Decision No.: 95-003

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 Halifax International Airport Represented by: Richard J. Charney, Counsel
Respondent:	Andrew Crutchfield Flight attendant Represented by: Tracy Angles and Stephen Morash Canadian Union of Public Employees
Mis en Cause:	R. M. Muzzerall Safety officer Human Resources Development Canada
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada

An oral hearing was held in Montreal, QuJbec, on January 18, 1995. Mr. Morash and Mr. Crutchfield agreed that Mr. Angles would be the spokesperson for Mr. Crutchfield, the refusing employee in the instant case, and for the Canadian Union of Public Employees.

Background

Mr. Crutchfield is a flight attendant with Air Canada on reserve status[3] who also holds the designation of purser[4]. On November 13, 1994, Mr. Crutchfield, who is six feet one half inch (6'2") tall, worked on Air Canada's CL-65 aircraft. The CL-65 is a fifty (50) seat jet with a cabin height of six feet one and one half inch (6'1 2"). The height extends the full length of the passenger area of the cabin and tapers slightly towards the cockpit.

---

[3] A flight attendant on reserve status means that he/she may be called to replace people on sick leave or that he may be called to work on a flight that comes up for which they need coverage. The reserve status is obtained through the seniority system.

[4] A purser is essentially an in-charge flight attendant i.e. a flight attendant in charge of a specific element of cabin service as well as having the responsibility for the functional direction of the cabin personnel in the cabin crew.

On November 21, 1994, Mr. Crutchfield received his schedule of flights for the month which, in the airline industry, is referred to as a block. Mr. Crutchfield was awarded that block as a result of a bid[5] he made in accordance with his collective agreement. He noted that he would be expected to work on the Halifax-Boston route which uses the CL-65 aircraft.

The events that followed are unclear. Mr. Crutchfield informed us at the hearing that he initially intended to lodge a grievance against his employer but was told that if he refused to work on the CL-65 aircraft, he was in fact invoking his right to refuse to work under the Canada Labour Code, Part II (the Code). He accepted this argument although, as he again stated at the hearing, he felt that the situation did not constitute a danger. Danger he was told is defined under the Code and only a safety officer could decide that issue. Hence a safety officer was summoned to investigate into this matter.

Safety officer Robert Muzzerall investigated the matter the following day in the presence of all the affected parties. The *Statement of Refusal to Work* signed by Mr. Crutchfield reads as follows:

> I WORKED ON THIS AIRCRAFT ON NOV 13. IT WAS AN ELEVEN AND A HALF HOUR DAY WHICH INVOLVED APPROXIMATELY 8 HOURS ON THE AIRCRAFT. BECAUSE THE AIRCRAFT CABIN HEIGHT IS SHORTER THAN I AM, I WAS FORCED TO BE HUNCHED OVER ALL DAY, WHICH CAUSED ME BACK PAIN. I DID NOT WANT TO DO IT AGAIN.

On November 25, 1994, the safety officer took measurements of both the interior of the aircraft and of Mr. Crutchfield. He reported the measurements as follows:

> Mr. A. Crutchfield's height 6'2"
> CL65's Highest point - Aisle 6'2"
> Exit sign near main entrance 71 2"
> Cockpit door 66 2"

The safety officer found that the working space provided to Mr. Crutchfield "makes it impossible to do his job without being crouched (sic) over." His decision was that a condition exists that constitutes a danger to the employee while required to work on the CL-65 aircraft. As required by the Code in those instances, the safety officer issued a direction to Air Canada under paragraph 145(2)(a) of the Code. The direction is formulated, in part, in the following terms:

> "*The said safety officer considers a condition exists that constitutes a danger to an employee while at work.*
>
> > *Due to the height limitation of the aircraft CL 65 and due to the height of the employee and due to the number of head injuries to the employee*

---

[5] Flight attendants must bid each month for a block i.e. an amount of flying time. The people that are more senior get regular blocks whereas the people who are more junior get reserve blocks. The selection is based on two criteria: seniority and bilingualism.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the Canada Labour Code, Part II, to take measures immediately for guarding the source of danger."

