

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

GREGORY P. BOKOCH, individually and	:	
for all similarly situated and RICHARD	:	
A. KOMACEK, RONALD H. RIFFLE, LAWRENCE	:	
J. FERK, and DALE ZIGLEAR,	:	
COMPLAINANTS	:	DOCKET NOS. E-18445P
	:	E-18447P
v.	:	E-18448P
	:	E-18449P
MONONGAHELA RAILWAY COMPANY,	:	E-19197P
RESPONDENT	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING EXAMINER

INTERIM ORDER

FINDINGS OF FACT *

1. Each Complainant was employed by Respondent when he requested a transfer to the position of brakeman. (S.F. 14, 15, 30, 31, 32, 39, 40, 41, 47, 48, 49, 50, 56, 58)
2. Each Complainant's request to become a brakeman was rejected by Respondent because of failure to meet visual acuity standards. (S.F. 17, 33, 41; N.T. 179, 345)
3. Respondent regarded each Complainant as handicapped by the need to wear eyeglasses to correct deficiencies in visual acuity.
4. Good vision is a legitimate job requirement for brakeman on the Monongahela Railway.
5. Each Complainant's corrected visual acuity is 20/20 or better. (C.E. 13, 14, 15, 16, 17)
6. Safety straps insure that glasses stay on the wearer's head, as do temple pieces that wrap around the ear. (N.T. 401, 466)
7. Safety glasses protect the eyes from injury by fumes, flying objects, particles, etc. (N.T. 400)
8. Only newly hired brakeman are prohibited by Respondent from wearing corrective lenses. (S.F. 6, 7)
9. Conditions on the Monongahela Railway have changed significantly since 1951: there is much more mechanization now, fewer close clearances, and

*The foregoing stipulations are hereby incorporated herein as if fully set forth.

Findings of Fact are also contained in the Opinion which follows: they are those recitations of factual matters which are followed by citations to pages of the record or reference to specific exhibits.

Key to abbreviations:

N.T.	Notes of Testimony
C.E.	Complainant's Exhibit
R.E.	Respondent's Exhibit
S.F.	Stipulations of Fact

better equipment; brakemen do less detailed work, and less climbing off and on the cars. (N.T. 560, 564, 571-572)

10. Respondent has no program for regularly testing the visual acuity of brakemen. (Response to Request for Production, No. 9)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.
3. Complainants are aggrieved individuals within the meaning of the Pennsylvania Human Relations Act.
4. Respondent is an employer within the meaning of the Act.
5. Complainants have made out a prima facie case by proving that:
 - a. They are handicapped and therefore protected by the Act from discrimination on that basis;
 - b. They applied for positions for which they were qualified;
 - c. Their applications were rejected; and
 - d. Respondent continued to seek qualified applicants.
6. Respondent has not demonstrated that Complainants' handicaps are job-related.
7. Complainants have shown that the reason advanced by Respondent for refusing to employ them as brakemen is a pretext for discrimination.

O P I N I O N

This case arises on complaints filed by five individuals ("Complainants") against the Monongahela Railway Company ("Respondent") with the Pennsylvania Human Relations Commission ("Commission"). Gregory P. Bokoch filed his complaint on July 14, 1980, at Docket No. E-18445P; Richard A. Komacek, on July 14, 1980, at Docket No. E-18447P; Ronald H. Riffle, on July 14, 1980, at Docket No. E-18448P; Lawrence J. Ferek, on July 14, 1980, at Docket No. E-18449P; and Dale A. Ziglear, on November 1, 1980, at Docket No. E-19197P. The complaint of George E. Harvey at Docket No. E-18446P was settled shortly before the hearing in these cases and is not considered here, although Mr. Harvey's name appears on the hearing transcript and other documents which are part of the record.

Commission staff conducted an investigation and found probable cause to credit the allegations of discrimination. Thereupon the parties and the Commission attempted to resolve the situation through conference, conciliation and persuasion. When these efforts were unsuccessful, the cases were approved for public hearing. A hearing was held on the consolidated cases on May 12, 13, 14 and 15, 1986, in Pittsburgh, Pennsylvania, before Hearing Examiner Edith E. Cox.

By agreement of counsel this hearing was bifurcated, with the initial phase limited to the issue of liability. It was agreed that, in the event of a finding of liability, a second proceeding would be convened to address the question of damages. This opinion therefore resolves only the question of whether, as each Complainant alleged, Respondent violated Sections 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §§951 et seq. ("Act"). Respondent has consistently denied that the

challenged actions were in any way discriminatory.

