

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canadian Union of Postal Workers, v. Canada Post Corporation,
2013 OHSTC 23

Date: 2013-08-08
Case No.: 2009-05
Rendered at: Ottawa

Between:

Canadian Union of Postal Workers

and

Canada Post Corporation

Matter: Appeal under subsection 146(1) of the *Canada Labour Code*
of a direction issued to Canada Post Corporation

Decision: The direction is varied

Decision rendered by: Mr. Richard Lafrance, Appeals Officer

Decision language: English

For the appellant: Mr. David Bloom, Counsel, Cavalluzzo Hayes Shilton
McIntyre & Cornish LLP

For the respondent: Mr. Stephen Bird, Counsel, Bird Richard

Canada

REASONS

[1] This is an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) by Ms. Gayle Bossenberry, 1st National Vice-President of the Canadian Union of Postal Workers (CUPW¹) of a direction issued to Canada Post Corporation (Canada Post) by Health and Safety Officer (HSO) Nicole Dubé on December 8, 2008. The said direction stated the following:

[...]

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:

No : 1

125.(1)(z.19) - Canada Labour Code Part II

The employer has failed to consult with the work place committee or the health and safety representative, on the implementation and monitoring of the Traffic Safety Assessment Tool (TSAT) for the Rural and Mail Suburban Carriers (RMSC) which was developed in consultation with the Policy Committee.

No : 2

125.(1)(z-11) - Canada Labour Code Part II

The employer has failed to provide to the Work Place Health and Safety Committee and Health and Safety Representatives a copy of any report on hazards in the work place, including the assessment results from the Traffic Safety Assessment Tool (TSAT).

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 December 15, 2018.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

[...]

Background ²

[2] Prior to 2004, Canada Post did not have a systematic process for assessing the safety of delivery to Rural Mail Boxes (RMBs) by employees and contractors. In 2004, CUPW became the bargaining agent for Rural and Suburban Mail Carriers (RSMCs) and entered into a collective agreement with Canada Post. Following the conclusion of the collective agreement, there were complaints and work refusals by RSMCs in various parts of the country in respect to the safety of delivery to RMBs.

¹ A glossary for the various abbreviations and shortenings used in this decision is attached as appendix II to the decision.

² Retained from the parties submissions.

[3] In light of the widespread safety concerns raised by RSMCs in 2006, Canada Post engaged the National Research Council (NRC) to develop a model/tool that could be utilized to assess the safety of RMB delivery. Due to limitations in the NRC model, Canada Post retained ITRANS to develop the Traffic Safety Assessment Tool (TSAT). Although CUPW was not involved in the retainer of ITRANS, it is acknowledged that Canada Post did consult with CUPW in connection with the development of the TSAT.

[4] As for the TSAT process itself, at each site inspection, the assessor makes observations and gathers and records data. The site inspection process includes:

- determining the number of lanes of traffic and the typical speed of the traffic;
- determining if the delivery vehicle will be off the road during the delivery;
- conducting a count of vehicles passing the RMB;
- determining whether the RMB is proximate to a hill, curve or obstruction and if so, measuring (by use of a stop watch) how quickly (the time gap) an approaching vehicle will reach a delivery vehicle attempting to get back onto the road or how much time an approaching vehicle would have to avoid a stopped delivery vehicle;
- determining whether an RMB failing the TSAT could be moved to another (acceptable) location proximate to its current unsafe location.

[5] In September 2007, the Labour Program of Human Resources and Skills Development Canada (HRSDC) received a complaint from Ms. Gayle Bossenberry stating that Canada Post was in violation of Part II of the Code regarding the application of the TSAT.

[6] Ms. Bossenberry stated in her complaint that in response to complaints/refusals by RSMCs, Canada Post had initiated in various locations across the country a project to assess the safety of delivery to all RMBs. This process involved the application of the TSAT, which is intended to assess whether delivery can be affected safely.

[7] Ms. Bossenberry indicated that neither the Policy Committee (referred to by Canada Post as the National Joint Health and Safety Committee (NJHSC)) nor the Work Place Health and Safety Committees (referred to by Canada Post as the Local Joint Health and Safety Committee (LJHSC)) nor the Health and Safety Representatives (HSR) were involved in the actual assessment process that includes onsite inspections and measurements pertaining to traffic volume and site lines.

[8] Ms. Bossenberry explained that while complete data related to all RMBs was collected, the NJHSC did not receive the reports containing the information, but only received aggregate data indicating how many RMBs had failed or passed. The NJHSC did not receive the available data indicating the basis on which boxes failed or passed.

[9] Ms. Bossenberry stressed that Canada Post's process was in clear violation of the Code as follows:

- Failure to include Health and Safety committees in the (safety) inspection/investigation of Rural Mail Boxes in violation of s. 125, 135(7)(e), 136(5)(g) (and possibly other sections).
- Failure to provide complete information to the National Joint Health and Safety Committee (Policy Committee) in connection with safety assessments of Rural Mail Boxes. The information provided has been incomplete and summary in nature in violation of s. 134(4)(6) (and possible other sections).

[10] HSO Dubé was assigned to investigate the complaint. She held individual meetings with the parties until the direction was issued on December 8, 2008.

[11] Upon completing her investigation, HSO Dubé concluded that Canada Post was in violation of the Code and issued the above direction.

[12] On February 5, 2009, Mr. Stephen Bird, Counsel for Canada Post, requested that the Occupational Health and Safety Tribunal Canada (Tribunal) dismiss the appeal as it was not submitted within the time limits set by the Code. On April 17, 2009, after having received written submissions from the parties, the appeals officer decided that the application for appeal was receivable³.

[13] The Federal Court quashed this decision on February 16, 2010⁴. On January 25, 2011, the Federal Court of Appeal allowed the appeal⁵ and restored the Appeals Officer's determination. Finally, on June 16, 2011, the Supreme Court of Canada dismissed⁶ the application for leave to appeal from the judgment of the Federal Court of Appeal.

[14] At the hearing, HSO Dubé testified that having previously been involved with other cases in the Montreal area, she was familiar with the TSAT tool. She stated that she understood that the tool was used to evaluate each point of call. This was to determine if particular points of call were safe for deliveries.

[15] She also stated that she was told that a third party did the assessments. She understood that if a RMB was found to be unsafe according to the criteria set in TSAT, it was either removed from the list or moved to a safe location.

[16] Her recollection of the complaint was that the LJHSCs wanted to be present when the TSAT tool was utilized to assess a delivery route. She stated that the LJHSCs complained that they were not given the results of the assessments.

³ *Gayle Bossenberry – Canadian Union of Postal Workers (CUPW) and Canada Post Corporation*, OHSTC-09-014(I).

⁴ *Canada Post Corporation v. Canadian Union of Postal Workers*, 2010 FC 154.

⁵ *Canadian Union of Postal Workers v. Canada Post Corporation*, 2011 FCA 24.

⁶ Judgements of the Supreme Court of Canada: *Canada Post Corporation v. Canadian Union of Postal Workers*, Case number 34152. Dated 2011-06-16.

[17] She understood that the NJHSC received summary reports of the assessments and that it was only when an employee was unsatisfied with the result of the assessment that the LJHSCs were involved under the Internal Complaint Resolution Process (section 127 of the Code). If not resolved at this stage, a HRSDC HSO was called in to resolve the matter. She believed that the TSAT assessment was a “safety” assessment. She also believed that the LJHSC had to participate in the TSAT assessment.

[18] She stated that she conducted an on-site visit of work places to determine whether the LJHSCs were participating in the assessments. During her visits, she found that, most of the time, RSMCs did not even know when or if their delivery routes were being assessed. She affirmed that she did not find any LJHSC members that participated in the TSAT assessments. However, where the assessment had been completed, the RSMCs were given the result and they could ask questions about the results.

[19] She explained that based on the Labour Program’s interpretation of the Code, it is to the Work Place Health and Safety Committee’s discretion to decide how they will be involved or participate in the assessments. She agreed that the LJHSCs or HSRs did not have to be present to all the TSAT assessments; neither did the NJHSC.

[20] HSO Dubé indicated that in response to the direction she issued to Canada Post on December 8, 2008, she received confirmation from Canada Post on December 15, 2009 that the process now “ensure that all future applications of the TSAT includes “consultation” with the employee and either the work place health and safety committee or site Health and Safety Representatives.”

[21] Canada Post further informed her that the process now ensures that the employees and the applicable LJHSC or HSR are provided with the results of the TSAT assessments. She accepted Canada Post’s response to the direction and deemed the case closed.

