

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 Railway Company (CN Rail)
Edmonton, Alberta
Represented by: Ken Glubish
Western Canada Safety Officer, CN

Respondent: Brotherhood of Maintenance of Way Employees
Represented by: Jasper Brar
General Chairman

Mis en Cause: Jim Beynon
Safety Officer
Human Resources Development Canada

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

On the request of Mr. Glubish, this case proceeded by way of written submissions. Mr. Brar, who was informed of the request for review of the direction, declined to participate in these proceedings on the basis that he had nothing to add. The review of the direction proceeded without the participation of Mr. Brar.

Background

The direction (see "APPENDIX-A") under appeal in the instant case resulted from a four day inspection of mobile working gangs on the Skeena Subdivision of CN Rail, B.C. North District, between Prince Rupert and Terrace. The safety officer reported that he observed several contraventions to Part IX (Sanitation) of the Canada Occupational Safety and Health Regulations (the "Regulations"). Each contravention was brought to the attention of employer representatives at the various work sites. CN Rail was subsequently directed, under subsection 145(1) of the Canada Labour Code, Part II (the "Code"), to terminate the contraventions by a specific date.

A summary report was prepared by the safety officer in support of the direction. In his report, the safety officer describes the contraventions to the Code and to the Regulations as he observed them during his four day inspection. Unfortunately the direction issued does not include, as one would normally expect, a short description of each contravention reported by the safety officer. Rather,

the safety officer merely reproduced from the Code and the Regulations the wording from each provision allegedly contravened. The direction must therefore be read concurrently with the report, prepared subsequently by the safety officer, to substantiate each contravention listed in the direction.

Submission of the Employer

The detailed submission of the employer is on record. Mr. Glubish noted that the direction of the safety officer specifically cited CN Rail for contravening sections 9.4, 9.6, 9.12, 9.16 and subsection 9.19(2) of the Regulations. Mr. Glubish argued each contravention separately.

Rather than reproducing the text of the submission in its entirety, I will proceed in the same order that Mr. Glubish did.

Decision

In my opinion, there are two very distinctive aspects to be considered in this case. The first aspect concerns the sanitation and personal facilities located at the start up point of the mobile work gangs and whether those facilities are in compliance with the Regulations. The second aspect to be considered, and probably the most important one, is whether prescribed sanitary facilities must be provided at the workplaces of the mobile work gangs referred to above. The direction of the safety officer does not make any distinction between these aspects and therefore, I will decide, on the basis of the evidence before me, whether the alleged contraventions apply to only one or to both aspects.

Item #1. Contravention of section 9.4 of the Regulations

In respect of this contravention, Mr. Glubish has submitted the following:

Section 9.4 states that "Each personal service room shall be cleaned at least once every day that it is used." Personal service rooms as defined by these regulations are "a change room, toilet room, shower room, lunch room, living space, sleeping quarters or a combination thereof." As noted in the background information for these work crews, they are, for the most part, working in remote locations where there are no buildings whatsoever, let alone rooms to accommodate personal services. Personal service rooms are provided for some of our gangs at their start up point, which can at times be several miles from their actual work location. Numerous employees start from points such as their hotel rooms etc. and travel from there to their work locations. Where personal service rooms are provided employees are instructed to ensure compliance with section 9.4.

Our request for review of this issue is to determine if Mr. Beynon is of the opinion that we should be providing "personal service rooms" for all employees, at all times and in all work locations? It is reasonably practical for C.N. to have buildings, trailers or whatever is required to meet the intent of providing personal service rooms, at all work locations

along our thousands of miles of track, through all types of terrain and in remote locations? We would like to have this reviewed to answer the above questions and determine what is the intent of this regulation.

I understand from the first paragraph above that Mr. Glubish acknowledges that CN Rail is in contravention of section 9.4 of the Regulations at the start up point for the mobile work gangs, which in the instant case is located in Terrace B.C., and that steps are taken to ensure compliance at that location. The direction should reflect this restriction in its scope of application. The employer should nonetheless understand that a reference to Terrace, B.C. does not exclude all other start up points. The direction puts that employer on notice that at start up points, compliance with section 9.4 of the Regulations is mandatory where personal service rooms are provided as prescribed.

