

CANADA LABOUR CODE  
PART II  
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146  
of the Canada Labour Code, Part II  
of a direction issued by a safety officer

Applicant: Canadian National Railways  
MacMillan Yard, Concord, Ontario  
Represented by: Mr. Bernie Mahoney  
System Transportation Officer

Interested Party: United Transportation Union (UTU) - Canada  
Represented by: Mr. Timothy S. Secord  
Alternate National Legislative Director

Mis en cause: Mr. W. J. Behun  
Safety Officer  
Transport Canada Surface (Ontario Region)

Before: Mr. Serge Cadieux  
Regional Safety Officer  
Labour Canada

An oral hearing was held on June 11, 1992 in Toronto, Ontario.

Background

The events that resulted in the fatality of a CN employee on November 20, 1991 at MacMillan Yard were investigated by safety officer W.J. Behun, a Transport Canada officer also appointed safety officer under the Canada Labour Code, Part II. A summary report describing the circumstances of the accident was prepared for the hearing by Mr. J.L. Dafoe, Chief of Operations and also Mr. Behun's supervisor. Mr. Behun is currently retired from Transport Canada.

The report informs us that when Mr. Behun arrived at the scene of the accident "the body and the rail cars had already been removed. Mr. Behun determined that the fatality was caused by a plug type door from rail car CN 411385 falling on the employee. The car had been observed by the employee to have damage to doors on both sides of the rail car. He reported it to the yardmaster and it was decided that it could be safely moved to a location where a carman could examine it. During the movement of the car, the door on the west side of the rail car came in contact with a tank car located on an adjacent track. The employee instructed the locomotive engineer by radio to

stop the movement. While the movement was in the process of stopping the employee was heard over the radio saying "Oh Oh", which sounded to the other crew members as a voice of urgency. The other yard helper proceeded to the scene and initiated a call for assistance and an ambulance. The employee had been struck by the plug door falling from the car...

Observations of the rail car 411385 indicated that it was loaded with rolls of newsprint paper, which had shifted thereby damaging the door and forcing it outward until it protruded sufficiently that it struck the hand rail of the tank car on the adjacent track. This caused the door to move on its track to the end of its travel and ultimately to fall. No witnesses saw where the employee was riding on the movement, however it would be normal for him to ride the end of the last car (CN 411385) of the movement on the side ladder on the east side of the car, the side opposite to the door which had fallen. When the dislodged door contacted the hand rail of the tank car it made a scraping sound which prompted the employee to call on the radio for the locomotive engineer to stop the movement. While the movement was stopping, it is believed that the employee went to cross over behind the stopping movement to see what was happening. The west door of CN 411385 was being pulled northward by the contact with the tank car and when the employee crossed over the door reached the end of its travel, then fell on the employee before he could avoid it."

Upon completing his investigation into this accident, safety officer Behun concluded that a danger existed to an employee while at work at MacMillan Yard. The danger was described as "(...) a box car equipped with plug type doors, was moved with the doors not closed and secured." The employer was directed to "take measures immediately, to protect any person from the danger, by ensuring that box cars discovered having plug type doors not closed and secured, will be inspected by a certified car inspector prior to movement."

### Decision

The issue to be decided in this case is whether the direction given to Canadian National is justified under the circumstances. In my view, the direction is justified and should be confirmed for the following reasons.

The parties to the review, as well as the circumstances surrounding the accident, have convinced me that when a box car equipped with plug type doors, to name only those types of doors, is discovered as having the doors not closed and secured for an unknown reason, the situation constitutes a danger as defined in the Code. In fact, the danger is latent and remains as such until the situation is corrected. Whenever an employee, or for that matter any person, is in the vicinity of the unsecured door, there exists an unacceptable risk that a serious injury will occur if the car is moved without special measures taken, if necessary, to control the hazard.

The employer contends that the box car can be moved safely to another track where it can be inspected and repaired, if necessary, by qualified personnel. The movement may be of short duration if the car is to be set over on an adjacent track or can take longer if it is to travel as much as a mile at very low speed. To protect the employees working on the cars, CN Rail has instructed them, subsequent to the accident, "that when riding a cut of cars containing a car which is known, or suspected to have sustained a shifted load, they must ride at least one car ahead of such car in

the direction of movement." This statement focuses only on those cars having sustained a shifted load contrary to the safety officer addressing all cars discovered having plug type doors not closed and secured. CN's directives are also intended to protect those employees working on the cars, not any person, as stated in the direction, that would be in the path of the moving train with a defective car.