[22] She explained that in her direction, she omitted to include that Canada Post had to provide the results of the TSAT to the NJHSC because she had been told by Canada Post that the NJHSC had access to those documents.

[23] She further stated that she had been made aware by Ms. Bossenberry, after she issued the direction, that Canada Post was still not providing the NJHSC with the full results of the TSAT assessments.

[24] The grounds for appeal were stated as follows:

- Health and safety office[r] Nicole Dubé erred when she failed to conclude that Canada Post Corporation was in violation of Part II of the Code including s. 135(7)(e) and 136(5)(g), and to issue appropriate directions;
- Health and safety officer Nicole Dubé erred when she failed to conclude that Canada Post Corporation was in violation of Part II of the Code including s. 134.1(4), 134.1(5) and s. 134.1(6) and to issue appropriate directions;

- Health and safety officer Nicole Dubé erred when she closed the file prematurely without providing CUPW reasonable opportunity to make further submissions and without having issued appropriate directions to ensure Canada Post Corporation's compliance with all relevant sections of Part II of the Code.

[25] Hearings were held in Ottawa, Ontario on December 10 and 11, 2009, January 13, 2010, August 3-5, 2011, January 4 and 5, 2012, February 10, 2012 and June 26 and 27, 2012. Final written submissions were received on July 23, 2012, August 2, 2012 and August 13, 2012.

Part I – Preliminary Issue

[26] Having heard the opening statements of both parties and given the specificities of the issues raised and the remedies sought, I requested submissions on the scope of my powers in the context of this appeal under subsection 146.1(1) of the Code, which states:

Inquiry

146.1 (1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may

(a) vary, rescind or confirm the decision or direction; and

(b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

[27] On January 11, 2010, I received written submissions from both parties. I informed them that I would take their submissions in consideration and render my decision on the issue within the final decision of this appeal.

Appellant's submissions

[28] Mr. Bloom submitted that HSO Dubé, in her investigation of the CUPW complaint, found that Canada Post was in violation of many sections of the Code and issued appropriate directions to Canada Post to terminate the contraventions and ensure that they do not continue to reoccur.

[29] However, HSO Dubé did not make any findings that any of the other sections cited by the CUPW in this case were violated and did not include those provisions within the directions she issued to Canada Post. In addition, he argued that her directions appear to relate only to certain locations in the Ottawa Regions/Eastern Ontario where she conducted the investigation.

[30] Mr. Bloom argued that the appeals officer has the power to determine this appeal and to vary the HSO's decision and directions to grant relief sought by the appellant. He stated that section 146 of the Code clearly provides the appeals officer with the authority to hear and determine the appeal of the HSO's directions in this case. Mr. Bloom argued that pursuant to paragraph 146.1(1)(a) and subsection 145.1(2) of the Code, as well as the

jurisprudence on this issue, the appeals officer has a broad power to vary the HSO's decision and directions. He stated that this position is supported by the Federal Court of Appeal's decision in *Martin v. Canada (Attorney General)*⁷:

[27] Under section 146.1, an appeals officer may “vary, rescind or confirm” a direction of a health and safety officer. If a health and safety officer has made a direction under subsection 145(2) that the appeals officer considers inappropriate, he may rescind that direction. However, because he now has all the powers of a health and safety officer, he may also vary it to provide for what he considers the health and safety officer should have directed.

[31] Mr. Bloom submitted that based on the decision in *Canadian Pacific Railway v. Woollard*⁸, the appeals officer's powers to vary a direction under paragraph 146.1(a) includes the power to issue an additional direction, provided that the appeals officer gives the parties an opportunity to make submissions in relation to this additional direction. While the Federal Court in *Woollard*, cited previously, set aside the additional direction on procedural fairness, as the appeals officer had not provided the parties with an opportunity to make additional submissions with respect to the additional direction, it did however return the matter to the appeals officer for a hearing into the additional direction.

[32] Consequently, Mr. Bloom argued that this power to vary includes the power to broaden the decision and directions and/or to issue additional directions that the HSO should have made to remedy CPC's violation of the Code.

[33] Finally, Mr. Bloom submitted that HSO Dubé erred when she failed to conclude that Canada Post was in violation of the other sections of the Code, including paragraphs 135(7)(e) and 136(5)(g), and subsections 134.1(4), 134.1(5) and 134.1(6). He submitted that the HSO closed the file prematurely without providing CUPW a reasonable opportunity to make further submissions. He requests that the appeals officer issue appropriate directions to remedy Canada Post's violation of the Code.

Respondent's submissions

[34] Mr. Bird submitted that neither Canada Post nor CUPW were requesting a remedy in respect of the directions issued by HSO Dubé. He argued that, in order to be successful in its appeal, CUPW requires that the term “vary” be given a broad interpretation to include the jurisdiction to issue a “new” direction, fundamentally different than those issued, to address the matters raised in CUPW's complaint.

[35] Mr. Bird argued that CUPW is not aggrieved by the directions that were issued, but rather by the “lack” of directions that were not issued by the HSO. He maintained that CUPW appealed because the HSO did not issue the directions that they wanted.

[36] Consequently, Mr. Bird contended that since CUPW is not requesting an appeal of the directions that were issued, there can be no grounds for an appeal. He submitted

⁷ *Martin v. Canada (Attorney General)*, 2005 FCA 297

⁸ *Canadian Pacific Railway v. Allen Woollard*, OHSTC Decision No. 05-48; and *Canadian Pacific Railway v. Woollard*, 2006 FC 1332. Appeal dismissed 2008 FCA 43

that CUPW is requesting the appeals officer to find additional contraventions of the code that are not whatsoever related to this case.

[37] Mr. Bird argued that the amendments brought to the Code in 2000, with the addition of a new provision which specifically permits an appeals officer to issue any direction that the appeals officer considers appropriate under subsections 145(2) or (2.1), which is specific to “danger” situation as contemplated by the Code, limit the applicability and scope of the term “vary” in paragraph 146.1(1)(a).

[38] Mr. Bird argued at length about the interpretation that the courts should have given to the term “vary”. He concluded that the case law under the previous Code reveals that the word “vary” had been interpreted broadly enough to permit a Regional Safety Officer (RSO) to substitute a direction given by an HSO with a new direction. He stated that such power could have been granted to an appeals officers under the revised legislation by simply replacing “Regional Safety Officer” with the term “Appeals Officer”. However, he argued that Parliament chose not to do this. Instead, it chose to add the specific power for an appeals officer to issue new directions and specifically limited to the circumstances in which that power could be exercised.

[39] Mr. Bird indicated that according to *Sullivan on the Construction of Statutes*⁹ at page 263, separate parts of a statute are presumed to fit together logically to form a rational, internally consistent framework. The parts are also presumed to work dynamically, each contributing something toward accomplishing the intended goal. He further argues that if the power to add new directions is still included in the power to “vary”, then paragraph 146.1(1)(b), which outlines the specific power of an appeals officer to issue a direction under subsections 145(2) and (2.1), is rendered unnecessary and redundant.

[40] Mr. Bird finally submitted that the appeals officer lacks the jurisdiction to grant the remedies requested in this appeal by CUPW and should therefore dismiss the appeal.

Analysis

[41] Having thoroughly considered the parties’ submissions, I am of the opinion that if an appeals officer finds that the employer is or was in contravention of the Code at the time of the HSO’s investigation, the appeals officer may vary the direction issued by the HSO to provide for what, in the appeals officer’s opinion, the HSO should have directed. This, in my view, means that an appeals officer may vary a direction to include other contraventions that the appeals officer determines should have been identified in the context of the investigation for correction in the original direction issued by the HSO.

[42] Paragraphs 27 and 28 of the *Martin* decision of the Federal Court of Appeal, cited previously, reads as follows:

[27] [...] [B]ecause [an Appeals Officer] now has all the powers of a health and safety officer, he may also vary [a direction] to provide for what he considers the health and safety officer should have directed.

⁹ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th edition, Butterworths, Markham, 2008.

[28] An appeal before an appeals officer is *de novo*. Under section 146.2, the appeals officer may summon and enforce the attendance of witnesses, receive and accept any evidence and information on oath, affidavit or otherwise that he sees fit, whether or not admissible in a court of law, examine records and make inquiries as he considers necessary. In view of these wide powers and the addition of subsection 145.1(2), there is no rationale that would justify precluding an appeals officer from making a determination under subsection 145(1), if he finds a contravention of Part II of the Code, notwithstanding that the health and safety officer had issued a direction under subsection 145(2).

