

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Jazz Aviation LP v. Canadian Auto Workers Union, 2013 OHSTC 40

Date: 2013-12-19
Case No.: 2012-07
Rendered at: Ottawa

Between:

Jazz Aviation LP, Appellant

and

Canadian Auto Workers Union, Respondent

Matter: Appeal under subsection 146(1) of the *Canada Labour Code* against a direction issued by a health and safety officer.

Decision: The direction is rescinded.

Decision rendered by: Mr. Jean-Pierre Aubre, Appeals Officer

Language of decision: English and French

For the appellant: Mr. Guy Lavoie and Ms. Josiane L'Heureux, Counsel,
Lavery, De Billy, L.L.P., Barristers and Solicitors

For the Respondent: Mr. Yves Côte, PSO, B&S Associés, Professional Paralegals

Canada

REASONS

[1] This appeal has been brought pursuant to subsection 146(1) of the *Canada Labour Code* (the Code) by appellant Jazz Aviation LP (Jazz) against a direction issued on December 13, 2011, by Health and Safety Officer (HSO) Sylvain Renaud pursuant to paragraph 145(1)(a) of the Code. That direction, more specifically described as a “contravention” direction due to its having been issued pursuant to subsection 145(1) of the Code, stated that HSO Renaud had formed the opinion that the appellant was in contravention of section 124 of the Code which formulates the general duty of any employer to which the Code applies to “ensure that the health and safety at work of every person employed by the employer is protected”. More specifically applied to the facts of this case, the direction states that the factual circumstances of the contravention by the appellant employer were as follows:

The employer did not ensure that employees had access to safe working procedures that the employees could understand. The Aircraft Service Manual (ASM) includes safety procedures that must be understood. The manual is not available in French, so Francophone employees cannot consult it.

Background

[2] The issue central to the present appeal was first raised on the occasion of a routine work place inspection carried out by HSO Renaud at the appellant’s Rouyn-Noranda station on March 8, 2011, therefore some nine months prior to the actual issuance of the direction under appeal. On that occasion, HSO Renaud identified a number of violations to the Code and the matter of the lack of a French translation or version to the Aircraft Service Manual (ASM) was brought to the latter’s attention by Mr. Gaston Girard, a member of the work place health and safety committee (employee representative) who is also a ramp attendant (préposé d’escal) at the Rouyn-Noranda station. It should be noted here that in his testimony at the hearing into this appeal, HSO Renaud pointed out that there had been no previous complaints by employees of the appellant regarding this matter, nor any work refusal in this regard, although some frustration may have been expressed by certain employees concerning the situation.

[3] Following that inspection, HSO Renaud received from the appellant an Assurance of Voluntary Compliance (AVC) signed by Daniel Baril, area manager, regarding a number of violations that had been identified in the course of the inspection, including more particularly the one having to do with the lack of a French version to the ASM, appearing as number 7 in the body of the AVC, and which stated that:

L’employeur n’a pas veillé à ce que les employés aient accès aux procédures de travail sécuritaire de façon à ce que les employés puissent les comprendre. L’aircraft service manuel (sic) ASM contient des procédures de sécurité qui doit (sic) être comprises par les employés, se (sic) faisant l’outil doit être disponible en français.

The document indicated that compliance would be achieved by March 31, 2011. While an AVC is an administrative measure designed to obtain compliance without having to resort to coercitive statutory means, it has no statutory foundation and thus is unenforceable under the Code. It nonetheless evidences an undertaking to comply with the legislation, where violations have been identified, as can be seen from the text bearing the employer representative's signature:

I, the undersigned hereby declare that I have read this document, and agree to take such action and to provide the inspector / health and safety officer of the Labour Program named below, within fourteen (14) calendar days of the latest compliance date specified above, for each item:

1. written confirmation that the remedial action has been taken and the Item is now in compliance; or
2. a written action plan with time frames for compliance for any outstanding Items.

The AVC received from the appellant through area manager Daniel Baril thus provided that the ASM should be made available in French to allow the francophone employees of the appellant to understand the work procedures related to health and safety. When testifying at the hearing, the HSO offered the opinion that an AVC received following an inspection, such as in this case, should be considered as being to the same effect as a direction issued pursuant to the Code.

[4] In the months that followed receipt of the AVC by HSO Renaud, the latter had numerous telephone contacts with representatives of the appellant concerning the translation of the ASM. During those contacts, it became apparent to the HSO that the appellant had become reluctant to comply with the undertaking to provide its employees with a French version of that document. On October 17, 2011, HSO Renaud returned to the Rouyn-Noranda station to follow-up on the inspection that had been conducted on March 8 of that same year. It became apparent to the HSO that despite the appellant representative's undertaking through the March 18, 2011 AVC, the ASM had not been translated into French. In an ensuing telephone conference with representatives of Jazz, HSO Renaud was informed that the appellant did not intend to translate the ASM on the general basis that the training provided to its francophone employees relative to the contents of the ASM is provided in French and that their supervisors, who can be consulted on the ASM, are themselves bilingual and thus can provide information and advice in French. In his testimony at the hearing, HSO Renaud recognized that the employer provides training in French on the ASM to all its employees who also have access in this regard to bilingual supervisors. However, he did offer the opinion that where employees need to consult the ASM, they should be able to do so in their own language. The officer also noted that there are approximately 10 francophone employees concerned with this question of a unilingual ASM. Although this may not have been stated expressly, it would appear that by using the descriptive "francophone", the HSO meant that these employees did not understand English.