While the employer does not challenge the decision of the safety officer that danger exists when box cars are discovered with plug type doors not closed and secured, it suggested to reword the direction to "permit the movement of such cars to an adjacent track for further inspection and/or repair by Equipment Department personnel. Such movement would only be made after all safety precautions described above were taken." The reworded direction, as suggested by the employer, reads:

**"HEREBY DIRECTS** the said employer at MacMillan Yard, pursuant to Section 145, subsection (2)(a), to take measures immediately, to protect any person from the danger, by ensuring that box cars discovered having plug type doors not closed and secured, will be inspected by a qualified person and that every precaution is taken, including setting the car over for further inspection and repair as required, prior to movement in trains or transfers."

The purpose of the safety officer's direction is to have the damaged box car inspected by specialized personnel i.e a certified car inspector, prior to movement, to assess the damage and determine whether the car can be moved safely to another track for repair, if necessary. The purpose of the suggested reworded direction, as proposed by the employer, is to allow "safe" movement of the said car subsequent to a preliminary inspection by a "qualified person" i.e a member of the crew possibly in consultation with the yardmaster, for further inspection by a certified car inspector, to assess the damage and have it repaired if necessary.

At first glance, the employer's proposal appears quite reasonable. However, in analyzing the reworded direction, one realizes that in effect, the employer is asking permission to move the train or a portion of it, to another track, after having "qualified" members of the crew determine hastily its condition. On this basis, the employer would then have the train or its defective component moved to an adjacent track to have it further inspected by specialized personnel i.e a certified car inspector. Manifestly, the purpose of the final inspection would be to establish the actual condition of the damaged car, to determine whether it requires repairs prior to movement or at least, the interim measures necessary to move it safely to a repair location. Therefore, this final inspection would be performed after the fact. In my view, this proposal is unacceptable and must be dismissed for obvious reasons.

Regrettably, I believe that expediency and economic considerations are dictating the employer's position in this matter to the detriment of the employees' safety. Furthermore, CN's proposal is in violation of and in direct contradiction with Order No. R-37253 "Railway Freight Car Minimum Inspection and Safety Standards" which stipulates under subsection 10(1)

"10. (1) The company shall not place or continue in service a freight car that has any of the defects described in Part II of this Order..."

The defects referred to above include, under subsection 22(2) of the Order, the following description:

"22. (2) The company shall not place or continue in service any car of the following type with any of these defects

(d) a box car which has

(iv) plug type doors not closed and secured before the car is moved, or...

However, the said car could be moved safely, according to the Order, if the company complies with the requirements of subsection 10(2) which stipulates

"10. (2) Notwithstanding the requirements of subsection (1) a freight car having such a defective component may be moved to another location for repair providing the company ensures that

(a) a certified car inspector determines that it is safe to move the car and the maximum speed and other restrictions necessary for safely conducting the movement;

I conclude from the above that, at those locations where certified car inspectors are available, referred to as locations designated for enroute inspection, paragraph 5(1)(b) of the Order, the responsibility to assess and determine the condition of the freight car having a defective component is devolved upon the above inspectors only, not the train crew. Furthermore, those inspectors also assume the responsibility for the car's safe movement. This responsibility requires the inspectors to take into consideration the safety of all employees working on the tracks at MacMillan Yard, including ground crews and other employees and not just those working aboard the train.

I am convinced that, had CN complied with this industry's own Orders, the fatality could and probably would have been avoided. Like the safety officer before me, I agree with the requirements of Order No. R-37253 respecting the movement of cars with plug type doors not closed and secured.

It is evident that if the train is discovered with a defective component on a main track, at a significant distance from the designated location, common sense would dictate that other safety measures may have to be considered and initiated. However, MacMillan Yard is a designated inspection location with certified car inspectors on duty on a 24 hour basis. The direction of the safety officer is made applicable to this location only. In my opinion, this is justified given that MacMillan Yard is the only site investigated by the safety officer.

The same rationale would apply to other types of doors that could be discovered defective. A safety officer would have to investigate those situations before issuing a direction applicable to those other types of doors.

For all the above reasons, I hereby confirm the direction given by safety officer W.J. Behun on March 24, 1992 to Canadian National Railways.

Decision issued in Ottawa this 3rd day of July, 1992

Serge Cadieux  
Regional Safety Officer