[Underlining added]

[43] I interpret the above Federal Court of Appeal decision to mean that, as an appeals officer acting in a *de novo* capacity in addition to being vested with all of the same powers of an HSO under subsection 145.1(2), I have the authority to vary a direction by way of including contraventions that, based on the evidence gathered, I find should have been included by the HSO in the direction under appeal.

[44] In my opinion, such action is an example of an appeals officer providing for what he considers the HSO should have directed. Furthermore, the appellant is aggrieved by the direction issued by HSO Dubé due to its exclusion of the alleged contraventions that were complained of by the appellant from the outset, and thereby within the purview of the HSO's original investigation. This is another underlying reason why I find that the Federal Court of Appeal's findings in *Martin* determine that I have the authority to vary the direction as requested in this case.

[45] In sum, my interpretation of the *Martin* decision leaves me convinced that varying a direction in the way sought by the appellant would be in line with my power to vary under paragraph 146.1(1)(a) of the Code.

[46] Having found that, as an appeals officer, I have the authority to vary HSO Dubé's direction in the way sought by the appellant; I will now proceed to treat this appeal on its merits.

Part II – Decision on the merits

Issues

[47] The appellant's raised three issues in the present appeal:

1. Did HSO Dubé err when she closed the file prematurely without providing CUPW reasonable opportunity to make further submissions and without having issued appropriate directions to ensure Canada Post's compliance with all relevant sections of Part II of the Code.
2. Did Canada Post contravene paragraphs 135(7)(e), 136(5)(g) and 125(1)(z.08) by failing to permit the participation of the LJHSCs and the HSRs in the TSAT assessment process.

3. Did Canada Post contravene paragraph 125(1)(z.11) and subsections 134.1(5) and 134.1(6) of the Code by failing to provide or allow access to the TSAT reports to the NJHSC.

Appellant's evidence

[48] Mr. Bloom called five witnesses for the appellant: Ms. Gayle Bossenberry, Mr. Serge Champoux, Ms. Diana Lamb, Ms. Toni MacAfee and Mr. Stéphane Vallé.

[49] Ms. Bossenberry, the CUPW National Union Representative, responsible for health and safety at the time of the complaint and investigation by the HSO. She was responsible for dealing with Canada Post with respect to RMB delivery.

[50] Ms. Bossenberry related historical background about the TSAT assessment process. She indicated that ITRANS was retained to further the safety assessment study and develop the TSAT. She stated that the tool was developed to determine whether RMBs were in safe locations for delivery by RSMCs. In the course of the assessments, ITRANS was looking particularly at types of roads, speed of traffic, sight lines from the RMBs, time gaps and driver behaviour.

[51] She confirmed that CUPW was involved in the development and evaluation of the tool. However, she noted that although they tried to reach an agreement with Canada Post about the participation of the Work Place Health and Safety Committees in the process and sharing of information, they were unsuccessful.

[52] Ms. Bossenberry explained that in CUPW's view, the TSAT is a "safety assessment". In support of this view, she identified a Canada Post document¹⁰ presented in evidence which describes the role of the RMB assessor as follows:

- Conduct the safety assessment as per Canada Post guidelines and procedures.
- Provide reviews of site investigation and recommendations in sufficient detail to enable verification of compliance with safety requirements.
- Work with Canada Post regional management to interpret safety assessment results from the TSAT and all site recommendations for safety compliance.

[53] She confirmed that there is no mention of consulting with the LJHSCs in any of the documents concerning TSAT. She understood Canada Post's position to be that the TSAT was not, as maintained in other cases¹¹ a safety inspection.

[54] Ms. Bossenberry testified that Mr. Fraser, Manager Workplace Safety and Health, for Canada Post wrote in a letter addressed to HSO Dubé, that Canada Post ensures that

¹⁰ Evidence: A-1: Request for Proposal: RSMC Delivery Safety Project Temporary Resources. (page 29, par. 3.1.2)

¹¹ D. Morrison et al., C. McDonnell et al. and Canada Post Corporation, Decision No. OHSTC-09-032.

all RSMC employee traffic complaints or refusals are investigated per section 127 and 128 of the Code. However, she indicated that Mr. Fraser constantly avoided the issue about the assessment being conducted without the participation of the LJHSCs or HSRs.

[55] Ms. Bossenberry provided an example¹² of the type of aggregated information given to the NJHSC, even though they have asked, as allowed by the Code, to receive more complete information about the results of the TSAT assessments.

[56] Ms. Bossenberry agreed that the LJHSCs and HSRs do not have to be present at the assessment of every 843,000 RMBs. However, she maintained that it is within the right of the LJHSCs to decide to participate as required to ensure a successful application of TSAT.

[57] With regard to meaningful participation of the LJHSCs, Ms. Bossenberry stated that the presence of the LJHSCs is required to allow the committee to verify speed measurements, traffic count, sight lines, distances and seasonal variances. The presence of the LJHSCs is also required for parties to make assessment of hazards the employees are exposed to and try to find measures to limit exposure or eliminate hazards.

[58] Mr. Serge Champoux, the CUPW National Union Representative, who assumed responsibility for health and safety in June 2008 confirmed that since he has occupied this position, Canada Post has not provided a protocol on the participation of the NJHSC and LJHSCs to the TSAT assessment process. In addition he confirmed that no TSAT training was offered to LJHSCs or HSRs.

[59] Ms. Diana Lamb, Secretary Treasurer of the CUPW Tritown Local (Carleton Place, Perth and Smith Falls, Ontario), also the CUPW HSR on the LJHSC for the Carleton Place Post Office testified about the implementation of the TSAT assessment in her region. She explained that the LJHSC was never informed of the time the assessments were to be conducted. She confirmed that she and other members of the LJHSC never received training on the TSAT assessment process. She testified that she did not participate in any of the meetings with regard to the results of the assessment, but was asked to sign the reports.

[60] Ms. Toni MacAfee was the President of the CUPW Truro Local, from 2004 to 2008 and is the CUPW Atlantic Region Education Officer since 2008. She was also a member of the LJHSC from 2003 to 2008. The CUPW Truro Local represents RSMCs in the 14 offices within its jurisdiction.

[61] Ms. MacAfee testified that as a LJHSC member, she was never made aware ahead of time that TSAT assessments were being conducted nor did she receive any training with regard to the TSAT assessment process. She stated that she has not received any results of the assessments conducted either. While she was aware of assessments being discussed with some RSMCs, she was never asked to attend.

¹² Evidence, E-11; Regional Progress Summary as of February 23, 2008.

[62] Mr. Stéphane Vallé was the president of the CUPW Farnham Local from 2005 to 2008, and a member of the LJHSC. He testified that, as the co-chair of the LJHSC, Canada Post never informed him about the TSAT assessments or when they would occur. He added that he was not invited to participate and no one from CUPW was ever present for the assessments. He learned from employees about the assessment occurring in Sutton and Masonville.

[63] Mr. Vallé stated that he was however invited to participate in the meetings on the review of the assessment and he was provided with a copy of the assessment report¹³. However, the assessor only wanted the verification of the addresses on the list by the RSMC. Mr. Vallé testified that the assessors were not willing to discuss the report or answer questions.

[64] Mr. Vallé confirmed that the LJHSC never participated in the assessment or the relocation of RMBs. He affirmed that he never received any training on TSAT from Canada Post. He did, however, obtain documentation from CUPW and read about the process. He took the initiative to verify some of the routes assessed and had many concerns with some of the new locations of the RMB's, some boxes were too close to the road with no room to get off road to make delivery, and they were some discrepancies related to the volume of traffic as some assessments had been done much later in the day than the normal time of delivery. He also found issues with some RMBs because of seasonal variances where the assessment done in early spring created problems for winter deliveries.

[65] Mr. Vallé produced documentation¹⁴ confirming that the RSMCs and CUPW had complained about the fact that Canada Post refused to provide information on changes to delivery routes and refused to allow the LJHSC members to participate in inquiries, inspections and/or assessments of RMBs.

Respondent's evidence

[66] Mr. Bird called three witnesses for the respondent: Mr. Glenn Briggs, Mr. Jeff Fraser and Ms. Sylvie Prudhomme.

[67] Mr. Glenn Briggs, the Director, Delivery Services Development for Rural and Suburban Mail Delivery for Canada Post, and responsible for RSMC delivery safety issues, spoke of his involvement with the NJHSC, and its participation in the development, implementation and testing of the TSAT. He also spoke about the involvement of CUPW locally, through the auspices of LJHSCs on the implementation of the TSAT assessment tool.

