BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Charles Bilbruck, Charging Party,	)	HRC Case No. 0031010549
vs.	)	*Final Agency Decision*
Burlington Northern Santa Fe Railroad, Respondent.	)	

I. Procedure and Preliminary Matters

On June 17, 2003, Charles Bilbruck filed a complaint with the Department of Labor and Industry, alleging that Burlington Northern Santa Fe Railroad discriminated against him on the basis of disability (obesity) when it denied him the position of conductor. On January 30, 2004, the department gave notice that Bilbruck's complaint would proceed to a contested case hearing and appointed Terry Spear as hearing examiner. Terry N. Trieweiler, Meloy Trieweiler, represented Bilbruck. Jeff Hedger, Hedger Moyers, represented the railroad.

On May 6, 2004, the hearing examiner convened a hearing on the parties' cross-motions for summary judgment. Both parties agreed that there were no disputed material facts. The hearing examiner issued a final prehearing order in this case on May 7, 2004. After considering the filings, arguments and authorities of the parties, the hearing examiner granted summary judgment on liability in favor of Bilbruck, issuing a written decision confirming that decision on May 10, 2004. The summary judgment ruling is incorporated into this decision.

Before the May 13, 2004, contested case hearing on damages, the parties agreed to submit their damages presentations in writing without an evidentiary hearing. The parties filed a written stipulation defining the conditions for their written submissions. Pursuant to that stipulation, the parties filed their damages submissions. The department received the last filing on June 29, 2004, at which time the case was deemed submitted for final decision. A copy of the hearing examiner's docket accompanies this decision.

II. Issues

The primary issues for this case are whether Bilbruck had a disability, whether the railroad proved he could not do the conductor job safely without

undue risk of harm, and what relief, affirmative and compensatory, is proper. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Charles Bilbruck was born on January 19, 1966. He is 38 years old and resides in Glasgow, Montana, where he was raised and has lived most of his life. He is a single parent with custody of his daughter Teara who was born on December 13, 1990, and is 13 years old. He is currently employed at the Montana Bar in Glasgow where he earns $6.00 per hour and works 32 to 40 hours per week. He has been employed there for four years. In 2003 he earned $9,006.00 from that employment.

2. On April 29, 2003, Bilbruck applied for a conductor-trainee position with the railroad, located at Glasgow, Montana. On May 13, 2003, Bilbruck was interviewed by the railroad's Human Resource Generalist, Robin Kindig.

3. On May 20, 2003, Kindig extended a conditional offer of employment to Bilbruck contingent on three things:

- Proof of permanent employment eligibility in the United States,
- Receipt and review of a completed railroad medical history questionnaire and
- Successful completion of a drug screen.

4. On May 23, 2003, the railroad told Bilbruck that his physical examination was scheduled for May 29, 2003. Later that same day he received another message from the railroad that his physical examination had been cancelled.

5. Bilbruck timely completed and submitted the railroad's medical questionnaire and was ready to comply with the other conditions for his employment. Before he was able to comply with the other conditions to employment, the railroad told him that he was not qualified for the position of conductor-trainee, based on his weight and height. At the time of that decision Bilbruck had not received a physical exam from the railroad's medical department or anyone else.

6. The railroad reviewed Bilbruck's completed medical history questionnaire and decided that his height (5' 8") and weight (310 pounds) gave him a Body Mass Index (BMI) of 50. The U.S. Department of Health and Human Services' Center for Disease Control and Prevention defines any

person with a BMI of 30 or higher as obese. The railroad decided that Bilbruck had extreme obesity.

7. The railroad decided that Bilbruck was not medically qualified for hire as a conductor-trainee, because his obesity created a significant safety risk of personal injury to himself and to other workers. The tasks of a conductor-trainee which the railroad thought created the risk included some of the tasks of conductor, train service and engineer positions (to which a conductor-trainee could rise). The specific tasks that the railroad believed caused the significant risk were:

- Walking over uneven surfaces (rock ballast along tracks, on bridges) for extended distances,
- Climbing on and off railcars,
- Riding on the vertical ladder of moving railcars,
- Controlling the movement of railcars in rail yards,
- Driving trains through communities at high speeds,
- Working up to 12 hours at a time at a variable schedule,
- Working outdoors in all types of conditions and
- Remaining alert and vigilant at all times to avoid potential hazards involved with the movement of trains.

8. Relying upon statistical data, the railroad reached the same conclusion it had already reached for other individuals[1] – that hiring an obese applicant would involve too great a danger to the obese new employee and to others. The risk factors upon which the railroad relied involved the statistically elevated risk, for persons with extreme obesity, for:

- Extreme daytime sleepiness
- Sleep apnea
- Decreased exercise tolerance
- Osteoarthritis of the knee
- Fractures of the ankle
- Heart disease and diabetes and
- Associated risks of sudden incapacitation or death.

9. On May 28, 2003, Bilbruck spoke to Art Freeman, the Director of the railroad's medical support services in Fort Worth, Texas. Freeman told

[1] See Exhibit "A" to the railroad's brief in support of its summary judgment motion, an investigative finding in another state that documents a similar non-hire situation, without ever naming the exact nature of the alleged disability.

Bilbruck that he did not qualify for the position because of his height and weight. Freeman asserted that Bilbruck could be riding on the side of a boxcar and his arms or legs could give out and he could fall. On June 2, 2003, the Respondent's staff physician, Dr. Michael Jarrard advised Bilbruck by letter from Fort Worth, Texas, that he would not be hired as a conductor because he suffered from "extreme obesity."

10. Dr. Ronald Peterson is a Great Falls physician licensed to practice medicine in Montana, who limits his practice to occupational and sports medicine. He examined Bilbruck at the Havre Clinic on March 24, 2004, to evaluate his fitness for duty. Dr. Peterson found no reason why Bilbruck would be unable to perform the job of conductor-brakeman. He did not find anything about Bilbruck's physical condition or health which would make it unsafe or dangerous for him to perform the job for which he applied with the railroad. He found no evidence that Bilbruck suffered from any of the conditions which the railroad considered risk factors.

11. Kindig, who interviewed Bilbruck and conditionally offered him employment as a conductor-trainee, testified that Bilbruck's disqualification from the railroad employment resulted solely from the railroad medical department's decision that Bilbruck's physical condition impaired his ability to perform his job.

