

TRANSLATION FROM FRENCH
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: Air Canada
Montreal International Airport (Dorval)
Montreal, Quebec
Represented by: Louise-HJIPne SJnJcal, Lawyer

Interested Party: Canadian Union of Public Employees
Represented by: Reynoud Wijtman
Co-Chair, Safety and Health Committee

Mise en Cause: Pierre Doucet
Safety Officer
Transport Canada, Aviation

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

On 6 July 1994, safety officer Pierre Doucet issued a direction (see Annex) under paragraphs 145(2)(a) and (b) of the Canada Labour Code, Part II, to Air Canada. On 7 July 1994, in response to a request by Air Canada for a review of this direction, I visited a DC-9 aircraft and closely inspected the seats that are the subject of the disputed direction. The parties were then given the opportunity to make submissions to me in this matter.

Summary of the facts

According to the safety officer, the problem regarding the seats used by flight attendants¹ during commercial flights on Air Canada DC-9 aircrafts has existed for a number of years. The safety officer, Pierre Doucet, intervened in this case following a complaint from Mr. Wijtman, who is both Co-Chair of the Air Canada Safety and Health Committee and representative of the Canadian Union of Public Employees.

¹ References to a problem regarding the seats are to be understood as meaning a problem when two flight attendants are required to occupy the same seat at the same time.

The safety officer explained that on 13 April 1994 he conducted an inquiry in this matter and visited an Air Canada DC-9 aircraft with a company engineer and employee representatives. The officer found that two people could not sit comfortably on the seats in question. After discussing the matter with the parties, the officer concluded that if certain events occurred, such as a crash, a difficult landing or even turbulence, the flight attendants sitting on these seats could suffer head or general body injuries.

Although the complaint file was reactivated for administrative purposes on 4 May 1994, it was only on 6 July 1994 that the safety officer issued a direction to Air Canada under paragraphs 145(2)(a) AND (b) of the Canada Labour Code, Part II. For all practical purposes, the safety officer put these seats off limits until Air Canada complied with the direction.

Air Canada made an oral request for a review to the regional safety officer on 7 July 1994, arguing the urgency of its request. Since I recognized that the request for a review was indeed urgent, and since the regional safety officer is not authorized to stay a direction, I carried out a summary inquiry the same day at Montreal, Quebec.

Employer's submission

Ms. SJnJcal argued that the safety officer had issued a direction relating to a situation that did not constitute a danger within the meaning of the Code. In short, according to Ms. SJnJcal:

1. the seats referred to in the direction comply with FAA (Federal Aviation Agency) requirements and are certified by the manufacturer, Douglas;
2. these seats have been in existence for 40 years and Air Canada has used them regularly for 25 years;
3. Air Canada has never received any accident reports regarding the use of these seats and no compensation claims have been submitted during all these years and up to the present;
4. the safety officer conducted his inquiry three months earlier, and although in his view there was a problem he did not see any immediate danger, since he issued his direction only on 6 July 1994, without advising the employer or proposing any period of time for "compliance";
5. this direction has serious economic consequences in an industry already in a weak position, and Air Canada is unable to bear this burden. Ms. SJnJcal also said that this direction would cost Air Canada at least \$400,000 a day, since the direction applies during the peak period.
6. the safety officer and the safety and health committee representative reacted in this case without allowing for the fact that Air Canada had decided to make certain changes, including padded surfaces, following discussions with the safety and health committee.

Mr. Famery, head of labour relations with Air Canada, confirmed that there had been emergency situations with DC-9 aircraft, but there had been no consequences linked to use of these seats. To the best of his knowledge, based on his long experience in the air transportation field, there had never been an incident relating to these seats.

Employee representative's submission:

Mr. Wijtman was involved in this case from the beginning as safety and health committee representative and union representative. In a document submitted by the safety officer, Mr. Wijtman states: "I want to be involved in the investigation of this complaint".