[68] Mr. Fraser, Manager, Workplace Safety, Canada Post testified on the implementation of the TSAT assessment tool in the "pro-active" RMB review phase nationally, and specifically the involvement of LJHSCs/HSRs in respect of the TSAT assessment process.

¹³ Evidence No. E-24: Traffic Safety Assessment worksheet.

¹⁴ Evidence No. E-25 "Formule de Grief".

[69] He testified that the NJHSC was consulted to establish the criteria to determine priorities for routes where no complaint had been received (work refusals) to be assessed. He further testified that the CUPW was involved with the development of the TSAT process.

[70] Mr. Fraser confirmed that the LJHSCs were not involved with the TSAT process unless there were issues to be solved under sections 127 or 128. In addition he confirmed that the results of the assessments were only communicated and discussed with the RSMCs involved.

[71] He confirmed as well that the position of Canada Post was that the TSAT process was not in their view, a process that required the involvement of the NJHSC or LJHSCs, as they believed that this was not a safety inspection as contemplated by the Code.

[72] Ms. Prudhomme, manager for Canada Post is responsible in the province of Quebec for delivery safety. She ensures that the delivery process to RMBs and assessment using the TSAT process is done in accordance with procedures. She confirmed that her mandate was to communicate to the employees, LJHSCs/HSRs, union representatives, that the need to assess RMB safety was to ensure the safety of the RSMCs.

Arguments of the parties

Appellant's arguments

Participation in the TSAT assessment process

[73] Mr. Bloom argued that from the beginning of the development of the assessment tools, CUPW tried to have an agreement with Canada Post to involve members of the LJHSC with the TSAT process as evidence shows in the minutes¹⁵ of the meetings of the NJHSC.

[74] He pointed out that Canada Post's position remains the same since 2007, that is, that the intent was not to involve the Work Place Health and Safety Committees unless there was a complaint or work refusal governed by sections 127 and 128 of the Code. He insisted that this position is consistent with the evidence of Mr. Jeff Fraser, Manager Workplace Safety and Health, in Abbotsford, Maple Ridge and Newmarket proceedings¹⁶.

[75] As testified by Mr. Vallé, the members of the LJHSC only played a very minor role in the Farnham area region. He testified that he was advised of the assessment meeting at the last minute and that there was no involvement of the LJHSC in the TSAT assessment. Mr. Vallé was provided, as co-chair of the LJHSC, with minimal information on the process and not invited to participate in the assessment.

¹⁵ Exhibit 22(b) – tab 32, RSMC National Joint Health and Safety Committee Minutes, December 6, 2006.

¹⁶ Exhibit 12, OHSTC Decision No. OHSTC-09-032, par. 262 and 284.

[76] Mr. Bloom submitted that according to Ms. MacAfee's testimony, she was never informed either about the TSAT process or when an assessment was being conducted. She learned about the impending assessments by employees of the concerned areas. She confirmed as well that she never received any result of the TSAT assessments.

[77] Mr. Bloom indicated that the evidence with respect to Sutton, Masonville (P.Q.) and Nova Scotia are consistent with the findings of HSO Dubé regarding Eastern Ontario. He maintained that the evidence support the conclusion that prior to the Dubé Direction that Canada Post did not involve the LJHSCs or HSRs in the TSAT process.

[78] Mr. Bloom asserted that Canada Post did not acknowledge that the TSAT process involved inspection or investigation to which sections 135 and 136 of the Code applied and which required participation by the LJHSCs or HSRs. He maintained that central to the present dispute, Canada Post consistently failed to recognize that LJHSCs or HSRs had the right to participate in the assessment process and more specifically, to be present during the site inspection of the RMBs.

[79] Mr. Bloom also stipulated that included in this dispute is the fact that Canada Post consistently refused to provide the LJHSCs or HSRs and NJHSC with complete information on the results of the TSAT assessments.

[80] He argued that HSO Dubé erred in failing to properly address the dispute and issue appropriate directions consistent with the plain language of the relevant sections of Part II of the Code. The TSAT assessment involves site inspection and investigations. Mr. Bloom argued that sections 135 and 136 of the Code clearly require participation by the Work Place Health and Safety Committees and HSRs in inspections and investigations.

[81] Mr. Bloom submitted that common sense dictates that participation in a work place inspection clearly requires attendance in the location where the inspection is occurring. Based on the decision in *Halterm Ltd.* and *Halifax International Longshoring Assn.*¹⁷, he submitted also that one cannot be said to have participated in a safety investigation where one is not in a position to verify or confirm the accuracy of observations and data on place.

Provision of the TSAT reports

[82] Mr. Bloom argued that HSO Dubé erred by not issuing a direction to Canada Post to provide the complete TSAT assessment report to the NJHSC. He believes this was due in fact that HSO Dubé was under the impression that Canada Post would provide the reports to the NJHSC, however, they have not provided a single complete TSAT report to the NJHSC.

[83] Mr. Bloom submitted that paragraph 125(1)(z.11) of the Code requires Canada Post to provide all hazard reports to the Policy Committee. He maintained that the TSAT assessments are hazard reports within the meaning of the Code.

¹⁷ *Halterm Ltd. and Halifax International Longshoring Assn.*, [1992] C.L.C.R.S.O.D. No. 1.

[84] In addition, Mr. Bloom stated that through subsection 135(5), the Policy Committee may request information that it considers necessary to identify existing or potential hazards. Subsection 134(6) provides that the Policy Committee shall have full access to employer's reports, studies and tests related to the health and safety of employees in the work place.

[85] Mr. Bloom pointed out that Ms. Bossenberry, as the co-chair of the NJHSC, requested the TSAT report on many occasions to no avail. Therefore, he argued that Canada Post's refusal to provide these reports violates sections 125 and 134 of the Code.

[86] Mr. Bloom finally submitted that the appeals officer should issue the following directions:

- A direction to Canada Post to permit participation by the LJHSCs and HSRs in the inspection/investigation of RMBs in the TSAT assessment process; more specifically, the direction should specify that LJHSCs and HSRs are permitted to be present when TSAT observations are made and data gathered;
- A direction to Canada Post to provide all completed TSAT reports to the NJHSC and to the LJHSC including the assessment reports and the RMB TSAT Review Summaries¹⁸;
- A direction to Canada Post to consult and cooperate with the NJHSC and the LJHSCs and HSRs by clearly communicating their respective roles and responsibilities in the TSAT process and provide appropriate training.

Respondent's arguments

[87] Mr. Bird submitted that while it is true that this process takes the form of a hearing *de novo*, this does not open the door for a party to transform and expand the appeal into matters never previously considered. It is a fundamental principle of natural justice that parties are to know the case that they are to meet. It is not open to CUPW to introduce new complaints through their evidence and certainly not at the point of closing argument.

Participation in the TSAT assessment process

[88] Mr. Bird argued that the matter at hand lies with the participatory rights and obligation of the NJHSC, LJHSCs and HSRs.

[89] Mr. Bird stated that the term "participate" is clearly essential to an understanding of the rights of the NJHSC and LJHSCs, as well as HSRs, under the Code; however, the term is not defined in the legislation.

¹⁸ Exhibit 5: RMB TSAT Review Summary

[90] Mr. Bird argued that although it does not have the force of law, HRSDC, Labour Program, has released an interpretation, policy and guideline document (IPG¹⁹) that is of some assistance in the interpretation of the word “participate”. The IPG states that the LJHSC’s role is not limited to the review of accident hazard reports; rather, the LJHSCs is entitled to “direct participation” in inquiries and investigations. The IPG does not, however, explicitly or implicitly suggest that the investigation or inquiry must be “joint”, in the sense that the LJHSCs must agree to conduct the inquiry or investigation, or agree to the methodology used therein. It is unilateral position of CUPW that they be in attendance at all assessments; it is not the position of the LJHSCs. In fact, this is consistent with the determination of HSO Dubé.

[91] Mr. Bird submitted that in the *Halterm*²⁰ decision, with respect to the mandatory nature of the Safety and Health Committee (now Work Place Health and Safety Committees) participation, the RSO²¹ stated:

The expression “shall participate in all inquiries and investigations” means there is a mandatory requirement on the safety and health committee to take an active part in all aspects of an accident investigation.

