Decision No. 95-002

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:	Charterways, Canadian Division London, Ontario Represented by: Christopher C. White, Counsel
Respondent:	Amalgamated Transit Union, Local 162 Represented by: J. Ivan Marini, Counsel
Mis en Cause:	Rod J. Noel Safety officer Human Resources Development Canada
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada

An oral hearing was held on January 6, 1995 in St-Catharines, Ontario.

Background

On May 5, 1994, safety officer Rod Noel and another safety officer, carried out an inspection of the workplaces controlled by Charterways, an employer under federal jurisdiction in the instant case. Those workplaces are, for the purpose of this case, school buses operated by Charterways. During the course of the inspection a number of infractions were observed and addressed by the safety officer through AVCs[1] (Assurances of Voluntary Compliance) and directions. Of particular interest to this case are two directions given to the employer which, incidentally, were confirmed in writing and which are the only directions for which the employer has sought a review.

The first direction of interest is given under subsection 145(1) of the Canada Labour Code, Part II (the Code). In this direction, Charterways is cited for contravening various provisions of the Code and the Canada Occupational Safety and Health Regulations (the Regulations). Charterways has requested a review of only the first contravention listed in the direction in which the safety officer alleges that the employer contravenes section 124 of the Code in the following manner:

"1) Paragraph (sic) 124 of the Canada Labour Code - Part II (Part II)

[1] Assurance of voluntary compliance means a formal written assurance by the person in charge of a workplace that a contravention of the Code or Regulations will be corrected.

> Fire extinguishers on buses are not being inspected monthly by trained personnel, with those inspections recorded (on tags affixed to each fire extinguisher) in accordance with safe industrial practice."

It should be noted that the issue of the timeliness of the request for review of the direction given under subsection 145(1) of the Code has been raised in this case. A preliminary objection was entered by Mr. Marini on this issue at the hearing. It was decided that I would take the objection under advisement and proceed in the meantime with receiving the submissions of the parties on the merits of the case.

The second direction of interest is given under paragraphs 141(a) and (g) of the Code. In this particular case, the safety officer ordered Charterways to obtain from provincial authorities specific information respecting the use of a makeshift device placed on the accelerator pedal of some of its school buses. The direction is worded, in part, in the following manner:

> "HEREBY DIRECTS THE SAID EMPLOYER PURSUANT to subsection 141 (1)(a)(g) of the Canada Labour Code Part II to conduct such, inquiries as are itemized here under not later than the 21st day of May, 1994 and to present the results to the undersigned Safety Officer in the form and manner specified.
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> 1. To make a written inquiry to the appropriate vehicle compliance branch of the Ontario Ministry of Transportation, describing the method of using wooden blocks to raise the height of an accelerator pedal to assist some drivers. The inquiry will include a request for technical advice on how this modification can be made safely, and the legalities of such modifications under the Highway Traffic Act.
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> 2. To request that the response from the Ontario Ministry of Transportation be in written form.
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> 3. To provide a copy of the request to the undersigned Safety Officer and to each Joint Health and Safety Committee in Charterways Canadian Division, by May 21, 1994.
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> 4. To provide a copy of any written response given in reply to the enquiry on receipt, to the undersigned Safety Officer and to each Joint Health and Safety Committee in Charterways Canadian Division."

DIRECTION UNDER SUBSECTION 145(1) OF THE CODE

Preliminary Objection

Mr. Marini pointed out that there is no documentary evidence, or other, which would authorize Charterways to request a review of the direction which is given under subsection 145(1) of the Code. This is because the fourteen day time limit stipulated by subsection 146(1) of the Code to make such a request has elapsed. Mr. Marini notes that the decision of the Federal Court, Trial Division, in Brink's Canada Limited v. Serge Cadieux et all, Court file number T-959-93,

confirmed that once a direction is given orally, the time to request a review of that direction starts running the day it is given orally and not when the direction is subsequently confirmed in writing. Consequently, the request to have this direction reviewed should be dismissed.