The Monongahela Railway is incorporated in Pennsylvania and West Virginia, with its principal offices in Pittsburgh, Pennsylvania. (S.F. 1, 3) It is wholly owned by Conrail, the Pittsburgh and Lake Erie Railroad, and the Baltimore and Ohio Railroad. (S.F. 2) It carries freight on routes totaling one hundred twenty-five miles in length, in West Virginia and Western Pennsylvania. (N.T. 268)

Employees at the Monongahela are subject to a complex seniority system. There are some seventeen different crafts, each with its own seniority roster. (N.T. 30) Among these are train crews and engine crews, the people who actually operate trains. Train crews include three positions: brakeman, the entry level position and the one at issue in this case (brakemen are also referred to as trainmen); flagman, to which a brakeman is usually promoted within a few months of being hired; and conductor, promotion to which usually takes about two years. (N.T. 266-267) The seniority roster for these three positions is the "trainmen" roster; it includes separate seniority dates for each of the three positions. (N.T. 271) Promotion to conductor is not automatic; applicants are tested by the trainmaster for their knowledge of the workings of the train and its routes. (N.T. 267-270) Engine crews are responsible for the locomotive itself, and consist of an engineer and in some cases a fireman. (N.T. 30) Many engineers on the railroad had previously been conductors. (N.T. 304, 305)

The general duties of brakemen are summarized in the company's Operating Rules, admitted to the record as Joint Exhibit A. The parties have stipulated that ". . . Brakemen are inter alia responsible for the display of train signals, the proper protection of trains, the handling of switches, the coupling and uncoupling of cars and engines, the manipulation of brakes and

for assisting the conductor or engineman in all things requisite for the prompt and safe movement of the train." (S.F. 11)

All Complainants were employees of the railroad at the time they applied for transfer to positions as Brakemen. Each Complainant's request was rejected because of his failure to meet the company's visual acuity standards. It is these rejections which Complainants claim violated the Act.

The parties have stipulated that Respondent has adopted the visual acuity guidelines issued by the Association of American Railroads ("AAR") in 1951; at all times relevant to this case those standards required class "A" employees to meet the entrance-to-service standard of 20/20 vision without glasses. Brakemen are class "A" employees. (S.F. 6, 7, 8)

The standard as noted is limited to those entering service as brakemen. The parties have also stipulated that, of the fifty-seven brakemen employed as of September 20, 1980, at least six wore glasses at all times and at least eighteen wore them for reading while on duty. (S.F. 63)

Complainants allege that they were discriminated against on the basis of their non-job related handicaps, wearing of eyeglasses. Respondent raises a variety of arguments. It claims that Complainants are not handicapped within the meaning of the Act and applicable regulations. It argues in the alternative that, if handicapped, the Complainants had job-related handicaps, and that the challenged visual standard is necessary to the safe and efficient operation of its business. It argues that the standard is reasonable and its limitation to entry-to-service, justified. It argues finally that accommodation of the Complainants would be unreasonable and impractical. For the reasons which follow, each of these arguments must be rejected.

Section 5(a) of the Act provides in relevant part:

It shall be an unlawful discriminatory practice. . .
for any employer because of the. . . non-job related

handicap or disability to any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required.

43 P.S. 955(a).

Section 4(p) provides the Act's only clarification of the reach of the cited portion of Section 5(a):

The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in.

43 P.S. 954(p).

Applicable regulations promulgated by the Commission provide:

Handicapped or disabled person -- Includes the following:

(i) A person who:

(A) has a physical or mental impairment which substantially limits one or more major life activities;

(B) has a record of such an impairment; or

(C) is regarded as having such an impairment.

(ii) As used in subparagraph (i) of this paragraph, the phrase:

(A) "physical or mental impairment" means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or mental or psychological disorder, such as mental illness, and specific learning disabilities.

(B) "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(C) "has a record of such an impairment" means has a history of or has been misclassified as

having a mental or physical impairment that substantially limits one or more major life activities.

(D) "is regarded as having such an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in subparagraph (i)(A) of this paragraph but is treated by an employer or owner, operator or provider of a public accommodation as having such an impairment.

