

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
Laurentian District, Transport
Montreal, Quebec
Represented by: Normand Bishop
Co-ordinator, Quality at Work

Interested Party: Patrick Gilmore
Yard master, Turcot Yard
Canadian National
Laurentian District, Transport
Montreal, Quebec
Represented by: Robert Michaud
Quebec legislative president
United Transportation Union

Mis-en-cause: Yves Jégou
Safety Officer
Human Resources Development (Labour)

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development (Labour)

The oral evidence was heard on November 25, 1993, in Montreal, Quebec.

Summary of the facts

The records submitted to me in this case show that on June 15, 1993, Yves Jégou, safety officer with the Human Resources Development Department, received a complaint from a Canadian National (CN) employee, Patrick Gilmore. The complaint referred to disciplinary action taken by CN against Mr Gilmore for allegedly exercising his right to refuse to work on December 16, 1991.

The investigation conducted by Mr Jégou in this case focussed on two matters: the radio communication procedure used in the Turcot Yard and the disciplinary action taken against Mr Gilmore. In both matters, the safety officer issued directions.

In the first instance, CN did not dispute the direction, which, let me say in passing, was issued under subsection 145(2) of the Canada Labour Code, Part II, and related to a hazardous situation. CN elected to comply with the direction. In the second instance, CN disagreed with the direction issued pursuant to subsection 145(1) of the Code, on the grounds that the direction by the safety officer had no bearing on Mr Gilmore's situation on December 16, 1991. The direction read as follows:

1. Subparagraph 147(a)(iii) of the Canada Labour Code, Part III (sic)

On December 16, 1991, Patrick Gilmore, yard master, Turcot Yard, took advantage of his right to refuse to work in case of danger to other employees under his responsibility as yard master. Disciplinary measures (suspension, demotion) were taken against Patrick Gilmore because he sought the enforcement of the provisions of this Part.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contravention no later than June 29, 1993.

Evidence by the employee

Mr Michaud explained the circumstances surrounding the events on December 16, 1991 as follows:

Patrick Gilmore is yard master at the Turcot Yard for Canadian National. This position is very demanding in that Mr Gilmore assumes the heavy responsibility of managing the various activities taking place in the marshalling yard. This yard is very busy, and train congestion is common. The activities taking place in the yard are as varied as the companies doing business there, for example, intermodal traffic, container traffic, and piggybacks. It is the responsibility of the yard master to co-ordinate all these activities while ensuring that the safety of everyone involved in the yard is not compromised.

Mr Gilmore stated that on December 16, 1991, he had refused to work pursuant to the Canada Labour Code, Part II. He had informed Mr Bishop, his immediate supervisor, that he refused to communicate with the carmen on a radio frequency which was accessible to them at all times and which allowed continuous monitoring. He told Mr Bishop that any radio communication would henceforth only be with Mr Pelletier, the car supervisor, on a specific frequency for direct communication with him. This refusal, claimed Mr Gilmore, was intended to protect the safety of all the parties in the yard in view of the chatter on the radio.

Mr Gilmore explained the reason for his refusal by the fact that the carmen, and others in the yard, had been talking on the radio without giving their names and had been passing on unnecessary comments and personal messages. Some very unpleasant remarks had been made on the radio about him by Mr Pelletier, the yard's car supervisor, and this created an intolerable situation for Mr Gilmore. Mr Gilmore told us that his authority was being flouted, which in his opinion jeopardized the safety of everyone in the yard.

The situation deteriorated to the point that Mr Gilmore told Mr Bishop, his immediate supervisor, that very day that an investigation had to be conducted about incidents allegedly involving Mr Pelletier on a previous date. Mr Gilmore also said that in future he would be using the communication procedure which he had established recently and which was identical with the procedure used in other yards. That procedure called for direct communication between the yard master and the supervisors in general including the car supervisor. In his opinion, that was the only way to ensure the safety of the employees in the yard.

Mr Bishop told Mr Gilmore that his attitude was unacceptable since he was jeopardizing the safety of all the employees in the yard. Mr Bishop ordered him to follow the current communication procedure. Mr Gilmore refused and was then relieved of his duties. A subsequent internal investigation by the company resulted in disciplinary action against Mr Gilmore.

Evidence by the employer

Mr Bishop maintained that on December 16, 1991, Mr Gilmore did not exercise his right to refuse to work pursuant to the Code, as he subsequently claimed. On that day there was a difference of opinion, a disagreement between two individuals: Mr Gilmore and Mr Pelletier. CN reacted in accordance with its labour relations procedures and conducted an internal investigation, as required in such a situation. Mr Bishop did not disagree that reprisals had actually been taken against Mr Gilmore. These reprisals were legitimate, however, since Mr Gilmore had disobeyed an order from his immediate superior.

According to Mr Bishop, this refusal to comply with the order from his immediate superior relating to radio communications is a labour relations problem. The communication procedure used by Mr Gilmore was contrary to the company's regular procedures for the yard whereby any decision or message from the yard master was to be communicated on the continuous monitoring frequency so that all carmen would be aware of the activities in progress in the yard and of any unscheduled changes. According to Mr Bishop, the safety of all the carmen in the yard was involved.

