Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: *Canadian Pacific Railway Company* v. *Allan Woollard*, 2010 OHSTC 10

Date: 2010-07-15
Case No.: 2008-10
Rendered at: Ottawa

Between:

Canadian Pacific Railway Company, Appellant

and

Allan Woollard, Respondent

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer
Decision:	The direction is varied
Decision rendered by:	Mr. Pierre Guénette, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Ron Hampel, Counsel - Canadian Pacific Railway Company
For the respondent:	Mr. James Baugh, Counsel - McGrady & Company

REASONS

[1] This is an appeal brought pursuant to subsection 146(1) of the *Canada Labour Code* (the Code) by Mr. Mike Pielak, on behalf of Canadian Pacific Railway Company (CPR), of a direction issued by Health and Safety Officer Rod Noel (HSO Noel) on June 12, 2003.

[2] Initially, Appeals Officer Douglas Malanka inquired into the circumstances of the direction and, on November 30, 2005, he confirmed the direction issued by HSO Noel. In addition, Appeals Officer Malanka issued a direction to CPR under subsection 145(1) of the Code, ordering the employer to immediately appoint a qualified person to carry out an investigation in accordance with section 10.4 of the *Canada Occupational Safety and Health Regulations* (the Regulations).

[3] CPR sought judicial review, before the Federal Court, of Appeals Officer Malanka's decision and on November 6, 2006, the Federal Court granted the application. Mr. Justice Beaudry found a breach of procedural fairness to have occurred when Appeals Officer Malanka issued a direction based on section 10.4 of the Regulations without providing CPR with an opportunity to make submissions on the matter.

[4] Mr. Allan Woollard appealed to the Federal Court of Appeal the part of the decision by Justice Beaudry dealing with the Appeals Officer's decision regarding CPR's violation of section 9.44 of the Regulations. In a decision dated February 4, 2008, the Federal Court of Appeal dismissed the appeal.

[5] Following the decisions by the Federal Court and Federal Court of Appeal, the matter was remitted to another Appeals Officer for redetermination.

[6] Hearings proceeded in Toronto, Ontario, on April 28 to 30, August 18 to 21, and November 24 to 26, 2009. By April 1, 2010, all final written submissions of the parties had been received.

Background

[7] A. Woollard is a Machine Operator for CPR. He is part of a 2-man surfacing crew operating track maintenance equipment at remote locations.

[8] As part of his work, A. Woollard carries out equipment maintenance, repair and refuelling. At the end of the work day, he returns to the accommodation (motel) he shares with a co-worker, still wearing those work clothes that he hangs in an open closet in the room after changing into street clothes.

[9] In March 2001, CPR had implemented the "Track Program's Motel and Camp Rules" where it was specified in the section titled "Motel Rooms" that a room to store their work clothes would be provided to employees.

[10] In July 2001, the respondent presented his supervisor with a written complaint (Safety/Hazard Report) to the effect that the employer was not providing surfacing crews with a change room to store work clothes that could be saturated with grease, diesel fuel, various hydraulic fluids and ballast dust. He added that this was contrary to the company's Motel and Camp Rules, the Code and section 9.44 of Part IX of the Regulations.

[11] A joint union-employer subcommittee investigated the matter and the Toronto Engineering Health and Safety Committee produced a report on this same matter. It stated that it was only to diesel fuel that employees could be exposed on a regular basis and that there were controls in place to reduce that potential exposure. Also, the report specified that surfacing crews are not regularly engaged in work where their work clothes are wet or contaminated by a hazardous substance. The report concluded that the employer was not in violation of section 9.44 of the Regulations and thus the employer took the position that it was not required to provide a separate change room for surfacing crews residing in motels. However, the employer does provide change rooms for some large track maintenance or construction crews staying in motels. The employer could, on an individual basis, accommodate employees in storing their work clothes in a location separate from the motel room, but only if this could reasonably be achieved and at no additional cost to CPR.

[12] In February 2002, CPR revised its Motel and Camp Rules and removed the provision requiring that a separate room be provided to store employees' work clothes.

[13] On November 21, 2002, A. Woollard filed a complaint with Human Resources and Skills Development Canada (HRSDC), alleging that his employer had eliminated the requirement of a storage and change room for the surfacing crews. Consequently, he could not change and store his wet and diesel fuel, hydraulic oil, gear oil and ballast dust saturated work clothes in a separate room.

[14] Following his investigation of the complaint, HSO Noel issued a direction pursuant to subsection 145(1) of the Code.

[15] On July 9, 2003, CPR appealed the direction pursuant to subsection 146(1) of the Code, seeking that solely the second item of the direction be rescinded. This second item reads as follows:

IN THE MATTER OF THE *CANADA LABOUR CODE*
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On April 9 and 16, 2003, the undersigned health and safety officer conducted an inquiry in the work place operated by Canadian Pacific Railway Company, being an employer subject to the ***Canada Labour Code***, Part II, at Cambridge, Ontario the said work place being sometimes known as Galt Sub-division and Galt Station.

The said health and safety officer is of the opinion that the following provisions of the ***Canada***

_____, Part II, have been contravened:

2. ***Canada Labour Code***, Part II paragraph 125(1)(i) and Canada Occupational Health and Safety Regulation sub-sections 9.44(1)(2) and (3).

