

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canada Post Corporation, 2012 OHSTC 34

Date: 2012-10-12
Case No.: 2010-32
Rendered at: Ottawa

Between:

Canada Post Corporation, Appellant

and

Canadian Union of Postal Workers, Intervenor

Matter: Appeal brought under subsection 146(1) of Part II of the *Canada Labour Code* against two directions issued by a health and safety officer

Decision: The directions are varied

Decision rendered by: Katia Néron, Appeals Officer

Decision language: French

For the appellant: Caroline Richard, Counsel, Bird Richard

For the intervenor: David Bloom, Counsel, Cavalluzzo Hayes Shilton McIntyre and Cornish LLP

Canada

REASONS

[1] This case concerns an appeal brought under subsection 146(1) Part II of the *Canada Labour Code* (the Code) by Ms. Caroline Richard, counsel acting on behalf of the Canada Post Corporation, against two directions issued by Health and Safety Officer (HSO) Isabelle Rioux on August 2, 2010.

[2] This case was heard in Montreal on February 14 and 15, 2012.

Background

[3] The following was taken from the testimony given by HSO Rioux, as well as from her investigation report and related documents.

[4] This case arises from a work refusal exercised Mario Daniel, who works for the Canada Post Corporation as a rural and suburban mail carrier (RSMC). On July 27, 2010, Mr. Daniel had to deliver mail on route #3812 (also known as route SS-12). This route includes rural mailboxes (RMBs) located on Plage St-Laurent Street in L’Ancienne-Lorette, Quebec. To perform this work, Mr. Daniel used his vehicle, a van equipped with two bucket seats in the front.

[5] In 2008, the Canada Post Corporation prohibited its RSMCs from delivering mail against the circulation of traffic. On Plage St-Laurent Street in L’Ancienne-Lorette, there is no shoulder lane. Therefore, to deliver the mail on that street, Mr. Daniel had to stop his vehicle in the traffic lane, then, through the front passenger-side window, place the mail in each RMB. To help him perform this work, Mr. Daniel was normally accompanied by another person, known as an “ergonomics assistant,” who sat in the passenger seat and took care of placing the mail in the RMBs.

[6] According to the investigation report submitted by HSO Rioux, Mr. Daniel refused to perform this work on the street in question that day because he was informed that he would no longer have the support of an ergonomic assistant. Without this person to help him, Mr. Daniel feared that he would injure his back and arms because, in order to deliver the mail himself, he had to move from his seat, bend in a crouched position and extend his body beyond the passenger seat beside him to reach the window. Furthermore, delivering the mail without an ergonomic assistant took more time at each RMB, and Plage St-Laurent Street has no shoulder lane, so his vehicle would be blocking the traffic lane for a longer period. According to Mr. Daniel, this would increase the risk of collision with another vehicle.

[7] Mr. Daniel’s work refusal reads as follows:

[Translation]

I do not have enough space along the road to park and do my deliveries. I am too far from the right-side window to do my delivery, so I am forced to cross from my seat to the one beside me and reach until I have half my

body outside the window, which hurts my back. In the long run, this may cause injuries to my back and arms.

[8] During her investigation, HSO Rioux obtained the reasons Mr. Daniel gave in support of his refusal. The employer's representatives who were on site, Mr. Claude Lafond and Mr. Claude Turcotte, then explained the following to HSO Rioux.

[9] In February 2008, Mr. Daniel filed a complaint concerning mail delivery on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec. After the complaint was received, an assessment was performed to determine whether mail delivery to the RMBs on the street in question posed a risk to Mr. Daniel's safety. To conduct the assessment, the employer used the "Traffic Safety Assessment Tool" (TSAT). Following the assessment, corrective action was taken.

[10] At the time of the investigation, a document containing the results of the TSAT assessment was given to HSO Rioux. In her testimony, she stated that she had not reviewed this document because the employer's representatives were not able to provide her with explanations about its content. In her investigation report, she added that the employer's representatives did not follow the specific criteria that must be met for an RSMC to keep his or her ergonomic assistant.

[11] Following her investigation, HSO Rioux decided that delivering the mail without his ergonomic assistant to the RMBs on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec, posed a danger to Mr. Daniel's health and safety, for the reasons that follow.

