to the specific physical handicap of the handicapped person.

The **Mahon case** is of particular interest because of the general comparability of the working circumstances of the complainant in that case and the grievor in the instant case. As a trackman, Mr. Mahon was described as working around moving trains and heavy equipment, on bridges or trestles in hot and cold weather. While his precise duties differ somewhat from those of a Track Maintenance Foreman, many of the conditions in which he works, described at p. D/3299-3399 compare to those of grievor Menkema.

On the whole, Professor Cumming was able to conclude that a serious diabetic reaction in Mr. Mahon's case was "real but unlikely" or, as it was alternatively put, a possibility, but not a probability. Professor Cumming's conclusions were expressed in the following terms:

> In my opinion, considering all the evidence, applying the framework for analysis established by the Supreme Court in Etobicoke, and keeping in mind the objective of `equality of opportunity' of the *Canadian Human Rights Act*, the employer's requirement that no person who is an insulin dependent diabetic (and specifically, the Complainant) can be employed as a trackman is not a bona fide occupational requirement within the meaning of paragraph 14(a) of the Act. The employer has not shown that there is a "sufficient risk of employee failure" to warrant a b.f.o.r. My findings are limited, of course, to the specific Complainant in this case. Moreover I emphasize that my findings refer only to a stable diabetic and are conditional upon his having continuing good health. For example, **if it were shown through a periodic medical checkup at a later point in time that an impairment of the autonomic nervous system had developed in respect of the stable diabetic like Mr. Mahon, or that his warning time in respect of an adrenergic reaction had become significantly abbreviated, then the employer would be justified in denying continued employment.** (emphasis added)

I turn to apply the foregoing principles to the case at hand. In doing so I would simply add one observation about the nature of risk which is, after all, the central focus in cases of this kind. It is not enough to consider simply what are the chances of the grievor suffering an epileptic seizure in the future, while at work and while in a circumstance that would endanger himself or others. That is, of course, an important consideration, the assessment of which involves a number of variables, some of which are in the employer's control, such as the time, place and nature of duties assigned to the employee, and some of which are out of the employer's control, such as faithfulness to prescribed medication, care and in the use of alcohol, the avoidance of fatigue or stress and the impact of other unpredictables such as diet and other illnesses. While it is essential to consider all of these factors to assess the likelihood of a seizure, the analysis of risk also includes a second dimension. As obvious as it may seem, it is the nature and extent of harm that could befall the employee or other persons in the event that an untimely seizure did occur. The overall risk being evaluated is substantially different if the damage that might be caused in the event of a

seizure is relatively minor, as in the case of the telephone operator in the **Base Communications Ltd. case** referred to above. If, on the other hand, as in the case of an airline pilot, a seizure could precipitate an event of tragic proportions, an entirely different order of risk is undertaken. The extent of the harm that could occur must be weighed in conjunction with the likelihood of a mishap, however minimal that likelihood might be. Therefore, in examining the question of risk, two questions must be asked: first, what is the chance of a seizure occurring and secondly, what might happen if it does.

In the instant case, the two-fold analysis of risk raises serious questions about the merit of Mr. Menkema's grievance. The evidence establishes that his condition, unlike that of Mr. Rodger, involves considerably more than a single incident of epileptic incapacity. He has had five known seizures, two of which apparently occurred while he was at work. Although these were experienced over a period of some five years, and appear to have happened before he undertook his current course of medication, these recurrences must nevertheless be seen as having some bearing on the likelihood of the grievor experiencing another seizure in the future while at work. In the grievor's case it would appear that such factors as being true to his medication and consistent care in respect of factors such as alcohol, stress and fatigue may have a significant bearing on his condition in the future. The fact, however, that these considerations are outside the employer's control should not, of itself, lead to the conclusion that he cannot be employed by the Company. They are factors to be weighed among others in assessing whether freedom from the grievor's specific condition constitutes a *bona fide* occupational requirement for work as a Track Maintenance Foreman.

The evidence of Dr. Newman is that the chance that Mr. Menkema will experience a seizure while at work, in circumstances which would endanger himself or others, is relatively slight. That prognosis is, of course, based on the assumption that the grievor maintains his medication and controls any of the number of factors which could precipitate a seizure. Dr. Grimard does not substantially disagree with that analysis. Significantly, however, this is a case where the reality of a slight risk must, as indicated by the decision of the Supreme Court of Canada in the **Etobicoke case**, be weighed against the harm that could result if that risk were realized. In this regard, it is important to appreciate the nature of the grievor's duties and what might transpire in the event that he loses consciousness while at work.