Mr. Glubish seeks some clarification as to whether "personal service rooms" are to be provided for all employees, at all times and in all work locations? The short answer to that question is "no". It would be ludicrous to expect an employer to provide the said rooms under those circumstances. Section 9.4 of the Regulations does not support such a liberal interpretation. That provision merely states that "Each personal service room shall be cleaned at least once every day that it is used." Evidently, that provision would only apply where a personal service room is provided as required by the appropriate provisions of the Regulations. In the instant case, no such rooms were provided at the workplaces of the mobile work gangs and, consequently, the direction does not apply in those circumstances. However, it applies at the start up points where personal service rooms were provided.

As to whether it would be reasonably practicable to ensure that personal service rooms are provided along the tracks is a question of judgement in every case. Consideration must also be given to the type of personal service room envisaged and the requirements of the Regulations. Personal service room is defined under section 1.2 of the Regulations as follows:

"personal service room" means a change room, toilet room, shower room, living space, sleeping quarters or a combination thereof;"

While each of the above noted room, space or quarters must comply with section 9.4 of the Regulations, the requirement to provide the said room, space or quarters is subject to the conditions set out in the appropriate provisions of the Regulations. For example, subsection 9.12(1) of the Regulations determines where a toilet room is required, subsection 9.23(1) where a shower room is required, subsection 9.44(1) where a change room is required, and so on. Since the safety officer did not specify which room, space or quarters were in contravention, I can only conclude that, where personal service rooms were provided, they were all in contravention of section 9.4 of the Regulations. That situation could only occur at the start up point in Terrace where personal service rooms are provided as noted in Mr. Glubish's initial response to the direction. He explained that:

"Employees on all of the above gangs are provided with personal service rooms at their work assembly (starting) point. Notice has been issued to ensure these are cleaned at least once every day that it is used. These personal service rooms include toilet rooms which meet the requirements of the regulations."

Therefore, in respect of the contravention to section 9.4 of the Regulations, **I HEREBY VARY** that item of the direction, to restrict its scope of application, by adding the following paragraph at the end of the contravention:

"Personal service rooms are not being cleaned every day at the start up point in Terrace, B.C.."

Item #2. Contravention of section 9.6 of the Regulations

In respect of this contravention, Mr. Glubish has submitted the following:

Section 9.6 of the C.O.S.H. regulations deals with containers used for solid or liquid waste. Our employees have been advised to ensure containers (garbage cans) used for refuse are to have a tight fitting lid and are to be emptied daily.

In reading this submission, it is my understanding that Mr. Glubish does not challenge the safety officer's finding in respect of this item of the direction. Therefore, I find no reason to proceed any further with the review of this contravention.

For the above reason, **I HEREBY CONFIRM** this item of the direction.

Item #3. Contravention of section 9.12 of the Regulations

In respect of this contravention, Mr. Glubish has submitted the following:

Sections 9.12 and 9.13 deal specifically with "toilet rooms". Section 9.12 states that "Where it is reasonably practicable, a toilet room shall be provided for employees..." 9.13 specifies the amount of toilets etc., based on number of employees. Where we do provide toilet rooms the intent of 9.13 is met. Referring back to previous information, it should be noted that these toilet rooms are generally at the start up point, not at the actual work location. Also referring back to previous information many of the projects undertaken by these work crews are in remote locations.

Our request for review of this issue is to determine if it is Mr. Beynon's intent to see toilet rooms at all work locations, again, along thousands of miles of track? Section 9.12 of the regulations states that "where it is reasonably practicable..." In our view it is not reasonably practicable to have facilities at every work location.

In order to decide that item of the direction, a clarification of the concept of "reasonably practicable" used in the context of the Regulations is necessary in the instant case. I have already dealt with this concept in Alberta Wheat Pool v. Zahn, unreported decision No. 92-002. In that

decision I concluded that the following points would have to be considered when assessing the "reasonably practicable" condition:

NOTE: A reference to the duty in the following test is a reference to the duty to provide a toilet room as prescribed.

1. A determination should be made in each case where the duty applies, as to whether it is "reasonably practicable" to comply with the duty.
2. In this case, the onus to demonstrate that it is not "reasonably practicable" to comply with the duty falls on the employer, Alberta Wheat Pool, because the duty is specified under paragraph 125(g) of the Canada Labour Code, Part II and the Canada Occupational Safety and Health Regulations, Part IX (Sanitation).
3. The above determination should take into consideration the benefit of the duty versus the cost, in time, trouble, and money, of the measures to secure the duty.
4. A computation should be made as to whether there is a gross disproportion between the benefit of the duty and the cost. If such a disproportion exists, then a conclusion that it is not reasonably practicable should be reached.