[12] First of all, the repetitive stretching and twisting movements that Mr. Daniel had to make to reach the passenger-side window could, in the opinion of the HSO, result in injury.

[13] Furthermore, Mr. Daniel had to stop his vehicle for longer periods at each RMB, as well as remove his seatbelt, which, in the opinion of HSO Rioux, increased his risk of collision with another vehicle, as well as his risk of injury in the event of such an incident. In the opinion of HSO Rioux, these risks were even greater in poor weather conditions, since the visibility of other drivers or the width of the road could be reduced, particularly in the winter during snowstorms and with the buildup of snowbanks along the street.

[14] Following this decision, HSO Rioux issued a danger direction to the Canada Post Corporation ordering it to take measures to eliminate the two risks indicated above. She also issued a direction ordering that Mr. Daniel not perform his work on the street in question until corrective measures had been taken by his employer.

[15] The directions issued by HSO Rioux read as follows:

[Translation]

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

DIRECTION TO THE EMPLOYER UNDER
PARAGRAPHS 145(2)(a) and (b)

On August 2, 2010, the undersigned health and safety officer conducted an investigation into the work refusal of Mario Daniel in the workplace operated by Canada Post, an employer subject to Part II of the *Canada Labour Code*, located at 1697 Notre-Dame, in L' Ancienne-Lorette, Quebec, the said workplace being sometimes known as Canada Post.

The said health and safety officer is of the opinion that the performance of an activity constitutes a danger to an employee, namely:

The fact that there is no shoulder on Plage St-Laurent Street requires Mr. Daniel to stop in the traffic lane. Having lost his ergonomic assistant, he must now remove his seatbelt and remain parked on the road for a longer period. Furthermore, he must use a constraining position to place the mail through the passenger-side window.

Therefore, you are HEREBY DIRECTED, under paragraph 145(2)(a) of Part II of the *Canada Labour Code*, to correct the hazard or condition before August 16, 2010.

In compliance with subsection 145(3), notice no. 3678 was posted at 1697 Notre-Dame in L' Ancienne-Lorette and cannot be removed without the authorization of the officer.

You are also HEREBY DIRECTED, under paragraph 145(2)(b) of Part II of the *Canada Labour Code*, not to perform the activity in question until these actions have been carried out.

Issued at Quebec City, this 2nd day of August, 2010.

Isabelle Rioux
Health and Safety Officer
Certificate No.: SQ3127

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

DIRECTION TO THE EMPLOYEE
UNDER SUBSECTION 145(2.1)

On August 2, 2010, the undersigned health and safety officer conducted an investigation into the refusal to work of Mario Daniel in the workplace operated by Canada Post, an employer subject to Part II of the *Canada Labour Code*, located at 1697 Notre-Dame, in L' Ancienne-Lorette, Quebec, the said workplace being sometimes known as Canada Post.

The said health and safety officer is of the opinion that the performance of an activity by an employee poses a danger to that employee at work, namely:

The fact that there is no shoulder on Plage St-Laurent Street requires Mr. Daniel to stop in the traffic lane. Having lost his ergonomics assistant, he must now remove his seatbelt and remain parked in the lane for a longer period. Furthermore, he must use a restrictive position to place the mail through the passenger-side window.

Therefore, you are HEREBY DIRECTED, under subsection 145(2.1) of Part II of the *Canada Labour Code*, not to perform the activity in question until your employer has complied with the directions issued under paragraph 145(2)(a) of Part II of the *Canada Labour Code*, to take steps to correct the hazard or condition.

Issued at Quebec City, this 2nd day of August, 2010.

Isabelle Rioux
Health and Safety Officer
Certificate No.: SQ3127

[16] Before the hearing, David Bloom, on behalf of the Canadian Union of Postal Workers (CUPW), informed me that the CUPW was withdrawing as a party in this case. However, Mr. Bloom requested intervenor status on behalf of the CUPW.

[17] In response to Mr. Bloom's request, I allowed the CUPW intervenor status at the start of the hearing on February 14, 2012. I also authorized Mr. Bloom to intervene when he deemed it useful during the hearing of the case, and I authorized him to submit his comments in response to the final written arguments submitted by Ms. Richard in this case.

[18] Mr. Daniel, who was present at the start of the hearing on February 14, 2010, informed me that he did not wish to submit arguments in this case.