[5] In addition, having briefly familiarized himself with the contents of the ASM, the HSO formed the opinion that this document deals with numerous work procedures that relate to employee safety and that need to be made available to francophone employees in French as reference material that is available for consultation when needed. In his report, the HSO cites specifically in support of his conclusion the introductory paragraph to section 2 of the ASM which reads:

The purpose of this section of the manual is to review the safe practices and procedures that apply to working at an airport. It is important to remember that the improvement to safety conditions at the work place is not just the responsibility of the Company and its management staff but it is also the responsibility of the employees. The rules and regulation (sic) outlined in this section are meant to insure a safe work environment for everyone at the airport. We will be looking at three areas of concern and the associated practices and procedures, which will insure a safe operation. These areas are:

- Personal Safety
- Housekeeping
- Safe Equipment Operation

HSO Renaud noted in his report that various circumstances could cause an employee to need to consult the ASM, such as responding to an emergency, needing to refresh one's memory relative to certain work procedures or particular problems or when faced with an unusual task. The HSO further expressed the opinion that failing to adhere to the ASM in doing one's work could lead to injury. The employer, on the other hand, maintained through that process that the ASM is not a document that its employees consult on a day-to-day basis.

[6] HSO Renaud indicated in his report that he only examined the ASM perfunctorily ("analyse succincte") when he conducted his inspection and it was made clear by his testimony at the hearing that he was not very familiar with the contents of said document which is central to this case. In point of fact, he was unable to indicate whether the said document applied to in-flight operations or to flight attendants, what kind of aircraft it applied to or what types of aircraft are operated by the appellant or the extent of its use throughout the company. Apart from a general affirmation that the document had a health and safety component, the HSO could not identify which sections of the document bore on that subject, nor did he consult the training material used by the employer and transmitted to employees or interview the ramp attendants present at the time of the inspection to determine whether they used the ASM, under what circumstances and for what purposes.

[7] Given the position taken by the appellant, the HSO issued a direction on December 13, 2011, pursuant to paragraph 145(1)(a) of the Code stating that the appellant's refusal to translate the ASM into French constituted a violation of section 124 of the Code. The direction reads as follows:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION
145(1)

On November 16, 2011, the undersigned health and safety officer followed up on an inspection in the workplace operated by JAZZ AVIATION S.E.C. carrying on business under the name and style of JAZZ AVIATION S.E.C., being an employer subject to the *Canada Labour Code*, Part II, at 100, ave de l' Aéroport, Rouyn-Noranda, Quebec, J9X 5B7, the said work place being sometimes known as Jazz Air.

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

No. / No : 1

124. – Canada Labour Code Part II,

The employer did not ensure that employees had access to safe working procedures that the employees could understand. The Aircraft Service Manual (ASM) includes safety procedures that must be understood. The manual is not available in French, so Francophone employees cannot consult it.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than February 13 2012.

Issued at Montreal, this 13th day of December, 2011.

[...]

Issue(s)

[8] As appears from what precedes, HSO Renaud concluded that the facts relative to the lack of a French language version of the appellant's ASM were grounds for the conclusion that a violation of the Code had occurred, in this instance section 124. Defining the issue to be determined in this appeal should thus represent a simple and straightforward exercise since the language of section 124 is somewhat straightforward and simple. In doing so however, a number of points need to be made. First, subsection 145(1) of the Code that provides a health and safety officer with the authority to issue "contravention" directions stipulates that in order to do so, the latter must have formed the "opinion that a provision of this Part", thus the Code, is being contravened or has recently been contravened, thus requiring a link between the facts of a given situation and a specific provision of the legislation. Second, the Code lists numerous specific as well as general employer obligations, the most relevant to the consideration of the present case being listed at sections 124 to 125.3 of the Code, under title "*Duties of Employers*". What is significant regarding the text of those listed obligations as well as the entire text of the

legislation is that it is silent as to the need or requirement to provide health and safety related information in one or other official language, thus making it impossible under the Code to claim violation of an obligation of such specificity.

[9] On the other hand, section 124 of the Code spells out the general duty of the employer to “ensure the health and safety at work” of its employees is protected, a general duty that is made part and parcel of every specific employer obligation listed at sections 125 and 125.1 through the use of their introductory words “without restricting the generality of section 124”.

[10] Given the silence of the legislation mentioned above, this would appear to clarify the rationale of HSO Renaud in invoking violation of the general employer obligation at section 124 of the Code, thereby satisfying the requirement of subsection 145(1) that a “provision” of the Code be contravened in order that a direction be issued. That being said, given the silence of the legislation mentioned earlier, while the circumstances recounted by the HSO in his report as basis for his issuance of the direction under appeal turn on the absence of a French version of the ASM, the issue raised in this case is not whether Jazz contravened an obligation to supply its Rouyn-Noranda employees with a French version ASM, since there is no such obligation under the Code, but rather whether the appellant failed in its much more general obligation to ensure the protection of the health and safety of its employees while at work, an obligation that one could relate to the proper provision of information, this in circumstances where it has not provided them with said French text of the ASM.

Submissions of the parties

A) Appellant’s Submissions

[11] The appellant’s challenge of the direction under appeal is essentially dual pronged. First, as to the evidence derived from the testimony of the HSO at the hearing and also from the latter’s investigation report that was filed as exhibit, the appellant has argued that the evidence by the HSO has clearly demonstrated that the latter’s opinion was far from being “informed” as is required by case law and that the said direction was not based on anything that the HSO himself had observed during his inspection of March 8, 2011. According to the appellant, that direction should not have been issued in the first place insofar as the HSO’s opinion should have been based on concrete facts that he observed on the day of the inspection rather than on what the HSO “perceived” as frustration on the part of Rouyn-Noranda station employees. As such, the appellant’s opinion is that the HSO did not fulfill the duty that the case law and the Code impose on a health and safety officer.

[12] The second point made by the appellant relates to the fact that the “contravention” direction issued pursuant to subsection 145(1) and section 124 of the Code was neither issued as a result of a dangerous situation nor relative to a specific duty of the employer under section 125 of the said legislation and thus cannot be claimed to be the result of a specific situation, danger or complaint. It would flow from the evidence and the case law

that the appellant could not be found to have contravened section 124 of the Code since it had taken all reasonable measures in the circumstances to protect the health and safety of its employees. According to the appellant, there is no compelling evidence to show that translation of the ASM is either needed or required under the legislation to protect the health and safety of the employees and furthermore, the HSO failed to prove otherwise. The appellant contends that it exercised due care and diligence to ensure the health and safety of every Ramp Attendant at the Rouyn-Noranda station.