[92] Mr. Bird added that, regarding the words “participate” and “inquiries and investigations”, the RSO concluded:

[36] **The term “participate” is defined consistently by all dictionaries as meaning “to take a part in”.** In my view, much of the controversy over the interpretation of the expression “**participate**” in all inquiries and investigations” stems from the emphasis placed on defining the term “**participate**” without regard to the activity involved.

[...]

[38] In my opinion, it is abundantly clear from those definitions that **a member of the safety and health committee must be physically present** during a hazardous occurrence investigation in order to take part in all the actions described above. How else could the committee fulfil its role unless one of its members is physically present to take part in seeking, searching, researching, examining systematically, asking questions and interrogating. All those actions are integral parts of an effective accident investigation.

[93] Mr. Bird submitted that the most recent consideration of the expression “participate” in the context of LJHSC involvement can be found in the Federal Court’s decision in *CUPE v. Air Canada*²², which was released more than 15 years after the *Halterm* decision.

[94] He argued that after reviewing the interpretation of the term “participate” as set out by the RSO in *Halterm*, the Court stated at paragraph 36:

¹⁹ “Participation of the Safety and Health Committee or Representative in Inquiries and investigations” – 935-1- IPG-004, 30 October 1987. (Employer’s book of authorities, Tab 1)

²⁰ *Halterm*, at par. 34.

²¹ Regional Safety Officer (RSO), now “Appeals Officer”.

²² *CUPE v. Air Canada*, 2010 FC 103, at par. 36.

While I agree with the thrust of the *Halterm Ltd.*, above, decision with regard to the definition of participation, I am cognizant of the fact that it is over 15 years old. Therefore, as methods of communication have changed, I do not put significant weight on the committee's requirement to be physically present at any investigation.

[Underlining added]

[95] Mr. Bird noted that the Court went on to confirm that the Code does not require joint investigations, remarking at paragraph 44:

There is no requirement in the Code for a joint investigation. The obligation is the participation of the WPC [workplace health and safety committee]. As I discussed above, words such as “joint” appear to have been adopted by people who work in this area. However, the adoption of such terms cannot oust the clear language of the statute nor give rise to substantive rights.

[Underlining added]

[96] He further stated that in *CUPE v. Air Canada*, although a Work Place Health and Safety Committee member was not present for each and every aspect of the hazardous occurrence investigation, the Court concluded that the HSO had had sufficient evidence before her to support a determination that the Work Place Health and Safety Committee had participated in the investigation, and that the employer's Code obligations had been satisfied.

[97] He maintained that in the past, the physical presence of a Work Place Health and Safety Committee member at the site of an investigation or inquiry appears to have been a required element of “participation” under the Code. Currently, however, given recent advances in communications technology, physical presence is simply no longer necessary in order to ensure that active Work Place Health and Safety Committee participation is achieved.

[98] Mr. Bird submitted that the NJHSC participated fully in the TSAT process. It was fully involved in its development, refinement and testing. It was involved in the development of each aspect of the test itself, the methodology of data capture and the pass/fail criteria. CUPW representatives on the NJHSC supported the tool, as did CUPW itself.

[99] With regard to the participation of the LJHSCs, Mr. Bird submitted that the term “participate” appears both in reference to the NJHSC and LJHSC and HSRs with respect to “inquiries, investigations, studies and inspections pertaining to occupational health and safety”. He added that there is a fundamental rule of statutory interpretation that when the same word is used in a statute in two or more locations, the words are to be given the same meaning:

As Sopinka J. wrote in *R. v. Zeolkowski*, “[g]iving the same words the same meaning throughout a statute is a basic principle of statutory interpretation.”²³

²³ Sullivan, R., *Statutory Interpretation*, 2nd ed., Irwin Law, Ottawa, 2007, at 185.

[100] Accordingly, if the interpretation of “participate” in respect of the NJHSC does not include on-site presence during individual RMB assessments, there is also an interpretive implication that the same term would not require such presence by the LJHSCs and HSRs for that same purpose.

[101] Mr. Bird submitted that the involvement in the assessment of each and every RMB is not required for the LJHSCs or HSRs participation in the TSAT process. As previously stated the TSAT methodology, data capture and pass/fail criteria were developed with the extensive involvement of the NJHSC. Contrary to CUPW’s submissions, there are no subjective elements in either the data capture or pass/fail determinations to be made under TSAT. Basic location data is observed, time is measured, and vehicles are counted. This data is recorded and an RMB passes or fails in accordance with pre-established and agreed upon criteria.

[102] Mr. Bird submitted that the LJHSCs or HSRs have a role to play after the routes have been assessed by the TSAT. At this point, the RSMC and the LJHSC or HSR are advised which RMBs have passed or failed, and with the TSAT data summary sheet they can see precisely why this was the result. As a result of any disagreement or need for clarifications, the RSMC and the LJHSC or HSR will accompany the assessor to the RMBs in question for review and re-assessment. Continued disagreement will result in the matter being considered as a complaint or refusal under the Code, with the mandated LJHSC or HSR involvement as prescribed being afforded.

[103] Mr. Bird pointed out that Mr. Fraser testified that there are a number of hazard assessments conducted on a regular basis, which are in many ways analogous to the TSAT assessment, like vehicle circle checks and asbestos abatement for instance. In the first situations, the employee is doing an inspection for potential hazards, but is doing so in circumstances where no hazard has been identified or might even be expected. LJHSCs are not involved, simply because there is no point to their presence at this stage. Mr. Bird submits that they are to be involved when issues are raised which are out of the ordinary or disputed. One would not expect the LJHSC to investigate the report of a burnt out tail; but might if there had been recurring reports of a safety issue that had not been addressed in the normal course.

[104] Finally, Mr. Bird submitted that the LJHSCs or HSRs’ involvement in the TSAT assessment process meets the obligations prescribed by the Code.

Provision of the TSAT Reports

[105] Mr. Bird contended that there was no reason for the NJHSC to be involved in the ongoing onsite application of the TSAT once its design was approved. Similarly, there was no reason for the NJHSC to receive detailed data on whether every individual RMB passed or failed and why. The methodology was known, as were the pass/fail criteria. The provision of summary information to the NJHSC on the routes/RMBs assessed and the general trends in pass/fail data provided adequate information for the NJHSC to be aware of and monitor TSAT assessments nationally. Issues of particular RMBs was a local matter, to be dealt with at the LJHSC or HSR level. In the event of systemic problems the matter could be raised to the NJHSC for consideration.

[106] The respondent argued that CUPW's position that the NJHSC is entitled to the TSAT results of each and every RMBs assessment is based on the notion that TSAT assessments constitute an investigation. If such an interpretation is correct, the respondent submits that the NJHSC must also receive each and every daily circle check (daily vehicle inspection reports) Motorized Material Handling Equipment (MMHE) and asbestos abatement inspection document (at a rough estimate, this represents several thousand documents each and every day).

[107] In the respondent's view, such an interpretation of the Code would render the NJHSC's ability to conduct its primary health and safety function impossible. The respondent argues that a purposeful interpretation of the provision should not and cannot lead to an absurdity.

Appellant's reply

[108] Mr. Bloom submitted that Mr. Bird seeks to limit the scope of the appeal. He stated that the appeal included three grounds. The third ground of the appeal related to HSO Dubé prematurely closing the file and failing to take steps to ensure that the TSAT process was implemented in a manner that was compliant with the provisions of the Code. Having regard to the scope of the appeal, he believes that it is appropriate for the Tribunal in a proceeding under section 146.1 to assess whether the TSAT process was implemented in a manner consistent with Part II of the Code.

[109] Mr. Bloom further submitted that the law is settled that an appeal under section 146.1 is a "*de novo*" proceeding and that an appeals officer has complete jurisdiction to make any direction that could have been made by the HSO and to issue directions which should have been issued.

[110] With regard to the *Air Canada* decision, he indicated that the Court concluded that the HSO decision was reasonable. The HSO had concluded that the LJHSC had participated in the investigation and having reference to the facts set out in paragraph 41 of the decision, it is clear that there was significant Work Place Health and Safety Committees involvement in the investigation. The Court also agreed with the thrust of the *Halterm* decision, but noted that means of communication had changed and in that regard, did "not put significant weight on that part of the decision". In this regard, he believes the Court appears to be saying that physical presence is not necessarily required for all aspects of the investigation where improved methods of communication make physical presence unnecessary for active participation.

[111] Mr. Bloom added that although the Court offers the view that the Code does not require a "joint investigation", the decision does not suggest that active participation in an investigation will never require physical presence. Having regard to the nature of the TSAT, he submitted that active participation in a TSAT investigation must require actual presence while the observations are made and the data is collected. As noted previously in his submission, this process includes an element of appreciation in respect of whether traffic volumes are normal and the speed of an approaching vehicle is typical.