In reply, Mr. White submits that Charterways intended to make the said request. According to Mr. White, the employer had discussions, prior to May 17, 1994, with his office and with officials of Labour Canada (now Human Resources Development Canada) "respecting a meeting to discuss the various Directives issued." Mr. White further points out that:

> "During these conversations, the Employer's intention to request reviews of all Directives was clearly communicated to those Labour Canada officials. In the event that the requested meeting did not resolve the Employer concerns, it was indicated that reviews would be requested. (emphasis added)

The requested meeting did not take place. Nonetheless, on the basis of the conversations with Departmental officials, of the meeting that was to take place and the intent of the employer to seek a review of the directions failing proper resolution at the scheduled meeting, Mr. White, the representative of the employer in this case, takes the position that:

> "...an oral request for review was made within fourteen days of the Directive in accordance with section (sic) 146(1) of the Code. The letter of may 25, 1994 was simply a written confirmation of that request."

Mr. White indicated that he was willing to testify personally in support of the intentions of the employer and of the conversations that did take place with Departmental officials on this issue.

Decision re: Preliminary Objection

It appears that the employer intended to appeal the direction given under subsection 145(1) of the Code if the discussions which were to be held with Departmental officials resulted in an unsatisfactory outcome for the employer. However, the wording of section 146(1) of the Code in respect of the request for review of a direction is, in my opinion, very explicit and non-discretionary. It stipulates:

> 146.(1) Any employer, employee or trade union that considers himself or itself 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. (emphasis added)

In reading that provision, the employer is under the statutory obligation to actually formulate a request to have the direction reviewed. All the best intentions in the world do not satisfy the requirement to effectively make a request to have a direction reviewed. At some point in time, the intention must give way to the action itself. The employer has to decide whether or not it will make that request and then proceed with making the request in an explicit and timely fashion. Also, a request for review cannot be conditional upon the outcome of discussions.

The reality, in the instant case, is that there was no request made within the fourteen day time limit set by subsection 146(1) of the Code. The safety officer gave an oral direction on May 5, 1994 to one of the employer representatives during his inspection and confirmed that direction in a letter dated May 9, 1994 and addressed to another employer representative. I have decided that the May 9, 1994 confirmation would be the date the direction would take effect because the direction was addressed to a different person. Nonetheless, the letter of May 25, 1994, in which the employer seeks to have the direction reviewed, is also outside the fourteen day time limit set by subsection 146(1) of the Code.

The safety officer has not been informed, either orally or in writing and neither directly or indirectly, of a request to have his direction reviewed. There is no evidence that any other regional safety officer has been informed in any way of such a request. The May 17, 1995 letter received from the employer respecting requests for review of other directions are, on the other hand, very clear and unambiguous and are made in a timely fashion. Obviously, the employer knew which directions to appeal, where to address the requests and the time frame to do so. All of this leads me to conclude that the employer, whether intentionally or not, allowed the fourteen day time limit to make the request for review elapse.

In the excerpt reported in the Brink's Canada Limited v. Serge Cadieux et all decision above, I said:

> 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.

In my opinion, I do not have jurisdiction to hear this case because the request to have the direction reviewed is untimely. For this reason, the request to have the direction issued under subsection 145(1) of the Code on May 5, 1994 and later confirmed in writing on May 9, 1994 by safety officer Rod J. Noel to Charterways, Canadian Division, is **HEREBY DISMISSED**.

DIRECTION UNDER PARAGRAPHS 141(a) AND (g) OF THE CODE

Submission of the Employer

It should be noted that Mr. White's submission on this issue does not concern the interpretations that could be given to the provisions referenced above. His submission is centred on the extent of compliance with the safety officer's direction in the instant case.

Mr. White confirmed that Mrs. Meredith, the recipient of the direction under appeal in the instant case, had contacted by telephone officials of the Ministry of Transportation of Ontario (MTO) on a number of occasions respecting the technical aspects and the legal implications of making modifications to vehicles. The officials of MTO essentially replied to Mrs. Meredith that there

were no regulations that permit these types of modifications or conversely, that prohibit them. MTO officials also informed Mrs. Meredith that they would not give technical advice as to what constituted a safe modification. MTO would make their position known only if they investigated an accident in which a vehicle had such a modification and it was found to be one of the causative factors.