[13] More generally, the appellant's submissions are built around Tribunal case law and the evidence provided by the witnesses it called. On the first element, to the effect that HSO Renaud had not made a properly informed decision in issuing the direction, the appellant pointed to the actual testimony of the HSO at the hearing. As such, counsel noted that the presence of the HSO in Rouyn-Noranda station had not been in response to any specific situation, accident, refusal to work based on a claim of danger or health and safety related complaint, but rather solely for the purpose of a mere "routine" inspection.

[14] Furthermore, it was apparent from the inspection report as well as from the HSO's testimony at the hearing that HSO Renaud knew little about the ASM despite the fact that this manual is central to the direction. In point of fact, the HSO did not know whether the ASM applied to in-flight operations or to flight attendants, what aircraft it concerned and what types of aircrafts Jazz operates, whether the manual is used throughout the company and in what circumstances or how many employees were directly affected by the direction.

[15] While the HSO had asserted that the direction concerned only those parts of the ASM pertaining to health and safety, which he claimed were numerous, he was unaware of which sections dealt with that subject and which did not, since, to use the HSO's words, he had only conducted "une analyse succinte de l'aircraft service manual". The HSO recognized that he had not consulted the ASM at the time of the inspection nor did he examine the training material on the ASM used by the employer, whom the HSO recognizes is provided in great part in French. HSO Renaud justified the issuance of the direction on the frustration at the ASM not being available in French expressed by a few employees of the Rouyn-Noranda station of which he was made aware at the time of his conducting the inspection. Yet, the appellant has argued the HSO did not question the employees (ramp attendants) present at the station, when conducting the inspection, to ascertain if they used the ASM, when they used it, under what circumstances and for what purposes. It is the opinion put forth by the appellant that the HSO failed to issue a properly informed direction.

[16] In this respect, counsel refers to the decision by Appeals Officer D. Malanka in *Canadian Pacific Railway and Brotherhood of Locomotive Engineers*, Decision no. 03-011, April 28, 2003, requiring that health and safety officers properly inform themselves prior to making a decision:

[26] While the question of due diligence is for the Courts to decide in a prosecution, health and safety officers must be guided by the evidence

before them as to whether an action or lack of action on the part of an employer contributed to the contravention under review. I would agree that subsection 145.(1) specifies that the health and safety officer must be “of the opinion” that a contravention has occurred. However, given the broad investigative powers that health and safety officers have under the Code, it must be understood that their “opinion” must at least be an “informed” opinion. [...]

According to the appellant, for the HSO to formulate an informed opinion, it is necessary that proper questions be put to employees and interested parties and that failing to do so could be ground for rescission of a direction. Counsel referred to a decision by a Regional Safety Officer (now called an Appeals Officer) in *Cast Terminal Inc. and Longshoremen’s Union, Local 375* [2001] C.L.C.R.S.O.D. No. 15, where a direction was rescinded when it was shown that the Safety Officer who had issued the direction had not questioned the employees, visitors or drivers. The Appeals Officer stated in that case that:

[22] At the hearing, safety officer Tran did not succeed in showing with the complete certainty that she should have demonstrated that she was able not only to identify exactly where the contraventions took place, but also, when issuing her direction, clearly indicate them to the employer so that he could correct them.

[17] The second element of the appellant’s submissions is to the effect that given the general obligation of the employer at section 124 of the Code that is claimed to have been contravened, the evidence clearly demonstrates that the employer has fully satisfied its general employee protection duty under that provision notwithstanding that a full translation of the ASM may not have been available to the Rouyn-Noranda station employees and further, that such a translation is not required to ensure the health and safety of the employees.

[18] To support that position, counsel has referred at length to Tribunal case law and to the testimony of the witnesses called by the appellant. On Tribunal jurisprudence, the appellant is of the view that it supports the position that given the very general nature of the employer obligation(s) set at section 124, one should look at whether the employer has taken all reasonable steps to ensure the health and safety of its employees, thereby subjecting the employer to an obligation of due diligence as opposed to the necessity of specific compliance, which is the case where specific obligations are established in the Code or its Regulations. To buttress its argument, the appellant referred to subsection 148(4) of the Code that sets a defence of due care and diligence against a prosecution for a contravention of a provision of the Code. Along that line, extensive reference was made to prior Appeals Officer decisions dealing with section 124 of the Code and the extent of the employer’s obligation under that provision.

[19] While the defence of due diligence is clearly restricted to a prosecution under the Code at subsection 148(4), which an appeal against a direction is not, the appellant has nonetheless derived from that case law interpretation of the said defence the position that where section 124 is concerned, due care and diligence that can be raised at prosecution can equate to the taking of all steps or measures reasonable in the circumstances of a

given situation to ensure the employees' health and safety protection in pre-direction situations, thus meaning that section 124 does not impose on the employer an obligation to provide protection over and beyond that reasonable threshold.

[20] According to the appellant, the evidence provided by all the witnesses who testified on behalf of the appellant serves to effectively establish that Jazz took all reasonable measures to ensure that the work place is safe. In formulating its submissions on this latest point, the appellant has categorized the evidence by its witnesses according to a number of points summarized below.

