Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canadian National Railway v. Teamsters Canada Railways Conference, 2013 OHSTC 5

Date: 2013-01-25
Case No.: 2012-93
Rendered at: Ottawa

Between:

Canadian National Railway Company, Applicant

and

Teamsters Canada Railways Conference, Respondent

Matter:	An Application for a partial stay of a direction
Decision:	The partial stay of the direction is granted
Decision rendered by:	Mr. Pierre Hamel, Appeals Officer
Language of decision:	English
For the Applicant:	Mr. L. Michel Huart, Counsel, Langlois Kronström Desjardins, LLP
For the Respondent:	Mr. Ken Stuebing, Counsel, CaleyWray

REASONS

[1] These reasons concern an application for a partial stay of a direction issued on December 7, 2012 by Health and Safety Officer (HSO) Mr. Todd Wallace, that was filed with the Tribunal on December 21, 2012 by Mr. L. Michel Huart, counsel for the Canadian National Railway Company ("CN" or "the employer").

[2] An appeal of the direction was filed on the same day and was accompanied by a written Motion in support of the request for a partial stay of its execution, sought pursuant to subsection 146(2) of the *Canada Labour Code* (the Code). Subsection 146(2) 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.

[3] The object of the present Application for a partial stay is to redact some of its wording which is considered by the employer to be offensive and prejudicial to its interests and reputation. For obvious reasons, I will not reproduce the text of the direction. Suffice it to say, for ease of understanding the issue at hand, that HSO Todd Wallace expressed certain conclusions in his direction regarding the cause of the accident that resulted in fatal injuries to Mr. Giesbrecht. It is those conclusions that are at the source of the employer's objection.

Background

[4] On November 29 and 30, 2012, HSOs Mr. Keith Dagg and Mr. Todd Wallace conducted an inspection of a workplace owned and operated by the employer at mile 864.3 of CN's Fort nelson subdivision, a workplace known as Gutah Camp. As Mr. Wallace specified in a cover letter dated December 7, 2012 that he sent to Mr. John Orr, Chief Safety and Sustainability Officer (CN), and in the direction issued that same day, as well as in his Report prepared subsequently, the inspection was conducted in response to a report of a fatal injury sustained by Mr. Bryan Giesbrecht, a railway Conductor in the employ of CN, on November 28, 2012.

[5] The inspection was performed in the presence of a number of representatives of CNR and employee representatives from the Health and Safety Committee. Following the inspection, HSO Wallace concluded that the non-standard signage and the lack of clarity in the timetable regarding the hazards of this particular location that he had observed, constituted a contravention of the Code, and accordingly issued a direction under subsection 145(1) of the Code, by which he required the employer to cease the contravention and bring corrective measures.

Submissions of the Parties

[6] Counsels for the parties were given the opportunity to present their submissions orally via teleconference. That teleconference hearing was held on January 9, 2013.

For the Applicant

[7] Counsel for the Applicant referred to the written Motion which he had filed with the Tribunal on December 21, 2012 and first reiterated that the question raised by the appeal was a serious one. He specified that, contrary to what was suggested in his Motion, the Transportation Safety Board was not, to his knowledge, conducting an investigation into the accident at this time. He argued however that the HSO had no jurisdiction to make findings regarding the cause of the fatal accident and referred to Decision 95-012, where Appeals Officer Cadieux wrote as follows:

> I must make one comment concerning the conclusion reached by the safety officer in the direction (SCHEDULE B) given under subsection 145(1) of the Code. In that direction, the officer concludes:
>
> "...the employee therefore did not take all reasonable and necessary precautions to ensure the safety and health of any person likely to be affected by his acts or omissions, so that accidents occurred."
>
> The conclusion reached by the safety officer **has serious consequences for ADM, since it assigns responsibility for the accident to ADM. It exposes ADM to civil actions, although the authorities responsible for determining the causes of the accident had not yet made their findings. In this sort of situation, there is nothing to prevent the safety officer from conducting an investigation under the Code. However, in such cases the safety officer's responsibility is to determine whether there has been a contravention of the Code, and not to assign responsibility for the accident.** [Emphasis added by counsel]

[8] Counsel for the Applicant stressed that in making similar findings as to the cause of the accident in the instant case, the HSO overstepped his jurisdiction, in a way that subsection 145(1) does not empower him to do. Counsel suggests that while such a finding could arguably form part of a report issued further to an investigation conducted under subsection 141(4) of the Code, he submits that the HSO relied on his authority pursuant to subsection 145(1) to conduct an inspection and is therefore confined to identifying contraventions of the Code and ordering the employer to take appropriate corrective measures. The contested conclusions as to what caused the fatal accident, drawn in that context, cause serious prejudice to the employer, who has not had an opportunity to "exercise its rights and express its viewpoint" in the process.