[19] At the start of the hearing on February 14, 2010, Ms. Richard informed me that the Canada Post Corporation, in agreement with the CUPW, was withdrawing its appeal concerning the ergonomic risk related to Mr. Daniel's work at the time of his refusal, identified by HSO Rioux in her directions as posing a danger to Mr. Daniel.

[20] However, Ms. Richard indicated that the Canada Post Corporation was maintaining its appeal concerning the circumstances identified by HSO Rioux in her directions as posing a danger to Mr. Daniel and regarding the risk of collision with another vehicle during the performance of Mr. Daniel's work.

Issue

[21] Since the appeal concerning the ergonomic risk associated with the work in question was withdrawn by the appellant, the issue in this case is whether the danger directions issued on August 2, 2010, by HSO Rioux, indicating a notice of danger with regard to traffic safety, were founded.

A) Appellant's submissions

[22] Ms. Richard, on behalf of the appellant, stated that, in September 2008, all the RMBs located on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec, were subjected to a TSAT assessment. Ms. Richard also stated that, following this assessment, the RMBs that did not meet TSAT requirements were either relocated to minimize the risk of collision with another vehicle during mail delivery on that street, or moved to community mailboxes or to the local post office.

[23] Ms. Richard went on to state that, for RSMCs, having to remove their seatbelt to deliver mail to an RMB through the passenger-side window when not accompanied by an ergonomic assistant is not in itself a potential cause of collision with another vehicle, nor does it increase the risk of collision.

[24] With regard to the inclement weather conditions described by HSO Rioux in her testimony and investigation report, which, in her view, increase the risk of collision with another vehicle during the performance of the work in question, Ms. Richard stated that, at the time of HSO Rioux's investigation, the Canada Post Corporation had implemented safe work procedures, taking into account these circumstances in order to ensure Mr. Daniel's safety.

[25] In support of these statements, Ms. Richard called as a witness, Ms. Geni Bahar, a traffic safety engineering specialist and President of ITrans Consulting (ITrans), a firm specializing in transportation planning and roadway engineering. After hearing Ms. Bahar's qualifications, I accepted this person as an expert in traffic safety. Ms. Richard also called as a witness Louis Desruisseaux, who was the head of delivery scheduling at the Canada Post Corporation at the time of the investigation conducted by HSO Rioux.

[26] Ms. Bahar stated that the TSAT was developed with the help of her group of consulting experts at ITrans and in cooperation with the Canada Post Corporation's health and safety coordination committee.

[27] Ms. Bahar submitted a copy of the report entitled [translation] "Basis of the traffic safety assessment tool for rural mailbox (RMB) delivery, version 3.0, May 2008" (the Report). She stated that this tool was developed in order to assess whether delivering mail to each RMB was safe for RSMCs in terms of their potential risk of collision with another vehicle during the performance of their work.

[28] Referring to point 2.1 on page 13 of the Report, Ms. Bahar stated that the group of experts that developed the TSAT took into account the following accident scenarios that could happen to an RSMC during the performance of their work:

- sideswipe collision (two drivers trying to occupy the same lane) or off-road accident caused by a driver trying to avoid the RSMC's vehicle that is re-entering traffic;

- head-on collision or off-road accident caused when the driver approaching from behind notices too late that the RSMC's vehicle is partially blocking the lane, and the driver does not have time to stop or move to the opposing lane;
- head-on collision or off-road accident caused when the driver approaching from behind moves to the opposing lane and a vehicle suddenly appears, approaching from the opposite direction.

[29] Ms. Bahar stated that the TSAT was accepted by the Canada Post Corporation and the CUPW as the best methodology currently available to assess and minimize these types of accidents during the performance of an RSMC's duties.

[30] Ms. Bahar stated that, based on these risks, the experts established that, for the location of an RMB to pass the TSAT assessment, it must be placed in such a way as to allow the RSMC sufficient time to re-enter traffic after stopping, whether on the road or a shoulder lane, and to allow other drivers who meet a stopped RSMC vehicle sufficient time and distance to see the RSMC's vehicle and react appropriately, by either stopping or changing lanes and passing on the left, potentially with vehicles coming from the opposite direction. These passing times also take into account the potential number and speed of other vehicles on the road; whether there are trucks, curbs, a cul-de-sac, stoplights or stop signs, pedestrians or bicycles on the road; the distance and visibility of the pass; and whether the road is a low-speed, low-traffic, rural road, a through road, a secondary road or a dead-end road. However, since RSMCs are required to frequently re-enter traffic, they are likely to be less willing to wait as long as the average driver. That is why, as stated by Ms. Bahar, the passing times recommended in the TSAT are conservative and longer than normally required.