Employees affected and their tasks

[21] The Rouyn-Noranda station eight ramp attendants affected by the direction are ground employees whose tasks involve conducting marshalling signals, visual inspection of the aircraft, attaching propeller restraint ties, opening the baggage hold and off-loading baggage, opening aircraft doors, minor cleaning of interior and exterior of aircraft where the aircraft is grounded for more than 40 minutes and where necessary, de-icing. These tasks are constant from day to day. Basically, there is only one type of aircraft used by the appellant at the Rouyn-Noranda station. Should a new type of aircraft be introduced at the station, M. Luc Ouellette, who is responsible for the overall training in ramp operations in Eastern Canada, mostly to station employee trainers, and who provides that training in either French or English according to individual choice, would attend at the station prior to the first landing of said new aircraft in order to ensure that ramp attendants are able to safely execute their duties with the new aircraft and are comfortable with the training received.

[22] In carrying their tasks, ramp attendants follow standard procedures which are the same throughout Jazz to ensure the uniformity essential to providing the same service expected by pilots at any station. Ramp attendant tasks do not include towing of aircraft, maintenance operations and push-backs. All Jazz witnesses testified to the fact that at Jazz, the rule is "if you are not trained to do a task, you should not accept to perform the task".

[23] David Deveau, vice-president, safety, quality and environment, is directly responsible for the SMS (Safety Management System) which serves to manage safety beyond reaction to issues or incidents and thus the actual reporting and planning in order to identify issues before they become problems. In this regard, employees, including ramp attendants, are encouraged to report issues that represent problems, including safety concerns, for them. Such reporting can be done in French as his staff is bilingual.

[24] As regards the tasks of the ramp attendants, the risks assessed through the job risk assessment required under the Code for such position are all associated with areas such as ergonomics restraints, noise levels of running aircrafts or ground tasks associated with loading baggage, assistance to passengers and fall prevention for instance in icy ground conditions. While the system (SMS) would have allowed for Rouyn-Noranda station ramp attendants to report on concerns relative to the language of the ASM as affecting

the safe execution of their tasks, there has never been a report of any sort by the employees concerning this.

[25] In the course of normal flight operations, it may become necessary to conduct what is referred to as an aircraft swap or replacement of an aircraft by a different type, one that employees, ramp attendants, may not be or be less familiar with. This may be caused by a regularly used aircraft at a station needing to be put out of service due to an unforeseen maintenance issue. In such instances that may require ramp attendants to execute less familiar tasks or tasks on an unfamiliar aircraft, the appellant has in place a standard protocol to ensure that the ramp attendants responsible for servicing the assigned aircraft have been trained to deal with this type of aircraft. That procedure is followed by the Operations Center and does involve obtaining confirmation from the manager of aircraft services that the new aircraft can be safely handled at the station, and where ramp attendant training would appear to be insufficient, may see the person responsible for training (Ouellette) attending personally at the station to ensure that the swap procedure is followed and that the ramp attendants are comfortable with the situation.

[26] In short, in a situation where an aircraft swap may be at hand, the confirmation of whether the new aircraft can be received safely also entails that if the station cannot receive the aircraft because of ramp attendants lacking adequate training, a trainer will be sent prior to landing or, as a last resort, the flight will be cancelled.

The Aircraft Services Manual (ASM)

[27] The manager of aircraft services (Polak) and the trainer of trainers (Ouellette) both described the ASM as anything but a reference document designed to be consulted by ground personnel in the course of their daily operations. Rather, it is presented as a documented process aimed at describing the current procedures followed by Jazz, and thus a non-mandatory document to be differentiated from mandatory maintenance manuals required by Transport Canada for every aviation companies. It contains procedures pertaining to the servicing of various aircraft and may be used as a reference manual in case of disagreement as to what tasks are appropriate to a given set of circumstances. It is thus a resource for managers and local representatives and may serve to demonstrate how the appellant manages the tasks related to ground handling when being audited by Transport Canada or the IATA (International Air Transport Association).

[28] As such, the evidence of the appellant is that the ASM was not created as a quick reference manual and is not used as such by employees, whether anglophone or francophone, to deal with safety issues. Managers do not refer employees to the ASM and ramp attendants do not have a paper copy of the ASM at their disposal, as it is available solely online. The usual practice at Jazz, according to the manager of aircraft services, is not to refer employees to the ASM when safety issues arise, but to have them address such questions to a supervisor, since the purpose of the document is not to be used as a resource by employees in their daily operations. Its translation would thus not represent a useful or appropriate way of ensuring the health and safety of employees. The document

is nonetheless prefaced (Chapter 2) with the statement of the Jazz Safety Policy bearing, among other subjects, on personal safety and safe equipment operation.

Measures in place to ensure the protection of the health and safety of employees at work

[29] The general position of the appellant is that while it has not provided a French version of the ASM, it has put in place measures that ensure that its employees have a proper understanding of safe working procedures and has provided them with the material and resources to assist in this regard and allows them to carry out their tasks in a safe environment. Those measures are as follows:

Mandatory Training

[30] All ramp attendants at Jazz, regardless of station or type of aircraft in service at their individual stations, are required to undergo the same various trainings which are based on the ASM. These trainings are provided in station by a local instructor who is also a ramp attendant who has previously received the same training by the person who has previously been described as the trainer of trainers (Ouellette). In Rouyn-Noranda, the local trainer is Gaston Girard. His training by Mr. Ouellette has been provided in French and he provides the training to the local ramp attendants also in French.

[31] According to witness Ouellette, Jazz provides five different kinds of training to ensure that ramp attendants understand the safe working procedures related to their work. Those are:

- (1) initial training upon hiring;
- (2) recurrent training every two years to review all materials, including the initial training and new procedures;
- (3) annual training for specific operations such as de-icing;
- (4) occasional training in class that may be required by a specific situation or where procedures are not followed adequately;
- (5) online training on specific subjects such as training on hazardous goods.