[9] Counsel further submits that if the direction is not partially redacted as sought by this Application, the HSO's conclusions are seen to prejudge the conclusions of other authorities, such as the RCMP or the Coroner, who may investigate the circumstances of the accident. Furthermore, as the direction must be posted in many workplaces, it becomes accessible to all, including the media, resulting in serious harm to the employer's reputation. Counsel reiterated that the employer intends to comply fully with the corrective measures set out in the direction.

For the Respondent

[10] After first mentioning that he would express no view on the seriousness on whether or not the question to be tried in the appeal was a serious one, counsel for the Respondent stressed that the concern raised by the employer regarding the risk of serious harm caused by the direction as worded, was not founded. Counsel referred to the regime established under the Workers Compensation legislation in British-Columbia, which establishes a "no-fault" system in circumstances of workplace accidents, thereby removing the possibility of civil action being taken against the employer, contrary to what the employer claims.

[11] Counsel concluded by stating that, so far as the Respondent is concerned, the safety and security of employees is the primary consideration in this instance and given the undertaking by the employer to comply with the operative parts of the direction, he did not have strong objections to a redacted version of the direction being posted and forwarded to the Health and Safety Committees, until the disposition of the appeal.

Analysis

[12] On January 10, 2013, I rendered my decision to grant the application for the partial stay of the direction as requested and the parties were so informed in writing on that day. The following are the reasons in support of my decision.

[13] Subsection 146(2) of the Code gives an Appeals Officer the authority to stay the effect of a direction. The Code does not specify the conditions or factors that an Appeals Officer must consider in the exercise of such authority. It is trite to state that the Appeals Officer's discretion must not be arbitrarily exercised and must be consistent with the purpose of the Code as found in section 122.1. To do so, Appeals Officers have developed a three-pronged test to provide for a framework within which to exercise their discretion under subsection 146(2). I see no reason to deviate from that approach.

[14] Accordingly, I applied the following three criteria to my determination of this Application. Those criteria were sent to both parties prior to the hearing:

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 he or she would suffer significant harm if the direction is not stayed.

3) The applicant must demonstrate that should a stay be granted, measures will be put in place to protect the health and safety of employees or any person granted access to the work place.

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

[15] I have no hesitation to conclude that the issue raised by the appeal is not frivolous, let alone vexatious. It raises the extent of the powers and authority of the Health and Safety Officer in relation to the capacity in which he or she carries out investigations and inspections under the Code, and the resulting effect on the parties' legal rights. I am of the opinion that such a question is serious and I am satisfied that the requirements for the first criterion have been met.

Would the applicant suffer significant harm if the direction is not stayed?

[16] The application of the second criterion of the test is not as simple. The significant harm in this case is somewhat difficult to quantify. The case cited by counsel for the Applicant goes more in my view to the merits of the appeal than providing support for satisfying the significant harm criterion in the context of an Application for a stay.

[17] That said, if the employer is right in its assertion that the HSO is without authority to draw conclusions as to the cause of and responsibility for the accident in the circumstances of his case, I am sensitive to the employer's argument that it may suffer significant harm given the facts of this case. Firstly, the context here is one of a very serious accident that took the life of an employee. The statutory obligation placed on the employer to post the direction in relevant work places will make the direction generally accessible to the public, including the media. In the circumstances, it is reasonable to assert that a direction which essentially concludes to the employer's responsibility for a fatal accident is likely to cause harm to the reputation of the employer. Also, those conclusions are made in a context where the employer may face the possibility, if not of civil suits for the reason mentioned by counsel for the Respondent, but of penal sanctions.

[18] The employer also raised the fact that the contested conclusions of the HSO may conflict with investigations and findings of other bodies whose mandate is perhaps more directly related to determining responsibility or causes of accidents. While that point may again be seen to relate more to the merits of the appeal than a factor relevant to the stay, I am persuaded that allowing those conclusions to remain in the direction at this stage could prejudice the Applicant in its dealings with possible future investigations by competent authorities such as the RCMP or the Coroner. We must keep in mind that the contested conclusions are written by a Health and Safety Officer, who is a Government official with particular subject matter expertise in occupational health and safety and who is vested with very important statutory powers. The expression of his opinion obviously carries weight, at least in the perception of the parties and the public, and as such could have the effect of pre-empting other investigations to proceed normally, a situation which is hardly desirable.

