

Occupational Health  
and Safety Tribunal Canada



Tribunal de santé et  
sécurité au travail Canada

Ottawa, Canada K1A 0J2

**Citation:** Canadian National Railway Company v. Teamsters Canada Rail Conference,  
2011 OHSTC 16

**Date:** 2011-07-21  
**Case No.:** 2011-03  
**Rendered at:** Ottawa

**Between:**

Canadian National Railway Company, Applicant

and

Teamsters Canada Rail Conference, Respondent

**Matter:** Objection to the filing of an expert report

**Decision:** The objection is denied

**Decision rendered by:** Mr. Richard Lafrance, Appeals Officer

**Language of decision:** English

**For the applicant::** Mr. Michel Huart, Counsel, Langlois Kronström Desjardins

**For the respondent:** Mr. Ken Stuebing, Counsel, CaleyWray

Canada

## REASONS

### Background

[1] This is in response to an objection by the Canadian National Railway Company (CN) to the filing by the respondent, the Teamsters Canada Rail Conference (TCRC) of a report, entitled “Ergonomic Risk Hazard Assessment” (“expert report”) prepared for this case.

[2] It should be noted that before the start of the hearing, after having taken into consideration submissions by the parties on the issue, I ordered that CN provide to the respondent TCRC access to locomotive 4760, or a similar model to conduct an ergonomic assessment. This assessment was to be conducted in relation to the issues raised in the direction issued by Health and Safety Officer (HSO) Rodgers on December 6, 2010.

[3] On June 7, 2011, in the course of the hearing of this appeal, the TCRC informed the Tribunal and CN’s counsel that the expert report would be communicated to CN’s counsel later that day. At close of the hearing that day a number of issues relating to the filing of the expert report were still outstanding such as its admissibility, the right of the Appellant to do a counter expertise, and cross examination of the expert.

[4] As the Appellant was objecting to the admissibility of the expert report on the basis of relevancy and necessity, I ruled that the parties would have to submit written representations on the issue of its admissibility. Having taken into consideration those submissions, the following are my reasons for finding that the expert report, and the testimony of the expert, are admissible as evidence in this matter.

### Decision

[5] CN relies on *R. v. Mohan* (1994) 2 S.C.R. 9, which sets out criteria governing the admissibility of expert evidence in criminal proceedings. The first two criteria set out in *Mohan* are (i) relevance and (ii) necessity. As CN points out, *Mohan* is relied upon by administrative tribunals to assist them in determining whether to admit expert evidence. In CN’s view, the expert report does not meet the relevance criteria because it does not deal with the subject matter of the direction. CN also takes the view that the expert report does not meet the necessity criteria, i.e., it is not necessary to enable the Appeals Officer to appreciate matters at issue.

[6] The TCRC argues that the direction issued in this matter plainly raises ergonomic issues and concerns about the challenges posed by the layout of the locomotive cab when operating in Long Hood Leading configuration. They point out that the Appeals Officer is not bound by strict rules of evidence in light of ss. 146.2(c) of the *Canada Labour Code* (the Code) which allows him to receive and accept any evidence seen fit whether admissible in court or not. They state that the strict criteria set out in *Mohan* are not

applicable to these proceedings, and that even if they were, CN has not demonstrated any prejudice that would arise from admitting the evidence.

[7] I note at the outset that ss. 146.1(1) of the Code requires that I inquire into the circumstances of the direction and the reasons for it.

[8] The threshold issue with respect to this expert report is whether it is relevant, i.e., will it tend to establish facts that are in issue before me. I have also considered whether, if relevant, such evidence is necessary in that it will assist me in understanding issues raised in this matter.

[9] When considering how to frame the issues before me, I must consider the circumstances that gave rise to the issuance of the direction under appeal, as set out in ss.146.1(1) of the Code. Those circumstances include the regulatory provisions relied upon by the HSO to issue his direction, as well as the situation he noted regarding the combination of the cab design and use of the locomotive in Long Hood Leading configuration.

[10] Sections 10.5 and 10.6 of the *On Board Trains Occupational Safety and Health Regulations* (OBTRs) raised in the direction pertain to the arrangement and design of controls on board rolling stock, and the extent to which they affect an operator's ability to safely operate it. They read as follows:

10.5 The arrangement and design of dial displays and the controls and general layout and design of the operator's compartment or position on all self-propelled rolling stock shall not hinder or prevent the operator from operating the rolling stock.

10.6 All self-propelled rolling stock shall be fitted with braking and other control systems that (a) are capable of safely controlling and stopping the movement of the rolling stock or any accessory equipment that is on or part of the rolling stock; and (b) respond reliably and quickly to moderate effort on the part of the operator.

[11] Section 10.13 of the OBTRs, also raised in the direction, pertains to the requirement that an employee be capable of operating rolling stock safely:

10.13 No employer shall require an employee to operate self-propelled rolling stock unless the employee is capable of operating the rolling stock safely.

[12] The covering letter to the direction issued by the HSO in this matter referred to the fact that a locomotive had operated in Long Hood Leading configuration for a distance of 37 miles. The direction itself set out the HSO's concern with respect to this situation, namely, that controlling locomotives "that were designed to operate primarily in a forward direction (Short Hood Lead) pose challenges when operating in Long Hood Lead". He then specified what the nature of those challenges were. He noted that the location of certain dials were set up for Short Hood Lead. Further, because of the operator's position when operating Long Hood Lead, certain controls limit the operator

[13] Section 10.6 of the OBTRs requires that control systems respond reliably and quickly to moderate effort on the part of the operator. The expert report which the TCRC is seeking to admit into evidence discusses repetitions and frequencies of movements purported to be non-ergonomic, and the extent to which risk of injury may result. As such, I consider that the expert report and the expert's testimony relate to, and would assist me in understanding, the level of effort required to operate the locomotive in Long Hood Leading configuration. Such level of effort is an issue that is squarely before me given the wording of section 10.6. I also note that section 10.6 requires that control systems be capable of safely controlling and stopping the movement of the rolling stock. In my view, evidence with respect to possible non-ergonomic movements and any resulting risk of injury when operating in Long Hood Leading configuration relates to, and would assist me in understanding, whether such a configuration allows for safe control of the locomotive.

[14] As well, section 10.5 of the OBTRs requires that the arrangement of dials and controls, and the general layout and design of the operator's compartment or position not hinder or prevent the operator from operating the rolling stock. As above, I consider that evidence with respect to repetitions and frequencies of movements which may be non-ergonomic, and the extent to which risk of injury may result, relates to, and would assist me in understanding, whether an operator could be hindered in operating the locomotive in Long Hood Leading configuration.

[15] I therefore find that the expert report, and the testimony of the expert with respect to it, satisfy the criteria of relevance and necessity, and are admissible in this matter.

[16] In its submissions, CN has raised a number of issues which appear to be related to the methodology used to prepare the report. CN will have the opportunity to address any such issues through cross-examination of the expert. Furthermore, CN will have the opportunity to present, if it chooses to, evidence to address the issue raised in the expert report.

Richard Lafrance  
Appeals Officer