In brief, it is the appellant's evidence and position that all safety related issues related to ramp attendants' tasks are covered through all these trainings, all based on the ASM and given in French. In addition, the information required to perform the work safely, said information being set out in the ASM, is included in French in the training material, which means that every ramp attendant has access to the information and can understand it. In his testimony, trainer of trainers Ouellette noted that ramp attendants do not have the ASM with them during their in-class training, that the ASM was not created for use as a training tool and that ramp attendants are not familiar with the manual, thus being clearly different from in-flight employees who are required to have the necessary manual in class for training and also while actually being engaged in their tasks. On this particular element, it is the appellant's position that it has established that the training and the training material is provided in French and is available in many forms (online, paper

version and videos), thus making sure that every ramp attendant at Rouyn-Noranda station understands the safety procedures and knows how to perform his or her tasks safely.

Supervision

[32] The essence of the appellant's argument on this point is that at Rouyn-Noranda station, there is always a bilingual person available in case of needed assistance, particularly if a situation raises a safety concern. If the employees are not comfortable with performing a given task, they are expected to refuse to carry it out and contact one of the resource persons available, not refer to the ASM. Those resource persons would be:

- the station senior lead who is in charge of supervising the station and can be reached at any time. In Rouyn-Noranda station, that person (L. Boucher) is francophone;
- the station trainer (G. Girard) who is also a francophone;
- the area manager (D. Baril);
- the manager of aircraft services (S. Polak), who wrote the ASM and testified that while he himself does not speak French, he will always ensure there is someone who does in his department;
- the trainer of trainers (Ouellette) who testified he can be contacted by ramp attendants with questions and will provide verbally the necessary information although he would not refer the employees to the ASM;
- the vice president of safety quality and environment, colleagues at the station and finally, the aircraft captain and cabin crew.

Safety Management

[33] Safety is managed in a number of ways at Jazz. They are:

A) Safety checklist

[34] Safety concerns such as execution of tasks not meeting required standard, are examined through in-station weekly audits conducted by the station senior lead (below the wing and above the wing safety checklists) and provided to area manager. This may lead to further training, issuance of bulletins or meeting with an employee. Many sections of the ASM are referred to in those checklists.

B) Jazz occupational health and safety workplace inspection checklist

[35] The regional health and safety committee conducts monthly inspections to ensure that work is done in a safe manner. Said checklist is sent to the area manager and to the general health and safety committee.

C) Safety Management System (SMS)

[36] Employees who have safety concerns can resort to the SMS which has been put in place by the employer to encourage any Jazz employee to report such without fearing a penalty to wit, online by a call to a hotline or through a written report. This can be done in French since the appellant assigns bilingual investigators to examine such reports. During safety training, all employees are informed of the necessity to report any issue or incident relative to safety. In this regard, the vice president of safety, quality and environment (Deveau), who has general oversight of safety throughout the organization, testified that between 300 and 600 such reports are filled out every month in either French or English with those evidencing an urgent situation being prioritized. In the witness's opinion, SMS reports ensure appropriate training and education for all employees, internal reporting, hazard identification, risk assessment and evaluation of corrective action directed at preventing recurrence as well as immediate action intended at eliminating unsafe workplace conditions and thus improve safety. His review of such reports made it clear that there has never been an SMS report complaining of the fact that the ASM is not available in French or that the lack of such translation represented a risk to the safety of ramp attendants.

D) Bulletins

[37] Ramp attendants have access to numerous bulletins (approximately 15 per year) which are issued in French and English and posted online or on a station bulletin board. They contain reminders, refreshers and new information and reproduce extracts and specific sections as well as updates of the ASM. Those bulletins provide contact information to reach the manager of aircraft services (Polak) as well as that of a French speaking resource person accessible at any time.

E) Provision of protective equipment

[38] As a means of avoiding injuries in the work place, the appellant provides its employees with personal protective equipment that includes ear protectors, steel-toe boots, industrial gloves, protective glasses, safety harnesses for aircraft de-icing and high visibility vests.

[39] Given what precedes, it is the appellant's opinion that it has demonstrated that it proactively manages safety and ensures the health and safety of its ramp attendants through a variety of measures that it qualifies as reasonable. In its opinion, those measures are clearly more effective than the translation of the ASM in seeking that the safety procedures are well understood.

[40] As can be derived from all of the above, the conclusions sought by the appellant are essentially twofold. First, it is of the opinion that the direction under appeal should not have been issued by HSO Renaud since he did not do so on the basis of concrete facts that he noted but solely on the latter's perception of employee frustration.

[41] Second, the appellant contends that consideration of the applicable law and jurisprudence makes it clear that the lack of an ASM French translation does not constitute a safety issue. Furthermore, through all the measures put in place, it has ensured that all its employees have a proper understanding of safety procedures, no contradictory evidence on this having been brought by the respondent, and that the ramp attendants have at their disposal enough material and resources to ensure their health and safety and that should they not know or understand their tasks, they have the unfettered right to exercise their right of refusal to work. Along that line, the appellant presents the ramp attendants as experienced workers who repeat the same tasks flight after flight and who therefore do not need an extra level of protection through the translation of the ASM, a document that is not a reference manual and one that even the anglophone employees do not consult.

[42] The appellant has thus fulfilled its general duty pursuant to section 124 of the Code and satisfied the corollary obligations imposed through that provision of the legislation. Having taken all safety measures reasonable in the circumstances and there being no compelling evidence of the need for an extra level of protection, the direction should be rescinded.

B) Respondent's Submissions

[43] The respondent prefaced its submissions by offering a description of the coming into existence and the development of the undertaking known as Jazz Aviation LP which it thus described as a wholly owned subsidiary of Air Canada and the result of the acquisition and/or amalgamation of the following four aviation undertakings: AirBC, Air Nova, Air Ontario and Canadian Regional, thereby making it one of the largest regional carrier in the world, serving more than 80 destinations in Canada and the U.S. as well as providing connecting service to Air Canada and Star Alliance carriers.

[44] It initiated its arguments by referring the undersigned to the Purpose statement found at paragraph 1.1 of Section 1 of the ASM, no doubt to make the point that the ASM, contrary to the position taken by the appellant, is more than simply a reference manual and does deal with safety. That statement reads in part as follows:

[...] The procedures contained in this publication apply to all personnel performing aircraft service duties on the ramp.