[112] He further submitted that unlike *Air Canada*, the employer (Canada Post) in this case, does not permit the LJHSC or HSRs to actually participate in an important or core aspect of the safety investigation inspection of the RMBs. He believes this is offensive to the holding in *Halterm*, which was not overturned by the Court in *Air Canada*.

[113] Mr. Bloom submitted that the case is not about whether the NJHSC was appropriately consulted in respect of the development of the TSAT as a safety program. Rather, the case is primarily about the failure of Canada Post to take appropriate steps to ensure necessary active participation by the LJHSCs or HSRs in the implementation of the process.

[114] He argued that under section 134, the NJHSC has a key role in developing the program and that under sections 135 and 136 the LJHSC or HSRs have a statutory mandate in respect of the monitoring and implementation of the program. This was even recognized by HSO Dubé whose notes²⁴ indicate that she reminded the parties of this division of responsibility.

[115] Mr. Bloom further argued that the fact that Canada Post engaged the NJHSC in the development of the TSAT program did not relieve it of its obligations with respect to the implementation of the program including its obligation to properly involve the LJHSC and HSRs in the implementation of the program including the safety investigation/inspection phase of the assessment process. He submitted that Canada Post improperly prohibited active participation in the proactive phase by not permitting the LJHSC and HSRs to be present while data was being collected and the key safety measurements were occurring (i.e. counting vehicles, stop watch timing of vehicles approaching the RMBs). Mr. Bloom added that the fact that some LJHSCs were involved in field testing the TSAT in the development phase does not satisfy Canada Post's obligations under sections 125, 135 and 136.

[116] He agreed that while it was not necessary (under section 134) for the NJHSC to be involved in local assessments, it was appropriate for the NJHSC to be involved in developing a process to ensure that the LJHSCs and HSRs were properly involved in the local assessment process, adding that clearly, this did not occur.

[117] In addition Mr. Bloom submitted that Mr. Bird did not present any reason for the NJHSC not to receive detailed TSAT reports. He argued that it was not within Canada Post's authority to decide what hazard reports were to be provided. He remarked that Mr. Bird did not put forward any reasoned argument as to why the NJHSC was not entitled to receive those reports under subsection 134(5) and paragraph 125(1)(z.11).

[118] Mr. Bloom implied that with regard to the provisions of Part II of the Code, the RSMCs delivering to RMBs are entitled to expect that all safety representatives would be trained in respect of TSAT²⁵. He stated that Canada Post improperly withdrew training in the context of its dispute with CUPW which was in part related to disagreements pertaining to the requirements of the Code.

²⁴ Exhibit 19, Volume 1

²⁵ Paragraphs 125(1)(z.01) and (z.19); paragraph 135(7)(e) of the Code.

[119] He submitted that Mr. Bird's assertion that it is only after the TSAT has been applied that the LJHSCs or HSRs would have a role, fails to acknowledge that LJHSCs and HSRs are required by law to actively participate in the investigation/inspection. He argued that receiving assessment results is not sufficient.

[120] He further argued that it is not the role of the employer to dictate to LJHSCs or HSRs how they will actively participate. Mr. Bloom submitted that 935-1-IPG-004 and the *Halterm* decision confirm that it is the LJHSCs or HSRs discretion to determine how the active participation requirement will be satisfied.

[121] Mr. Bloom disagreed with Mr. Bird's assertion that the results recorded by HSO Dubé were not surprising in light of the fact that the TSAT assessments had not yet occurred at the time of her visits. He stipulated that this is misleading as a review of the record of HSO Dubé's investigation indicates that the TSAT process had begun in a number of locations without there having been participation by neither the LJHSC nor the HSRs²⁶.

[122] Mr. Bloom indicated that in his submissions, Mr. Bird relied on the evidence of Mr. Jeff Fraser in support of his contention that there have been hazard assessments at Canada Post comparable to the TSAT process that have not involved the LJHSC or HSRs. These included vehicle safety checks, the MMHE safety checks and asbestos abatement process. Mr. Bloom added that Ms. Bossenberry's evidence was that these processes were not comparable to the TSAT. The vehicle check and MMHE process were long standing in nature and had been recognized by the NJHSC as appropriate. The vehicle and MMHE checks are done on a daily basis and are really in the nature of housekeeping functions. The asbestos abatement process has been the subject of specific agreement at the NJHSC level and the role of the LJHSCs in that process has been accepted by the parties²⁷.

[123] Mr. Bloom's finally submitted that Mr. Bird's suggestion that the activities of the NJHSC would be impaired by the receipt of the TSAT assessment reports is entirely unsubstantiated by any document or other evidence. He indicated that the evidence is that those reports are available electronically and there is simply no evidence to support this contention.

Analysis

Issue 1: Did HSO Dubé err when she closed the file prematurely

[124] The appellant is arguing that HSO Dubé chose to close her file prematurely without providing CUPW with reasonable opportunity to make further submissions.

[125] The Appeals Officer is a creation of statute and therefore only enjoys the powers conferred to him/her by their enabling legislation. My reading of subsection 146.1(1)

²⁶ Exhibits 2 & 3- Lanark, Carleton Place, Hawkesbury, Alfred, Plantagenet.

²⁷ Exhibit 35 and the reply evidence of G. Bossenberry

leads me to conclude that reviewing the way in which an investigation was carried out is ultra vires of my jurisdiction.

[126] Although I have previously concluded in this decision that I have the authority under the Code to vary a direction to include additional contraventions that I find should have been included by the HSO, I believe that my jurisdiction under the Code do not extend to reviewing HSOs' decision to continue or terminate their investigations nor the way they choose to carry their investigations for that matter.

[127] For this reason, I will not address the allegations regarding HSO Dubé's investigation and will proceed to examine the other two grounds of appeal raised by the appellant, based on the evidence presented, to determine whether the direction issued by HSO Dubé should be varied as per my power under subsection 146.1(1).

Issue 2: Participation of the LJHSCs and HSRs

Did Canada Post contravene paragraphs 135(7)(e) and 136(5)(g) of the Code?

[128] Paragraphs 135(7)(e) and 136(5)(g) impose a duty to the Work Place Health and Safety Committees and the HSRs to participate in all inquiries, investigations or inspections pertaining to the health and safety of employees. These paragraphs read as follows:

Duties of committee

135(7) A work place committee, in respect of the work place for which it is established,

(e) shall participate in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees, including any consultations that may be necessary with persons who are professionally or technically qualified to advise the committee on those matters;

Duties of representative

136(5) A health and safety representative, in respect of the work place for which the representative is appointed,

(g) shall participate in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees, including any consultations that may be necessary with persons who are professionally or technically qualified to advise the representative on those matters;

[129] Though the duties outlined at 135(7)(e) and 136(5)(g) fall on the Work Place Health and Safety Committees and the HSRs respectively, the employer has the obligation under paragraph 125(1)(z.08) of the Code to cooperate with the Policy Committee and work place committees and the health and safety representatives in the execution of their duties under Part II of the Code. This paragraph reads as follows:

125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

(z.08) cooperate with the policy and work place committees or the health and safety representative in the execution of their duties under this Part;

[130] Therefore, the employer has an express obligation under paragraph 125(1)(z.08) to cooperate with the LJHSCs and the HSRs in a manner that will allow them to fully execute their duties under sections 135 and 136 of the Code.

[131] The employer is also under the obligation, pursuant to paragraph 125(1)(z.01) the Code, to ensure that the members of the policy committee and workplace committees and HSRs are trained and informed of their responsibilities under Part II of the Code. That paragraph of the Code reads :

125(1) Without restricting the generality of section 124, every employer shall, in respect of every workplace controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

(Z.01) ensure that members of policy and work place committees and health and safety representatives receive the prescribed training in health and safety and are informed of their duties under this part;

[132] As mentioned above, the appellant submitted that Canada Post was in violation of paragraphs 135(7)(e) and 136(5)(g) of the Code when it failed to permit the LJHSCs and HSRs to participate in the inspection and investigation phase of the TSAT process by being present when observations were made and data collected.

[133] On the other hand, Canada Post's position is essentially, that the NJHSC fully participated in the development of the TSAT process as they were involved in its development, refinement and testing, and on the argument that the TSAT is an objective assessment which doesn't require the physical presence of a LJHSC member or an HSR for each and every RMB evaluation.