Decision

To resolve this matter, I must first determine whether Mr Gilmore did in fact exercise his right to refuse to work on December 16, 1991.

If I conclude that there was a refusal in accordance with the Code, I will have to determine, as I indicated at the hearing, whether the safety officer had the authority to issue the direction concerned in this review. If the safety officer exceeded his authority, I will have to rescind the direction, as provided for in section 146 of the Code. If the safety officer was justified in exercising his authority, I will confirm the direction or vary it accordingly.

If I conclude that the right to refuse to work was not exercised on December 16, 1991, I will rescind the direction for lack of jurisdiction in labour relations matters. In point of fact, such matters do not come within the purview of Part II of the Code.

Mr Gilmore stated that he had exercised his right to refuse to work on December 16, 1991, and that it was for this reason that reprisals had been taken against him. Mr Michaud agreed. Obviously, the safety officer shared this opinion since he specifically referred to it in his direction and, in any event, he so testified at the hearing. Mr Bishop contested Mr Gilmore's refusal but nevertheless recognized that there was a very important element of safety in the matter.

While the procedure set out in the Code was not followed in this case, I am of the opinion that Mr Gilmore exercised his right to refuse to work on December 16, 1991. He also reported a situation affecting the safety of the employees to his employer. He sought out his union representative. In my opinion, Mr Bishop should have carried out an investigation in the manner stipulated in sections 128 and 129 of the Code simply because a very important and very obvious safety matter was involved since Mr Gilmore had decided to change the radio communication procedure. I cannot, however, dwell on the matter of whether the procedure set out in the Code was followed since it is not the point at issue at this time. I must focus my attention on the direction issued by the safety officer.

Obviously, having concluded that the right to refuse to work was exercised, I must now decide whether the safety officer had the authority to issue the direction because the Code does contain a procedure for resolving problems of the type experienced by Mr Gilmore. This procedure is set out in sections 133 and 134 of the Code and can be used by an employee who has refused to work, subject to certain conditions. These sections deal specifically with reprisals taken following a refusal to work.

There is another reason why I must determine whether the safety officer had the authority to issue the direction. Mr Gilmore stated at the hearing that he had complained to the Canada Labour Relations Board as set out in subsection 133(1) of the Code. The Board apparently refused to accept the complaint on the grounds that Mr Gilmore had not submitted it within the time limit set in subsection 133(2) of the Code. Mr Michaud argued that Mr Gilmore was aggrieved because he had exercised his right to complain to the Board and was refused the protection of the Code on the basis of a point of law.

It therefore seems that there are two concurrent procedures in the Code that are designed to resolve the same situation. There is the procedure set out in subsection 145(1) of the Code and the one set out in sections 133 and 134 of the Code. The first procedure is general and relates to all the provisions of the Code. The second is specific and relates to the measures contrary to paragraph 147(a) of the Code taken when an employee has exercised the right to refuse to work in accordance with the Code.

I have already dealt with this apparent conflict in a previous unreported decision, No 91-004, Employment and Immigration v Bergeron, where I stated the following:

The first procedure involves a safety officer who acts pursuant to the Code and who may issue directions in order to terminate a contravention. Ordinarily, a direction may lead to criminal proceedings in which the party at fault may be fined. However, it is not the primary purpose of criminal courts to become involved in industrial relations in order to settle problems between employers and employees.

The other procedure involves the PSSRB¹. The Board may act pursuant to sections 133 and 134 of the Code precisely in order to settle situations in which disciplinary measures have been taken with respect to an employee who has exercised a right to refuse to work under the Code. Pursuant to section 134 of the Code, the Board may require that remedial measures be taken in such a way as to rectify the situation and, where necessary, that the relief it considers appropriate be made.

It is therefore clear that the purposes contemplated in these two procedures are basically different. I have no doubt that the legislature wished it so, with a specific object in mind that I will not deal with here. However, I must take this fact into account in my decision. Accordingly, I must make a choice between two procedures: a general procedure that may be set in motion through a safety officer's actions pursuant to subsection 145(1) of the Code and a more specific procedure that may be set in motion by the PSSRB* pursuant to section 133 of the Code.

There is a rule of interpretation in law to the effect that a specific provision takes precedence over a general provision. In this case, the specific provision is that contemplated in section 133 of the Code. Consequently, I am of the opinion that Mr Bergeron's complaint should be dealt with by the Board, inasmuch as he did in fact assert the right to refuse to work.

For the same reasons that I have just given, I am of the opinion that it is the Board that had the authority to deal with Mr Gilmore's case and not the safety officer. In my opinion, the officer overstepped his authority by issuing a direction to Canadian National. The role of the safety officer in such a case is not to take the place of the Board but to steer the employee toward the Board. In situations where the employee does not respect the time limits, the safety officer can only advise the employee and the employer on the best way to resolve the problem and cannot impose the resolution of the case by the use of the authority conferred on him by the Code.

For all these reasons, I am rescinding the direction issued by safety officer Yves Jégou on June 15, 1993 to Canadian National.

Decision rendered this December 20, 1993

Serge Cadieux
Regional Safety Officer

¹ For employees of the Public Service of Canada, a reference to the Board is a reference to the Public Service Staff Relations Board (PSSRB).

* Translator's note: "employJ" ("employee" in English) was used in the French version.