In this particular case, the safety officer observed that toilet rooms were not provided along the Skeena subdivision. However, the safety officer gave no indication that he considered any of the above noted factors, or similar factors. For those provisions where the "reasonably practicable" condition exists, the safety officer should not form an opinion and conclude that a contravention exists unless he considered the facts that are relevant to the alleged contravention. In the instant case, those facts should have a direct impact on whether it is reasonably practicable to provide toilet rooms at the work sites of the mobile work gangs. After all, the concept of reasonably practicable implies that the person making the judgement will consider and analyze in a logical manner the facts specific to the situation at hand.

Assuming that the safety officer did consider the facts relevant to the situation before him, given his knowledge and experience with the rail industry, the employer would be entitled during the review of the direction to present a defense in respect of the evaluation made by the safety officer. In this respect, I submitted to the employer a list of questions (see "APPENDIX-B") which may have been considered by the safety officer. The answers given should help me decide if it is reasonably practicable to provide toilet rooms for mobile work gangs along the Skeena subdivision. I have no reason to believe that the answers given by Mr. Glubish are intended to deceive and, in the absence of the participation of the union representative, I am proceeding on this basis.

Essentially, Mr. Glubish replied in the following manner to the questions.

1. It is very costly to provide toilet rooms: using the example of a white fleet unit, 1982 model, the cost is approximately \$39,000 per unit, not including transportation at the various sites, set up and maintenance;

it is definitely not practicable to provide them: each time a unit is relocated, it takes up a considerable amount of time because of the set up procedure which involves

setting up septic holding tanks, checking damage to plumbing, cleaning etc; it is almost impossible to move them: they can only be moved from location to location by a locomotive since it is impossible to move them with the track units used by the mobile work gangs.

2. Outdoor privies are provided where cost and engineering requirements permit and where the crews are not constantly moving.
3. The Skeena subdivision is a 94.6 miles single track subdivision with eight short sidings used exclusively for running trains.
4. Traffic is generally allowed on that track with approximately ten trains per day on that subdivision.
5. The type of work and the time to carry out the activity varies from job to job and very often, on a daily basis.
6. Sidings are operating tracks and are not used to store equipment.
7. The safety and health committee is not involved in the initial planning regarding where to place equipment and facilities. However, the committee is encouraged to advise the employer regarding safety and health issues resulting from poor planning.
8. On average for 1994, the size of the crews varied from 15 to 20 employees with approximately 5% of the work force being women. Some gangs may have more women whereas others may have none.

The sites where the mobile work gangs work are not stationary work sites. Given the nature of the work in the rail industry, the work sites constantly change with time and with the type of work being carried out. There may be situations where one could justify the requirement for toilet rooms. For example, at start up points, it would be difficult to argue that it is not reasonably practicable to provide toilet rooms. However, in this case, we are not overly concerned with start up points where, incidentally, toilet rooms are provided. We are mainly concerned with the provision of toilet rooms for mobile work gangs which would require the toilet facilities to be constantly displaced. In light of the information submitted by Mr. Glubish, I do not believe that it would be reasonable to require the employer to provide toilet rooms under those circumstances on the Skeena subdivision. The cost in time, trouble and money to comply with the duty to provide those toilet rooms is, in my view, grossly excessive.

In my opinion, the employer has demonstrated that there exists a gross disproportion between the benefit of providing toilet rooms at the workplaces of the mobile work gangs on the Skeena subdivision and the cost in time, trouble and money to comply with that duty. For this reason, I **HEREBY RESCIND** this item of the direction.

Item #4. Contravention of section 9.16 of the Regulations

In respect of this contravention, Mr. Glubish has submitted the following:

"(section) 9.16 refers to providing toilet paper. Notice has been issued to ensure toilet paper is provided where toilet rooms are provided.

I conclude from the above submission that Mr. Glubish accepts the safety officer's finding that toilet paper was not provided as prescribed. I therefore find no reason to proceed any further with the review of this contravention.

For the above reason, **I HEREBY CONFIRM** this item of the direction.