16 Pa. Code §44.4.

Non-job related handicap or disability -- Includes the following:

- (i) Any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in, or has been engaged in. Uninsurability or increased cost of insurance under a group or employe insurance plan does not render a handicap or disability job-related.
- (ii) A handicap or disability is not job-related merely because the job may pose a threat of harm to the employe or applicant with the handicap or disability unless the threat is one of demonstrable and serious harm.
- (iii) A handicap or disability may be job-related if placing the handicapped or disabled employe or applicant in the job would pose a demonstrable threat of harm to the health and safety of others.

16 Pa. Code §44.4.

These definitions have been upheld as a valid exercise of the Commission's legislative rule-making authority. Pennsylvania State Police v. PHRC, 457 A.2d 584 (1983); and see Pennsylvania State Police v. PHRC, 483 A.2d 1039 (1984), reversed on other grounds 517 1253 (1986) (appeal limited to propriety of remedy).

The burden of proof applicable to this case was set forth by Pennsylvania's Commonwealth Court in National Railroad Passenger Corporation (Amtrak) v. PHRC, 452 A.2d 301 (1982). The Complainants must first make out a prima facie case, which they may do by proving:

1. They are handicapped;
2. They applied for positions for which they were otherwise qualified;
3. They were rejected because of their handicaps;
and
4. The employer continued to seek qualified applicants.

Only the first element is seriously contested by the parties. As to the other elements, there is uncontradicted evidence that each Complainant applied for a position as brakeman (S.F. 15, 32, 41, 50, 58; N.T. 57, 142, 178, 217, 341, 342, 611) and was rejected because he wore eyeglasses. (S.F. 17, 33, 41, 50, 58) It is also not disputed that a number of individuals were hired as brakemen during the time periods when Complainants were seeking these positions. (Exhibit Z) It is therefore necessary to determine whether the Complainants are handicapped as defined by the Act and the regulations set out above.

On this record it cannot be seriously disputed that Respondent regarded each Complainant as handicapped within the meaning of 16 Pa. Code §44.4(ii)(D), cited above: their visual impairments were treated by the railroad as conditions which substantially limited their ability to perform the duties of brakemen. They are therefore handicapped within the meaning of 16 Pa. Code §44.4(i)(C), and are protected by the Act from discrimination on that basis.

Complainants are also handicapped within the meaning of 16 Pa. Code §44.4(i)(A): the fact of their rejections by Respondent means that their visual impairments substantially interfered with the major life activity of

working. Pennsylvania State Police v. PHRC, 457 A.2d 584, 589 n. 12. Complainants have therefore established a prima facie case, and it is necessary to consider Respondent's explanation of events.

Commonwealth Court in National Railroad Passenger Corp., cited above, held that an employer's burden, once a handicapped Complainant has made out a prima facie case, is to prove that the handicap in question is job-related. The regulations cited in full above define the job-relatedness of handicaps in terms of both ability to perform the essential functions of the position and the consequences of inability to so perform in terms of risk to either the handicapped individual or to other people. Respondent here argues strongly that deficient visual acuity is a job-related handicap for a brakeman. Resolution of this issue is at the core of this case and requires fuller discussion of both a brakeman's duties and the impact thereupon of wearing eyeglasses.

A very general description of brakeman duties taken from Respondent's Operating Rules has already been set forth above. A document entitled "Job Description and Physical Requirements for Brakemen," admitted as Exhibit X, provides greater detail. In addition, in a site visit to the railroad on May 13, 1986, a brakeman's duties were viewed and described on the record during an actual train ride; the tasks performed that day were described as a fair representation of brakeman duties by Respondent's Trainmaster, James J. Joswick, who provided most of the testimony during the site visit. (N.T. 316) Other testimony also described brakeman duties.

When a train is in motion the brakeman generally rides in the locomotive, along with the engineer and the conductor. (N.T. 262) Both brakeman and conductor serve as "second lookouts," closely watching ahead of the train for obstructions on the track or any conditions which might prove

hazardous. This function is particularly important in certain of the company's locomotives where the engineer's view is obstructed on one side by the structure of the locomotive itself. (N.T. 262-265) In rare instances it might be necessary for a brakeman to pull the emergency brake to stop the train. (N.T. 296)

Brakemen look back as well as forward. Particularly on a long curve where much of the train is visible, the brakeman looks back over the train, looking for problems such as smoke coming from the wheels and indicating a sticking brake. (N.T. 301) The distances involved may be considerable: the site visit began on a train ninety-nine cars and approximately one mile long. (N.T. 260, 297)