Employees who work on and maintain maintenance of way track clearing equipment are regularly required to work outside in inclement weather where clothing becomes wet. During the operation and maintenance of equipment, clothing is frequently contaminated by hazardous products such as diesel fuel, lubricating grease, antifreeze and hydraulic oils. The employer provides hotel rooms housing two employees per rooms for periods of several days. Employees are required to return to those rooms directly from the workplace, while wearing the wet or contaminated clothing. The employer has failed to provide a change room and separate storage area to ensure protection of employees exposed to wet or contaminated work clothing.

Therefore, you are **HEREBY DIRECTED,** pursuant to subsection 145(1) (a) of the ***Canada Labour Code***, Part II, to terminate the contraventions(s) no later than June 27, 2003.

Further, you are **HEREBY DIRECTED, pursuant to paragraph 145(1) (b) of the *Canada Labour Code***, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contraventions do not continue or reoccur.

Issued at Woodstock, Ontario, this 12th day of June, 2003.

Rod Noel
Health and Safety Officer
Id No ON3272

Issue

[16] I must determine whether HSO Noel erred in finding that the employer was in contravention of paragraph 125(1)(i) of the Code and subsections 9.44(1), (2) and (3) of the Regulations.

Evidence

HSO's testimony

[17] I called HSO Noel to provide insight into his investigation, as well as explain the rationale of the direction to CPR. I retain the following from his testimony.

[18] As part of his investigation, HSO Noel visited A. Woollard's and co-worker's shared motel room and observed their living conditions.

[19] The employees left the work site wearing the work clothes that had been exposed to hazardous substances. Those were then stored in an open closet, in contact with their street clothes. In the motel room, the HSO noted a diesel fuel odour.

[20] HSO Noel also visited the work site and observed the equipment as well as a demonstration of tasks performed by those two employees.

[21] HSO Noel was informed that those employees are regularly required to change

[22] In short, the investigation by HSO Noel covered the following:

1 - statements from employees;
2 - Material Safety Data Sheet (MSDS)[1] for diesel fuel, hydraulic oil, ethylene glycol, lubricating oil and lubricating grease;
3 - his observations of the motel room, the track machines and the work environment at the work site;
4 - consultations with HRSDC - Labour Program representatives.

[23] HSO Noel concluded that the employer must provide the employees with a change room, as well as a separate room for clothing storage because of the hazardous chemicals used by those employees, the work circumstances and the accommodations at isolated work sites.

B) Appellant's Evidence

[24] R. Hampel filed 16 exhibits and presented two witnesses as well as one expert witness. The witnesses were:

- Mr. D. Tash;
- Mr. J. Moreash;
- Mr. D. N. Wylie (Expert Witness).

[25] R. Hampel presented D. Wylie, Occupational Hygienist, as an expert on the subject of occupational hygiene. The respondent accepted D. Wylie's expertise on that specific subject.

[26] D. Wylie had been hired by the employer to conduct the investigation under Part X of the Regulations ordered by Appeals Officer Malanka in his May 2006 direction.

[27] D. Wylie evaluated the following:

1 - airborne exposure in the machine cab;
2 - airborne exposure in the motel room;
3 - dermal exposure from clothing.

[28] He performed the testing in early May 2006, and considered the substances that could contaminate employees' work clothes, such as:

1 - diesel fuel (when refuelling both machines);

[1] Material Safety Data Sheet is a document that contains information on the potential hazards and how to work safely with the chemical product.

2 - ethylene glycol (antifreeze) (from the cooling system of those machines);
3 - waste motor oil (from the engine);
4 - creosote (from railroad ties);
5 - hydraulic oil;
6 - dust and silica (inside the machine cab).

[29] D. Wylie conducted the following three separate tests:

1 - airborne exposure inside the tamper[2] and the regulator[3];
2 - air testing in the motel room occupied by the workers in the Perth, Ontario, area;
3 - dermal monitoring to estimate what substances, as well as what quantity of such, were on the work clothes, including the potential dermal exposure of the workers.

[30] In his report, D. Wylie considered the chemical and toxicological properties of the substances listed at paragraph 28.

[31] The hazard assessment produced the following results:

1 - the airborne concentration for dust and silica in both machines was within current occupational exposure limits;
2 - the results of the air testing in the motel room were too low to measure;
3 - surfacing crews have no significant exposure to some substances on and through their work clothes.

[32] D. Wylie stated at cross-examination that the temperature was approximately 12° C on the day of the field test and that creosote liquefies with a rise in temperature. The test was conducted mostly on old railroad ties, while concentration of creosote is higher on new ties. He found that employee coveralls come in contact with creosote when working on the railway. However the level of polynuclear aromatic hydrocarbons (PAH) on work clothes was very low. He added that it is difficult to avoid creosote on coveralls because of the properties and staining characteristics of that substance.

[33] D. Wylie testified that creosote contains PAH, a carcinogen substance.

[34] According to the witness, “contamination” has to do with the quantity of the substance on the work clothes. Furthermore, the toxicology and the physical properties of the substance need to be considered before determining whether work clothes are contaminated. In addition, contamination should present a hazard to the health and safety of an employee.

[2] A tamper is a machine used to maintain and repair the track and track bed of the rail line.
[3] A regulator is a machine used to broom or sweep the railway.