[31] Ms. Bahar stated that the applicable regulatory restrictions, such as not passing on two solid yellow lines, are incorporated into the TSAT.

[32] Referring to Figures 9, 10 and 11 (pages 48, 49 and 50) of the Report, Ms. Bahar stated that they contain the criteria analyzed for TSAT assessment purposes. She also stated that these criteria were selected on the basis of rigorous scientific studies and of the passing times and traffic volumes on the road (or the maximum number of vehicles that may drive on the road in 15 minutes) recommended by the experts and described in Table 3 on page 45 of the Report. She added that the evaluation of all these criteria helped to determine whether the location of an RMB on an RSMC's route, be it a two-lane road, a four-lane road or a low-traffic, low-speed rural road, is safe.

[33] As stated by Ms. Bahar, the TSAT also takes into account that the location of an RMB may require the RSMC to stop partially or fully in the traffic lane because there is no shoulder, for instance, when the four wheels of the RSMC's vehicle are in the traffic lane. In that situation, described in Table 3 of the Report as an [translation] "on-road" situation, for an RMB to be deemed safe, it must meet the following criteria:

- There must be a passing time of 11 seconds behind the RSMC's vehicle;
- There must be a passing time of 14 seconds in front of the RSMC's

- vehicle; and
- The maximum number of vehicles on the road in a 15-minute period must be equal to or less than 40.

[34] Ms. Bahar stated that all the criteria in the Report must be met in order for an RMB to be declared safe. If the RMB does not meet one of the criteria, its location is deemed unsafe and must be changed. In that case, the RMB must be either relocated to an area that meets TSAT criteria on the RSMC's route, or purely and simply eliminated.

[35] Ms. Bahar stated that the RSMC not wearing a seatbelt, because he or she is required to remove it to deliver the mail through the passenger-side window, is an action that neither causes accidents nor increases the risk of accident for the RSMC. She added that this situation does not render TSAT results invalid, either.

[36] Mr. Desruisseaux stated that the RMBs on route SS-12 in L'Ancienne-Lorette, Quebec, were assessed in February and September 2008. He submitted the reports of those assessments, one dated February 11, 2008, the other September 3, 2008. The reports are entitled [translation] "Rural mailboxes – TSAT Table – Quebec – L'Ancienne-Lorette, Route SS-12." According to these reports, Plage St-Laurent Street in L'Ancienne-Lorette, Quebec, otherwise known as route SS-12, has two traffic lanes, and approximately 19 cars in 15 minutes pass by each RMB located on that street. The posted speed limit on the street is 30 kilometres an hour.

[37] Mr. Desruisseaux submitted a report dated December 9, 2008, which contained the final results of the last assessment of route SS-12 conducted in September 2008, as well as the corrective action taken by the Canada Post Corporation with regard to the RMBs that did not meet TSAT requirements. This report is entitled [translation] "Rural delivery safety assessment – 3rd notice – Suburban route 12 in L'Ancienne-Lorette (Cap-Rouge sector), Quebec." According to this report and as stated by Mr. Desruisseaux, the 58 RMBs on route SS-12 were assessed. Of those 58 RMBs, 32 passed the TSAT assessment. Of the other 26 RMBs that did not meet TSAT requirements, 8 were relocated to a safe area on route SS-12 pursuant to TSAT requirements, 7 were moved to a community mailbox, and, for the 11 that remained, the clients opted for a delivery service via a community mailbox or the local post office.

[38] Mr. Desruisseaux submitted policy no. 1202.05 developed by the Canada Post Corporation describing the safe work procedures for mail delivery by RSMCs. This document is dated August 29, 2008, and is entitled [translation] "Hazards and Obstructions to Delivery."