12. The railroad regarded Bilbruck as disabled when it applied to him the statistical risks associated with the general population of morbidly obese people. The railroad regarded Bilbruck as unable safely to walk over uneven surfaces for extended distances, to climb on and off railcars, to ride on the vertical ladder of moving railcars, to control the movement of railcars in rail yards, to drive trains through communities at high speeds, to work up to 12 hours at a time at a variable schedule, to work outdoors in all types of conditions and to remain alert and vigilant at all times to avoid potential hazards involved with the movement of trains. In short, the railroad regarded Bilbruck as unable safely to engage in skilled driving, operation of large and complex machinery and sustained heavy manual labor, among other tasks. Indeed, the railroad regarded Bilbruck as unable safely to stay awake at work, adequately to rest and to sleep while off-duty, safely to do his physical labor, safely to bend his knees and even to avoid breaking his ankles. The railroad also regarded Bilbruck as unable to avoid heart disease and diabetes and the associated risks of sudden incapacitation or death while at work.

13. By regarding Bilbruck as a direct threat to himself and others in engaging in the listed conductor-trainee, train service and locomotive engineer

tasks, the railroad necessarily regarded him as unfit and unable to work the entire range of jobs that would require he safely engage in any tasks requiring the same skills and abilities. The railroad necessarily considered Bilbruck substantially limited in the performance of a broad range of jobs (and outside life activities, for that matter).

14. Even if Bilbruck's obesity was not an actual physical or mental impairment, the railroad treated him as if he had a substantially limiting impairment.

15. The railroad's justification of its adverse action by alleged safety risks was pretextual, since it was not based upon any effort to verify actual safety risks individual to Bilbruck's actual condition, and no such actual safety risks existed.

16. The railroad conditionally hired Bilbruck to begin his employment on June 16, 2003. But for its withdrawal of that conditional hiring, he would have started work on that date. He was ready, willing and able to work all shifts available to him from that date forward. He wanted to work as much as possible and intended to work until his full retirement age of 67.

17. From June 16, 2003, through March 31, 2004, Bilbruck earned $7,200.00 from employment at the Montana Bar and $300.00 performing a roofing job for Lynn Sather. He did not seriously dispute the railroad's contention that he also earned approximately 12% of his bartending wages in tips or $864.00. His total wages over the 9.5 months from his prospective hire date through March 31, 2004, were $8,364.00. His average monthly income from his employment was and is, therefore, $880.42.[2] He earned no fringe benefits either bartending or roofing except mandatory Social Security withholding and employer contributions.

18. Bilbruck has done roofing work when it was available. The availability of that work has decreased in recent years. He receives no fringe benefits in his current occupation. He has a high school education and no specialized training. His current income is typical of what is available for a person with his training and experience in Glasgow, Montana, apart from work for the railroad. He has continued to monitor the sources of information about jobs in the area but has found nothing for which he is qualified that offers

[2] This is slightly more than Bilbruck would average if he worked a full time minimum wage job with no benefits for 50 weeks a year (2.143 weeks off work without pay for sickness, vacation, etc.).

better pay. Bilbruck has made reasonable efforts to mitigate the wage loss caused by the railroad's adverse action, as he continued to pursue earning a wage to support himself and his daughter.

19. Because he wanted to work as much as possible, Bilbruck would have earned as much as railroad employees with comparable seniority dates to his original date of June 16, 2003. The railroad hired nine persons with comparable seniority dates. Two of them quit before training concluded. Another quit in January of 2004. Of those who remain, their earnings from June 16, 2003, to April 30, 2004, are as follows:

- Sam Galland – $37,689.37
- Robert Baillargeon – $34,540.05
- Josh Partridge – $36,254.40
- Garret Gardner – $35,575.30
- Todd Israel – $27,054.26
- David Johannes – $41,966.22

20. Johannes was unable to hold jobs in Glasgow based on his seniority[3] and voluntarily went to Minot, North Dakota. Israel's earnings substantially deviate from those of the others in the class, for no explicable reason. A reasonable estimate of what Bilbruck would have earned, excluding Johannes and Israel, is the average earnings of the remaining four members of the class of employees that would have included Bilbruck. The average of the other four employees over that ten and one-half month period is $36,014.78 or $3,429.98 per month.[4]

21. In addition to their average monthly income of $3,429.98, the employees comparable to Bilbruck received benefits for health care, dental care and life insurance at a value estimated by the railroad to be $900.00 per month. There is no evidence that Bilbruck incurred or deferred any out of pocket expenses in any of these areas to date.

22. The railroad also contributes, under federal law, 19.3% of employee income to their individual railroad retirement accounts and 1.45% of each employee's income for Medicare Hospital Insurance. The monthly average of these contributions is $711.72 (20.75% of $3,429.98).[5]

---

[3] The six employees are listed in descending order of their seniority.

[4] Both parties proposed this monthly earnings figure, for slightly different reasons.

[5] The combined total of the federally mandated contributions from the employer may not exceed $15,252.45 per year, which exceeds the contributions Bilbruck would have earned.

23. As a direct result of the railroad's illegal discrimination, Bilbruck has lost wages of $2,549.56 per month, from June 16, 2003, to the present. He will also lose, unless the railroad elects to hire him in accord with this decision, future wages at that same rate for whatever period of time he would have been willing and able to continue in the employ of the railroad.[6]

24. Seniority determines availability and work options for railroad employees. If the railroad cannot, consistent with any collective bargaining agreement or federal requirement, assign Bilbruck seniority based on his original proposed hire date, he will lose future income even if the railroad hires him now. His income loss will result from having less seniority than employees hired after June 16, 2003, until the date the railroad hires him.

25. After the railroad's adverse action (withdrawal of the original conditional offer of employment), Bilbruck talked with other railroad employees to ask if they thought he could perform the job for which he had applied. He also asked their advice about how to proceed again to pursue employment with the railroad. By these actions, Bilbruck published[7] the fact of the railroad's rejection of his application based on his weight in his hometown of Glasgow. The railroad did not publish its adverse action or the reason for it. As a result of his own publication of the information, Bilbruck has been the subject of embarrassing comments and some ridicule.

26. Bilbruck's lifelong ambition was to work for the railroad. He applied for work on numerous occasions prior to June 2003 incident, but was not interviewed. When on this occasion he was interviewed, conditionally hired, and then rejected based on his weight (a lifelong condition), it was an emotionally painful experience. Reasonable compensation for the emotional distress he has experienced as a result of the railroad's unlawful discriminatory conduct, but not his publication of that conduct is $5,000.00, payable immediately, without regard to the following lost income options.