The sequence in which these operations are performed is also detailed to standardise arrival and departure routines as much as possible. If the handling or servicing function affects the safety of personnel or equipment, there must be no deviation from the sequence or procedure specified.

While the respondent does not challenge the accuracy of factual circumstances recounted by the appellant in its submissions, it does however emphasize that its position is quite different from the one adopted by the appellant in that the respondent considers the ASM

as an essential work tool to be used in resolving differences that may exist in dealing with specific circumstances involving operational and ground personnel safety.

[45] The respondent has supported its submissions with the testimony by two witnesses. The first, Mr. Pascal Gaudet, is a Rouyn-Noranda station ramp attendant. Employed as such since 1990, Mr. Gaudet initially worked for Air Alliance and subsequently Air Nova, Air Canada Regional and eventually Jazz Aviation. He testified about a specific situation which occurred in the fall of 2011 when Jazz having contracted with CanJet to handle the latter company's aircraft, additional training became necessary for ground personnel, in particular relative to de-icing procedures, as aircrafts used by CanJet differed from those used by Jazz. The required training was provided in French by the appellant using a French speaking trainer. The training material as well as the final test questionnaire however were solely in English. The witness raised the fact that the final test questionnaire was only in English but was told to sign the document which would then be completed by the trainer. Mr. Gaudet testified having informed area manager D. Baril of this with the latter eventually endorsing as normal this manner of proceeding. The exchange of emails between Mr. Gaudet and Mr. Baril filed in evidence (E-30) does however show that Mr. Baril had indicated that the trainer could fill out the test form for the employee where the test questions had been translated to the employee, one would assume for the purpose of formulating the latter's answers.

[46] The correspondence indicated that the previous translation of the questions had been confirmed to the area manager. The witness added that the appellant has made considerable effort to correct the training problems, in particular during the year preceding the hearing into the present matter, and that while he was appreciative of the training being provided in French, he still could not consult the English only ASM. Mr. Gaudet added that the tasks of Rouyn-Noranda ramp attendants, as well as those of Val d'Or attendants are not limited to baggage handling and aircraft marshalling. With reference to Manual 420 "Emergency Procedures", a system of posted envelopes containing emergency response task descriptions, the witness noted additional understanding difficulties as those descriptions are solely written in English.

[47] The second witness, Mr. Gaston Girard, took part in the March 8, 2011, inspection by HSO Renaud as well as in the discussion that occurred in the office of area manager Baril with the HSO. At the time, in addition to being a ramp attendant in Rouyn-Noranda, he acted as OSH employee representative on the local committee and at times acted as local station trainer. According to the witness, one needs no particular qualifications to act as trainer since one is selected on the basis of seniority pursuant to the collective agreement. As local trainer, the witness has been himself trained in French by trainer of trainers Ouellette and he provides the initial training upon hiring as well as the various recurrent trainings to Rouyn-Noranda station ramp attendants in French.

[48] Qualifying his English fluency as average, Mr. Girard indicated that he consults the ASM regularly (online) because it is easier to access than other documents, although other documents of the employer, such as the Air Canada cargo handling manual, do include much information that would also be found in the ASM. He also serves as contact

resource to the other station attendants when at work and also when away from the work place.

[49] Mr. Girard confirmed that for the last year, the appellant has gradually offered its training in French and that it is in the process of completing its bilingual training programs. Furthermore, he confirmed the general testimony by the previous witness, particularly to the effect that the CanJet contract training had been provided by a French speaking trainer (S. Lapointe).

[50] As to his taking part in the HSO's inspection, Mr. Girard has indicated that the issue of the ASM arose only when the HSO asked whether Mr. Girard had questions relative to health and safety, and that HSO Renaud did not read the ASM but simply had a perfunctory look and upon being informed by the witness that the document was available online, indicated that he would have a look.

[51] The respondent reduces the position taken by the appellant in the present case to the latter having attempted to show that the ASM is not essential to an understanding of operational procedures by ramp attendants since there are other means of achieving this at their disposal, such as training documents or material and service bulletins and that this being so, Jazz would have satisfied its duties pursuant to section 125 of the Code and thus would not be required to have the ASM translated.

[52] While the respondent has referred to the employer's duties under section 125 in its written submissions, I have considered this to be in error and that what was meant were obligations pursuant to section 124 which is the provision claimed to have been contravened by the HSO. While the respondent sees as commendable the efforts made by the appellant to address the situation, there nonetheless are still shortcomings in its opinion. It is of the view that the ASM bears essentially on the safety of station operations, and that this cannot be dissociated from employee health and safety. Noting the argument put forth by the appellant that in the case of an operational problem, it has in place a number of resource personnel that ramp attendants can turn to, the respondent notes that those are not clearly identified, nor is there any priority of contact established. Furthermore, the respondent argues that there is no guarantee that those resource persons can be reached at any time since they may be off work, away for the week-end or even no longer in the designated position, for example as a result of a promotion, and that consequently the preferred option should be for the appellant to create a resource position within its undertaking offering a single stop resolution center with competent and bilingual personnel.

[53] In addition, the training material does not address all situations and these loopholes may render consulting the ASM necessary. Furthermore, it is the respondent's view that the evidence does not support a conclusion that consulting the training material would not be a time consuming exercise and thus that the best measure to take would be to have the ASM translated.

[54] This being said, the HSO used his discretionary authority to address issues, whether of greater or lesser importance, in issuing the direction following the appellant's refusal to abide by its AVC. That decision was based on the information held by the latter at the time and was reasonable in the circumstances. The respondent thus argues that in deciding this appeal, I must consider the reasonability of said HSO decision, separate and apart from corrective action that may have been taken by the appellant in the interim, and that while as an Appeals Officer, I can substitute my opinion to the HSO's, this could be done only upon my finding that the HSO decision was unreasonable.

