

Occupational Health  
and Safety Tribunal Canada



Tribunal de santé et  
sécurité au travail Canada

Ottawa, Canada K1A 0J2

**Citation:** Canadian National Railway Company, 2011 OHSTC 24

<b>Date:</b>	2011-10-12
<b>Case No.:</b>	2011-45
<b>Rendered at:</b>	Ottawa

**Between:**

Canadian National Railway Company, Appellant

<b>Matter:</b>	An application for a stay of a direction
<b>Decision:</b>	The stay of the direction is granted
<b>Decision rendered by:</b>	Mr. Douglas Malanka, Appeals Officer
<b>Decision language:</b>	English
<b>For the appellant:</b>	Mr. Andy Pushalik, Counsel, Fraser Millner Casgrain LLP

## REASONS

[1] On August 26, 2011, Mr. A. Pushalik, Counsel for the Canadian National Railway Company (CN), filed a written application for a stay of direction pursuant to subsection 146(2) of the *Canada Labour Code* (Code). That subsection reads as follows:

146(2) Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

### Background

[2] The direction under appeal was issued by Health and Safety Officer (HSO) Chris Wells to Mr. Robert Bruder, Senior Risk Manager, CN, on August 9, 2011, pursuant to subsection 141(1) (h) of the Code. The direction reads:

On August 9, 2011, the undersigned health and safety officer conducted an investigation regarding documents in the work place operated by Canadian National Railway Company, being an employer subject to the Canada Labour Code, Part II, at OSHAWA MECHANICAL DEPARTMENT 874 THORTON RD. SOUTH, Oshawa, Ontario, L1J 8M6, the said work place being sometimes known as Canadian National Railway Company.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 141(1)(h) of the *Canada Labour Code*, Part II, to produce, no later than August 19, 2011, the documents and information relating to the health and safety of your employees or to the safety of the work place which are identified below, and to permit the said health and safety officer to examine and make copies or take extracts of such documents and information.

**Provide all of Mr. Rick McColl's medical information that Canadian National Railway has on file, for the purpose of conducting a fatality investigation.**

Issued at Toronto, this 9th day of August, 2011.

[3] A hearing to hear the request for stay was held on September 2, 2011. Mr. Rod Tompkins, Chief Steward, GLR, Local 2004, of the United Steel Workers Union informed the Tribunal that the Union did not wish to act as respondent in matter.

[4] Taking into consideration Mr. Pushalik's written and oral submissions, I ordered a stay of the direction on September 6, 2011, until a decision on the merits of the appeal is rendered by an appeals officer. The following outlines my reasons for granting the stay of direction.

### Analysis

[5] The authority for an appeals officer to grant a stay is derived from the above aforementioned subsection 146(2) and the exercise of this discretion must be consistent with the purpose clause of the Code found in section 122.1 and any other applicable provisions.

S. 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.

[6] In deciding this stay application, I applied the three part test adopted by the Tribunal. This test requires that:

- 1) The applicant must satisfy the Appeals Officer that there is a serious question to be tried as opposed to a frivolous or vexatious claim.
- 2) The applicant must demonstrate that significant harm would be suffered if the direction is not stayed.
- 3) The applicant must demonstrate that measures will be put in place to protect the health and safety of employees or any person granted access to the workplace should the stay be granted

**Is the question to be tried serious as opposed to a frivolous or vexatious?**

[7] Mr. Pushalik held that the direction conflicts with the employer's obligation to protect an employee's privacy. Specifically, he stated that the serious question to be tried is whether the health and safety officer's need to obtain medical documents for the purpose of his investigation supersedes an employee's right to privacy, and consequently, an employer's obligation to protect that right. Moreover the direction issued by HSO Wells relates to a CN employee who was fatally injured in an accident in the work place.

[8] Based on Mr. Pushalik's argument related to the important notion of an individual's privacy rights and the fact that the direction relates to the fatality of a CN employee, I am satisfied that there is a serious question to be tried.

**Would the Applicant suffer significant harm if the direction is not stayed?**

[9] Mr. Pushalik argued that the documents sought by the direction are not within CN's power and control, but reside exclusively with a separate entity known as CN Health. He urged that if the stay was not granted, CN would be forced to produce medical documentation and that such action would, in CN's view, be in breach of the *Federal Personal Information Protection and Electronic Documents Act* (PIPEDA). He maintained that the direction should not place CN in a potential breach of the PIPEDA where the authority for the issuance of the direction is being challenged by CN on appeal.

[10] He further held that CN is a unionized employer and that disclosure, if a stay is not granted, could have a significant negative impact on its relationship with its employees and their bargaining agent.

[11] Given the submissions made by Mr. Pushalik, and given that the internal responsibility system philosophy reflected in the Code provides for employers and employees to work in collaboration for ensuring that the health and safety of employees and persons granted access to the work place is protected, I am persuaded by CN's argument that it would suffer significant harm if the direction is not stayed.

**What measures will be put in place to protect the health and safety of employees or any persons granted access to the work place should the stay be granted?**

[12] During the hearing, HSO Wells stated that he would await the outcome of CN's appeal of his direction before taking further action. I am satisfied that granting a stay of the direction will not adversely impact on the health and safety of employees.

**Decision**

[13] Taking into consideration the above, the stay of the direction issued by HSO Wells to CN on August 9, 2011 is granted.

Douglas Malanka  
Appeals Officer