B) Respondent's Evidence

[35] J. Baugh filed 3 exhibits and presented three witnesses as well as one expert witness. Those were:

- Mr. A. Woollard;
- Mr. K. Hutchings;
- Mr. B. Poirier;
- Mr. J. P. Cui (expert witness).

[36] A. Woollard was first to testify. He is a machine operator, part of a surfacing crew made up of two workers and a foreman. Since 2002, CPR does not provide a change room for surfacing crews, as opposed to larger rail crews who still have access to a change room although the tasks are the same for all rail crews.

[37] As a machine operator, he regularly:

- operates the machines;
- fuels the machines with diesel;
- maintains and repairs those machines.

[38] On a daily basis, he has to check:

- oil levels and add oil, if necessary;
- cooling system levels and add antifreeze, if necessary;
- fuel tank levels and add fuel, if necessary;
- air, oil and fuel filters and change those, if necessary.

[39] In the course of those daily tasks, machine operators have to crawl or kneel on the railway to maintain and repair the machines. As a result, their work clothes and safety vests come in contact with railway ties impregnated with creosote. In addition, diesel fuel, oil and antifreeze get spilled on said work clothes and safety vests.

[40] After a time, their work clothes and safety vests remain contaminated with diesel fuel and hydraulic oil. Furthermore, rain, snow and sweat may also wet the work clothes.

[41] At the end of the work day, machine operators leave the work site wearing the creosote, diesel fuel and oil soiled work clothes, change in the motel room and store those clothes in an open closet.

[42] Machine operators receive a $5.00 weekly laundry allowance for the work clothes. However, surfacing crews are not allowed to launder them at most Laundromats because of the substances (creosote, diesel fuel and oil) on them.

[43] Machine operators do not have the option of storing their dirty work clothes elsewhere.

[44] K. Hutchings, the respondent's second witness, testified that small crews do not have proper shut-off nozzles on their fuel tanks. Only 10% of fuel tanks have nozzles with shut-off valves. As a result, diesel fuel spills on their work clothes.

[45] As for exposure to creosote, on a daily average, he spends twenty minutes crawling on railway ties underneath machines to do inspections. For repairs, a machine operator can be on the railway ties for approximately 5 to 6 hours, thus exposing his work clothes to the creosote on the ties.

[46] On warmer days, railway ties are more saturated with creosote.

[47] B. Poirier, the third witness, testified that in May 2006, he was present when D. Wylie proceeded with his hazard assessment. He observed that his test concerning exposure to creosote was conducted on 20 to 25 year old railway ties. Consequently, most of the creosote would have wept out, which is not reflective of a real life scenario. At the time of the testing, the temperature was about 12°C and consequently, the creosote on the ties had reduced liquidity.

[48] J. Baugh presented J. P. Cui as an expert witness. He is a Senior Certified Industrial Hygienist. He qualifies as an expert in the field of industrial hygiene. J. P. Cui presented his report during his testimony.

[49] The report mostly relates to PAHs contamination on work clothing. Based on a brief review of the document received from J. Baugh, J. P. Cui identified creosote on railway ties and waste motor oil as the two major sources of PAHs.

[50] Most of his testimony concerned the creosote literature attached to his expert report.

[51] J. P. Cui pointed out that below 20° C, creosote is more solid and above that temperature, the substance's liquidity increases. Consequently, more creosote gets on the work clothes when the temperature rises above 20° C. He identified PAHs as a major concern because they are human carcinogens.

[52] J. P. Cui concluded his report by stating that based on the limited evidence available to him, the CPR field workers regularly engaged in work where a hazardous substance contaminated their work clothes.

Arguments of the parties

A) Appellant's Arguments

[53] R. Hampel questioned HSO Noel's investigation on the basis that:

- he failed to consider the Threshold Limit Values for each substance with respect to the employee's exposure level;

[54] R. Hampel submitted that HSO Noel's investigation conclusions as well as the direction that ensued are not supported by fact and solid evidence. To support his position, he referred to Regional Safety Officer[4] Serge Cadieux's decision in *Canada Post Corp.* v. *Qureshi*[5] to the effect that the determination by an HSO as to whether there is a contravention of the Code needs to rest on solid evidence. Therefore, R. Hampel submitted that the direction should be rescinded.

[55] R. Hampel further submitted that the hazard assessment conducted by D. Wylie in 2006 demonstrated that in fact, employees are not regularly engaged in work where their work clothes are contaminated by hazardous substances. The hazard assessment showed that the airborne exposure inside the machine cabs and in the motel room was well below the threshold limit value and the limits specified in Part X of the Regulations. In addition, dermal exposure was also well below the threshold limit value.

[56] R. Hampel argued that the issue of wet clothing is not a factor in the case because HSO Noel failed to observe any employee with wet work clothes. In addition, as employees operate the machines from an enclosed cab, they are exposed to wet weather only when they service or do repairs on a piece of equipment.

[57] R. Hampel argued that for contamination to be determined to exist, it should be found to be real as opposed to potential.

[58] He pointed out that work clothes cannot be seen as being contaminated when the substance on them is not hazardous to the health and safety of an employee.

