Decision: 93-004

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:	Brink's Canada Ltd. Ottawa, Ontario Represented by: Mr. George Vassos, Counsel
Interested Parties:	Mr. Jean Patry Mr. Dan Schlievert Represented by: Mr. Andy Wepruk Canadian Brotherhood of Railway, Transport and General Workers
Mis-en-Cause:	Mr. Jacques Robert Safety Officer Labour Canada
Before:	Mr. Serge Cadieux Regional Safety Officer Labour Canada

An oral hearing was held in Hull, Quebec on February 1, 1993. Mr. Vassos completed the review process by presenting written submissions which were not challenged by Mr. Wepruk.

Background

On March 23, 1992 safety officer Jacques Robert responded to a call from Mr. Jacques Delorme, Brink's Canada Ltd. area manager for Ottawa, who reported that a refusal to work was taking place at #3242 corner of Hawthorn Road and Stevenage, Ottawa, Ontario. According to the report, two Brink's employees, Mr. Dan Schlievert, driver and Mr. Jean Patry, messenger were refusing to work at that location.

The investigation of the safety officer revealed that the refusals were exercised for three reasons, one of which is the notorious three man crew versus two man crew issue. The reader should understand that this issue is partly responsible for the animosity encountered by the safety officer during his investigation. In the instant case, the refusing employees contended that, while constantly present in their minds, this issue was not the basis for their refusals. Brink's Canada Ltd. representatives certainly advocated the opposite.

After completing his investigation, the safety officer concluded there was no danger for the employees to work at the above noted location and, as a result, did not uphold their refusal to work.

The safety officer explained, in the summary report prepared for the hearing, that once he "declared the non acceptance of the employees refusal, Mr. Delorme immediately threatened the employees of being fired if they refused to work again that day. I explained to Mr. Delorme that he could not intimidate the employees or threaten them as it is a violation of the Canada Labour Code. He persisted and I ordered him to stop, however, he continued to intimidate and harass the employees..."

The safety officer expressed the opinion in his summary report that, as a result of the ongoing threats and harassment of the two refusing employees, he had no choice but to issue a direction to Brink's Canada Ltd.. Consequently, a written direction was given to Brink's Canada Limited on July 6, 1992, more than three months after the events of March 23, 1992. The direction, issued under subsection 145(1) of the Canada Labour Code, Part II specifically refers to those same events i.e the refusals to work and the threats and harassment of the refusing employees. It also stipulates that the conduct of Mr. Delorme contravenes subparagraph 147(a)(iii) of the Code and it further directs Brink's Canada Ltd. "to immediately terminate the contravention."

Whether intentionally or not, the written direction was not dated by the safety officer. Furthermore, the summary report confirms that it was the safety officer who advised Mr. Delorme of his "right to appeal my decision on the direction within fourteen days of this day (July 6, 1992) to the regional safety officer". Brink's Canada Ltd. has requested a review of this direction on July 17, 1992.

Arguments for the employer

Mr. Vassos submitted that the written direction given by the safety officer on July 6, 1992 was in fact a confirmation of an oral direction that had been given initially on March 23, 1992. Accordingly, this is a "threshold issue" that is so crucial to the outcome of this case that Mr. Vassos is adamant: this issue must be addressed and resolved firstly by the Regional Safety Officer.

Mr. Vassos further argued that if the Regional Safety Officer agrees that the written direction was in fact a confirmation of the oral direction and since it was impossible on July 6, 1992 to "immediately terminate the contravention" as ordered by the direction, the direction should be rescinded.

To defend the proposition that the written direction was, in fact, a confirmation of the oral direction, Mr. Vassos has submitted, with supporting evidence, that:

1. In regards to the events that occurred on March 23, 1992 Mr. Robert provided an oral direction on that day to Mr. Delorme "that he cease and desist from allegedly threatening or coercing the employees with dismissal for exercising their right to refuse dangerous work."

2. Mr. Robert issued his undated, written direction on or about July 6, 1992, and provided a copy of same to Mr. Delorme on July 6th. Mr. Robert testified that the written direction was intended to confirm the oral direction provided by Mr. Robert to Mr. Delorme on March 23, 1992.

3. The delay in providing a written confirmation of the oral direction only occurred because Mr. Robert needed to consult departmental experts on the procedure to follow in such a case.

Two other facts were reported by Mr. Vassos, however I chose not to refer to them as they do not add more clarity and pertinence to the above proposition.

Decision

To begin with, I should say that the "threshold issue" was not initially viewed by myself as an issue that had to be decided. I was satisfied, on the face of the written direction, that this case could be resolved on its merits without objections of this kind. However, the situation has evolved to the point where I no longer have a choice. I must now consider and rule on this issue prior to deciding anything else.

Consequently, the main issue to be decided in the instant case is whether the written direction issued by the safety officer on July 6, 1992 to Brink's Canada Ltd. is, in fact, a confirmation of the oral direction given on March 23, 1992. If so, then I must look at the consequences of this conclusion. If not, then I must decide whether Brink's Canada Ltd. is prejudiced by a decision that I intend to render on the merits of the case and in the absence of the testimony of Mr. Delorme, a material witness as alleged by Brink's Canada Ltd..