[39] Mr. Desruisseaux stated that point 3.1 on page 5 of this policy gives an example of snowbanks preventing delivery to RMBs. In that situation, the policy stipulates that the RSMC is not required to deliver the mail to the RMBs if he or she deems it unsafe to do so. This guideline is the same in inclement weather conditions (see point 4.2, [translation] "Late delivery scans," on page 11 of policy no. 1202.05). Mr. Desruisseaux also stated that, in such situations, the policy stipulates that the RSMC must inform his or her

superior and that the RSMC is not required to deliver the mail until action has been taken to resolve the situation or weather conditions improve.

[40] Mr. Desruisseaux described the measures taken by the Canada Post Corporation following the complaint filed by Mr. Daniel in February 2008 because the RMBs on route SS-12 were not sufficiently cleared and the road was covered in snow. The RMBs and the road were then cleared. After this was done, Mr. Daniel withdrew his complaint.

[41] Based on this evidence, Ms. Richard stated that, since all the RMBs on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec, at the time of Mr. Daniel's refusal met the TSAT requirements, the residual risk related to the possibility of a collision with another vehicle while delivering mail to these RMBs was, at that time, a normal condition of employment pursuant to paragraph 128(2)(b) of the Code.

[42] To support these arguments, Ms. Richard referred to the following case law: *Morrison v. Canada Post Corporation*¹ and *Townsend v. Canada Post Corporation*.²

[43] However, Ms. Richard stated that this case differs from *Morrison* and *Townsend* because the refusals to work in those cases occurred in January 2006, and the TSAT was implemented in April 2006. Therefore, when the RSMCs in *Morrison* and *Townsend* refused to work, their mail delivery route had not been subject to a TSAT assessment. As stated by Ms. Richard, that is not the case here because, at the time of Mr. Daniel's refusal and the investigation conducted by HSO Rioux, a TSAT assessment had been done for the work in question.

[44] Ms. Richard also stated that, in *Morrison* and *Townsend*, Appeals Officer Richard Lafrance concluded, based on the fact that the employer had later implemented the TSAT, that the residual risk of collision was a normal condition of employment pursuant to paragraph 128(2)(b) of the Code.

[45] Ms. Richard went on to state that, for an RSMC, having to remove his or her seatbelt when delivering mail to RMBs without an ergonomic assistant changes neither the soundness of nor the findings in *Morrison* and *Townsend*, which found that, if the RMBs passed the TSAT assessment, the residual risk of collision with another vehicle was a normal condition of employment under paragraph 128(2)(b) of the Code.

[46] On that basis, Ms. Richard stated that, in this case, Mr. Daniel could not, on July 27, 2010, invoke his right to refuse to work as set out in the Code on the grounds that there was a potential risk of collision with another vehicle, since a TSAT assessment had been done before his refusal, and all the RMBs in delivery mode on Plage St-Laurent Street in L'Ancienne-Lorette met TSAT requirements.

[47] For these reasons, Ms. Richard stated that HSO Rioux's finding that a danger

¹ *Morrison v. Canada Post Corporation*, OHSTC-09-032.

² *Townsend v. Canada Post Corporation*, OHSTC-10-007.

existed for Mr. Daniel on August 2, 2010, with regard to traffic safety was not founded. She suggested that the wording of the directions issued by HSO Rioux be varied as follows:

[Translation]

The said healthy and safety officer finds that the performance of an activity constitutes a danger for the employee, since, having lost his ergonomic assistant, the employee must now remove his seatbelt and use a constrictive position to place the mail through the passenger-side window.

B) Intervenor's submissions

[48] At the end of the hearing on February 15, 2012, Mr. Bloom indicated that the CUPW was of the opinion that the TSAT developed by ITrans for the Canada Post Corporation was an effective tool for assessing whether the performance of work posed a danger to RSMCs with regard to traffic safety. He also indicated that the CUPW did not dispute the results of the TSAT assessment of the RMBs located on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec, nor the steps taken afterward to relocate the RMBs that did not meet the TSAT requirements on that street.

[49] Mr. Bloom did not submit final written arguments in response to those submitted in writing by Ms. Richard.

Analysis

[50] The issue in this case is whether the danger directions that were issued on August 2, 2010, by HSO Rioux with regard to traffic safety were founded.