27. The railroad conditioned its employment offer to Bilbruck upon proof of permanent employment eligibility in the United States (which should

---

[6] The variables involved in future earning losses are virtually infinite, including changes of career plans, illness, injury and disciplinary separation. As already noted, a third of the nine employees who started when Bilbruck should have started had left within seven months. The least senior of the remaining six employees moved out of state to make better money while remaining with the railroad, an option that Bilbruck, as a single parent of a teenage daughter, might not have been willing to accept.

[7] The verb "publish," in this decision, is used in its technical legal sense, meaning to provide the information to others.

not be a problem), receipt and review of a completed railroad medical history questionnaire (which he provided), successful completion of a drug screen (which he still must do) and a physical examination (which the railroad cancelled and Bilbruck obtained himself through Dr. Peterson). The railroad did not condition the offer upon any additional conditions.

28. Unless Bilbruck fails a standard railroad drug screen or cannot provide ordinary proof of his permanent employment eligibility, he is entitled to employment by the railroad in the position of conductor-trainee with a retroactive seniority date effective June 16, 2003, with his seniority determined by lot within the seniority of his contemporaries and ahead of all subsequent hires. If the railroad hires Bilbruck with this retroactive seniority date, then he has lost wages of $34,538.89 ($2,549.56 times 13.547 months from June 16, 2003, through August 3, 2004), as well as the railroad's contributions to his pension and Medicare accounts over the same time. Bilbruck had no out of pockets expenses incurred during the 13.547 months as a result of no fringe benefits, and will now have those fringe benefits. He suffered no loss due to the absence of fringe benefits (aside from emotional distress).

29. If the railroad hires Bilbruck without retroactive seniority, then he has lost wages of $34,538.89, as well as the railroad's contributions to his pension and Medicare accounts over the same time. Bilbruck had no out of pockets expenses incurred during the 13.547 months as a result of no fringe benefits, and will now have those fringe benefits. He has suffered no loss due to the absence of fringe benefits (aside from emotional distress). Bilbruck will also lose future wages due to his decreased seniority. This future loss is reasonably worth $10,000.00, on each of the first four anniversaries of his hire, provided that for each such payment he has, through the date the payment is due, either remained in the employ of the railroad or has left that employment involuntarily, through discharge, injury, lay off or other method of ending his employment which he did not elect.

30. For every day after this final decision (beginning August 4, 2004) that the railroad fails to hire Bilbruck, until the day of such hire under either paragraph 28 or 29, Bilbruck will lose an additional $83.82, plus contributions to his pension and Medicare accounts for those days.

31. If the railroad elects not to hire Bilbruck pursuant to this decision, then he has still lost wages of $34, 538.89, as well as the railroad's contributions to his pension and Medicare accounts. He also has lost fringe benefit coverage in the past and the opportunity to earn wages and benefits in future employment with the railroad. These losses are reasonably worth an

immediate additional $12,192.30 and, on each of the first four anniversaries of this decision, the additional sum of $50,000.00, as liquidated front pay.

32. Interest on the back pay is in the total of $1,808.36 to date ($2,549.65 times .1 divided by 12 equals monthly interest on monthly lost wages – 12.547 plus 11.547 plus 10.547 . . . etc. . . . plus 1.547 plus .547 months equals total months of interest – total months of interest times monthly interest on monthly lost wages equals interest to date).

33. The railroad has a practice of applying the statistical risk factors for the class of morbidly obese applicants as the sole determinant in taking adverse employment actions against job applicants, without undertaking individualized assessments of the actual risks for the particular applicant. This may not be the only circumstance in which the railroad relies upon statistical data, gathered and analyzed in accord with the practice of occupational medicine and/or public health medicine, to the exclusion of individualized assessment, in rejecting applicants for employment. It is reasonable to require that hereafter when the railroad considers job applications submitted for positions in Montana, it must undertake an individualized assessment before rejection of such applications for medical reasons. The railroad cannot reject such applications for employment based simply upon medical literature or statistical evidence regarding the greater likelihood that a person with a given body-mass index is more likely to develop health problems. Any such rejection for medical reasons can be based only on an individualized assessment of the applicant which must include a physical examination, a complete health history and physical capacities testing. In the event the railroad chooses to reject such an applicant following the assessment, it must document the objective bases for the rejection and retain, for possible administrative review, the results of the rejected applicant's physical evaluations and, for purposes of comparison, the comparable test results of others who were hired for the position.

IV. Opinion[8]

Montana law prohibits employment discrimination because of disability, unless the essential tasks of the job require a distinction for the disability. Mont. Code Ann. § 49-2-303(1)(a).

A. Liability

[8] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

In 1998, the Montana Supreme Court clarified the standard by which to judge direct evidence cases in which the parties agreed upon the reasons for adverse action and only disagreed on whether the reasons were discriminatory. *Reeves v. Dairy Queen*, ¶¶ 16-18, 1998 MT 13, 287 Mont. 196, 953 P.2d 703. Both Bilbruck and the railroad agreed that this was a direct evidence case. The railroad refused to hire Bilbruck solely because of his height and weight, citing various statistical correlations between high BMI and serious health problems. There was no dispute about the railroad's actual motive – it denied Bilbruck the job because of his obesity.

To establish his case of disability discrimination in employment, Bilbruck had to prove that (1) he had a disability; (2) he was otherwise qualified for the job he sought and doing that job would not subject him or others to any undue risk of physical harm; and (3) the railroad denied him the job because of his disability. *Reeves* ***at*** ¶21, ***citing*** *Hafner v. Conoco, Inc*. (1994), 268 Mont. 396, 886 P.2d 947, 950; ***see*** Mont. Code Ann. §§ 49-4-101 and 49-2-303(1)(a).

Bilbruck was qualified for the job but for his obesity, which was the sole reason why the railroad denied him the job after making a provisional offer of employment. The key questions of this case involve whether he had a disability and whether he could do the job safely without undue risk of harm.

The railroad defended this case on both those bases. First, it argued that Bilbruck did not have a disability and that it had rejected him only for this job, not for a broad range or class of jobs. Second, it argued that even if it did consider Bilbruck's obesity a disability, it rejected him because his obesity presented a direct threat to his own safety and that of others if he became a conductor-trainee.

A(1). Obesity Regarded as a Disability

A disability is a physical or mental impairment substantially limiting one or more of a person's major life activities. Mont. Code Ann. § 49-2-101(19)(a). Bilbruck was a person with a disability if he had an impairment that substantially limited one or more of his major life activities or a record of such an impairment or a condition regarded as such an impairment. ***Id.*** Work is a major life activity. *Martinell v. Montana Power Co.* (1994), 268 Mont. 292, 886 P.2d 421, 428.