Off the train brakemen may mechanically throw the switches which control the direction of the track, determining for example whether the train goes onto a siding or stays on the main track. (N.T. 276-277) Also off the train the brakeman may couple or uncouple cars from each other or from the locomotive; this may be done at a fair distance from the locomotive. (N.T. 282-286) He may climb up onto a car, apply and release the hand brake, and dismount from the car. (N.T. 286)

In the process of performing duties such as uncoupling, the brakeman must communicate with the engineer and other members of the train crew. This is done by means of hand signals or small radios carried by the crew. The choice of whether to use hand signals or a radio is the crew member's; the railroad has no preference. (N.T. 287-288) Radios may however develop dead batteries, necessitating the use of hand signals. (N.T. 288)

All of these operations must be performed at night as well as during the day, and in poor weather conditions. (N.T. 317) The brakeman may have to get on or off a moving car. (N.T. 581) The maximum speed limit for the

railroad's trains, set by the company itself, is twenty-five miles per hour. (N.T. 280-281) While walking along the tracks he must avoid tripping over the rails, ties, and other obstacles on the ground; at night he may have only the light from a lantern. (N.T. 589) In the event of a sudden stop he may be thrown about, particularly if he is riding toward the rear of the train. (N.T. 590)

It is clear from this recitation of brakeman duties that good vision is a legitimate job requirement. Complainants do not contest that conclusion; they simply argue that their corrected vision is adequate to the job's demands. Respondent however points to the conditions under which brakemen must work and argues that serious hazards are posed by novice brakemen wearing eyeglasses: glasses may be lost, knocked off or broken in accidents, or fogged in bad weather; users of contact lenses may be incapacitated by dust particles which lodge in their eyes. It is these dangers to which Respondent points in support of its claim of job-relatedness.

This Commission has repeatedly rejected claims of this kind as sufficient evidence of the job-relatedness of a handicap. First, the dangers appear on this record to be purely hypothetical. In spite of the admitted fact that many of its brakemen wear eyeglasses, Respondent's very able defense to these charges did not produce a single incident of difficulty experienced by a brakeman wearing eyeglasses in connection with those eyeglasses.

Further, many of the dangers posited by Respondent are faced by all brakemen, whether or not they wear glasses or contact lenses. A blow to the head will cause at least temporary incapacity to anyone; dust particles will force anyone to shut his eyes at least briefly. Dangers faced equally by the handicapped and other workers cannot establish job-relatedness. See Pennsylvania State Police v. PHRC, 483 A.2d 1039 (1984).

Also, Respondent presents no persuasive reason for rejecting Complainants' suggestions that two kinds of special equipment would address its concerns: safety straps, to hold glasses securely on the wearer's head, and safety glasses. Indeed, the railroad apparently already provides both safety straps and safety glasses to certain of its employees. (N.T. 172, 228)

In addition, justification of the challenged policy is seriously weakened by the limits of the policy itself: as already noted, only newly hired brakemen are prohibited from wearing glasses. As it must, Respondent argues that experience in the position lessens the dangers posed by the wearing of glasses. However, no particular length of time in the position is required before it becomes permissible to wear glasses; a brakeman could conceivably spend a few weeks in the job before injury or illness necessitated glasses, and before familiarity with the job had been acquired.

It is particularly significant that one of the railroad's own witnesses testified credibly that conditions on the railroad have changed significantly since the challenged policy was adopted. James Emery, whose thirty-seven years on the railroad included ten years as a trainman (N.T. 545, 546), testified as follows:

Q: Do you think [the Complainants] could work the job of Trainman?

A: Today, yes.

(N.T. 570)

Q: You still feel that today the 20/20 uncorrected vision requirements is a good one for Trainmen entering service?

A: I have to be perfectly honest with you. I don't think it stands up to the same as it did back in the years when I started, because they have different conditions of working under now.

(N.T. 571)

Finally, Complainants presented the persuasive testimony of two expert witnesses. Dr. David Rupp, an optometrist, examined and tested the visual acuity of each Complainant. He also reviewed a job description of the duties of a brakeman. Significantly, he found that each Complainant's corrected visual acuity was 20/20 or better. (C.E. 13-17) Dr. Rupp testified that each Complainant could perform brakeman duties without any increased risk of harm to himself or others. (N.T. 392-400)

Dr. Gary Rubin, an expert in psycho-physics the study of how the visual system works and the visual conditions necessary for performing various tasks reviewed the results of the Complainants' vision tests, and viewed a brakeman performing representative duties during the site visit. His extremely persuasive testimony was that each Complainant could safely perform brakeman duties, with no increased risk to himself or anyone else.