[59] Based on the above definition in the Code, as well as some provisions of the *Hazardous Products Act*, R. Hampel submitted that the following criteria needs to be satisfied before a direction based on paragraph 9.44(1)(b) of the Regulations can be issued to the employer:

- identification of substances on the work clothes;
- the substances have to meet the definition of "hazardous substance";
- sufficient exposure to a hazardous substance on the work clothes to constitute a risk to

[4] The term "Regional Safety Officer" changed to "Appeals Officer" on September 30, 2000.
[5] *Canada Post Corp.* v. *Qureshi*, [1994] Decision No.: 94-003

health or safety;
- the employee is regularly engaged in work in which all of the above occurs.

[60] R. Hampel argued that where the Regulations speak of hazardous substances in the workplace, all provisions of the Code and Regulations need to be considered.

[61] On the subject of expert J. P. Cui's report, counsel questioned his testimony based on the following points:

- no testing was conducted of the substances under consideration or the employee's exposure levels to these substances;
- the worksite was not visited and consequently J. P. Cui did not observe the work performed by the employees;
- no samples or measurements from the work clothes or the air were taken by J. P. Cui;
- the report was based solely on a review of the literature, his past experiences and a review of D. Wylie's expert report.

[62] R. Hampel argued that HSO Noel exceeded his authority in directing CPR to provide employees with a change room, as well as a separate storage area for their wet or contaminated work clothes.

[63] He maintained that paragraph 9.44(1)(b) of the Regulations only requires that a change room be provided. That provision does not specify that a separate storage area has to be provided to employees in addition to a change room.

[64] In short, R. Hampel maintained that HSO Noel's conclusion that the substances present on the employees' work clothes were of the type and in sufficient quantity to support a conclusion that they were contaminated by a hazardous substance was not based on sufficient information.

[65] Further, the conclusion of the hazard assessment conducted by D. Wylie was that employees were not endangered by exposure to a hazardous substance, and consequently section 9.44 of the Regulations did not apply.

[66] For all those reasons, the appellant requested that the direction by HSO Noel be rescinded.

B) Respondent's Arguments

[67] J. Baugh addressed the issue of "regularly" by pointing out that the word is not defined in the Code or the Regulations. Therefore he referred to the *Canadian Oxford Dictionary* for the definition. It reads:

> Regularly: at regular intervals or times – in a balanced or regular manner.

[68] J. Baugh argued that the word "regularly" at paragraph 9.44(1)(b) of the

[69] For J. Baugh, the evidence on that issue comes from the testimony of A. Woollard who stated that as machine operators, they regularly perform several tasks, which are:

1 - fuelling their machines with diesel fuel;
2 - kneeling on railway ties every morning to inspect underneath the equipment;
3 - adjusting the brooms on the front plow every morning for 20 minutes;
4 - sliding under the equipment to check gear oil levels;
5 - checking oil levels and adding oil if necessary;
6 - checking cooling system antifreeze levels and adding antifreeze, if necessary;
7 - checking hydraulic oil levels.

[70] J. Baugh argued that surfacing crews are required every day to work outdoors for part of the time. Consequently, their work clothes may become wet from rainfall and from being exposed to various liquids such as hydraulic oil spray and mist from the equipment they are working on.

[71] Counsel pointed out that A. Woollard confirmed that hazardous substances to wit, hydraulic oil, lubricating oil and lubricating grease, contaminated his work clothes. In addition, contamination occurred also from the three following controlled products: diesel fuel, antifreeze and creosote.

[72] When conducting his tests, D. Wylie found creosote on the work clothes and also determined that a certain amount of diesel fuel fumes came from the work clothes hanging in the open closet of the motel room shared by the employees.

[73] J. Baugh submitted that the dermal study conducted by D. Wylie is irrelevant because he focussed on skin exposure to hazardous substances instead of on the contamination of work clothes.

[74] He pointed out that D. Wylie failed to test the used coveralls worn by A. Woollard and hi co-worker to evaluate the degree of contamination by the various hazardous substances.

[75] J. Baugh concluded that sufficient evidence was provided to determine that A. Woollard and his co-worker were regularly engaged in work in which their work clothes were being contaminated by hazardous substances, such as diesel fuel, antifreeze, creosote, hydraulic oil, lubricating oil and lubricating grease. For that reason, he was of the view that paragraph 9.44(1)(b) of the Regulations properly applies and that the direction issued by HSO Noel should be confirmed.

C) Rebuttal

[76] According to R. Hampel, the respondent has not satisfied the evidentiary burden for

[77] HSO Noel arrived at his finding of contamination through information received from employees. He determined neither the type nor the amount of hazardous substances on the work clothes. He only observed what hazardous substances were at the worksite.

[78] The hazard assessment done by D. Wylie constitutes evidence that employees exposure to hazardous substances is well below the safety limits set out in Part X of the Regulations. The hazard assessment also demonstrates that hazardous substances were on work clothes. It was thus counsel's view that the quantity of hazardous substances on the clothes needed to be measured.

[79] R. Hampel argues that the respondent failed to specify what level of hazardous substances on the work clothes constitutes contamination. The use of the Threshold Limit Values referenced at Part X of the Regulations is a way to determine whether work clothes are effectively contaminated.

[80] Furthermore, it is through the use of TLVs that one determines whether a hazardous substance presents a risk to the health and safety of an employee.