The railroad first argued that Bilbruck was not actually disabled. Bilbruck agreed and this point is not in dispute. The real dispute arose over whether the railroad regarded Bilbruck as disabled when it applied to him the

statistical risks associated with the general population of morbidly obese people. The railroad insisted that it did not regard him as disabled, because it regarded him only as a safety risk that it should not have to assume, rather than a person with an impairment that substantially limited one or more of his major life activities.

The question of whether the railroad regarded Bilbruck as substantially limited in the performance of a broad range of jobs is a fact question. ***See*** *Reeves*, ***op. cit.*** The parties agreed that the hearing examiner had all the objective facts (about which they had no dispute) which bore upon the question of the railroad's perception of Bilbruck. Thus, the hearing examiner decided this perception question on summary judgment. There were no credibility issues involved, only issues of interpretation and application of the law to the uncontested facts.

The railroad necessarily considered Bilbruck substantially limited in the performance of a broad range of jobs (and outside life activities, for that matter):

> On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs . . . .

Butterfield v. Sidney Pub. Schools, ¶ 23, 2001 MT 177, 306 Mont. 179, 32 P.3d 1243 (quoting and applying the EEOC's interpretive guideline to 29 C.F.R. § 1630.2(j).

Bilbruck, according to the railroad, had substantially more limitations than the claimant in *Butterfield*, whose employer clearly regarded him as disabled:

> The District contends that . . . Butterfield failed to prove that he was significantly restricted in performing a "broad range of jobs" and showed only that he could not perform the custodian's job because it required lifting more than 50 pounds. Having reviewed the record and the hearing examiner's findings,

> we now conclude that the District mischaracterizes Butterfield's burden and that he satisfied his burden when he proved and the hearing examiner found that he is significantly restricted in the ability to perform that class of jobs which requires heavy physical labor, or at least that his employer regarded him as so restricted.

Butterfield, ***at*** ¶ 19 (emphasis added).

The Court went on to detail the kind of evidence sufficient to establish a "regarded as" disability case, ***id. at*** ¶¶ 31-32:

> We noted that the Conoco personnel director testified that in his opinion Hafner was restricted in basic job functions that would limit his performance of work or could limit his performance of work and on that basis held:
>
> > Under the federal standard, which we adopt, and based on the testimony of the Conoco personnel director, we conclude that Hafner has established that Conoco "regarded" him as physically disabled. We hold, therefore, that the District Court erred in determining that Hafner failed to establish the first element of a prima facie case of employment discrimination. . . .

Hafner, 268 Mont. at 403, 886 P.2d at 951.

> We concluded in *Hafner* that the plaintiff's employer regarded him as physically disabled because it expressed the opinion that he was "restricted . . . in basic job functions . . . ." It is clear from the hearing examiner's findings in this case that Butterfield was not allowed to return to work for the exact same reason. His employer considered him restricted in his ability to do heavy lifting. As such, Butterfield was regarded as restricted in the ability to perform that class of jobs which required heavy lifting and therefore was or was at least "regarded as" physically disabled.

Every employer considers an applicant's fitness for the particular job to which the application applies. If employers thereby automatically insulated themselves from any liability for regarding applicants as restricted from a broad range of jobs, the "regarded as" provision of the law would be useless. In enacting laws the Montana Legislature "neither does nor requires useless acts." Mont. Code Ann. § 1-3-223. When (as *Hafner* notes) the employer considers

the claimant restricted in his ability to perform specific tasks, the employer necessarily considers the claimant restricted from performing those tasks in any job that requires them. The railroad cannot defend by claiming it exercised subjective tunnel vision, looking only at Bilbruck's restrictions with regard to a single job. To defend, it must show that the specific restrictions it assigned to Bilbruck uniquely disqualified him from that single job but not from a broad range or class of jobs.

A commercial airline pilot's job may require uncorrected 20/20 vision, even though most jobs (including most pilots' jobs) require only 20/20 corrected vision. *Sutton v. United Air Lines, Inc.* (1999), 527 U.S. 471. A job requiring a DOT commercial license may also have more strict requirements than most driving jobs. *Albertson's v. Kirkingburg* (1999), 527 U.S. 555. Such restrictions may not preclude an applicant from a wide range or class of jobs, because they are so specific to the particular job. But the laundry list of "risks" the railroad regarded Bilbruck as facing would have disqualified him from a huge range or class of jobs.

A(2). Bilbruck Was "Regarded as" Disabled When the Railroad Incorrectly Decided His BMI Imposed Substantial Limits on His Ability to Work

If Bilbruck's obesity actually limited his major life activities, an additional question would arise about whether his obesity could constitute a disability. Obesity that limits major life activities but does not result from physical or mental abnormalities is potentially temporary. It develops and remains because of voluntary individual choices regarding diet, exercise, and so on.

Temporary conditions typically are not disabilities under the law. *Adamson v. Pondera County*, ¶ 23, 2004 MT 27, 319 Mont. 378, 84 P.3d 1048, ***quoting*** EEOC Interpretive Guidelines to 29 C.F.R. § 1630.2:

> On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza.

In the same section quoted in *Adamson,* the guidelines likewise cite obesity as a temporary condition rather than a disability: "Similarly, except in rare circumstances, obesity is not considered a disabling impairment."[9]

Thus, obesity may not be an actual disability if it is a condition resulting from personal choices as opposed to a condition resulting from a physical or mental abnormality.[10] Federal disability law applies the same reasoning in extending disability discrimination protection to cover drug addicts in recovery but not current illegal drug users. ***See***, ***e.g.***, *Davis v. Bucher* (E.D.Pa. 1978), 451 F. Supp. 791; ***see also***, 42 U.S.C. § 12210.

For "regarded as" disability, however, 29 C.F.R. § 1630.2(l)(3) extends the protection to people who do not actually have a physical or mental impairment at all, but are only treated as if they had one:

> (l) Is regarded as having such an impairment means:
>
> . . . .
>
> (3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(h)(1) and (2) define physical or mental impairment as disorders or abnormalities, the kinds of problems that happen to people rather than resulting from volitional choices:

> (h) Physical or mental impairment means:
>
> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome,

---

[9] ***Cf.***, *Soliz v. Continental Oil Co.* (Mont. H.R.C., 1978) No. RHE6-147 (***dicta,*** limited to the facts of the case).