[51] The term “danger” is defined as follows in subsection 122(1) of the Code:

“danger” means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

[Emphasis added]

[52] With regard to the test for establishing whether there is any existing or potential danger within the meaning of subsection 122(1) of the Code, Justice Gauthier of the Federal Court stated the following at paragraph 36 of the decision rendered in *Verville*³:

[36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future

³ *Verville v. Canada (Correctional Service)*, 2004 FC 767.

activity will occur. I do not construe Tremblay-Lamer's reasons in *Martin* above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one. [Emphasis added]

[53] The evidence shows that the potential traffic safety hazard related to the work in question consists of another vehicle colliding with Mr. Daniel's vehicle while Mr. Daniel is delivering mail to the RMBs on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec.

[54] The evidence also shows that Plage St-Laurent Street in L'Ancienne-Lorette, Quebec, has no shoulder lane, requiring Mr. Daniel to block one of the traffic lanes while he delivers the mail on that street.

[55] Furthermore, according to the testimony given by Ms. Bahar, a traffic safety expert, as well as the group of experts who wrote the aforementioned Report, the potential hazard of an RSMC colliding with another vehicle during the performance of the work in question may cause injury to the RSMC in the following three circumstances:

- sideswipe collision (two drivers trying to occupy the same lane) or off-road accident caused by a driver trying to avoid the RSMC's vehicle that is re-entering traffic;
- head-on collision or off-road accident caused when the driver approaching from behind notices too late that the RSMC's vehicle is partially or completely blocking the lane, and the driver does not have time to stop or move to the opposing lane;
- head-on collision or off-road accident caused when the driver approaching from behind moves to the opposing lane and a vehicle suddenly appears, approaching from the opposite direction.

[56] I fully agree with the findings of Appeals Officer Lafrance in *Morrison, supra*, who, at paragraph 325, states:

[325] I agree that injuries may not be sustained every time a collision occurs, as recognized by Justice Gauthier in the *Verville* decision (*supra*). However, the collision does not have to cause an injury every time the person is exposed to the danger. It must only be capable of causing injury. As indicated above, I find that it is reasonable to expect that a vehicle collision will cause an injury to any person involved in it.

[57] Moreover, it appears clear to me that, if another vehicle was to hit Mr. Daniel's vehicle, the potential injuries to Mr. Daniel could be aggravated by his not wearing a seatbelt.

[58] In *Morrison and Townsend*, *supra*, Appeals Officer Lafrance also found that there was an existing danger within the meaning of the Code during the delivery of mail by the RSMC in cases where there is a serious possibility of collision at certain RMBs on the delivery route, and where the RSMC's vehicle is partially blocking traffic. However, Appeals Officer Lafrance found that this danger becomes a normal condition of employment within the meaning of paragraph 128(2)(b) of the Code after the RMBs in question have been subject to a TSAT assessment and those that do not meet TSAT requirements have been relocated, thus, in his view, minimizing the potential risk of collision with another vehicle.

[59] Subsection 128(1) and paragraph 128(2)(b) of the Code read as follows:

128(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

- (a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
- (b) a condition exists in the place that constitutes a danger to the employee; or
- (c) the performance of the activity constitutes a danger to the employee or to another employee.

128(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if

[...]

- (b) the danger referred to in subsection (1) is a normal condition of employment. [Emphasis added]

[60] In addition, Ms. Richard, on behalf of the Canada Post Corporation, is not disputing that a danger exists for Mr. Daniel, namely, the potential risk of collision with another vehicle during the delivery of mail to the RMBs in question when the RMBs have not been assessed using the TSAT. However, she stated that, as found by Appeals Officer Lafrance in *Morrison and Townsend*, because the RMBs in question were assessed using the TSAT, and the RMBs that did not meet TSAT requirements were moved, or were relocated to community mailboxes or to the post office, the risk of collision with another vehicle was reduced as much as possible. As a result, the residual danger at the time of HSO Rioux's investigation constituted a normal condition of employment within the meaning of paragraph 128(2)(b) of the Code.

[61] In *Éric V. and et al.*,⁴ Appeals Officer Serge Cadieux defined a normal condition of employment within the meaning of paragraph 128(2)(b) of the Code. At paragraphs 296 and 297, he wrote:

⁴ *Éric V. and et al. v. Correctional Service of Canada*, OHSTC-09-009.

[296] In his investigation, the HSO is to determine whether the measures taken by the employer have minimized the reasonable possibility of injury to the employee who must perform the work.