[81] R. Hampel referred to RSO Serge Cadieux's decision (Decision No. 96-016) which stands for the position that in order to determine whether or not a hazardous substance will likely endanger the safety and health of an employee, one has to take into account the requirements of Part X of the Regulations.

Analysis

[82] The issue at hand is whether HSO Noel erred in finding that CPR was in contravention of paragraph 125(1)(*i*) of the Code and, as a result, in issuing a direction under subsection 145(1) of the Code.

[83] Paragraph 125(1)(*i*) of the Code reads as follows:

> **125.(1)** Without restricting the generality of section 124, every employer shall, in respect of every workplace controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,
>
> (*i*) provide prescribed sanitary and personal facilities;

[84] The prescribed sanitary and personal facilities relevant to the present case are specified at section 9.44 of the Regulations:

> **9.44(1)** A change room shall be provided by the employer where
>
> (*a*)…
> (*b*) an employee is regularly engaged in work in which his work clothing becomes wet or contaminated by a hazardous

substance.

(2) Where wet or contaminated work clothing referred to in paragraph (1)(*b*) is changed, it shall be stored in such a manner that it does not come in contact with clothing that is not wet or contaminated.

(3) No employee shall leave the work place wearing clothing contaminated by a hazardous substance.

[85] In order to decide whether CPR should provide a change room to surfacing crews, I need to determine, as required by paragraph 9.44(1)(b) of the Regulations, whether A. Woollard and surfacing crews are regularly engaged in work in which their work clothes become wet or contaminated by a hazardous substance.

[86] In order to do so, I will first consider the statutory interpretation to be put on the terms "regularly", "contaminated" and "hazardous substances" found in paragraph 9.44(1)(b) of the Regulations. Secondly, I will query whether CPR has a statutory obligation to provide a change room and a separate storage area for A. Woollard and the surfacing crew because they regularly engage in work in which their work clothes become wet or contaminated by a hazardous substance, as was directed by HSO Noel.

Statutory and Regulatory Interpretation

"Regularly engaged in work"

[87] I concur with the Respondent's submissions that paragraph 9.44(1) (b) refers to an employee "regularly engaged in work in which his work clothing becomes wet or contaminated by a hazardous substance" as opposed to employees "engaged in work in which their work clothing regularly becomes wet or contaminated by a hazardous substance".

[88] The word "regularly" not being defined in the Code or in the Regulations, in accordance with the principles of statutory interpretation and more specifically section 12 of the *Interpretation Act*[6], the Code being remedial in nature, I must adopt a fair, large and liberal interpretation consistent with the objectives of the legislation.

[89] The *Webster's*[7] *dictionary* defines the adverb "regularly" as:

> **1**: in a regular manner
> **2**: on a regular basis; at regular intervals.
> (my underline)

[90] Based on that definition, I find that the expression "regularly engaged" should be interpreted as meaning work that is carried out on a regular basis as opposed to exceptional work or work that is performed part of the time. This interpretation is consistent with the one adopted by Appeals Officer Malanka and confirmed by the

[6] R.S., 1985, c. I-21,
[7] Merriam Webster's Collegiate Dictionary , 10th edition

Federal Court[8].

"Contaminated"

[91] Paragraph 9.44 (1) (b) of the Regulations refers to work clothes or clothing that becomes "contaminated by a hazardous substance". However, this part of my analysis will be limited to the sole term "contaminated".

[92] As for the previous terminology, the word "contaminated" is not defined in the Code or the Regulations and as such, as previously stated, the principles of statutory interpretation require that I adopt a fair, large and liberal interpretation consistent with the objectives of the Code. As a result, I must look at a dictionary definition for the ordinary meaning that is consistent with the objectives of Part II of the Code.

[93] The purpose clause of Part II of the Code is found at section 122.1 which states :

> **122.1** The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this part applies.

[94] The word "contaminated" is defined in the 10th edition of the *Merriam Webster's Collegiate Dictionary*, as follows:

> Contaminate (d): 1a: to soil, stain, corrupt, or infect by contact or association;
>
> 1b: to make inferior or impure by admixture.
>
> 2: to make unfit for use by the introduction of unwholesome or undesirable elements.

[95] CPR argued that when interpreting the word "contaminated" in light of the purpose clause of the Code, it would be patently absurd to conclude that work clothing is contaminated if the condition it is in does not present a risk to the health and safety of an employee. Therefore, the dictionary definition of "contaminated" can be reconciled with the purpose of the Code if the word "contaminated" is to be defined as: to make unfit for use by the introduction of a "hazardous substance", where "unfit for use" means "poses risk of injury to health".

[96] Thus, CPR's position is that given the purpose clause of the Code, in order for paragraph 9.44(1)(b) of the Regulations to find application, it must be established that one or more hazardous substance is present in the clothing to a degree sufficient to pose a risk to health and safety.

[97] In short, CPR maintained that a finding of contamination under paragraph 9.44(1)(b) cannot be supported on the basis of just any level of exposure to a hazardous

[8] *Canadian Pacific Railway Company* v. *Woollard* , 2006 FC 1332

substance. There follows that a hazardous substance assessment investigation pursuant to Part X of the Regulations titled "Hazardous Substance" is necessary to determine whether the health and safety of the employees is or may be endangered by exposure to a hazardous substance. Moreover, CPR argued that the hazard assessment that it conducted showed that the hazardous substances to which the employees were exposed did not endanger their safety or health and that therefore section 9.44 of the Regulations does not find application.