Submission of the Employer

The detailed submission of the employer is on record. Air Canada submitted that it "challenges the order on two grounds:

(a) first, Air Canada submits that the circumstances causing Crutchfield's discomfort do not constitute a "danger" for the purposes of subsection 122(1) of the *Code*; and

(b) second, and in the alternative, Air Canada submits that if there is any "danger" involved in the work, it is inherent in the employee's work, or as (sic) a normal condition of employment and therefore, pursuant to paragraph 128(2)(b) of the *Code*, does not entitle Crutchfield to refuse the assignment."

Mr. Charney acknowledged that the distance between the floor and the header in the cockpit doorway is five feet six inches (5'6"), that the header should normally have a rubber padding on it and that one is in the process of being installed. The absence of a protective device on that door would account for the head injuries suffered by Mr. Crutchfield. However, Mr. Charney notes, the head injuries suffered by Mr. Crutchfield are not the basis on which he exercised his refusal to work. Rather, it is the height of the aircraft that is the source of his complaint.

Submission for the Employee

Mr. Angles submits that when Mr. Crutchfield works the CL-65 aircraft, he must take a position which is injurious to him simply because he does not fit in the aircraft. He also notes that Mr. Crutchfield has never had a back problem in the past but that he suffers back pain when he takes the hunched position in the CL-65 aircraft.

Mr. Angles acknowledges that Mr. Crutchfield did not see a doctor for his back problem and that he does not have a doctor's certificate ascertaining the source or even the existence of his injury. Mr. Crutchfield did not refuse to work any other aircraft but only the CL-65.

Joint Submission

In an attempt to resolve the matter outside the review process, the parties in this case i.e. Mr. Charney for Air Canada, Mr. Crutchfield for himself and Mr. Angles and Mr. Morash for the Canadian Union of Public Employees, agreed that there exists no dispute on the facts reported in Air Canada's brief. The parties unanimously agreed that the manufacturer's specifications for the cabin, which is 6'1 2" (six feet one and one half inch), is accurate, that in reality the cabin height will vary from 6'1 2" to 6'1" (six feet one inch) due to variations in the CL-65 and that Mr. Crutchfield is 6'2" (six feet one half inch) tall. To sum it up, the parties indicated that Air Canada's submissions were agreed to.

It was further agreed that there was no reason to engage in further evidence and that the parties were satisfied that no further submissions would be made on this matter. Having been denied by the Regional Safety Officer the joint request to simply rescind the direction without further consideration, the parties asked that the above facts be the only ones considered by the Regional Safety Officer in making his ruling.

Decision

The issue to be decided in the instant case is whether there existed a danger to Mr. Crutchfield when the safety officer investigated the day following the refusal to work. From the submissions of the parties and the report of the safety officer, I retain the following facts:

1. Mr. Crutchfield is a purser i.e. an in-charge flight attendant hired by Air Canada to fly all aircrafts;

2. Mr. Crutchfield exercised his refusal to work from home after noticing, on his schedule of flights, that he could be flying the Halifax-Boston route where the CL-65 is used;

3. Mr. Crutchfield only works the CL-65 aircraft on occasion and he suffers no back problem outside the CL-65;

4. Mr. Crutchfield alleges that he suffers back pain only on the CL-65 because of the hunched position he has to take when working that aircraft but readily admits that he did not see a doctor for that problem and that he does not have a medical certificate supporting his allegation;

5. Mr. Crutchfield never meant to exercise a right under the Code but intended to lodge a grievance against his employer to resolve this matter; and

6. Mr. Crutchfield does not believe that the discomfort of working in a hunched position on the CL-65 constitutes a danger to him; that finding was made by a safety officer.