Item #5. Contravention of subsection 9.19(2) of the Regulations

In respect of this contravention, Mr. Glubish has submitted the following:

The final item, 9.19(2) states that "Where an outdoor privy is provided by an employer, the employer shall provide wash basins required by subsection (1) as close to the outdoor privy as is reasonably practicable." Under subsection (1) wash basins are noted as having to be supplied with "cold water and hot water". Some of our work gangs are provided with outdoor privies. They are also provided with hand cleaner and paper towelling for clean - up. Wash basins are provided where we have personal service rooms or through public facilities.

Request for review on this item is to determine if it is Mr. Beynon's intent to have us provide wash basins with hot and cold water at all remote locations where outdoor privies are provided? Is this reasonably practical?

In my opinion, wash basins supplied with cold and hot water must be provided with outdoor privies. Therefore, the employer has no discretion in this case. Hot and cold water must be supplied where an outdoor privy is provided. The real issue here is how close must the prescribed wash basins be from the actual location of the outdoor privy, where one is provided? It may be that it is not reasonably practicable to supply hot and cold water next to the outdoor privy. Again, the test that the employer has to meet in the instant case is, as noted above, what is the cost to the employer, in terms of time, trouble and money to comply with the duty to provide wash basins as prescribed?

The safety officer noted in his summary report that no wash facilities were in evidence at the work sites of the mobile work gangs. On the other hand, the employer's initial response to the direction was as follows:

"Wash basins are provided in the personal service rooms. For gangs where outdoor privies are provided these wash basins are the closest to the privies as is reasonably practicable."

The safety officer made no attempt to determine whether it was reasonably practicable to provide the prescribed wash basins at the work sites in question. I therefore accept Mr. Glubish statement that "where outdoor privies are provided, these wash basins are the closest to the privies as is reasonably practicable." (emphasis added)

I would caution both the employer and the safety officer in this case. There is no direction given respecting the provision of outdoor privies and therefore, I am not authorized to volunteer an interpretation on this issue. There may be considerations for this issue which could supersede the requirement, or absence thereof, for outdoor privies under the Canada Labour Code. As a good corporate citizen, the employer is invited to take measures to protect the dignity of every person working for him.

For all the above reasons, **I HEREBY RESCIND** this item of the direction.

Decision rendered on January 9, 1995

Serge Cadieux
Regional Safety Officer

IN THE MATTER OF THE CANADA LABOUR CODE
PART II - OCCUPATIONAL SAFETY AND HEALTH

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On April 26 - 29, 1994, the undersigned safety officer conducted inspections of Gangs 112, 113, 102 and 103 and the Thermite Welding Gang in the work place operated by Canadian National Railway Company, being an employer subject to the Canada Labour Code, Part II, on the Skeena Subdivision of the B.C. North District.

The said safety officer is of the opinion that the following provisions of the Canada Labour Code, Part II, are being contravened:

Canada Labour Code Part II Section 125(g)

125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,

(g) provide prescribed sanitary and personal facilities;

and the Canada Occupational Safety and Health Regulations:

9.4 Each personal service room shall be cleaned at least once every day that it is used.

9.6(1) Each container that is used for solid or liquid waste in the work place shall

(a) be equipped with a tight-fitting cover;

(b) be so constructed that it can easily be cleaned and maintained in a sanitary condition;

(c) be leak-proof; and

(d) where there may be internal pressure in the container, be so designed that the pressure is relieved by controlled ventilation.

(2) Each container referred to in subsection (1) shall be emptied at least once a day that it is used.

9.12(1) Where it is reasonably practicable, a toilet room shall be provided for employees and, subject to section 9.13, where persons of both sexes are employed at the same work place, a separate toilet room shall be provided for employees of each sex.

(2) Subject to subsections (3) and (4), where a toilet room is provided in accordance with subsection (1), the employer shall provide in that room a number of toilets determined according to the maximum number of employees of each sex who are normally employed by him at any one time at the same work place as follows:

- (a) where the number of such employees does not exceed nine, one toilet;
- (b) where the number of such employees exceeds nine but does not exceed 24, two toilets;
- (c) where the number of such employees exceeds 24 but does not exceed 49, three toilets;
- (d) where the number of such employees exceeds 49 but does not exceed 74, four toilets;
- (e) where the number of such employees exceeds 74 but does not exceed 100, five toilets; and
- (f) where the number of such employees exceeds 100, five toilets and one toilet for every 30 such employees or portion of that number in excess of 100.