[98] On the other hand, Respondent's position is essentially that one finds no requirement in paragraph 9.44(1)(b) of the Regulations that any particular level of contamination be established in order for work clothing to be seen as contaminated by a hazardous substance. Section 9.44 does not require that a technical hazard assessment be conducted to determine the actual level of contamination of the work clothes.

[99] First, I find the employer's restrictive interpretation of paragraph 9.44(1)(b) to seemingly be more in line with the previous version of the Regulations[9], which stipulated at paragraph 43(1)(b) that:

> **43.(1)** Every employer shall provide a change room where
>
> (*a*)…
> (*b*) an employee is regularly engaged in work in which his work clothing becomes wet or contaminated by a dangerous substance <u>to a degree sufficient to constitute a health and safety hazard to himself or other persons</u>.
>
> (my underline)

[100] The words "to a degree sufficient to constitute a health and safety hazard to himself or other persons" have been removed by the legislator and no longer appear in the current version of the Clothing Storage provisions of the Regulations. One could thus infer from that amendment that it is no longer necessary to establish that the work clothes are contaminated "to a degree sufficient to constitute a health and safety hazard" but rather that it is sufficient to show that the work clothes are contaminated by a hazardous substance.

[101] In light of the current version of the Regulations, it is therefore not necessary, in my opinion, to establish any level of contamination in order for the obligations under subsections 9.44 (1), (2) and (3) of the Regulations to be triggered. That section of the Regulations does not require that a hazard assessment be conducted pursuant to Part X of the Regulations to evaluate the level of contamination.

[102] The new section 9.44 of the Regulations, under the heading "Clothing Storage", is found in Part IX of the Regulations under title "Sanitation".

[103] Paragraph 9.44(1) (b) of the Regulations does not require that it be established that an employee's health and safety is endangered by a hazardous substance before the

[9] SOR/DORS/79-891

employer is required to provide a change room. This interpretation is consistent with the fact that Part IX of the Regulations concerns only matters of Sanitation, as the title of that section demonstrates.

[104] Furthermore, I do not share the view expressed by the appellant that it is necessary to establish that the contamination of the work clothes constitutes in and of itself a hazard prior to issuing a direction for violation of paragraph 9.44(1)(b) of the Regulations. It is enough to show that the work clothes are contaminated by a hazardous substance.

[105] Secondly, the main purpose of Part II of the Code is aimed at preventing injury to health in the workplace. Moreover, the purpose of the "Sanitation" provisions set out in Part IX of the Regulations is, as stated by HSO Noel in his investigation report, "to promote good personal hygiene, safe work practices, and to limit cross-exposure of work contaminants to personal service areas and living spaces".

[106] Considering that the "Sanitation" regulatory requirements were enacted mainly to prevent unhealthy situations in the work place and considering the overall preventive nature of Part II of the Code, I find that the term "contaminated" in its plain and ordinary meaning can be interpreted to mean to "soil", "stain" or "corrupt".

[107] Moreover, I am of the opinion that the purpose of the "Sanitation" provision and of Part II of the Code is better attained if the term "contaminated" as used in paragraph 9.44(1)(b) of the Regulations is construed as meaning to "soil", "stain" or "corrupt".

[108] Finally, given my interpretation of the word "contaminated", I do not find the hazard assessment conducted by D. Wylie, the expert produced by the employer, to be relevant.

[109] Although, this assessment was made in response to the direction issued by my colleague, Appeals Officer Douglas Malanka, it is my opinion that such an assessment made in regards to airborne and skin exposure or absorption of hazardous substances is not relevant to the issue that is before me in this appeal, since paragraph 9.44(1)(b) of the Regulations is part of the Clothing Storage provisions and does not refer to skin contamination or exposure but rather to the work clothing that is contaminated by hazardous substances. Consequently, all that needs to be established in this case in order for paragraph 9.44(1)(b) of the Regulations to find application is that the work clothes of the surfacing crews are soiled, stained or corrupted by a hazardous substance when they regularly perform their duties as machine operators.

"Hazardous substance"

[110] "Hazardous substance" is defined at subsection 122(1) of the Code as follows:

> "hazardous substance" includes a controlled product and chemical, biological or physical agent that, by reason of a property that the agent possesses, is hazardous to the safety or health of a person exposed to it.

[111] Given that definition, any controlled product comes within the definition of hazardous substance without having to establish that such a product is hazardous to the safety and health of a person exposed to it by reason of a property that it possesses.

[112] In his direction to the employer, HSO Noel identified the following four substances as being hazardous substances and noted the following from the MDSDs provided by the employer:

1. Diesel fuel:
“Avoid prolonged or repeated skin contact”
“Remove contaminated clothing-launder before reuse”
“Do not breathe gas, vapour, spray”
“Practice good personal hygiene”
“Launder work clothes frequently”

2. Hydraulic oil (HYDREX XV):
“Avoid inhalation and skin contact”
“Practice good personal hygiene”
“Launder work clothes frequently”

3. Antifreeze (ethylene glycol):
“Contact can cause slight irritation of skin, eyes and respiratory tract”
“Remove contaminated clothing - launder before use”

4. Lubricating oil (ARDEE 32)
Similar phrasing

5. Lubricating Grease (PRECISION EP 1)
Similar phrasing

[113] The evidence before me establishes that diesel fuel and antifreeze are controlled products under the Workplace Hazardous Materials Information System (WHMIS) classification and as such, this would suffice to trigger the employer’s obligations under section 9.44 of the Regulations.