[134] Furthermore, the respondent is of the opinion that the participation of the NJHSC and the LJHSC in the elaboration phase of the TSAT should suffice to meet their duties to participate in all inspections as per sections 135 and 136 of the Code.

[135] First, I would like to note that the participation of the LJHSCs and the HSRs has been a long standing issue between the parties. Canada Post's view has always been that the TSAT is not a safety assessment that should be governed by the provisions found in Part II of the Code.

[136] The testimony of Mr. Fraser, spokesperson for Canada Post, is clear, and remains the same as in the case²⁸ that was heard in Abbotsford, British Columbia in 2006; Mr. Fraser refuses to recognize the TSAT applications as being an "investigations, studies or inspections" pertaining to the health and safety of employees.

[137] The first issue therefore to resolve is whether the TSAT process comes within the meaning of paragraphs 135(7)(e) and 136(5)(g); that is: whether the TSAT is an inquiry, an investigation, a study or an inspection pertaining to the health and safety of employee.

[138] I have reviewed the TSAT assessment and I find that it is a systematic inspection that looks closely at the location of RMBs to assess whether a location meets or fails established criteria therefore, deciding on the safety of the location for deliveries by RSMCs. Those criteria are in essence, the presence or not of a road shoulder to stop the RSMC vehicle to do the delivery, the width of the road, the number of road lanes, the presence of a solid line at the centre of the road, the line of sight (time gap), the speed of traffic, and the number of vehicles in a given amount of time.

[139] I therefore find that the TSAT assessment process falls within the definitions of "inspection" and pertains to the health and safety of the employees as understood in paragraphs 134.1(4)(d), 135(7)(e) and 136(5)(g) of the Code.

[140] With that in mind, I need to determine whether the LJHSC or the HSRs have participated in the TSAT process in a manner that is consistent with their obligations under paragraphs 135(7)(e) and 136(5)(g), and whether Canada Post has cooperated with the LJHSCs and the HSRs in a manner that fulfills its own obligation under paragraph 125(1)(z.08) of the Code.

[141] In other words, I must decide whether Canada Post has cooperated with the LJHSCs and the HSRs in a way that allows them to meet their duties under the Code.

[142] With regard to what constitutes "participation" by the LJHSCs or the HSRs as per the meaning of paragraphs 135(7)(e) and 136(5)(g) of the Code, the respondent relies on the Federal Court's decision in *CUPE v. Air Canada* to support the argument that the need to be physically present during an inspection or investigation is not deemed necessary anymore, as the judge varied the interpretation given by the appeals officer in the *Halterm* decision.

[143] However, upon reading *CUPE v. Air Canada*, I find that certain aspects of the Federal Court's decision can be distinguished from the case at hand. I refer particularly to the following passages to inform my thoughts on this question:

[36] While I agree with the thrust of the *Halterm Ltd.*, above, decision with regard to the definition of participation, I am cognizant of the fact that it is over 15 years old. Therefore, as methods of communication have changed, I do not put significant weight on the committee's requirement to be physically present any more.

²⁸ D. Morrison et al., C. McDonnell et al. and Canada Post Corporation, Decision No. OHSTC-09-032, Paragraph: 277

[...]

[40] Based on the role of the workplace committee as set out in *Air Canada and CUPE*, above, and the definition of participation as set out in *Halterm Ltd.*, above, the HSO had evidence before her to support a determination that the [workplace committee (WPC)] had participated in the investigation and that the obligations under the Code had been satisfied.

[41] The HSO's decision is supported by the WPC's participation in the following activities related to the Respondent's investigation:

- Meeting or debrief on the day following the incident. While this was conducted with EAP, information was collected and no one was precluded from taking notes;
- Review of reports from cabin crew members;
- Review of levels of turbulence matrix;
- Preparation of a list of question to ask Flight Safety;
- Conference call with a Flight Safety Officer to discuss the Flight Safety Investigation and findings contained in their draft report;
- Verification of weather patterns for their particular flight;
- Meetings with Flight Operations to discuss weather patterns;
- Interviews with flight attendants conducted by employee representatives of the Committee;
- Creation of an appendix tracking of turbulence;
- Joint inspection of aircraft by WPC members;
- Review of photographic evidence;
- Discussion of the employer's investigation report and of recommendations; and
- Review of all pertinent information and reports at joint meetings held during three days from April 1-3, 2008.

[42] The HSO's decision was reasonable.

[Underlining added]

[144] In *CUPE v. Air Canada*, the Court determined that the work place committee had participated in the investigation through its extensive involvement in the actual investigative process. Although the Court deemed that the physical presence of the work place committee was not necessarily required if other means of communication were available, the evidence in that case showed that the work place committee was actively involved in the investigation phase of the process.

[145] In my opinion, whether or not the TSAT was elaborated as an objective assessment tool does not remove the obligations put on the HSRs and LJHSCs to participate in all inspections and investigations pertaining to the health and safety of employees pursuant to paragraphs 135(7)(e) and 136(7)(g) the Code.

[146] My interpretation of these paragraphs leads me to conclude that the LJHSCs and the HSRs have to partake not only in the elaboration phase of the TSAT process, but also in its inspection/investigation phase in order to achieve participation as required by the Code. This duty under the Code is not simply a right, but a requirement that cannot be interfered with. As was stated by Appeals Officer Cadieux in *Halterm*:

[35] [...] Also because there is a mandatory requirement on the safety and health committee to participate in inquiries and investigations, any outside interference with this role of the committee is illegal and reprehensible.

[147] Additionally, Canada Post's obligation under paragraph 125(1)(z.08) of the Code is to cooperate with the LJHSCs and the HSRs in a way that enables them to fulfill their duties. While I agree that, in some circumstances, either because of distance, remoteness or urgency of the moment, that the LJHSCs and HSRs could in part, participate through a form of alternative communication device, the obligation to participate, and by extension, not to bar, deny or inhibit such participation, does remain.

[148] Canada Post is similarly obligated under paragraph 125(1)(z.01) of the Code to ensure that the LJHSCs and the HSRs are informed and trained so that they are able to fulfill their participation duties as required by the Code.

[149] As a consequence, I find that the LJHSCs and HSRs not only have the right but the duty to participate in the on-site inspections and investigations of the TSAT process. These LJHSCs and HSRs are composed of both employer and employee representatives who are in the best position to decide the level of participation required. I would like to clarify that if a LJHSC or HSR wants to participate in an assessment, the assessors or the managers cannot refuse given that they are fulfilling their duties as required by the Code.

[150] After having carefully reviewed the totality of the evidence presented, I find that the LJHSCs and HSRs did not take part, other than on a few rare occasions, in the actual on-site inspection and investigation phase of the process, i.e., the evaluation of RMBs with the TSAT.

[151] Members of the LJHSC or HSRs were not permitted to be present while the assessments of the RMBs were being conducted nor did they play any role in the on-site inspection/investigation unless a complaint or refusal to work under sections 127 and 128 of the Code was invoked. Canada Post agrees that the LJHSCs or HSRs have a role to play in case of disagreements by the RSMC of the result of the assessment; however that role is already understood in the "Internal Complaint Resolution Process" under section 127 of the Code. Furthermore, the members of the LJHSC or HSRs received no training from Canada Post regarding the TSAT process nor were they informed by Canada Post of their responsibilities vis-à-vis the TSAT process as required by the Code.

[152] While I appreciate that having members of the LJHSC and the HSRs participate in the assessment of over 840,000 RMBs would add another procedural element to the process, I retain Ms. Boysenberry's testimony to the effect that:

[O]ur expectation is not to be in the driver's seat. We understand the magnitude of the process, but we want to keep our right to participate as we require ensuring a successful application of the TSAT. [...]

We believe we have a right to be there when the inspection is done. We would be willing to (not forfeit our right to participate) but have a right to participate in review process.

[153] Finally, I conclude that by failing to cooperate with the LJHSC and the HSRs during the on-site inspections and investigations of the TSAT process, either by failing to communicate with LJHSCs or HSRs prior to each evaluation, or by omitting to elaborate a strategy to assure their participation, and by failing to ensure that they are informed and trained on their TSAT responsibilities, Canada Post contravened paragraphs 125(1)(z.1), 125(1)(z.08), 135(7)(e) and 136(5)(g) of the Code.

[154] Based on all the above, I will exercise my power under subsection 146.1(1) to vary the direction to include the above identified contraventions of the Code.

