Decision No. 94-010

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:	CN North America ("CN Rail") Concord, Ontario Represented by: Kenneth R. Peel, Counsel
Respondent:	J.L. Crawford Locomotive Engineer Represented by: J.H. Houston Brotherhood of Locomotive Engineers
Mis en Cause:	W.B. Armstrong Safety officer Transport Canada - Surface
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada

An oral hearing was held on August 25, 1994 in Toronto, Ontario.

Background

The particulars of this case have been described at length by the parties and are on record. Suffice it to say that on May 14, 1994, Locomotive Engineer Jeffrey L. Crawford exercised his right, under the Canada Labour Code, Part II (the "Code"), to refuse to work. The Statement of Refusal to Work signed by Engineer Crawford reads, literally, as follows:

> ENGR CRAWFORD STATED HE REFUSED TO OPERATE TRAIN B411 OVER GUELPH SUB WHEN ACCOMPANIED BY A CONDUCTOR NOT FAMILIAR WITH THE GUELPH SUBDIVISION (SILVER TO LONDON JUNCTION). ENGINEER FELT HE HAD SUFFICIENT RESPONSIBILITY TO OPERATE TRAIN IN SAFE MANNER & IN ACCORDANCE WITH CROR WITHOUT BEARING ADDITIONAL RESPONSIBILITY OF PERFORMING CONDUCTOR DUTIES WHILE OPERATING ON THAT TERRITORY.

The safety officer reported, in his narrative report into the refusal to work, that:

> "Engineer Crawford stated he refused to operate train B411 over the Guelph Subdivision because the conductor had not made any trips over that territory and had requested a pilot[1] be assigned to their train. He himself admitted he had only made one trip over that terrain in the previous six months, and three possibly four trips in the previous five years."

The safety officer concluded, following his investigation into this matter, that "the operation of freight trains over the Guelph Subdivision with a crew member(s) not familiar with the territory, constitutes a danger to the safety of train employees, while at work." A direction was given to CN Rail under paragraph 145(2)(a) of the Code to "take immediate measures to protect the employee (employees) from the danger by providing a qualified employee familiar with the territory in question (referred to as a pilot) to accompany the employee(s) over that subdivision."

It should be noted at this point that the safety officer testified that there was no immediate danger to the crew and neither to Mr. Crawford when he investigated the refusal to work at the Malport Yard. Danger would exists only upon entering the Guelph subdivision. The safety officer stated that his decision is based on his experience with the Guelph subdivision territory.

Submission of the Employer

The detailed submissions of Mr. Peel are on record. A Summary of Employer's Principal Submissions was included in the employer's written submission. It reads as follows:

1. No "danger", as defined by section 122(1) of Part II of the *Canada Labour Code*, existed at the material times of the refusal to work and of the Safety Officer's inquiry and issuance of direction;

2. On the facts, the Locomotive Engineer J.L. Crawford was not unfamiliar with the Guelph Subdivision rail territory and thereby did not require the provision of a pilot, whether for reasons of safety or to ensure compliance with the relevant provisions of the applicable collective agreement;

3. The engineer involved, J.L. Crawford, may not rely upon the alleged lack of familiarity with the territory of crew member, Conductor M.J. Helps, where that other employee has not refused to work nor asserted the existence of a danger.

4. The circumstances were such, where the complainant employee was familiar with the territory in question, that any "danger" (which is not admitted but in issue) was inherent in the employees' work and/or constituted the normal condition of employment, within the meaning of subparagraph 128(2)(b) of the *Canada Labour Code*;

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[1] PILOT: an employee assigned to a train when the engineman or conductor, or both, are not fully acquainted with the physical characteristics or rules of the railway, over which the train is to be operated.

[2]5. The employer does not admit of the bona fides (good faith) of the exercise of the refusal to work in the circumstances hereof, having regard to prevailing conduct of union-management issues;

6. The Safety Officer failed to exercise natural justice and to reasonably hear the position of the employer, and to determine all of the relevant circumstances, including policies and procedures and practices, prior to issuing his direction(s);

7. The Safety Officer failed to consider that there is sound basis for the employer's policy, which is to supply a single pilot, being a qualified employee familiar with the territory in question to accompany the employee(s) over the subdivision, in the circumstances of "conductor-only" operations, only where the locomotive engineer and conductor (representing the crew of such an operation) are both unfamiliar with the territory in question;

8. The Canadian Rail Operating Rules, and other rail operating practices and instructions, do not require the provision of a pilot in such circumstances;

9. Such further or other submissions as the Regional Safety Officer may hereafter give leave to consider, or as may seem just.

Submission of the Employee

Mr. Houston agreed that no danger existed at the time of the work refusal and of the safety officer's inquiry and issuance of direction. Nonetheless, Mr. Houston stated that the danger would have become evident upon their entry into the Guelph subdivision. The danger, stated Mr. Houston, "was created by Helps' unfamiliarity with the Guelph subdivision...".

Furthermore, Mr. Houston is adamant: Mr. Crawford had reasonable cause to believe that danger did exist when he refused to work. On this issue, Mr Houston stated "we submit that Mr. Crawford's knowledge of the circumstances leading to his apprehension of danger lies within the fact that because of his knowledge of the requirements, both positions of conductor and locomotive engineer and his knowledge and familiarity with the operating rules, and his switching experience, his familiarity with timetables and general instruction requirements, all of the above gave him reasonable cause for belief in the presence of a dangerous situation the moment he operated his train on the Guelph subdivision and further during switching operations."