[10] In some cases, the theory that obesity is a voluntary and therefore temporary condition might be hotly contested. That question is irrelevant here.

emotional or mental illness, and specific learning disabilities.

Montana has essentially the same statutory provisions (defining disability as physical or mental impairment) as those appearing in the Americans with Disabilities Act (ADA). Mont. Code Ann. § 49-2-101(19). The prohibition against disability discrimination in employment, which appears in Mont. Code Ann. § 49-2-303(1)(a), likewise mirrors the ADA.

Whether Bilbruck's obesity would meet the legal definition of a physical or mental impairment if it were actually substantially limiting is irrelevant under the law. The railroad treated him as if he had a substantially limiting impairment. That treatment put him squarely within the third category of "regarded as" disability under 29 C.F.R. § 1630.2(l)(3), even if the condition regarded as limiting him was not legally an impairment. The law prohibits discrimination based upon an erroneous perception that the claimant is substantially limited. Even if Bilbruck's obesity did not fit within the impairment definitions in 29 C.F.R. § 1630.2(h)(1) and (2), the railroad treated him (erroneously) as if he had a substantially limiting impairment, thereby illegally discriminating against him.

Reeves is actually a case in point. Any time an employer, such as Dairy Queen for Reeves or the railroad for Bilbruck, regards a person (applicant or current employee) as substantially limited when the person is not, the employer violates the Human Rights Act. The prohibition against discrimination because of "regarded as" disability can sometimes be broader than the prohibition against discrimination due to actual disability, when the limitation is only in the perception of the employer.

A(3). Montana Law Requires an Individualized Assessment to Establish a "Direct Threat"

Both parties cited one decision in the prolonged federal litigation between Mario Echazabal and Chevron. *Chevron U.S.A. v. Echazabal* (2002), 536 U.S. 73. The railroad correctly cited *Echazabal* as consistent with Montana discrimination law that an employer can refuse to hire an individual with a disability, if working the job could pose a direct threat to the safety of

the individual or others.[11] The Montana Human Rights Commission addressed this precise issue in 1996, by rule. Admin. R. Mont. 24.9.606(6).[12]

Montana courts seeks guidance from federal cases when there is no Montana precedent and the federal law interpreted has the same rationale and purpose. ***E.g.***, *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, 204; *Crockett v. Billings* (1988), 234 Mont. 87, 761 P.2d 813, 816. In this case, Montana law controls for the human rights claim, and no resort to the federal case law is necessary. If Bilbruck actually posed a direct threat to the health or safety of himself or others, the railroad's rejection of his application would not have been unlawful.

The 1996 Montana rule required an employer to undertake an independent assessment of actual safety risks before taking adverse employment action based upon disability, or else the employer's safety concern was presumed to be a pretext. Admin. R. Mont. 24.9.606(7).[13] The rule also defined "independent assessment." Admin. R. Mont. 24.9.606(8).[14]

Echazabal also mirrored this prior Montana law, since the Supreme Court approved an EEOC regulation that mandated factual inquiry into any alleged direct threat of harm before the employer took the adverse action:

> The E.E.O.C. regulation disallows just this sort of sham protection, through demands for a particularized enquiry into the harms the employee would probably face. The direct threat defense must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence," and upon an expressly

---

[11] The specific holding of *Echazabal* upheld an EEOC regulation approving refusal to hire based on danger to the applicant's own health due to a disability.

[12] "An accommodation to a person with a physical or mental disability for the purpose of enabling the person to perform the essential functions of an employment position is not reasonable if it would endanger the health or safety of any person."

[13] "If an employer defends an adverse employment action against a person with a physical or mental disability on the grounds that an accommodation would endanger the health or safety of a person, the employer's failure to independently assess whether the accommodation would create a reasonable probability of substantial harm will create a disputable presumption that the employer's justification is a pretext for discrimination on the basis of disability."

[14] "Independent assessment of the risk of substantial harm is evaluation by the employer of the probability and severity of potential injury in the circumstances, taking into account all relevant information regarding the work and medical history of the person with the disability before taking the adverse employment action in question."

> "individualized assessment of the individual's present ability to safely perform the essential functions of the job," reached after considering, among other things, the imminence of the risk and the severity of the harm portended. 29 CFR § 1630.2(r) (2001).

Echazabal, ***op. cit. at*** 85-86 (emphasis added).

The congruence between *Echazabal* and the Montana rules is interesting but essentially irrelevant. The department must follow Montana regulations in deciding this case, without regard to whether federal law is consistent with it. *Laudert v. Richland County Sheriff's Office*, 2000 MT 218, ¶40, 301 Mont. 114, 7 P.3d 386 (when the statute authorized discretionary monetary recovery against the respondent, and a properly adopted regulation exercised the agency's discretion by denying any such recovery upon proof of "mixed motive," the department properly followed its own regulation rather than the discretionary language of the statute and denied the recovery upon proof of mixed motive).

A(4). The Railroad Failed to Meet the "Direct Threat" Standard

Admin. R. Mont. 24.9.606(5), (6) and (7), quoted at notes 13, 14 and 15, pp. 15-16, ***supra***, establish the "direct threat" standard under Montana law. Since any accommodation that leaves an individual with a disability a danger to the health or safety of any person is unreasonable, an employer has no obligation to hire or retain an employee who because of disability engenders such a danger. The railroad is defending on this basis. Unless the railroad independently assessed the reasonable probability of substantial harm, its safety defense is presumed to be a pretext. An "independent assessment" is an evaluation by the railroad of the probability and severity of potential injury in the circumstances, taking into account all relevant information regarding the work and medical history of the person with the disability before taking the adverse employment action in question.[15]

The railroad placed Bilbruck within the entire class of persons with morbid obesity and applied to him the statistical risk factors for that entire class. It did not inquire into or consider Bilbruck's work history, activity history, prior complaints with such activities or medical approvals to engage in those activities. It relied solely upon his status as an extremely obese person.

[15] The regulations address direct threat in the context of accommodations. Clearly, when an employer decides (without any effort to accommodate) that hiring or retaining the employee is impossible because of the danger to the applicant or others, the same analysis applies.

Neither the railroad nor Dr. Peterson, the physician who actually performed a physical examination of Bilbruck after the railroad cancelled its physical examination of him, could predict whether or when Bilbruck actually would develop any of the problems identified as "risks" of the morbidly obese. However, Dr. Peterson verified that Bilbruck had none of those problems at the time of his examination, after the railroad had rejected him. The railroad, basing its rejection purely on the "risks," made no effort to ascertain whether Bilbruck had any of those problems. Clearly, the absence of those problems made no difference to the railroad's decision. The railroad did not engage in an independent assessment of the probability and severity of potential injury in the circumstances, taking into account all relevant information regarding the work and medical history of Bilbruck before taking the adverse employment action in question.