Mr. Wijtman stated that two flight attendants cannot sit properly on these seats. If a strong force were to be exerted in a forward direction, a back injury could result. In his opinion the seats are neither comfortable nor safe, and we should therefore not wait for an accident and injury before reacting.

Decision

On 7 July 1994, I rendered the following decision:

"On the basis of the findings of my inquiry and the points of law to be explained later in the reasons for my decision, it is my decision that use of the forward and aft seats for flight attendants in DC-9 aircraft is not dangerous.

I accordingly RESCIND the direction issued on 6 July 1994 to Air Canada under paragraphs 145(2)(a) and (b) of the Canada Labour Code, Part II, by safety officer Pierre Doucet."

The following are the reasons for my decision.

Reasons for decision

Following my inquiry, the issue to be resolved in this case was the following: Since the safety officer issued his direction under paragraphs 145(2)(a) AND (b) of the Canada Labour Code, Part II (hereinafter "the Code"), did there exist, at the time of the safety officer's inquiry a hazard or condition constituting a danger to employees such that it was necessary for the officer to intervene immediately to protect the employees? In addition, since the officer applied the provision in paragraph 145(2)(b) of the Code, I must also ask myself, if I find that a danger exists, whether the impossibility of immediately protecting the employees against the danger was such that it was necessary to direct that these seats not be used.

In order to answer these questions, I must consult the definition of the word "danger" in subsection 122(1) of the Code and apply this definition in light of the case law. "Danger" is defined as follows:

"danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected.
(underlining added)

The courts have had many opportunities to interpret the scope of the term "danger". From this case law two extremely important points have emerged that have guided me in my decision.

The first point is that the danger must be immediate. Thus, the expression "before the hazard or condition can be corrected" has been associated with the concept of "imminent danger" that existed before the Code was amended in 1984. In *Pratt*, the Vice-Chairman of the Canada Labour Relations Board, Hugh R. Jamieson, wrote:

"...Parliament removed the word "imminent" from the concept of danger...but replaced it with a definition that has virtually the same meaning."

The second point I take from a large number of decisions is that the employee's exposure to the hazard or situation must be such that the likelihood of injury is obvious. Accordingly, the danger must be more than hypothetical, or there must be more than a small probability of its becoming a reality. The danger must be immediate and real, and no doubt must remain regarding its imminence. It must be sufficiently serious to justify, in the case under consideration, discontinuation of use of the seats for flight attendants.

In light of these principles, I have decided that no danger exists in this case. Accordingly, it cannot be claimed that danger, such as possible back or head injuries from using the seats, could occur at a future time. Danger within the meaning of the Code is imminent or immediate danger which is real and present at the time of the safety officer's inquiry and sufficiently serious to justify non-use of the seats referred to in the direction. It is clear at this point that there is a marked difference between the commonly employed concept of danger and its meaning under the Code.

The Federal Court of Appeal had the opportunity to clarify the regional safety officer's function when it considered an appeal from a safety officer's direction. The Court returned to the concepts stated above in *Bonfa v. Minister of Employment and Immigration*. On behalf of the Court The Honourable Mr. Justice Louis Pratte wrote:

"...These considerations were unrelated to the questions which the regional officer had to answer, and in particular to the first of these questions as to whether at the time the safety officer did his investigation the respondent's workplace presented such dangers that employees were justified in not working there until the situation was corrected."

In this case also, the Federal Court of Appeal clarified the function of the safety officer when he conducts an inquiry following a refusal to work in order to determine whether a danger exists. The Court said:

"...the function of the safety officer is solely to determine whether, at the time he does his investigation, that place presented such dangers that employees were justified in not working there."

The wording of the safety officer's direction confirms that he wished to settle a hypothetical situation that had been in existence for a very long time. Air Canada's very long experience with these seats certainly does not accord with what Parliament defined as a danger. Daily use of these seats without any incidents affecting the back, head or any other part of the body for more than 25 years cannot and does not constitute a danger within the meaning of the Code.