Decision

The parties have described with many details, in the oral and material evidence, the numerous responsibilities of the locomotive engineer, the conductor and the company CN Rail in the instant case. They have explained the difficulties that may be encountered on a track and the consequences of making errors. They added, for my benefit, explanations respecting the operation of a train in terms of clearances, restrictions, meets with another train, crossings, switching

[2] Evidence was not called by the employer respecting this issue.

operations, timetables, visual and audio communications, and the list goes on. In other words, the complexity of operating a train was well explained. However, I would surely not do justice to the parties in attempting to describe, in this text, such a complex operation.

My responsibility, in reviewing a direction, is stipulated at subsection 146(3) of the Code. It provides as follows:

> 146. (3) The regional safety officer shall in a summary way inquire into the circumstances of the direction to be reviewed and the need therefor and may vary, rescind or confirm the direction and thereupon shall in writing notify the employee, employer or trade union concerned of the decision taken. (emphasis added)

In the instant case, the circumstances which gave rise to the direction to be reviewed are a refusal to work exercised by Mr. Crawford and the subsequent investigation by a safety officer.

Before proceeding further with this matter, one issue, which I note is of great concern to Mr. Houston, should be put to rest. The issue, for which the employer has called no evidence at the hearing, is the reasonableness of the refusal to work. Personally, I do not doubt for an instant that Mr. Crawford was genuinely concerned for his safety when he refused to work and that he acted solely with that concern in his mind. Obviously, neither did the safety officer who concluded that danger existed to the refusing employee. Unless it could be demonstrated that the safety officer, a reasonable and objective person, was bias, partial and deceitful, it would be very difficult in any case to substantiate an allegation of a frivolous exercise of the right to refuse under the Code.

Having said this, I must look at the investigation of the safety officer and determine whether at the time of his investigation, a danger, within the meaning of the Code, existed to Mr. Crawford. The Federal Court of Appeal expressed its view respecting the role of the safety officer when investigating into a refusal to work. In Bonfa v. Minister of Employment and Immigration, Court file No. A-138-89, the Honourable Louis Pratte of the Federal Court of Appeal said, in respect of the investigation of the safety officer,

> The function of the safety officer is not to decide whether the employee was right in refusing to work in his workplace but whether, at the time the officer did his investigation, a condition existed in the workplace that constituted a danger to the employee. If the officer concludes that there was a danger, he must give the direction he considers appropriate under s. 145(2).

Clearly then, in a refusal to work situation, the responsibility of the safety officer is to determine whether danger exists at that point in time when he is investigating. The investigation of the safety officer must consequently be an objective one as opposed to the refusing employee who may refuse on the basis of subjective considerations. Therefore, in my opinion, the safety officer must identify a specific hazard or condition, one that is real and that exists when he is investigating, which hazard or condition is so severe and imminent that unless he takes immediate action to protect the employee, that employee is likely to be injured. The safety officer's general experience with a particular subdivision, such as the Guelph subdivision, does not meet the above criteria.

I have dealt with the concept of danger in many decisions. In Air Canada vs. Canadian Union of Public Employees, unreported Decision No. 94-007, I wrote the following:

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

The apprehension of danger expressed by Mr. Crawford and Mr. Houston certainly merit serious consideration and attention. I surely do not condone the decision of CN Rail to have the locomotive engineer assume additional responsibilities for the operation of a train in territory where the lack of familiarity with the territory can be a serious handicap. However, the apprehension of danger or the possibility that an incident occur, either at a crossing or along the track or at any other moment on the Guelph subdivision, constitutes a hypothetical situation which, in my opinion, does not come within the realm of the right to refuse dangerous work. The safety officer did not gather any factual evidence, during his investigation, that a hazardous situation would occur.

The evidence shows that Mr. Crawford was familiar, to a certain extent, with the Guelph subdivision having himself admitted he had only made one trip over that terrain in the previous six months, and three possibly four trips in the previous five years. The characteristics of the territory do not change radically in such a short period of time. During the employer's investigation of the refusal by Mr. MacKenzie, Mr. Crawford was advised that he could operate the train in the Guelph subdivision at reduced speed if he felt the necessity to do so or bring the train to a full stop. In my

opinion, when coupled with his knowledge, training and experience as a locomotive engineer, and that of the conductor who did not refuse to work, Mr. Crawford was not facing any immediate hazard or condition which would jeopardize his safety. Furthermore, the safety officer never identified any specific hazard or condition that would jeopardize Mr. Crawford's safety, or for that matter any one else's safety, had he proceeded with operating train B411 in the Guelph subdivision.

My ruling is to the effect that no danger existed when Mr. Crawford refused to work and when the safety officer conducted his investigation into the matter. I suspect that this ruling will not fully satisfy the respondents in the instant case. I recognize that there exists a problem in situations of this kind, however the right to refuse to work under the Code is, in my opinion, an inadequate mechanism to resolve these problems.

For all the above reasons, I HEREBY RESCIND the direction given on May 17, 1994 by safety officer W.B. Armstrong to CN North America.

Decision rendered on September 28, 1994

Serge Cadieux
Regional Safety Officer

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Applicant: CN North America, Concord, Ontario

Respondent: J.L. Crawford, Locomotive Engineer

Mr. Crawford had refused to operate a train over a particular subdivision because he felt his lack of familiarity with the territory constituted a danger to him and to other employees. The safety officer agreed with the locomotive engineer primarily because of his experience with the territory in question.

The regional safety officer disagreed with the safety officer and felt that Mr. Crawford's lack of familiarity with the territory did not constitute a danger. The safety officer never identified a specific hazard or condition which would jeopardize the safety of Mr. Crawford. Also, Mr. Crawford was advised that in that territory, he could operate the train at reduced speed and if necessary, bring it at a full stop. Coupled with his knowledge, training and experience, there was no real and immediate condition likely to injure Mr. Crawford. The regional safety officer rescinded the direction.