I should point out that the safety officer was not aware that Mr. Crutchfield refused to work from home, that he intended to lodge a grievance and that he did not believe that he was facing a danger. In my opinion, had the safety officer been aware of those circumstances, he might have attempted to resolve this matter outside the refusal to work process. After all, the safety officer does not know for a fact that Mr. Crutchfield would have been required to work on that aircraft in the near future since, I am led to believe, he does not meet the bilingualism criteria that would entitle him to bid for routes using the CL-65 aircraft. The right to refuse is intended to address serious problems that arise unexpectedly and that must be resolved right there and then when the employee is exposed to the alleged danger. It is not intended to resolve dangers that may possibly arise in the future.

I will nonetheless proceed with deciding this case on its merits since the jurisprudence clearly establishes that the safety officer must decide whether danger exists to an employee at the time of his/her investigation and not whether danger existed at the time of the refusal to work. In the instant case, the safety officer carried out an investigation the following day in the presence of the employee and found that danger existed at the time of his investigation and gave a direction accordingly. I will review the circumstances that gave rise to that direction and decide in light of the facts whether danger did exist.

To decide whether Mr. Crutchfield was in a situation of danger, one must look at the definition of danger found at subsection 122(1) of the *Code* in light of the right of the employee to refuse to work in accordance with subsection 128(1) of the *Code*. Subsection 128(1) of the *Code* provides:

> **128. (1)** Subject to this section, where an employee while at work has reasonable cause to believe that
>
> (*a*) the use or operation of a machine or thing constitutes a danger to the employee or to another employee, or
>
> (*b*) a condition exists in any place that constitutes a danger to the employee,
>
> the employee may refuse to use or operate the machine or thing or to work in that place.

and, danger is defined at subsection 122(1) of the *Code* as:

> "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.

When read in the context of the refusal to work exercised by Mr. Crutchfield, the above definition suggests that the hazard or condition must originate from the workplace and be likely to cause injury or illness to a person. The workplace must be the source of the problem, not the employee. Furthermore, the use of the expression "before the hazard or condition can be corrected" indicates that the problem i.e the hazard or the condition, must be one that is correctable.

The aircraft is approved by the FAA and by Transport Canada and no major corrections can be made to it. Air Canada has no means of physically correcting the problem other than by implementing an administrative solution. In this particular case, it is the personal condition of Mr. Crutchfield that is the source of the problem. Mr. Crutchfield does not fit inside the aircraft, or in other words, the equipment (the CL-65) is not adapted to that particular employee. Fitting equipment to a person is a question of ergonomics, a science which has not yet received the full recognition it deserves.

The safety officer accepted the allegation of Mr. Crutchfield, that he was being injured as a result of the hunched position he was required to take in the CL-65, without verifying the merits of that allegation. The decision of the safety officer is founded on that allegation, a medical issue at that point in time. Mr. Crutchfield asserts that he never had a back problem in the past, that his back only hurts when he works the CL-65 and that the problem disappears when he leaves the aircraft. I would be tempted to say that Mr. Crutchfield finds it very uncomfortable to work on that aircraft and, in my opinion, experiences the symptoms of discomfort that any person would normally

experience in a similar situation. I would reach that conclusion merely because Mr. Crutchfield has not worked the CL-65 on numerous occasions. I would find it very difficult to conclude, from a single day's work, that the CL-65 is responsible for causing injuries to Mr. Crutchfield's back.

In any case, for the safety officer to automatically conclude to an injury requires a leap of faith since Mr. Crutchfield has not consulted a doctor for that problem, let alone obtaining a medical certificate to support his allegation. He could have done so, or at least attempted to do so, since he had worked the CL-65 on November 13, 1994 and refused to work on November 21, 1994.

Upon completing his investigation into a refusal to work, the safety officer must decide whether danger exists. If, as he has done in the instant case and in accordance with subsection 129 (4) of the *Code*, the safety officer "decides that the use or operation of a machine or thing constitutes a danger to an employee or that a condition exists in a place that constitutes a danger to an employee..."(emphasis added), he must give a direction under subsection 145(2) of the *Code*. Unlike an employee who is only required to "have reasonable cause to believe.." that a danger exists, the safety officer is required to decide the reality of the danger and not just the possibility of its existence.