C) Reply

[55] In its reply, the appellant essentially reiterated the points it had made in its primary submissions, adding a number of additional passing comments on the interpretation put by the respondent on some of the evidentiary elements put forth at the hearing. While it is not necessary here to recount all of those, the appellant's reply bore on three main points.

[56] First, as to the actual issue that the undersigned is to determine in this case, the appellant stressed once more that the matter in dispute is not to determine whether the manual central to the appeal, the ASM, is an essential work tool, but rather whether the appellant employer has satisfied all the employer general occupational health and safety obligations that appertain to its general obligation at section 124 of the Code to ensure the occupational health and safety protection of its employees, despite the fact that the ASM is not translated in its entirety.

[57] Second, on the claim by the appellant that the HSO decision/direction had been taken on the basis of incomplete information and the opposing view expressed by the respondent that the HSO's decision had been fully informed, credible and reasoned given the passage of time between receiving an AVC and the subsequent issuance of the direction, the appellant once more referred to the routine nature of the inspection by the HSO, the latter's perfunctory examination of the ASM and his actual lack of knowledge of its contents, as demonstrated through his testimony at the hearing, to state that by definition, a decision is said to be reasonable and reasoned when it is made following an exhaustive collection of elements allowing one to arrive at a conclusion, something that the appellant claims was not the case here.

[58] In addition, the appellant emphasized that the fact that a manager signs an assurance of voluntary compliance while the actual employer, Jazz Aviation in this instance, opts for another avenue of refusing to actually comply, cannot be seen as founding the existence of a right.

[59] Thirdly, on the matter of the list of contact persons that can be reached to provide assistance in French regarding operational elements that may concern the ASM and the claim by the respondent in its submissions that the said list lacks contact priority and specificity, as well as the lack of certainty that one or other individual on the said list can be contacted at certain times such as for example, a summer week-end evening, the

appellant noted that this would constitute unsubstantiated speculation on which a decision by the undersigned could not be based, the respondent not having provided any supporting evidence to this claim at the hearing before the undersigned.

Analysis

[60] As stated at the outset, the issue raised by this appeal concerns the general health and safety protection obligation of an employer, in this instance Jazz, established at section 124 of the Code, relative to circumstances where a document, the ASM, in and of itself is not available in French to the appellant's component of eight employees working as ramp attendants at the Rouyn-Noranda station who are said to be unilingual francophone. I use the word "said" knowingly for the simple reason that apart from the statement made by two of those employees at the hearing as well as the general statement made by the HSO, in all appearance based on what the latter had been told by one of those employees at the time of his inspection, who himself at the hearing stated having an average fluency in English, no evidence was adduced to support the contention that all the said employees were unilingual francophones. This however cannot be viewed as determinative of the issue at hand.

[61] In addition, it is generally recognized by both parties, the witnesses they presented as well as HSO Renaud, that the matter of the absence of a French version of the ASM and the related tasks of ramp attendants in this regard, were never the object of a complaint or refusal to work action by any of the Rouyn-Noranda ramp attendants. Furthermore, it is important to start this determination by also stating what this matter does not entail, given that it is not disputed that the actual ASM manual exists only in English or existed only in English at the time of the inspection by HSO Renaud and the later issuance of the contested direction. At issue here is not the service delivery by Jazz in the two official languages, nor does the issue relate to a question of respect by an employer vis-à-vis its employees who are said to be solely French speaking. This being said, case law has established that the appeal process through which this case is being heard is a *de novo* process, which means that my determination needs to be arrived at on the basis of the evidence presented to the undersigned at the hearing and evaluated on a balance of probabilities.

[62] Stated very summarily, the position taken by HSO Renaud at the conclusion of his inspection was that lack of a French version of the document identified as the ASM, which demonstrated a number of explicit safety and security components, as evidenced by section 2 of said document, made it difficult for unilingual French speaking employees to consult and thus amounted to a violation of the employer's general employee protection duty at section 124 of the Code. At the hearing, the HSO essentially repeated the same thing during his testimony, reiterating that he had not examined the ASM when on site but had had a view online. He acknowledged that this manual is the same throughout the Jazz undertaking, although not aware of anglophone employees circumstances, and asserted his conviction that it is necessary that employees have access to safety information and be capable of referring to and understanding said information. There is little to no indication in the HSO report and none was provided at the hearing

that apart from this translation issue, the HSO had looked at whether generally the appellant satisfied its safety and security obligations, and in particular those that would relate to its general duty pursuant to section 124 of the Code.

[63] As stated previously, the appellant has built its position that the direction should be rescinded on two points to wit first, that the HSO's conclusion arose from an incomplete examination of all relevant facts and circumstances and second, that Jazz is fully meeting its obligations under section 124 of the Code even in the absence of a translated ASM since under the Code it is under no obligation to offer such a translated version. Aside from the absence of a French version to the ASM, the respondent has essentially provided no evidence that the employer's obligation under section 124 has not or is not being satisfied, opting to argue that the HSO's decision was reasonable in the circumstances and should not be disturbed.

[64] The appellant has adduced considerable evidence, which has not been contested or questioned, as to meeting its general obligation under section 124 of the Code. Leaving aside for the moment the matter of the ASM translation, and while this evidence has been enunciated previously in my summary of the appellant's submissions and need not be repeated here, one needs to point out that under title "Measures in place to ensure the protection of the health and safety of employees at work", the said measures are first, the mandatory training of all ramp attendants, whether initial upon hiring, recurrent (2 years), annual for specific operations, occasional as dictated by specific situations or inadequately observed procedures and online training, all dispensed by a French speaking trainer with the training material referring generously to the ASM being available to the employees and this increasingly in French, second, management of safety through safety checklists, OSH workplace inspection checklists, the Safety Management System (SMS) as well as Bulletins and third, the provision of personal protective equipment that includes ear protectors, steel-toe boots, industrial gloves, protective glasses, safety harnesses and high visibility vests. Having regard to what precedes, I am satisfied that from a general standpoint, all these measures by the employer would appear to satisfy the requirements of section 124 of the Code. This being said, one must examine the matter of whether the fact that the ASM is not translated into French impacts on this finding.