[297] In a recent Federal Court decision in *P&O Ports Inc. and Western Stevedoring Co. Ltd. v. International Longshoremen's and Warehousemen's Union, Local 500*, 2008 FC 846, the Court upheld the AO's interpretation in that case with regard to a danger that constituted a normal condition of employment. Like the Court, I fully share the interpretation of this notion by the AO, which is explained as follows:

[152] I believe that before an employer can say that a danger is a normal condition of work, he has to identify each and every hazard, existing or potential, and he must, in accordance with the Code, implement safety measures to eliminate the hazard, condition, or activity; if it cannot be eliminated, he must develop measures to reduce and control the hazard, condition or activity within safe limits; and, finally, if the existing or potential hazard still remains, he must make sure that employees are provided with the necessary personal protective equipment, clothing, devices and materials against the hazard, condition or activity. This of course, applies, in the present case, to the risk of falling as well as to the risk of tripping and slipping on the hatch covers.

[153] Once all these steps have been followed and all the safety measures are in place, the "residual" hazard that remains constitutes what is referred to as the normal condition of employment. However, should any change be brought to this normal employment condition, a new analysis of that change must take place in conjunction with the normal working conditions.

[154] For the purpose of this case, I find that the employers failed, to the extent reasonably practicable, to eliminate or control the hazard within safe limits or to ensure that the employees were personally protected from the hazard of falling off the hatch covers.

[62] Based on the above and in reference to the issue that I am to decide in this case, I must determine whether the potential risk of collision with another vehicle during the delivery of mail to the RMBs in question constituted, on August 2, 2010, a normal condition of employment within the meaning of the Code.

[63] To arrive at that conclusion, in referring to the interpretation of a normal condition of employment within the meaning of the Code as described by Appeals Officer Cadieux in *Éric V. and et al., supra*, as well as the interpretation of "danger" as defined by the Code according to Justice Gauthier in *Verville*, I understand that I must determine whether the Canada Post Corporation had, on August 2, 2010, implemented safety measures to minimize the potential risk of a collision with another vehicle during the delivery of mail to the RMBs in question. If I find that this was the case, I must find that the wording referring to the presence of danger on August 2, 2010, with regard to this risk in the two directions issued by HSO Rioux, was not founded.

[64] The evidence shows that, on August 2, 2010, the Canada Post Corporation had developed and implemented the TSAT.

[65] Furthermore, according to the testimony given by Ms. Bahar and the aforementioned Report submitted by Ms. Bahar, I find that, for the location of an RMB to pass the TSAT, it must be placed in such a way as to allow a driver approaching from behind an RSMC's vehicle, when that vehicle is completely or partially blocking the road or is merging into traffic, a period of time deemed "acceptable" by the experts to determine whether he or she will stop or pass the RSMC's stopped vehicle on the left. This period of time takes into account the potential traffic on the road, the speed and number of vehicles on the road, and the reaction time of the RSMC sitting in the vehicle when determining whether to merge into traffic.

[66] Upon reading the above-mentioned document and the testimony given by Ms. Bahar, I also understand that these periods of time established for the TSAT by the group of ITrans experts, as well as the other criteria used to determine whether the location of an RMB is safe, help to minimize the RSMC's risk of collision with another vehicle during the performance of his or her work.

[67] In addition, upon reading the same document, I understand that, for an RMB to be declared safe, all TSAT criteria must be met. In fact, if one of the criteria is not met, the RMB must be either moved to a location that meets TSAT requirements, or eliminated from the delivery route.

[68] The evidence also shows that, after a TSAT assessment, every RMB that does not meet TSAT requirements must undergo another assessment to be relocated to a safe area on the delivery route, converted to community mailboxes, or moved to the local post office.

[69] With regard to potentially inclement weather conditions (build-up of snowbanks, snow-covered mailboxes, snowstorms or thunderstorms) that may increase the risk of collision during mail delivery on the street in question, both the testimony given and the document submitted by Mr. Desruisseaux show that work procedures were put in place by the Canada Post Corporation before August 2, 2010, stipulating that RSMCs should not deliver mail if such conditions are present.

[70] I am of the opinion that the implementation of these measures ensures that the potential hazard identified above is reduced to a minimum.

[71] I am also of the opinion that, if these measures were in place on August 2, 2010, on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec, the potential risk of collision with another vehicle during mail delivery to the RMBs on that street was minimized.