Issue 3: Did Canada Post contravene paragraph 125(1)(z.11) and subsections 134.1(5) and 134.1(6) of the Code

[155] The next issue to be resolved pertains to the provision of the TSAT assessment reports to the NJHSC.

[156] It is the appellant's contention that HSO Dubé failed to direct Canada Post to provide the TSAT reports to the NJHSC. I note that the direction issued by HSO Dubé only requires Canada Post to provide the assessment results of the TSAT to the LJHSC and the HSRs.

[157] At the hearing of this appeal, HSO Dubé testified that she did not see the need to include the NJHSC in the direction because she was told by Canada Post that the NJHSC already had access to the TSAT assessments results.

[158] Accordingly, the appellant is requesting the appeals officer to vary the direction issued by HSO Dubé to direct Canada Post to provide the TSAT assessments results to the Policy Committee as required by paragraph 125(1)(z.11) of the Code, which states that:

125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

(z.11) provide to the policy committee, if any, and to the work place committee or the health and safety representative, a copy of any report on hazards in the work place, including an assessment of those hazards;

[159] In my opinion, there is no ambiguity in the obligations prescribed by the Code on this issue. The language used in the code is clear. The employer shall "provide to the policy committee, if any" "a copy of any report on hazards in the work place, including an assessment of those hazards."

[160] There is simply no doubt that the TSAT, being a tool developed to assess the safety of delivery to RMB's is a hazard report within the meaning of paragraph 125(1)(z.11). Consequently, I am convinced based on a reasonable interpretation of this provision that Canada Post ought to provide the TSAT reports to the NJHSC.

[161] In addition to a contravention of paragraph 125.1(z.11), the appellant submitted that Canada Post's refusal to provide the TSAT assessment reports also violated subsections 134.1(5) and (6) of the Code, which read:

Information

134.1(5) A policy committee may request from an employer any information that the committee considers necessary to identify existing or potential hazards with respect to materials, processes, equipment or activities in any of the employer's work places.

Access

134.1(6) A policy committee shall have full access to all of the government and employer reports, studies and tests relating to the health and safety of employees in the work place, or to the parts of those reports, studies and tests that relate to the health and safety of employees, but shall not have access to the medical records of any person except with the person's consent.

[162] I need to make mention of the fact that I believe subsection 134.1(6) is better suited than subsection 134.1(5) to deal with this issue for the reason that subsection 134.1(6) more specifically requires that the Policy Committee "have full access" to all reports and tests relating to the health and safety of employees in the work place.

[163] As previously mentioned, the TSAT is an assessment of the safety hazards that may exist at RMB locations and pertains to the safety of the RSMCs. Therefore, I believe that it falls within the meaning of an employer reports, studies, tests relating to the health and safety of the employees in the work place as described in subsection 134.1(6). As a result, Canada Post is under the obligation to comply with the NJHSC's requests to have access to the full TSAT assessment reports.

[164] While I appreciate that the application of subsection 134.1(6) and paragraph 125.1(z.11) to the present case could entail the reception of several thousand documents every day by the NJHSC, my view remains that the NJHSC is entitled to receive the TSAT assessment reports when requested. That being said, I understand from testimonies on the issue, that the reports are available in electronic format and could easily be provided.

[165] Nonetheless, the evidence indicates that Canada Post has systematically refused to provide the TSAT assessments results to the NJHSC following numerous requests made in this regard. It is my opinion that by doing so, Canada Post contravened paragraph 125(1)(z.11) and subsection 134.1(6) of the Code.

[166] For these reasons, HSO Dubé's direction should be varied to include Canada Post's obligation to provide the TSAT assessments to the Policy Committee.

Decision

[167] For all these reasons stated above, I hereby vary the direction issued by HSO Dubé on December 8, 2008 as follows:

- To include Canada Post Corporation's obligation to provide the complete TSAT assessments reports to the Policy Committee as per paragraph 125(1)(z.11) and subsection 134.1(6) of the Code.

To include a contravention by Canada Post Corporation of paragraphs 125(1)(z.01), 125(1) (z.08), 135(7)(e) and 136(5)(g) of the Code.

- To include a contravention by Canada Post Corporation of paragraph 125(1)(z-11) and subsection 134.1(6), 135(9) and 136.(7) of the Code.

[168] There is a final point that I would like to mention regarding the scope of the direction under appeal. While the varied direction relates to specific locations in the Ottawa Regions/Eastern area visited by HSO Dubé in the course of her investigation of the complaint, I am mindful of the fact that my decision has national implications. The TSAT was created as a national initiative and my understanding is that the on-site inspection/investigation of the RMBs are being conducted in the same manner in all of the other regions not covered by the direction. The evidence presented has not revealed any differences or particularities in the way the TSAT assessments are being conducted in all the work places operated by Canada Post.

Richard Lafrance
Appeals Officer

APPENDIX I

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On November 27 and 28 2008, **Health and Safety Officer Nicole Dubé**, conducted an investigation at various work places operated by CANADA POST CORPORATION (Amprior, Almonte, Carleton Place, Lanark, Hawkesbury, Alfred, Plantagenet, Curran and Bourget), being an employer subject to the Canada Labour Code, Part II. The said work places being sometimes known as Canada Post Corporation report to their Head Office located at 2701 Riverside Drive, Ottawa, Ontario, K1A 0B1.

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:

No : 1

125.(1)(z.19) – Canada Labour Code Part II

The employer has failed to consult with the work place committee or the health and safety representative, on the implementation and monitoring of the Traffic Safety Assessment Tool (TSAT) for the Rural and Mail Suburban Carriers (RMSC) which was developed in consultation with the Policy Committee.

No : 2

125.(1)(z.11) – Canada Labour Code Part II

The employer has failed to provide to the Work Place Health and Safety Committee and Health and Safety Representatives a copy of any report on hazards in the work place, including the assessment results from the Traffic Safety Assessment Tool (TSAT).

Following an appeal brought under subsection 146(1) of the *Canada Labour Code*, Part II, the undersigned Appeals Officer varied the direction to include these additional contraventions:

No : 2

125.(1)(z.11) and subsection 134.1(6) – Canada Labour Code Part II

The employer has failed to provide to the **Policy Committee** a copy of any report on hazards in the work place, including the assessment results from the Traffic Safety Assessment Tool (TSAT).

134.1(6) A policy committee shall have full access to all government and employer reports, studies and tests relating to health and safety of the employees in the work place, or to the parts of those reports, studies and tests

that relate to the health and safety of employees, but shall not have access to the medical records of any person except with the person's consent.

No : 3

125(1)(z.08), 135(7)(e) and 136(5)(g) – Canada Labour Code Part II

The employer has failed to cooperate with the work place committees, policy committee and health and safety representatives in a manner that allows them to execute their duties of participation as per paragraphs 135(7)(e) and 136(5)(g) with respect to the TSAT assessment process.

135(7) A work place committee [...]

(e) shall participate in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees, including any consultations that may be necessary with persons who are professionally or technically qualified to advise the committee on those matters.

136(5) A health and safety representative [...]

(g) shall participate in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees, including any consultations that may be necessary with persons who are professionally or technically qualified to advise the representative on those matters.

No : 4

125(1)(z.01) – Canada Labour Code Part II

The employer has failed to ensure that the work place committees and health and safety representatives were informed of the TSAT responsibilities and provided appropriate training.

Therefore, you are **HEREBY DIRECTED**, pursuant to paragraph 145(1)(a)(b) of the Code, to take measures within 30 days of reception of this direction to terminate the contraventions and to ensure that the contraventions does not continue or reoccur.

Varied at Ottawa, this day of July, 2013.

Richard Lafrance
Appeals Officer

To: Canada Post Corporation
 2701 Riverside Drive
 Ottawa, Ontario
 K1A 0B1

APPENDIX II

GLOSSARY

<u>Acronym or Shortening</u>	<u>Meaning</u>
Canada Post	Canada Post Corporation
the Code	<i>Canada Labour Code</i>
CUPW	Canadian Union of Postal Workers
HRSDC	Human Resources and Skills Development Canada
HSO	Health and Safety Officer
HSR	Health and Safety Representatives
LJHSC	Local Joint Health and Safety Committee
MMHE	Motorized Material Handling Equipment
NJHSC	National Joint Health and Safety Committee
NRC	National Research Council
RMB	Rural Mail Boxes
RSMC	Rural and Suburban Mail Carriers
RSO	Regional Safety Officer
Tribunal	Occupational Health and Safety Tribunal Canada
TSAT	Traffic Safety Assessment Tool