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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 consitutes 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 greivor'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 equpment. 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 recongnize 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 abreviated, 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 responsiblities of a Track Maintenance Foreman, and the

harm that could result in the event of a mishap, the position of the Company respecting the greivor'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.

Michel G. Picher,
Arbitrator