The investigation of the safety officer must therefore be an objective one. He/she is required to consider the facts of the case and, on the basis of those facts and the law applicable, render a decision. To do this, it may be necessary for the safety officer to take the necessary time to obtain some assurance to substantiate his finding that a danger exists. There is no pressure on the safety officer to render a decision immediately, especially in cases where the issue is a difficult one. Until such time that the safety officer renders his/her decision, the employee can remain at a safe location or be assigned reasonable alternate work [ss.129(3)]. Therefore, while the safety officer carries out his/her investigation, the employee is not exposed to the alleged danger.

In cases similar to this one, the safety officer should advise the employee of the advantage of obtaining medical confirmation that his working conditions are causing harm or damage to his physical condition. This is so because, in this case, there is no test, analysis or assessment that can be carried out by the safety officer to ascertain that a particular working condition is injurious to Mr. Crutchfield. Only a professional in the field of medicine or ergonomics can do this.

Notwithstanding the above, if the employee obtained a medical certificate to support his allegation, I would still have to determine, as submitted by Mr. Charney, whether the danger alleged is a danger intended to be covered by the *Code*. I need not decide this issue at this point since the parties agreed on the facts.

In light of the evidence jointly submitted by the parties in this case and the absence of evidence supporting either the safety officer's finding of danger or Mr. Crutchfield's allegation that he is being injured, my conclusion is that Mr. Crutchfield is not in a situation of danger, as defined in the *Code*, when working the CL-65. However, there is no doubt in my mind that Mr. Crutchfield is in a very uncomfortable position when working the CL-65, a situation over which he has very little control.

When bidding for a reserve block, Mr. Crutchfield has no information on the routes making up the block or the type of aircraft used on those routes. If that information was made available to Mr. Crutchfield, it would allow him to make a choice on the blocks to bid on and to decide which aircrafts to avoid. It seems to me that if the parties sought the advice of the safety and health committee in cases similar to this one, simple solutions could and would be found.

Since the employer has acknowledged that Mr. Crutchfield suffered injuries to the head due to the absence of padding on the header of the cockpit doorway and that this situation can be corrected, I will vary the direction to take this admission into consideration. The employer is further advised that any other source of hazards in the aircraft would also have to be protected if it is known to cause injuries to the employees. I understand that an unprotected exit sign on the CL-65 aircraft may be such a source.

For all the above reasons, **I HEREBY VARY** the direction issued to Air Canada on the thirtieth day of November 1994 by safety officer R.M. Muzzerall, by replacing the third paragraph of the direction with the following paragraph:

> "The absence of padding on the header of the cockpit doorway causes head injuries to the employee."

Decision rendered on February 28, 1995

Serge Cadieux
Regional Safety Officer

Decision No.: 95-003

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Air Canada

Respondent: Canadian Union of Public Employees (CUPE)

KEYWORDS

Danger - Comfort - Personal condition - Height - Aircraft - Head injury - Back problem - Standing position - Flight attendant - cabin height - block - Bid - Statement of Refusal to Work - Inherent - Normal condition of employment - Joint submission - Vary - Ergonomics - Objective investigation - Doctor certificate - Danger real

PROVISIONS

Canada Labour Code: 122(1), 128(1), 129(3), 129(4), 145(2).

SUMMARY

An Air Canada flight attendant refused to work on Air Canada's new 50 seat jet because he was too tall to fit inside the cabin of the aircraft. A safety officer agreed that the employee was injured when he worked the CL-65 because of back pain resulting from the haunched position he had to take in that aircraft.

On review, the Regional Safety Officer found that alleging a back problem was insufficient in this case to justify the decision that a danger existed because the employee had not sought medical advice. The Regional Safety Officer found that the safety officer's role in a refusal to work is to decide the reality of the danger, not just its possibility. The Regional Safety Officer **VARIED** the direction because the employer admitted the employee suffered head injuries due to the absence of padding on the header of the cockpit doorway.