[114] Furthermore, the uncontested evidence also shows that lubricating grease, hydraulic oils and lubricating oil, by reason of a property that they possess, are hazardous to the safety or health of a person exposed to them. Indeed the MSDSs for those chemical agents indicate that prolonged or repeated contact with these substances “may cause skin irritation characterized by dermatitis or oil acne”. Under the heading “first aid measures”, “Skin contact”, it is stipulated that contaminated clothing should be removed and laundered before reuse.

[115] Consequently, all the products identified in the HSO direction are hazardous substances as that term is defined at subsection 122(1) of the Code.

CPR statutory obligation to provide a change room under the clothing provisions in Part IX of the Regulations.

[116] In light of all the above, I now have to be satisfied by the provided evidence that under paragraph 9.44(1)(b) of the Regulations, CPR has a statutory obligation to provide the surfacing crews with a change room because on a regular basis the employees perform work:

- in which their work clothing becomes wet, or

- is contaminated, i.e. soiled, stained or corrupted by either diesel fuel, antifreeze and hydraulic oils or lubricating oils.

[117] The term "change room" is defined as follows at section 1.2 of the Regulations:

> "Change room" means a room that is used by employees to change from their street clothes to their work clothes and from their work clothes to their street clothes, and includes a locker room.

[118] With regard to the issue of the work clothes becoming wet, Counsel for the appellant argued that there is no evidence that the employees' work clothes are wet by rain, because their main duty is to operate the machines from an enclosed cab. They can be exposed to rain only while servicing or repairing the machines. On the other hand, Counsel for the Respondent claimed that because the surfacing crews work outdoors for a portion of every work day, their work clothes are rendered wet not only by various liquids such as hydraulic oil spray and mist from the equipment they work on, but also by rain.

[119] Based on the fact that the evidence has shown that surfacing crews' tasks require the employees to work outside, in remote locations, for at least part of the work day, I am of the view that weather conditions are an inherent condition of their work. In the performance of their duties, surfacing crews work clothes may occasionally become wet because of rain or snow, although not every day.

[120] For those reasons, I find that HSO Noel was correct in finding in his direction that the surfacing crews regularly engage in work in which their work clothing becomes wet.

[121] On the matter of work clothing becoming contaminated i.e. soiled, stained or corrupted by a hazardous substance, the evidence shows that A. Woollard and his co-workers, as Machine Operators, operate various machines for the maintenance of railway tracks. In addition, they regularly do maintenance and repairs on those machines, including adjustments and testing. As part of maintenance, their daily duties include checking:

1 - engine oil levels and adding oil if necessary;
2 - cooling systems and adding anti-freeze if necessary;
3 - fuel tank levels and adding diesel fuel if necessary;

[122] I have taken note of the testimony of A. Woollard who stated that, as a machine operator, he has to regularly fuel the machinery with diesel fuel and change the diesel fuel filters on the equipment, which can cause fuel spillage. A. Woollard declared that he would get diesel fuel on his knees, the left side of his legs and the waist area. A change of the diesel fuel filters would result in the surfacing crews having diesel fuel mainly down their arms and on their chest.

[123] A. Woollard identified pictures taken by HSO Noel of the surfacing crews' coveralls and indicated that the stains found on the coveralls worn by him and his co-workers were caused by hydraulic oil, used motor oil and some diesel fuel from fuelling the machines. He further declared that the surfacing crews were in contact daily with hydraulic oil because of the oil film on the machinery they operate which gets on their coveralls and work pants because they work in and around the machines.

[124] Furthermore, although not identified by HSO Noel in the direction to the employer, the parties offered evidence of another substance (creosote) that is present in the workplace and on the work clothes of surfacing crews. Creosote is another controlled product under the WHMIS classification and therefore a hazardous substance, pursuant to the Code, that can be found on the employees' work clothes.

[125] According to a study done by the University of Nijmegen in the Netherlands[10], creosote oil is used as a wood preservative, mainly to impregnate railway ties. The expert witness for the respondent testified that at a temperature above 20° C, creosote is more liquid and more solid at a lesser temperature. Consequently, employees would have more chance of getting creosote on their work clothes when working at temperatures above 20° C.

[126] The testimony by both A. Woollard and K. Hutchings showed that the working clothes of the maintenance of railway workers do become contaminated with creosote from the constant contact with railway ties. The evidence is that everyday, those railway workers have to kneel on, crawl on, sit or lie on the railway ties in order to inspect under the equipment, to check the gear oil levels and when changing hoses.

[127] I find particularly significant K. Hutchings' testimony that when he was working with A. Woollard on the surfacing crews, he went through over twenty t-shirts, which he had to dispose of because they were so dirty due to heavy levels of grease and hydraulic oils stains that would go right through his work clothes onto his shirts. On that same subject, testimony by A. Woollard established that the diesel fuel or hydraulic oil that got onto his work clothes could no longer be washed or laundered out after a certain amount of time.