[72] According to the testimony given by Mr. Desruisseaux, all the RMBs on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec, underwent a TSAT assessment before

August 2, 2010.

[73] The evidence also shows that, following the assessment, all the RMBs that did not meet TSAT requirements were moved to a safe location that did meet those requirements on that street, converted into community mailboxes, or moved to the local post office.

[74] According to the evidence, in February 2008, after Mr. Daniel complained about snow-covered mailboxes and the presence of snowbanks on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec, Mr. Daniel was told not to deliver mail to the RMBs on the street, and Canada Post Corporation took steps to resolve these issues before allowing Mr. Daniel to resume mail delivery on that street, as stipulated in the safe work procedures. I find that these procedures are implemented when required.

[75] Based on all the preceding information, I find that Mr. Daniel's potential risk of collision with another vehicle on August 2, 2010, while delivering mail to the RMBs in question was minimized and that, as a result, the residual hazard was, at that time, a normal condition of Mr. Daniel's employment within the meaning of paragraph 128(2)(b) of the Code.

[76] I therefore find that the wording referring to the presence of danger on August 2, 2010, with regard to this risk in the two directions issued by HSO Rioux was not founded.

[77] I cannot rescind the directions issued by HSO Rioux in their entirety because they also address the ergonomic aspect, and only the issue concerning the risk of collision with another vehicle was appealed in this case. I can, however, pursuant to paragraph 146.1(1)(a) of the Code, vary them to remove all references to traffic safety.

Decision

[78] For these reasons, I decide, as authorized under paragraph 146.1(1)(a) of the Code, to vary the two directions issued by HSO Rioux on August 2, 2010, removing all references to the issue of traffic safety. The varied directions are found in Appendix I.

Katia Néron
Appeals Officer



Ottawa, Canada K1A 0J2

APPENDIX I

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

DIRECTION TO THE EMPLOYER UNDER
PARAGRAPHS 145(2)(a) and (b)

On August 2, 2010, health and safety officer Isabelle Rioux conducted an investigation into the refusal of work of Mario Daniel in the workplace operated by Canada Post, an employer subject to Part II of the *Canada Labour Code*, located at 1697 Notre-Dame, in L'Ancienne-Lorette, Quebec, the said workplace being sometimes known as route SS-12 on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec.

The said health and safety officer is of the opinion that the delivery of mail to the RMBs located on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec, poses a danger to the employee at work, namely:

To deliver the mail through the passenger-side window of his vehicle, Mr. Daniel must use a restrictive position.

Therefore, you are HEREBY DIRECTED, under paragraph 145(2)(a) of Part II of the *Canada Labour Code*, to take steps to eliminate the risk or correct the situation before August 16, 2010.

In compliance with subsection 145(3), notice no. 3678 was posted at 1697 Notre-Dame in L'Ancienne-Lorette and cannot be removed without the authorization of the officer.

You are also HEREBY DIRECTED, under paragraph 145(2)(b) of Part II of the *Canada Labour Code*, not to perform the task in question until these directions have been carried out.

Varied at Ottawa, as indicated in italics, this 12th day of October, 2012.

Katia Néron
Appeals Officer



Ottawa, Canada K1A 0J2

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

DIRECTION TO THE EMPLOYEE
UNDER SUBSECTION 145(2.1)

On August 2, 2010, health and safety officer Isabelle Rioux conducted an investigation into the refusal of work of Mario Daniel in the workplace operated by Canada Post, an employer subject to Part II of the *Canada Labour Code*, located at 1697 Notre-Dame, in L'Ancienne-Lorette, Quebec, the said workplace being sometimes known as route SS-12 on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec.

The said health and safety officer is of the opinion that the delivery of mail to the RMBs located on Plage St-Laurent Street in L'Ancienne-Lorette, Quebec, poses a danger to the employee at work, namely:

To deliver the mail through the passenger-side window of his vehicle, Mr. Daniel must use a restrictive position.

Therefore, you are HEREBY DIRECTED, under subsection 145(2.1) of Part II of the *Canada Labour Code*, not to perform the work in question until your employer has complied with the directions issued under paragraph 145(2)(a) of Part II of the *Canada Labour Code*, to take steps to eliminate the risk or correct the situation.

Varied at Ottawa, as indicated in italics, this 12th day of October, 2012.

Katia Néron
Appeals Officer