I sat in these seats and fastened the safety belts. For all practical purposes these belts are in fact harnesses. If anyone on these aircraft is protected, in my opinion the flight attendants are. It is a little difficult to fasten the seat belts which, by the way, are anchored at four separate points, but once this is done it is practically impossible to move on the seat. Because of the belts, these seats are very safe.

However, I agree with the flight attendants that it may be very uncomfortable to position oneself on the seat when sharing it with a colleague, depending on the physique of each person. However, it must be admitted that flight attendants normally use the seats for only a few minutes during takeoffs and landings.

There was clearly no danger on 6 July justifying the issue of the direction by the safety officer, nor was there any reason to direct that the seats not be used. If the past is a reliable indicator of the future, I would say that it is extremely unlikely that an employee using these seats would sustain a serious injury. And if there is a potential risk that a flight attendant might sustain an injury when using these seats, this risk is so remote that in practical terms it is highly unlikely. The situation considered by the safety officer presented no real, immediate or serious hazard to the safety and health of the flight attendants.

Having said this, in my opinion a very simple and inexpensive solution could be found to the problem of the seats used by flight attendants. Air Canada has already devised an additional cushion to protect the head in situations where it might come into contact with an unprotected part of the aircraft cabin. I am convinced that any solution to the problem associated with using these seats should be discussed with the Air Canada safety and health committee in co-operation with the company's engineering department.

I wish to make it clear that the review conducted in this case and my decision to rescind the direction are not intended to criticize the decision of the safety officer, who made a decision that he considered correct in the circumstances. It has emerged that the safety officer erred in issuing this direction. In situations where an error of this kind is obvious, it is the duty of the regional safety officer to rectify it without delay.

Issued in Hull, Quebec, 15 July 1994

(signed)
Serge Cadieux
Regional Safety Officer

CANADA LABOUR CODE
PART II - OCCUPATIONAL SAFETY AND HEALTH

DIRECTION TO EMPLOYER UNDER PARAGRAPHS 145(2)(a) AND (b)

On 13 April 1994, the undersigned conducted an inquiry in a work place, a DC-9 aircraft operated by Air Canada, an employer subject to Part II of the Canada Labour Code, located at PO Box 9000, St-Laurent, Quebec, H4Y 1C2, a location sometimes referred to as Montreal International Airport, Dorval.

In the opinion of the safety officer, a situation exists in the work place which constitutes a danger to an employee while at work, as follows:

Forward seat (2 position) for flight attendants on DC-9 aircraft

Effective today, this seat is restricted to a single flight attendant, who must occupy the left side of this seat when facing aft, since the seat does not provide an adequate and sufficient surface for use by two flight attendants. In the case of an accident or any other incident involving a major vertical component (rough landing), there may be serious consequences for the person who has only one buttock on the seat. Furthermore, in the event of a crash or incident involving a lateral acceleration or deceleration component, or during flights with slight, moderate or severe turbulence, the head of the flight attendant seated close to the forward door could be thrown against it.

Aft seat (2 position) for flight attendants on DC-9 aircraft

Any two flight attendants are prohibited from sitting in the aft seat if, as a result of their respective physiques, one of the two cannot safely support his or her back when seated. In the event of an accident or incident involving a lateral acceleration or deceleration component, or during flights with slight, moderate or severe turbulence, there may be serious consequences for the flight attendant seated in a twisted position. Furthermore, even if the respective physiques of the flight attendants allow them to sit on the aft seat, there is still a risk of injuries at head level because of the lack of padded surfaces on the sidewalls adjacent to these seats.

You are therefore HEREBY DIRECTED, under paragraph 145(2)(a) of the Canada Labour Code, to immediately protect these persons from the above-mentioned dangers.

You are ALSO HEREBY DIRECTED, under paragraph 145(2)(b) of the Canada Labour Code, that these seats not be used for cabin personnel until these directions are complied with.

Done at Dorval, this 6th day of July 1994.