There was no direct evidence of the degree to which Bilbruck individually increased the particular risk of harm to others or to himself if he went to work for the railroad. The railroad applied the statistics to him straightforwardly – since the class of morbidly obese persons was, overall, at a statistically higher risk of the various problems than the entire population, so was Bilbruck individually. The railroad did not provide any valid basis to apply the statistics whole cloth to any individual, nor did it attempt any comparison between the alleged risk for Bilbruck versus either the entire morbidly obese population or the general populace in performing railroad jobs.

In some areas the law allows wooden application of a statistical analysis to ascertain an individual person's entitlement. For example, the Montana Workers' Compensation Act uses impairment ratings, based on objective range of motion losses, to set minimum entitlements for injured workers (further entitlements can accrue if an injured worker suffers an actual lost earning capacity). Mont. Code Ann. § 39-71-703.

In disability discrimination, by contrast, Montana law expressly prohibits stereotyping based upon perceived disability as a basis for denying an otherwise qualified individual consideration for a job the individual could safely perform. ***E.g.***, *Reeves*, ***op. cit. at*** ¶ 30. To rely upon the defense of risk of harm the employer must show that it found, through an individualized assessment, that allowing the particular claimant to perform the job would create a reasonable probability of substantial harm to either that particular claimant or to others within the actual zone of risk for that job. *Hafner v. Conoco, Inc*. 1999 MT 69, ¶ 34, 293 Mont. 542, 977 P.2d 330; Admin. R. Mont. 24.9.606(5), (6) and (7). To comply with the law, the railroad had to perform an individualized assessment of the risk of harm if Bilbruck commenced work in the particular job,

to verify the risk before taking adverse employment action. The railroad had to make appropriate actual inquiries about risk of harm to Bilbruck, not to the statistical class. It had to take into account all relevant information about Bilbruck particularly. The pertinent information for Bilbruck would have included whether he actually suffered from any of the "risk" factors, his work history, his medical history and his actual risks of substantial harm because of his prospective individual actual employment. *Hafner* ***at*** ¶ 41.

The railroad took Bilbruck's BMI from his medical history, and ignored everything else. It ignored all the other mandatory factors for independent assessment, and decided to withdraw its conditional offer of employment. Its statistical analysis of morbidly obese persons' risk factors did not rebut the disputable presumption that it acted out of a discriminatory motive. Indeed, the railroad did act out of a discriminatory motive – it stereotyped Bilbruck because of his weight, failing and refusing to evaluate his individual risks as an applicant. In this connection, a quotation from the legislative history of the ADA, S. Rep. No. 101-116, p. 28 (1989), is entirely consistent with Montana Human Rights law: "It would also be a violation to deny employment to an applicant based on generalized fears about the safety of the applicant. . . . . By definition, such fears are based on averages and group-based predictions. This legislation requires individualized assessments" (emphasis added). The railroad could no more reject Bilbruck solely because of a perceived disability (without an individualized assessment) than it could reject him solely because of his membership in any other protected class.

B. Relief Accorded

Finding the railroad illegally discriminated against Bilbruck, the department may order any reasonable measure to rectify the resulting harm that Bilbruck suffered. Mont. Code Ann. § 49-2-506(1)(b). The purpose of damage awards in discrimination cases is to assure the victim is made whole for such damages. *Vortex Fishing Systems, Inc. v. Foss*, 2001 MT 312, ¶ 27, 308 Mont. 8, 38 P.3d 836; *P.W. Berry, Inc. v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; ***see***, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.

B(1). Back Pay and Prejudgment Interest

By proving discrimination, Bilbruck established a presumptive right to recover lost wages. *Albermarle Paper Company*, ***supra at*** 417-23. He proved with reasonable accuracy the amount of wages he lost because of the railroad's adverse actions. *Horn v. Duke Homes* (7th Cir. 1985), 755 F.2d 599, 607 ***and*** *Goss v. Exxon Office Systems Co.* (3rd Cir. 1984), 747 F.2d 885, 889.

The Department is authorized to order interest paid at the rate of 10% per annum on the amount of back pay due. *P.W. Berry, Inc.*, ***supra at*** 523; *European Health Spa v. Human Rights Commission* (1984), 212 Mont. 319, 687 P.2d 1029, 1033; *Foss v. J.B. Junk*, HRC No. SE84-2345 (1987).

B(2). Fringe Benefits

The railroad estimated the value of the fringe benefits (health care, dental care and life insurance) it provided to employees at $900.00 per month. Bilbruck did not show any actual expense he incurred or deferred due to the lack of those benefits. Clearly, if the railroad elects not to hire him, he will lose those benefits, and incur expenses in the future, as the result of that loss. Rather than take an estimated value and woodenly applying it, reasonable measures to rectify this harm will vary according to the choice the railroad makes regarding its future treatment of Bilbruck. If the railroad hires Bilbruck, the commencement of the benefits with that hiring will ameliorate any past harm, so that a specific pecuniary remedy in addition to the hiring (and the award for emotional distress) is not reasonably necessary. If the railroad elects not to hire Bilbruck, then there is no such amelioration, and both an award for the past loss of the benefits and an enhanced award for future losses (including the benefits) are reasonably necessary.

Also, retroactive contributions to the pension plan and Medicare are reasonable if possible. If not possible, then contributions to Social Security are a reasonable alternative. If the railroad declines to hire Bilbruck at all, this is another future loss that justifies "front loading" the final front pay option.

B(3). Front Pay

For future relief from a discriminatory refusal to employ, the preferred remedy is reinstatement. *Cassino v. Reichhold Chem. Inc.* (9th Cir. 1987), 817 F.2d 1338, 1346. When an order for reinstatement or hire is not an option, front pay can be awarded. *Fortino v. Quazar Co.* (7th Cir. 1991), 950 F.2d 389, 398. "Front pay" is an award for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when placement in the lost job is not feasible – it is usually temporary to permit the victim to reestablish his "rightful place" in the actual job market. *Martinell*, ***op. cit. at*** 439; *Rasmussen v. Hearing Aid Inst.*, HR Case #8801003988 (March 1992), ***approved***, *H.A.I. v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 635; *Sellers v. Delgado Community College* (5th Cir. 1988), 839 F.2d 1132; *Shore v. Fed. Ex. Co.* (6th Cir. 1985), 777 F.2d 1155, 1158.