[65] The centermost fact is not in dispute. The document identified as ASM exists only in English and the appellant employer has indicated that in its opinion, it does not have to have it translated to satisfy its general obligation of safety and security of employees under section 124 of the Code. As the ASM has been adduced as exhibit (E-1), I have had ample occasion to examine it at length and upon considering its entire coverage, one can see that while numerous aspects may not relate to the tasks of ramp attendants in Rouyn-Noranda, if only because the document applies to some aircraft types that do not land at that station, the document is directed at ramp personnel and their responsibilities for handling and servicing aircraft on the ramp. The purpose section of the document, cited above as part of the respondent's submissions, is particularly instructive in this regard. Furthermore, as I stated at the outset, the whole document is premised by the statement of the appellant employer's Safety Policy, the initial part of which reads as follows:

Safety is our top priority and will not be compromised. We will ensure the health, safety and security of employees, customers and the general public.

We will accomplish this through a Safety Management System (SMS) which ensures:

- Appropriate training and education for all employees.
- Internal reporting, hazard identification, risk assessment and evaluation for taking corrective actions to prevent recurrence.
- Immediate actions to eliminate unsafe workplace conditions and improve safety practices.

Employees are responsible to perform their duties in accordance with established health, safety and security policies, procedures, laws and regulations giving consideration to their own safety, the safety of their co-workers and the safety of our customers.

[66] This last statement closely replicates the stated employee obligations at paragraph 126(1)(c) of the Code which reads “While at work, every employee shall... take all reasonable and necessary precautions to ensure the health and safety of the employee, the other employees and any person likely to be affected by the employee’s acts or omissions” and the whole of the above makes it obvious, in my opinion, that the whole of the ASM, the execution of all procedures and processes therein listed must be read taking into account the employer as well as the employees obligation to abide by the health and safety requirements of the Code, thus attaching to this document a health and safety component that, in my opinion defeats in great part the position adopted by the appellant that this document is not a document destined to serve as reference material to ramp employees. The fact that the document can be accessed online at every Jazz station only serves to reinforce that opinion. This being said, does the fact that the document is not translated, available in English only, impact on the general conduct of the appellant employer under section 124 of the Code in a manner that would support the HSO conclusion?

[67] There are a number of factors that require consideration in addressing this question. Under the Code and the Regulations made pursuant to that legislation, there are stated numerous employer communication obligations, with said communication involving various means and methods, and, in applying established rules of interpretation directed at satisfying the general purposes of the legislation, requiring in my opinion that those means and methods ensure comprehension by those parties at whom such communication is directed. However, nowhere in the legislation (Part II of the Code) and its regulations is there stated any obligation that said communication be conducted in a particular language or languages. While, in my opinion, this would give strength to the argument that it is the employer’s prerogative to communicate with its employees in the language it so chooses, and to some extent, where there is no stated obligation to do so in a particular format, to do so in the manner it so chooses, this must however be tempered by my just expressed opinion that to satisfy the purposes of the legislation, communication to be effective must be capable of comprehension.

[68] Were the absence of an obligation to provide a translated ASM the only factor invoked by the appellant in seeking that the direction be rescinded, I would likely find against the appellant. There are however additional factors that cannot be ignored and acquire great importance in my determination.

[69] First, the training of local trainers and the subsequent training of station employees by said local trainers regarding the ASM is provided in French to French speaking employees, as in the case of Rouyn-Noranda station trainer and ramp attendants. Second, while the ASM may not be considered a training tool *per se*, evidence that I would consider uncontested shows that ASM-based training regarding safety issues related to ramp attendant's tasks and the information required for safe performance of those tasks is part of the training material in French and is provided to the employees, as are major parts of the ASM. Third, the evidence has established that a number of resource persons are available at any given time to provide assistance in French, when needed, to local attendants seeking clarification or explanation of processes or procedures found in said ASM to ensure their safe execution. It is true, as argued by the respondent, that one cannot be certain of the continued availability of all said persons, but this is defeated, in my opinion, by their number. Fourth, the appellant has stated unequivocally that its safety policy is to the effect that an employee is to refuse to execute a task for which the latter feels untrained, this tying into the guaranteed and protected refusal to work right under the Code. Taking all of those factors into consideration, although the actual document that is known as ASM remains in English, it is my opinion that the appellant does ensure that its employees have access to safe work procedures that they can understand. It is thus my conclusion that the appellant is not in contravention of section 124 of the Code.

[70] The appellant has also challenged the direction by HSO Renaud on the basis that in its opinion, the health and safety officer had not conducted a complete and exhaustive examination of the facts and circumstances surrounding this issue, with the result that the latter had not rendered a completely informed opinion as to the existence of the contravention basing the direction. Given the conclusion arrived at in the preceding paragraph, addressing the question of the completeness of the investigation and whether an informed opinion was rendered by HSO Renaud is not necessary to resolving the matter.

[71] I will however formulate the following comment. Section 141 of the Code grants health and safety officers extensive powers to collect the information necessary to formulate the decisions they are empowered to render pursuant to the Code. While the formulation of those powers is characterized by the discretionary nature of their exercise, I am nonetheless of the opinion that the legislator demonstrated in this manner its intention that such authority be exercised fully in the search for needed information. In short, an HSO not only must but is required to be fully informed to formulate one's opinion. In this respect, I share the opinion expressed by my colleague D. Malanka in *Canadian Pacific Railway and Brotherhood of Locomotive Engineers* (previously cited).

Decision

[72] In light of all that precedes, the appeal is granted and the direction is rescinded.

Jean-Pierre Aubre
Appeals Officer