In my view, Mr. Vassos' proposition is quite right. The direction given by safety officer Jacques Robert on July 6, 1992 to Brink's Canada Ltd. is, in my opinion, a confirmation of the oral direction that was formulated and given on March 23, 1992. There are many facts on record which support this conclusion. For example:

i) in his summary report, the safety officer confirms that he ordered Mr. Delorme to stop intimidating and threatening the employees who refused to work that day;

ii) the safety officer testified during the hearing that the written direction handed to Mr. Delorme on July 6, 1992 was intended to confirm the oral direction given to him on March 23, 1992;

iii) It was only because the safety officer needed guidance from his superiors, respecting the procedure for providing a written version of the oral direction, that a delay was necessary;

iv) the direction refers specifically to the events, which were investigated by the safety officer on March 23, 1992, and directs Brink's Canada Ltd. to terminate that contravention;

v) Mr. Vassos reports that Mr. Delorme was formally ordered to "cease and desist from allegedly threatening or coercing the employees with dismissal for exercising their right to refuse dangerous work".

I am satisfied that the written direction under review is, in reality, a confirmation of the oral direction referred to above. The safety officer has testified to this fact as well. Mr. Vassos is evidently of this view. Also, since Mr. Wepruk has not challenged any of the facts submitted by Mr. Vassos, I can only conclude that he also shares that view.

The question I must answer now is what is the consequence of this conclusion? Mr. Vassos would have me rescind the direction on the basis of his proposition and because the written direction, issued more than three months later, is no longer needed and serves no purpose.

I believe I do not have the power to do so at this stage.

The direction is, as it should be, issued under subsection 145(1) of the Code. This provision stipulates:

> 145. (1) Where a safety officer is of the opinion that any provision of this Part is being contravened, the officer may direct the employer or employee concerned to terminate the contravention within such time as the officer may specify and the officer shall, if requested by the employer or employee concerned, confirm the direction in writing if the direction was given orally.

Clearly then, the safety officer is empowered under this provision to give directions orally. In respect of this power, I am of the view that, where a safety officer uses the power of the legislation to give a formal order, or direction, to an employer or employee to comply with the legislation, then that formal order, or direction, has all the force of law at the time it is formulated.

While I believe that written directions should be the norm and oral directions the exception, subsection 145(1) of the Code does make that distinction. In light of the submissions made and the testimonies given during this case, I am convinced that an oral direction was formulated and given to Mr. Delorme on March 23, 1992. That is the direction, dated March 23, 1992 that has the force of law.

Furthermore, there is no requirement under the above provision for the safety officer to confirm the direction in writing unless he is requested to do so by the recipient. The safety officer testified that neither Brink's Canada Ltd. representatives or any of the refusing employees i.e Mr. Jean Patry and Mr. Dan Schlievert requested that he confirm the direction in writing.

It is, quite appropriately, a policy of Labour Canada that any direction given orally be confirmed, as soon as possible, in writing. No doubt that confirming a direction three and a half months later is not what is envisaged by this policy. In the instant case, the delay is unreasonable and could be perceived as causing prejudice to Brink's Canada Ltd..

Nonetheless, a written confirmation of an oral direction does not create a new direction in itself. Neither does it generate new rights.

I am surprised that the safety officer was so specific in advising Mr. Delorme "of the right to appeal my decision on the direction within fourteen days of this day (July 6, 1992) to the regional safety officer." (my underlining) The determination of the timeliness of a request for review of a direction is, under the Code, the sole responsibility of the Regional Safety Officer. This is so because the timeliness of a request for review of a direction determines, among other things, whether the Regional Safety Officer has jurisdiction to hear the case submitted. In this instance, timeliness marks a turning point in the case.

Subsection 146(1) of the Code establishes the time frame to request a review of a direction. It stipulates:

> 146. (1) Any employer, employee or trade union that considers himself aggrieved by any direction issued by a safety officer under this Part may, within fourteen days of the date of the direction, request that the direction be reviewed by a regional safety officer for the region in which the place, machine or thing in respect of which the direction was issued is situated.

The fourteen day time limit set by subsection 146(1) of the Code is a mandatory time limit. Failure to meet this requirement removes the legal capacity of the Regional Safety Officer to deal with this matter. Furthermore, the Regional Safety Officer has no discretion respecting this time limit and, consequently, no power to extend it. To ignore this mandatory time limit and to proceed further in this case, without the authority to do so, is equivalent to acting without jurisdiction in this matter.

Therefore, the applicant is advised that the fourteen day time limit set by the Code to request a review, which request was made on July 17, 1992, of the oral direction given by safety officer Jacques Robert to Brink's Canada Ltd. on March 23, 1992 has elapsed. Considering that the Code does not contain any provision authorizing the Regional Safety Officer to extend time limits, I consider that I do not have jurisdiction to hear this case.

For all the above reasons, this request for review of the above referenced direction is hereby dismissed.

Decision rendered on March 29, 1993

Serge Cadieux
Regional Safety Officer