The material before the Arbitrator establishes that the grievor's duties involve both manual and supervisory tasks. These include the removal and replacement of defective ties and rails, fastening bolts at joints that hold rail ends together, lubricating switches, angle bars and joints, unloading, spreading and tamping ballast in the repair and maintenance of road bed, the replacement, repair and adjustment of track switches, the correction of track surface, alignment and gauge, assisting in the repair of railway crossings, bridges and level crossings and the operation of a track motor car and/or Company truck. It is not disputed that on occasion, like Mr. Rodger, the grievor might, while working alone, discover a safety hazard which would require him to immediately place warning signals to prevent a derailment. It is also apparent that the grievor will have occasion to work near moving trains and other heavy equipment. In these circumstances, the Arbitrator must conclude that given the general duties of a Track Maintenance Foreman, the risk of serious harm to himself, to other employees or to the public is real and substantial should Mr. Menkema experience another seizure while at work.

In the Arbitrator's view the circumstances of Mr. Menkema are distinguishable from those considered by Professor Cumming in the case of Mr. Mahon. In that case the employee had never once experienced a loss of consciousness and had, over a number of years, demonstrated an ability to recognize and control mild hypoglycemic reactions while at work by immediately consuming sugar. In contrast, Mr. Menkema has had repeated incidents of *grand mal* seizures, causing complete loss of consciousness for relatively extended periods. While it is true that he has not suffered a seizure since being put on medication by Dr. Newman, it is not denied that he remains at risk of suffering a seizure while at work. It is also significant that in the grievor's case seizures apparently occur without warning. The Arbitrator notes Professor Cumming's observation that if Mr. Mahon's condition changes so that his warning time became significantly abbreviated, the Company would be justified in no longer employing him as a trackman. In the Arbitrator's view the circumstances of the grievor are more closely approximate to that situation. By way of further comparison, the grievor's condition appears more serious than that of Mr. Rodger, whose complaint was nevertheless dismissed by the Canadian Human Rights Tribunal. That is not to suggest that Mr. Menkema's grievance is to be judged entirely by the standards applied in the cases of other employees. The analyses and outcomes in those cases, however, do provide useful guidance in considering what constitutes an acceptable level of risk in this particular work setting.

Can reasonable accommodation be made for the grievor's condition if he were to continue to work as a Track Maintenance Foreman? I find it difficult to support the conclusion that it can. The Arbitrator accepts the Union's suggestion that Mr. Menkema's work could be organized in such a fashion as to prevent him from ever being alone in a track motorcar, and that some other employee could be required to drive the track motorcar, and that some other employee could be required to drive the truck available in his location. However, those possibilities alone are not compelling. There are, as noted, many other aspects of genuine risk, both predictable and unpredictable, that would confront the grievor day to day, the realization of which could have drastic consequences.

In considering the employability of the grievor in track maintenance, a further significant factor is the risk of fatigue. It is inevitable that as part of a track maintenance crew the grievor will frequently be required to work long hours, frequently with little forewarning. It is not disputed that in the event of severe weather, a derailment or any other emergency, track maintenance crews are required to work for as long as sixteen hours without a break. In these circumstances, the factors of stress and fatigue are difficult to predict and control. In this case, the added risk due to the likelihood of tiredness and lack of sleep, which can influence the occurrence of a seizure, is not a factor which the Arbitrator can lightly ignore.

On the whole, the Arbitrator must conclude that having regard to the duties and responsibilities of a Track Maintenance Foreman, and the harm that could result in the event of a mishap, the position of the Company respecting the grievor's continued employment, in light of his medical history and susceptibility to *grand mal* seizures, is not without justification. Given that Mr. Menkema works near moving trains and other heavy equipment, makes decisions and relays information in respect of the condition of track, switches and other equipment, and can be assigned long hours of arduous work, the Company's concern for serious harm to the grievor, other employees and the public are well grounded. In these circumstances, in the Arbitrator's view, the right of Mr. Menkema to continue in the position of Track Maintenance Foreman must yield to the overriding concern of the Company for the safety of its operations. For these reasons the Arbitrator concludes that the Company has not violated the collective agreement, to the extent that it may be qualified by the **Canadian Human Rights Act**, in holding the grievor out of service on account of his medical disability. The grievance must therefore be dismissed.

As noted, it appears from the material before the Arbitrator that reasonable accommodation of the grievor's conditions is not possible in the context of work on a maintenance crew. There are few, if any, positions within the bargaining unit in which it appears he could safely be employed. It should, however, be appreciated that Mr. Menkema has been in the service of the Company for over ten years as a good and productive employee. In light of these facts, the Arbitrator recommends that the Company examine the possibility of locating a job within its operations, either inside or outside the bargaining unit, in which Mr. Menkema may continue to serve without undue risk to himself or to others. Being forty years of age, with more than ten years of his working life invested in the railway, given the added burden of his disability, it may be difficult for Mr. Menkema to find alternative employment. It is the Arbitrator's hope that both parties will in good faith canvass whatever possibilities can be identified in this regard.

DATED AT Toronto this 25th day of November, 1986.

(signed) MICHEL G. PICHER
Arbitrator