Front pay is appropriate if it is impossible or inappropriate to order the railroad to employ Bilbruck. One common reason to award front pay is if

hostility or antagonism between the parties makes such an order impracticable. *Cassino*, ***supra at*** 1347 (upholding front pay award based on "some hostility" despite testimony that the plaintiff and the defendant were still friends); *Thorne v. City of El Segundo* (9th Cir. 1986), 802 F.2d 1131, 1137; *E.E.O.C. v. Pacific Press Publ. Assoc.* (N.D. Cal.), 482 F.Supp. 1291, 1320 (when effective employment relationship cannot be reestablished, front pay is appropriate), *affirmed* (9th Cir. 1982), 676 F.2d 1272. However, the absence of antagonism does not preclude front pay if requiring the railroad to hire Bilbruck is not realistically workable or even possible for other reasons.

It would be preferable that the railroad hire Bilbruck with a retroactive seniority date established by lot as compared to the other employees hired on that date in the Glasgow area. However, the record does not establish whether the railroad can do so. Therefore, front pay based on the continuing wage loss due to lesser seniority must be an option to address the circumstances if the railroad can and will hire Bilbruck, but without retroactive seniority. The lesser seniority will affect Bilbruck throughout his future employment with the railroad. The greatest impact will be the initial impact, when his earnings are at their probable lowest and the greatest number of other employees hired after June 16, 2003, and before this order will still be working for the railroad. Normal attrition over the years will reduce the impact of his lesser seniority as some of those other employees leave work with the railroad for various reasons. The amount of income lost per year, even in the first four years, may well be less than $10,000.00 per year, but the loss will continue after the first four years. "Front-loading" this award for four years and then ceasing it is a reasonable measure to compensate Bilbruck (the duration of whose career with the railroad remains uncertain, as it is for all employees) for that loss.

If the railroad elects not to hire Bilbruck at all, a heavier "front loading" is necessary. Bilbruck, in such a case, will be losing around $30,000.00 a year in income, based upon his present actual earnings. Enhancing that recovery in light of the loss of four years of benefits and of both income and benefits beyond the four years is reasonable.

Ascertaining future lost wages is necessarily an exercise in reasoned speculation. The hearing examiner cannot hold Bilbruck to an unrealistic standard of proof (***see*** *Horn*, ***op. cit.***), yet there must be credible and substantial evidence to support a finding that future lost wages extend into the distant future. The facts here do include evidence of Bilbruck's intent to stay with the railroad, which is credible in light of the labor market in Glasgow. Nevertheless there is obviously some turnover for railroad employees, as the departure of three of the nine persons hired in June 2003 during the first seven months of their employment illustrates. The railroad may face financial

problems in the future that could result in changes to its retention and pay practices. Bilbruck's family situation will change. He may no longer elect to stay in the Glasgow area. His career goals also may change over the years.

Montana law gives weight to these kinds of concerns about long-range prognostication of future wage loss. In the Montana Wrongful Discharge from Employment Act, recovery of lost wages and fringe benefits is for a maximum of four years from the date of discharge. Mont. Code Ann. § 39-2-905(1). There is no comparable statutory limitation applicable to human rights complaints, but clearly the legislature wants future lost wages awards to be carefully considered before extending them far into the future. Four years of "front loaded" front pay in addition to back pay is reasonable and supported by the credible and substantial evidence of record. More front pay after the "front loaded" four years awarded is not sufficiently supported and would be unreasonably speculative.

B.(4). Emotional Distress Damages

Bilbruck is entitled to damages for emotional distress he suffered as a result of the unlawful discrimination. The department can award damages for emotional distress either established by the evidence or inferred from the circumstances of the illegal discrimination. ***E.g.***, *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.2d 836. Bilbruck suffered the indignity of being turned down for work solely because of his weight, without the required individualized assessment.

In *Vortex*, the Court affirmed an award of $2,500.00 for emotional distress damages resulting from the charging party's loss of his job. Much of that emotional distress stemmed from financial problems due to loss of an existing income. Bilbruck has also suffered and may continue to suffer (depending upon the railroad's choices under this order) a substantially smaller income than he reasonably expected, because of the railroad's discrimination. However, he added to his distress by publishing what the railroad had done, and for that distress he is not entitled to any recovery.

Bilbruck's emotional distress is somewhat like that of the plaintiffs in *Johnson v. Hale* (9th Cir.1991), 940 F.2d 1192; ***cited in*** *Vortex* ***at*** ¶33. In *Johnson*, the plaintiffs (African-Americans) suffered emotional distress resulting from the refusal of a landlord to rent living quarters to them due to their race. The plaintiffs suffered no economic loss because they were able immediately to find other housing. The incident upon which they based their claim lasted only a fleeting time on a single day. The landlord's refusal to rent to them because of their race occurred with no one else present to witness their humiliation. There was no evidence of any recourse to professional treatment

or lasting impact upon their psyches as a result of the discriminatory act. Nevertheless, the court increased their awards from $125.00 to $3,500.00 each for the overt racial discrimination.

Unlike *Johnson*, there is no real evidence here that Bilbruck was acutely upset by the incident, nor that it adversely affected his relationships with an entire class of people. But there is another element recognized by Montana cases that does apply to Bilbruck's claim.

Montana law expressly recognizes the right to be free from unlawful discrimination. Mont. Code Ann. § 49-1-101. Violation of that right is a *per se* invasion of a legally protected interest. Montana does not think it reasonable to expect any person to endure emotional distress resulting from the violation of a fundamental human right. *Vainio v. Brookshire* (1993), 258 Mt. 273, 852 P.2d 596.; *Campbell v. Choteau Bar and Steak House* (1993), HR No. 8901003828. This is the heart of the *Vortex Fishing Systems*, ***op. cit.***, holding that the limitations and enhanced burdens of proof applicable to recovery of emotional distress damages in common tort claims are inapplicable to emotional distress claims in discrimination cases.

Bilbruck testified that he is not "suffering." Nonetheless, both the undisputed facts of record and the additional facts that can be inferred from his circumstances indicate that he is suffering and has suffered. Bilbruck experienced embarrassment and emotional pain as a result of the railroad's rejection of him and because he continues to work for far lower wages as a result of that rejection. His compensable emotional distress (not his distress resulting from his publishing in the community his rejection due to obesity) entitles him to recover $5,000.00.

