Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

**Citation:** Canadian National Railway Company and Teamsters Canada Rail Conference, 2012 OHSTC 2

**Date:** 2012-01-12
**Case No.:** 2011-03
**Rendered at:** Ottawa

**Between:**

Canadian National Railway Company, Applicant

and

Teamsters Canada Rail Conference, Respondent

| | |
|---|---|
| **Matter:** | Motion to strike |
| **Decision:** | The Motion is granted in part |
| **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 |

## REASONS

### Background

[1] Further to Canadian National Railway Company's (CN) final submission of November 21, 2011 on this matter, the Teamsters Canada Rail Conference (TCRC) provided a final reply on December 12, 2011. Shortly after, on December 15, 2011, CN filed a motion with the Tribunal requesting that certain paragraphs of the TCRC's submissions be struck.

[2] In particular, CN requests that paragraphs 74 to 78, which are based on two witness statements (statements of Mrs. Allen and Johnstone) which had not been introduced as evidence by the TCRC at the hearing, be struck. CN also argues as well that I should not consider the statements themselves as this would amount to a breach of procedural fairness.

[3] CN also requests that paragraphs 7, 45, 46, 47 and 66 of the TCRC's submissions be struck on the basis that they reveal an attempt by the TCRC to introduce evidence that was not put before the Tribunal during the hearing.

[4] In response to the motion by CN, the TCRC notes that the statements of Mr. Allen and Mr. Johnstone are relevant to the proceeding. They suggest that the broad power to accept evidence, afforded to an Appeals Officer pursuant to ss. 146.2(c) of the *Canada Labour Code* (the Code), justifies that the statements be accepted and considered by me at this stage. Although the TCRC does not specifically request that the hearing be re-opened at this stage to allow this evidence to be presented, they seem to leave it to me to request that such evidence be provided, either in affidavit form or through *viva voce* evidence.

[5] I have determined that the statements of Mr. Allen and Mr. Johnstone will not be considered by me. I have also determined that no formal order for striking paragraphs as requested by CN is necessary. My reasons are below.

### Decision

### Statements of Mr. Allen and Mr. Johnstone

[6] I note at the outset that ss. 146.2(h) of the Code allows me to determine the procedure to be followed at a hearing, while giving an opportunity to the parties to present evidence and make submissions.

[7] The TCRC, in their final submissions dated December 12, 2011 which triggered this motion by CN, did not request that the two individuals who provided these statements be called as witnesses. Rather, the TCRC simply attached the statements and made brief comments regarding their relevance (paras 74-77). Even at this juncture,

paragraphs 9 to 11 of the TCRC's December 19 response to CN's motion appear to leave it to me to determine whether *viva voce* testimony of these witnesses is necessary.

[8] Given the submissions of the parties on this motion by CN, I am left to conclude that it would have been possible for these witnesses, the evidence of whom the TCRC seeks to adduce through statements, to be called during the hearing if the TCRC thought they could contribute to this inquiry. The hearing is clearly the process contemplated to adduce evidence. The submissions stage is not. To permit the TCRC to adduce the evidence of these two witnesses through the statements at this stage would be unfair to CN. To re-open the hearing would no doubt delay the proceeding. There may well be cases where it is clear that a party had no knowledge of evidence at the time of the hearing, and therefore did not have the opportunity to present it at that time. In such cases, it may be that an appeals officer will accept to consider such evidence after the hearing is closed, subject to considerations of fairness, relevance and materiality, in keeping in mind the appeals officer's role to inquire into the circumstances surrounding the issuance of a direction or decision.

[9] In this case, however, the TCRC does not allege that they became aware of these statements after the close of their case. In response to CN's comment at paragraph 5 of their December 15, 2011 submissions that these statements predate the November 2011 hearing dates, the TCRC responds that the statements "were both taken in August 2011, and only came to the TCRC's attention much later- well after the TCRC had confirmed, upon the Tribunal's request, that its only remaining witness was its expert witness". This assertion does not answer the important question of why the TCRC failed to request that these two additional witnesses be called in November. The TCRC does not dispute that it agreed to move to the submissions stage of this proceeding with knowledge of the existence of this evidence. By failing to make such a request at a time when the evidence could properly have been tested at the hearing, and leaving it to this stage, the admission of this evidence would prejudice CN. The TCRC provides no explanation as to why the evidence has become necessary at this stage, *viva voce* or otherwise, rather than at the time of the hearing proper in November.

[10] Given my concerns with respect to fairness of this proceeding, as well as its efficiency, and given that the submissions pertaining to this motion show that the TCRC had the opportunity to request that this evidence be presented at the hearing in November, I will not consider the two witness statements of Mr. Johnstone and Mr. Allen in rendering my decision in this appeal, nor will I consider the TCRC's submissions at paragraphs 74-78 with respect to them.

**Purported new evidence at paragraphs 7, 45, 46, 47 and 66 of the TCRC's submissions**

[11] I must also deal with CN's argument that certain elements contained in the above paragraphs of the TCRC's pleadings amount to new evidence. CN asks for a formal order striking certain parts of the TCRC's pleadings. I do not consider this necessary, for the following reasons.

[12] I believe it would be inefficient for me to review each parties' submissions to determine which parts of these should be formally removed on the basis that the record does not support them, and then proceed to a deliberation on the matter based on these perfected submissions. I say this because, as the parties are aware, I can only base my findings on the evidence which was put before me at the hearing. Of course, both parties can, in their submissions, draw to my attention any concerns they have with respect to each other's submissions and the extent to which these are supported by the record. In deliberating this matter, I will certainly consider these, and of course rely on the record which is properly before me as generated by the hearing into this matter which was started in Edmundston, New Brunswick on June 7 and 8 and concluded in Montréal on November 2 and 9, 2011.

**Schedule for completion of written submissions**

[13] On December 16, 2011, I had directed that the timeframe for final submissions and reply would be suspended pending my decision on this motion. As this decision has now been issued, CN is directed to provide its rebuttal to TCRC's final submission no later than January 19, 2012.

Richard Lafrance
Appeals Officer