Mrs. Meredith informed the safety officer of the above conversations and also that it is the company's policy that no modification is acceptable on any of its vehicles. She therefore refused to make a written inquiry to the MTO, as directed, because she felt that if she did, it could be perceived that the company would be setting up a standard which would be in opposition to its policy of having no modification on its vehicles.

Submission for the Employees

Mr. Marini notes that "if the safety officer had to go to every government department or ministry for verification of what he reasonably proposes, he would need fifty hours in each day." In looking at the direction and its wording, Mr. Marini stated the following:

> "Is the direction a justified one, I say it is imminently justified and what is he really directing, he simply wants some additional facts. He has not made a finding of fault, he has not asked for an order prohibiting something, he is simply saying, if what you say is true show it to me in writing. Given the statutory mandate that he has, under the CLC, I say the request is justified and reasonable."

Decision

The issue to be decided in this instance is whether Mrs. Meredith can refuse to carry out the direction of the safety officer as formulated i.e. to inquire in writing to the MTO? The simple answer to that query is no, she cannot. Mrs. Meredith must comply with the order of the safety officer for the simple reason that the safety officer is empowered under the Code to require her to do so. Mrs. Meredith is challenging the authority of the safety officer to order her to do something by informing him that she does not agree with a portion of the direction and that she will not comply with it.

In those cases where an employer feels aggrieved by a direction of a safety officer, the mechanism to challenge the direction is to the regional safety officer. The right of the employer to request a review of the direction [ss.146(1)] and the powers of the regional safety officer [ss.146(3)] are stipulated at section 146 of the Code. That section provides as follows:

Review of direction

> **146. (1)** Any employer, employee or trade union that considers himself or itself 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.

> **(2)** The regional safety officer may require that an oral request for a review under subsection (1) be made as well in writing.
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> **(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.
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> **(4)** A request for a review of a direction under this section shall not operate as a stay of the direction.

Regardless of what the regional safety officer will decide upon reviewing the direction, the Code states at subsection 146(4) that a request for review does not grant relief to the employer from complying with the direction. Until such time that the regional safety officer has rendered his decision, the direction must be complied with in its entirety.

The safety officer informed Mrs. Meredith on a number of occasions that she had to comply with the direction as formulated. He insisted that her correspondence with MTO officials be in writing. There is no discretion in this case. There is a mandatory statutory requirement on the employer to comply in such cases. That requirement is further reinforced by paragraph 125(w) of the Code. It provides:

> 125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,
>
> > (w) comply with every oral or written direction given to the employer by a safety officer concerning the safety and health of employees.

In fact, non-compliance with the direction constitutes an offense under subsection 148(2) of the Code with far reaching consequences.

For all the above reasons, **I HEREBY CONFIRM** the direction issued under paragraphs 141(a) and (g) of the Code on May 5, 1994 by safety officer Rod J. Noel to Charterways.

Decision rendered on January 23, 1995

Serge Cadieux
Regional Safety Officer

Decision No.: 95-002

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Charterways Canadian Division

Respondent: Amalgamated Transit Union, Local 162

Charterways was issued a number of directions by a safety officer. Only two directions were appealed by Charterways.

The first direction was given under subsection 145(1) of the Code. The timeliness of the direction was raised as an objection. The employer had requested in writing and in a timely fashion that other directions be reviewed by a regional safety officer. However, the employer did not formally request that the 145(1) direction be reviewed. The employer submitted that it intended to request a review of the 145(1) direction if discussions which were to be held with Human Resources Canada officials did not result in satisfactory resolution. The Regional Safety Officer found that the Code requires the employer to make an explicit request. Intentions and conditions cannot be used as valid arguments in defense. The Regional Safety Officer **DISMISSED** the request.

The second direction was given under paragraphs 141(a) and (g) of the Code. The safety officer had ordered the employer to make a written inquiry to the Ministry of Transportation of Ontario (MTO) respecting the use of wooden blocks used on the acceleration pedal of some of its trucks. Charterways would not make the written inquiry because it felt it could be perceived as setting up a standard with which they did not agree since it was company policy that no modification on its vehicles were acceptable. The Regional Safety Officer found that the employer had no discretion in this case. It had a mandatory statutory obligation to comply with the direction as formulated. The Regional Safety Officer **CONFIRMED** the direction.