C. Affirmative Relief

Upon a finding of illegal discrimination, the law requires affirmative relief, enjoining any further discriminatory acts and prescribing appropriate conditions on the respondent's future conduct relevant to the type of discrimination found. Mont. Code Ann. § 49-2-506(1)(a). Because the railroad clearly engaged in a pattern and practice of rejecting applicants based solely upon obesity (and perhaps upon other physical factors for other applicants) without individualized assessments, permanent injunctive relief is necessary.

In undertaking individualized assessment, the railroad can, when appropriate, use functional capacities testing or other such tools. It is too late, to seek to impose a new requirement on Bilbruck for a functional capacities test now, but that does not preclude the use of such tools on future applicants

whose initial screening raises questions about possible disabilities that might create safety risks. It is reasonable to enjoin the railroad from further discrimination against job applicants or employees based on any perceived disability from obesity or other health conditions without an individualized assessment which may include complete health history as well as physical, medical and functional capacities examinations. If employees are denied employment on the basis of obesity, they are entitled to seek department review of the results of their examinations in comparison to the results of examinations of employees hired for the same position.

The department can inspect to assure the railroad's compliance (without the necessity of a new complaint) for not more than one year after this decision becomes final. Mont. Code Ann. § 49-2-506(3). However, the Department's injunction is permanent. Mont. Code Ann. §49-2-506(1)(a).

V. Conclusions of Law

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).

2. On June 16, 2003, the Burlington Northern Santa Fe Railroad illegally discriminated against Charles Bilbruck because of a condition it regarded as a disability when it withdrew a conditional offer of employment to Bilbruck without first undertaking an independent individualized assessment of the risk of substantial harm to Bilbruck or others and rejected him for employment. Mont. Code Ann. §§ 49-2-101(19) and 49-2-303(1)(a).

3. The railroad must immediately take one of the following three actions:

> (a) Upon satisfaction of the remaining conditions for his employment (passage of a standard railroad drug screen and provision of proof of his permanent employment eligibility), immediately hire Bilbruck in the position for which it extended the conditional offer of employment, awarding him retroactive seniority to June 16, 2003 (determining by lot his seniority relative to the other employees with that hire date) and:
>
> > (i) Pay Bilbruck, as back pay, the sum of $34,538.89, plus $83.82 for each additional day after the date of this decision before it takes the mandated actions in this subsection, making the appropriate contributions to his pension and Medicare accounts retroactively for the back pay;
> >
> > (ii) Pay Bilbruck, as prejudgment interest on his back pay, the sum of $1,808.36;

(iii) Pay Bilbruck, as compensation for his emotional distress, the sum of $5,000.00; **or**

(b) If electing to hire Bilbruck but unable to award retroactive seniority due to collective bargaining agreement or federal regulation, upon satisfaction of the remaining conditions for his employment (passage of a standard railroad drug screen and provision of proof of his permanent employment eligibility), immediately hire Bilbruck in the position for which it extended the conditional offer of employment, awarding him seniority as of his date of actual hire and:

(i) Pay Bilbruck, as back pay, the sum of $34,538.89, plus $83.82 for each additional day after the date of this decision before it takes the mandated actions in this subsection, making the appropriate contributions to his pension and Medicare accounts retroactively for the back pay;

(ii) Pay Bilbruck, as prejudgment interest on his back pay, the sum of $1,808.36;

(iii) Pay Bilbruck, as compensation for his emotional distress, the sum of $5,000.00; and

(iv) Pay Bilbruck, as front pay awarded for the indeterminate losses he will suffer in the future due to his decreased seniority, the sum of $10,000.00 on each of the first four anniversaries of his hire date, provided that for each such payment he has, through the date the payment is due, either remained in the employ of the railroad or has left that employment involuntarily, through discharge, injury, lay-off or other method of ending his employment which he did not elect; **or**

(c) If electing not to hire Bilbruck:

(i) Pay Bilbruck, as back pay, the sum of $34,538.89, plus $83.82 for each additional day after the date of this decision before it takes the mandated actions in this subsection, making the appropriate contributions to his pension and Medicare accounts retroactively for the back pay or if unable to do so, calculating and making the appropriate contribution to Social Security as the employer's share of Bilbruck's back pay;

(ii) Pay Bilbruck, as prejudgment interest on his back pay, the sum of $1,808.36;

(iii) Pay Bilbruck, as compensation for his emotional distress, the sum of $5,000.00;
(iv) Pay Bilbruck, as the value of the fringe benefit coverage he would have had and will not have in the future, the sum of $12,192.30; and
(v) Pay Bilbruck, as liquidated front pay for the lost opportunity to earn wages and benefits in the employment the railroad elects to deny him, the sum of $50,000.00 on each of the first four anniversaries of this decision.

Mont. Code Ann. § 49-2-506(1)(b).

4. The law mandates affirmative relief against the railroad, to address the risk of future similar discrimination. The department permanently enjoins the railroad from discrimination in employment against prospective employees because of conditions it regards as disabilities without first undertaking an independent individualized assessment to verify the risk of substantial harm to the prospective employees or others. Mont. Code Ann. § 49-2-506(1)(a).

5. The department enjoins and requires the railroad, within 60 days after this decision becomes, to submit to the Human Rights Bureau proposed policies to comply with the permanent injunction, including the means of publishing the policies to present and future employees and applicants for employment, and to adopt and implement those policies, with any changes mandated by the Bureau, immediately upon Bureau approval of them.

6. The department enjoins and requires the railroad to obtain training in disability discrimination under Montana law for its employees who make decisions regarding rejection or further investigation of prospective employees because of conditions regarded as disabilities, specifically including within the training the necessity for independent individualized assessment to verify the risk of substantial harm to the prospective employees or others. The training must have a duration of at least four hours. The railroad must, within 60 days after this decision becomes final, submit a plan for the training to the Human Rights Bureau and implement that plan, with any changes mandated by the Bureau, immediately upon Bureau approval of it.

VI. Order

1. Judgment is found in favor of charging party **Charles Bilbruck** and against respondent **Burlington Northern Santa Fe Railroad** on the charge

that the respondent discriminated against the charging party on the basis of disability (obesity) when it denied him the position of conductor.

2. The Department orders the respondent immediately to comply with one of the alternative mandates in Conclusion of Law No. 3 – (a), (b) or (c).

3. The Department enjoins and orders the Respondent to comply with all provisions of Conclusions of Law Nos. 4-6.

Dated: August 3, 2004

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

Charles Bilbruck FAD tsp