[19] Therefore, I am of the view that the second criterion is satisfied. The Applicant has established to my satisfaction that, in the circumstances of this case, it would suffer significant harm if the contested wording is allowed to remain in the direction pending the determination of the appeal on the merits. The question raised by the appeal is

ostensibly the same underlying question which is at the heart of this Application, namely the extent to which a HSO may draw conclusions on the cause of an accident when acting under the Code. I believe that such a question is best left to be determined after the parties have had the opportunity to present evidence and full argument on the issue. However, I wish to make it clear to the parties that I make no finding on that question at this stage of the proceedings.

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

[20] The redaction sought by the Applicant of some specific wording in the direction does not otherwise affect the operative part of the direction, namely that the employer cease the contraventions of the Code that were identified by HSO Todd Wallace and satisfy him that corrective and preventive measures are being taken to address those contraventions. The employer has made it clear that it intends to comply with the operative part of the direction and I note that specific actions already undertaken by the employer in that regard are identified in Mr. Wallace's report filed with the Tribunal.

[21] I therefore conclude that the third criterion is also met. I am comforted in that respect by the fact that counsel for the Respondent did not strongly oppose the temporary redaction of the contested wording in the manner sought by the Applicant, until the disposition of the appeal. I agree with counsel that the need to ensure the protection of the health and safety of employees is, in the final analysis, a paramount consideration here and the partial redaction of the direction in no way compromises that objective.

Decision

[22] For the reasons set out above, the Application for a partial stay of the direction issued by HSO Todd Wallace on December 7, 2012, is hereby granted.

[23] The direction is temporarily modified so as to redact the wording considered prejudicial by the employer, as per the redacted version of the direction attached to these Reasons. All other aspects of the direction remain otherwise unchanged and continue to be legally binding. The redacted version of the direction will remain in effect until the disposition of the appeal on the merits.

[24] Accordingly, the employer is authorized to use the redacted direction (or copy thereof) to be posted and forwarded to the policy and work place committees, for the purpose of complying with subsection 145(5) of the Code.

Pierre Hamel
Appeals Officer

Transport Canada / Transports Canada

Surface / Surface

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

In response to a report of a fatal injury sustained by an employee of Canadian National Railway on November 28, 2012, Health and Safety Officer Keith Dagg and the undersigned Health and Safety Officer conducted an inspection of the workplace owned or operated by Canadian National Railway, being an employer subject to the *Canada Labour Code* Part II, at Mile 864.3 of Canadian National Railway's Fort Nelson subdivision, the said workplace commonly known as Gutah or Gutah Camp. This inspection was performed on November 29 and 30, 2012 and carried out in the presence of Canadian National Railway Officers Mr. Doug Ryhorchuk, Mr. Brian Kalin, Mr. Don Penney, Mr. Roger Worsfold, Ms. Carrie Mackay, Mr. Chris Doerksen, Mr. Don Ennis and Employee Health and Safety Representative Mr. Joe Dineley.

The undersigned Health and Safety Officer is of the opinion that the following provisions of the *Canada Labour Code* Part II are being contravened.

Section 124 of the *Canada Labour Code* Part II

Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

Paragraph 125.(1)(s) of the *Canada Labour Code* Part II

Every employer shall, in respect of every workplace controlled by the employer..ensure that each employee is made aware of every known or foreseeable health and safety hazard in the area where the employee works.

By utilizing signage that is of a non-standard nature which shares the identical characteristics of many other signs that are commonly seen throughout the railway on the former BCR, by failing to notify employees of the presence of non-standard signage and the failure to clearly make employees aware of multiple derails on this track, the employer has failed to ensure that employees are made aware of known hazards in the area where employees work

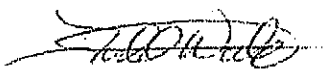
Certified To Be A True Copy Of The Original Document
Date Dec 7, 2012
ON 8545
Health and Safety Officer & ID#

Canada

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than January 4, 2013.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code* PART II, to take steps to ensure signs which advise employees of the presence of critical equipment are standardized and instructions for exceptional circumstances are provided with clarity to employees as well as any other steps the employer deems appropriate prior to January 4, 2013, to ensure the contraventions do not continue or reoccur.

Issued at New Westminster this 7th day of December 2012.



Todd Wallace
Health and Safety Officer
ID# ON8545

Certified To Be A True Copy Of The
Original Document
Date: DEC 7, 2012
Health and Safety Officer & ID# ON 8545

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