Within the meaning of the regulations cited above, the Complainants' handicaps have not been shown to be job-related, either in terms of their ability to perform the duties of brakemen, or in relation to any threat posed to themselves or to other people. Respondent's arguments that its policy is both reasonable and necessary to the safe and efficient operation of its business are simply different ways of articulating the same concerns, and need not be separately addressed.

As noted, the applicable burden of proof in this case is that set out in National Railroad Passenger Corp. v. PHRC, 452 A.2d 301 (1982). To the extent that Action Industries, Inc. v. PHRC, 518 A.2d 610 (1986) requires Complainants to show that the reason articulated by Respondent for its action is pretextual, that showing has likewise been made on this record. The reason, failure to meet visual acuity standards, is overcome by evidence that: brakemen once hired may wear glasses no matter how recent their hire; many

brakemen do wear glasses; no program exists for regularly checking the visual acuity of brakemen; and safety glasses and safety straps are already being issued by the railroad.

Pennsylvania's Superior Court, holding that the Act requires reasonable accommodation of handicaps apart from the regulations imposing that requirement, addressed policy considerations and issues of statutory construction which are peculiarly relevant here:

We are bound to construe the Act "liberally for the accomplishment of the purposes thereof" (43 P.S. §962 (a)) and to read it "in a manner which will effectuate its purpose, a task which compels consideration of more than the statute's literal words." PHRC v. Chester School District, 427 Pa. 157, 166-167, 233 A.2d 290, 295 (1967). One purpose of this Act is to "foster the employment of all individuals in accordance with their fullest capacities regardless of their. . . handicap." 43 P.S. §952(b) (Emphasis added). The reason for this is because the "denial of equal employment. . . opportunities because of such discrimination, and the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, and necessitates their resort to public relief." 43 P.S. §952(a) (Emphasis added).

Were we to adopt the reasoning that reasonable accommodation is not required, the above purpose would be totally frustrated. For example, any time the disability involved one of the senses or faculties used in the performance of the job, the individual could automatically be denied employment by the very literal interpretation that the handicap itself is "job related." Under this reasoning, an applicant with a sight impairment could be denied employment because without his corrective lens he was unable to perform the job's essential functions and an employer would not need to make any accommodation for the wearing of glasses. Such a result surely negates the purpose of fostering full employment. We hold that the Act requires employers to make reasonable accommodations; the proper inquiry then becomes what constitutes reasonable accommodation.

Jenks v. AVCO Corp., 490 A.2d 912, 916 (1985) (All emphasis as supplied by Court).

After a careful review of the entire record in this case, it is my conclusion that Respondent discriminated against Complainants by refusing to employ them as brakemen, in violation of Section 5(a) of the Act. Based on the previous agreement of counsel, the hearing in this case is therefore to be reconvened for the purpose of determining the remedy to which Complainants are entitled. An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

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RESPONDENT	:	

RECOMMENDATION OF HEARING EXAMINER

Upon consideration of the entire record in this case, the Hearing Examiner concludes that Respondent discriminated against Complainants on the basis of their non-job related handicaps, in violation of Section 5(a) of the Pennsylvania Human Relations Act, and therefore recommends that the foregoing Findings of Fact, Conclusions of Law, and Opinion be adopted by the full Commission, and the following Interim Order entered, pursuant to Section 9 of the Act.

Edith E. Cox

Edith E. Cox
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

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RESPONDENT	:	

INTERIM ORDER

AND NOW, this 1st day of May, 1987, following review of the entire record in this case, including the notes of testimony, exhibits, briefs, and pleadings, the PHRC hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore

O R D E R S

that the hearing in this case be reconvened to determine the appropriate remedy to be awarded the Complainants, such hearing to be scheduled at the earliest convenience of the parties and the Commission but in any event no more than sixty (60) days from the effective date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Thomas L. McGill, Jr.
 Thomas L. McGill, Jr.
 Chairperson

ATTEST:

John P. Wisniewski
 John P. Wisniewski, Secretary