9.16 Toilet paper on a holder or in a dispenser shall be provided

- (a) where there is only one toilet in a toilet room, in that toilet room; and
- (b) in each toilet compartment.

9.19 (2) Where an outdoor privy is provided by an employer, the employer shall provide wash basins required by subsection (1) as close to the outdoor privy as is reasonably practicable.

QUESTIONNAIRE

1. What is the cost to the employer in terms of time, trouble and money to provide toilet rooms at the work sites of the mobile working gangs? I understand that toilet rooms are available on cars at start up points; why are they not moved along with the equipment being transported at the work sites?
2. What is the cost to the employer in terms of time, trouble and money to provide outdoor privies, at the sites of the mobile work gangs, with wash basins supplied with hot and cold water as prescribed? Why are they not provided on a regular basis using the example of the Rail Relay Gang 103, on April 26, 1994, at 80 kilometres west of Terrace, when a portable toilet was provided on a flat push car next to the first aid car?
3. Is the Skeena subdivision a single or double track subdivision? On the days were work is to be carried out, are there sidings along those tracks where cars carrying the toilets can be parked temporarily and in a safe manner?
4. Is traffic allowed to go through on the Skeena subdivision on the days were work is to be carried out? Is a Rule 42 required? What is the frequency of traffic on those days?
5. What type of work is to be carried out and how much time is involved to accomplish the work?
6. How far away from the sidings, if they exist, is the work being performed? Do the mobile work gangs travel a significant distance from the site where the toilet room or outdoor privy is or could be located?
7. Is the safety and health committee involved in these decisions? If so, to what extent?
8. What is the size of the mobile work gangs on the average? How many are men and how many are women? Are the crews usually made up of employees of both sexes and if so, in what proportion?
9. Is there any other information that would be useful in assessing whether it is or is not reasonably practicable to provide toilet rooms along the tracks in the Skeena subdivision?

Applicant: Canadian National Railway Company (CN Rail)

Respondent: Brotherhood of Maintenance Employees

In this case, CN Rail was cited by the safety officer for contravening sections 9.4, 9.6, 9.12, 9.16 and subsection 9.12(2) of the COSH Regulations. Essentially, the safety officer cited the employer for failing to provide sanitary and personal facilities to its mobile work gangs along its tracks on the Skeena subdivision, B.C. between Terrace and Prince Rupert. The employer argued each contravention separately. The RSO considered the evidence submitted by the safety officer since the union declined to participate.

1. Contravention of section 9.4 of the COSH Regulations

The Regional Safety Officer found the employer to be in contravention of this item only to the extent that "personal service rooms are not being cleaned every day at the start up point in Terrace, B.C." and **VARIED** this item of the direction accordingly.

2. Contravention of section 9.6 of the COSH Regulations

This contravention, which deals with containers used for solid or liquid waste, was not challenged by CN Rail. The Regional Safety Officer **CONFIRMED** this item of the direction.

3. Contravention of section 9.12 of the COSH Regulations

The Regional Safety Officer found that the safety officer merely observed that no toilet rooms were not provided along the Skeena subdivision. The safety officer failed to consider whether it was reasonably practicable to provide the said toilet rooms as specified in section 9.12 of the Regulations. Upon review, the Regional Safety Officer concluded that CN Rail demonstrated that it was not reasonably practicable to provide the toilet rooms to mobile work gangs. The Regional Safety Officer **RESCINDED** that item of the direction.

4. Contravention of section 9.16 of the COSH Regulations

Since CN Rail did not challenge the finding of the safety officer that toilet paper was not provided, the Regional Safety Officer **CONFIRMED** that item of the direction.

5. Contravention of subsection 9.12(2) of the COSH Regulations

The safety officer noted that where outdoor privies were provided, wash basins supplied with hot and cold water were not provided. Upon review, the Regional Safety Officer found that the safety officer failed to consider whether it was reasonably practicable to

supply the prescribed wash basins close to the outdoor privies. The employer on the other hand argued that prescribed wash basins were "the closest to the privies as is reasonably practicable." In the absence of the participation of the union in this case and of any attempt by the safety officer to determine the reasonably practicable condition of this provision, the Regional Safety Officer **RESCINDED** this item of the direction.