[10] Effect of the reduction of skin contamination on the internal dose of creosote workers exposed to polycyclic aromatic hydrocarbons by Joost GM Van Roooj, MSc, Eugenie MA Van Lieshout, MSc, Monika M. Bodelier-Bade, BSc, Frans J. Jongeneelen, PhD, Department of Toxicology, Faculty of Medical Sciences, University of Nijmegen, The Netherlands, 1993.

[128] It is as well of particular interest that both A. Woollard and K. Hutchings stated that in their motel room, there was an odour of diesel fuel that was noticeable as soon as someone would walk in the room this due to the fact that the contaminated work clothes were being kept in their room. As well, the smell would make them feel nauseous and would sometimes give them headaches.

[129] I give considerable weight to the fact that in the course of his investigation, HSO Noel observed that boots and work clothes were visibly contaminated by oil and showed grease spots and stains. He further noted noticeable odours coming from the work clothes stored in the employees' room.

[130] Based on all of the above, I find that the work clothes worn by A. Woollard and his co-workers in the regular performance of their work do become contaminated, i.e soiled, stained or corrupted by hazardous substances.

[131] Consequently, HSO Noel did not err in directing the employer to provide a change room for the employees who work on and maintain maintenance of way track clearing equipment as per paragraph 9.44 (1)(b) of the Regulations.

CPR statutory obligation to provide a separate storage area under the clothing storage provisions of the Regulations

[132] HSO Noel directed the employer not only to provide the surfacing crews with a change room, but also a separate storage area to store their wet or contaminated work clothes. In doing so, I find that the HSO erred in his interpretation of the Regulations.

[133] Subsection 9.44(2) of the Regulations provides that:

> **(2)** Where wet or contaminated work clothing referred to in paragraph (1)(b) is changed, it shall be <u>stored in such a manner that it does not come in contact with clothing that is not wet or contaminated.</u>
>
> (my underline)

[134] Subsection 9.44(2) of the Regulations does not specify that the employer must provide a separate storage area, contrary to HSO Noel's direction. The Regulations do not stipulate the means by which the employer must satisfy its obligation to ensure that the wet or contaminated work clothes are stored in such a manner that they do not come in contact with an employee's non-contaminated street clothes. For that reason, HSO Noel erred when he directed the employer to do so.

[135] In the course of his investigation, HSO Noel noted that there was only one available closet space in the motel room that the two employees were required by the employer to share. As such, both employees had to store in that single space their supply of wet or contaminated work clothes with their non-work clothing, thus creating the problem in preventing the contact between the contaminated work clothing and the clean non-work clothes. This evidence was not contested by CPR.

[136] While subsection 9.44 (2) of the Regulations does not require CPR to provide the employees with a separate storage area, there remains the obligation to prevent the contact between the employees' wet and contaminated work clothes and their clean, dry and non contaminated street and work clothes. On the basis of my findings herein, it is now left to CPR to ensure that their obligations with respect to the Clothing Storage provisions in the Regulations are met.

[137] Having concluded that the conclusion by HSO Noel that the employer was required to provide the surfacing crews with separate storage to store their wet and contaminated work clothes was based on an erroneous interpretation of the Regulations, the second item of the direction needs to be modified accordingly.

Decision

[138] For these reasons, as per the appended direction, I vary the second item of the direction issued on June 12, 2003, by HSO Noel, by adding "creosote" as one of the hazardous substances contaminating the work clothing of the employees and by removing the obligation put on the employer to provide a separate storage area.

Pierre Guénette
Appeals Officer

APPENDIX

IN THE MATTER OF THE *CANADA LABOUR CODE*
PART II – OCCUPATIONAL HEALTH AND SAFETY

MODIFIED DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On April 9 and 16, 2003, the undersigned health and safety officer conducted an inquiry in the work place operated by Canadian Pacific Railway Company, being an employer subject to the *Canada Labour Code*, Part II, at Cambridge, Ontario the said work place being sometimes known as Galt Sub-division and Galt Station.

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:

2. *Canada Labour Code*, Part II paragraph 125(1)(i) and Canada Occupational Health and Safety Regulation sub-sections 9.44(1)(2) and (3).

Employees who work on and maintain maintenance of way track clearing equipment are regularly required to work outside in inclement weather where clothing becomes wet**.** During the operation and maintenance of equipment, clothing is frequently contaminated by hazardous substances such as **creosote**, diesel fuel, lubricating grease, antifreeze and hydraulic oils. The employer provides hotel rooms housing two employees per rooms for periods of several days. Employees are required to return to those rooms directly from the workplace, while wearing the wet or contaminated work clothing. The employer has failed to provide a change room to ensure protection of employees exposed to wet or contaminated work clothing.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions(s) no later than **August 27, 2010**.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contraventions do not continue or reoccur **and to report this information to a health and safety officer of the Ontario Region by August 27, 2010.**

Modified by Appeals Officer Pierre Guénette in Ottawa, Ontario, this 15th day of July, 2010.

Rod Noel
Health and Safety Officer
Id No ON3272

To: **Canadian Pacific Railway Company**