

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 Auto Workers
Rail Division, Local 100
Represented by: John Merritt

Respondent: C.N. North America
McGregor Yard
Sarnia, Ontario
Represented by: Kenneth R. Peel

Mis en cause: R.D. (Bob) Fortner
Safety officer
Human Resources Development Canada

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

An oral hearing was held on January 18, 1996 in Toronto, Ontario. It was agreed at the hearing that the issue dealing with overtime was outside the jurisdiction of the Regional Safety Officer and would be dealt with under Part III of the Canada Labour Code. The issue of alertness due to excessive hours of work was not an issue considered by the safety officer during his investigation and no direction was given on this issue.

Background

On May 26, 1995, Mr. Crowe, a senior transportation clerk with CN, was seriously injured by a CN vehicle. The accident occurred around 4:00 o'clock, p.m. in the McGregor Yard. Mr. Crowe had finished his sequence check of the cars located on track A8 and was returning to his vehicle that was parked along a service road adjacent to the tracks. When the accident occurred, Mr. Crowe was bent over in front of his vehicle, with headlights on and, apparently, trying to read something. The driver of the oncoming vehicle reported that Mr. Crowe appeared "20 to 25 feet" in front of his vehicle and that he was unable to avoid the collision at that point. It is unclear why Mr. Crowe was in the oncoming lane.

The speed of the vehicle involved in the collision was established at being approximately 10 to 15 mph.. The police investigation confirmed that, at the speed at which the oncoming vehicle was travelling and the distance at which Mr. Crowe was distinguished, the accident was unavoidable regardless of the condition of the brakes on the vehicle involved in the accident.

The results of the investigation carried out by the safety officer in this case revealed that three factors contributed to the accident. They are:

1. Mr. Crowe was dressed in dark clothing, a black/grey jacket and dark pants, making him very difficult to see in low light conditions. The test carried out on lighting conditions and visibility at the time of the incident revealed that "a person, dressed in dark clothing, is not readily visible when in an area between two vehicles approaching each other with headlights illuminated, until the distance between the vehicles becomes very minimal."
2. Mr. Crowe was not wearing any personal protective equipment i.e. head protection and foot protection.
3. Motor vehicle #078446 which was in contact with Mr. Crowe was found to be in an unsafe condition with deficiencies noted with its brake system, steering, tires.

In response to these findings, the safety officer issued a direction (APPENDIX-1) to C.N. North America addressing the use of:

- a) high visibility clothing;
- b) personal protective equipment; and
- c) safe vehicles and equipment.

Submission for the employees

Mr. Merritt explained at the hearing that he had only requested a review of items number 2 and 3 of the direction and that only those two items were to be reviewed.

Mr. Merritt stated that, in respect of the second item, the technical and legal format of the direction was unacceptable because the safety officer failed to identify the provision of the Canada Occupational Safety and Health Regulations (the Regulations) that had been contravened, thus questioning whether the direction was enforceable. Mr. Merritt is asking the Regional Safety Officer to vary that item of the direction by including a reference to paragraph 125(s) of the Canada Labour Code, Part II (the Code) and identifying section 12.15 of the Regulations as the appropriate provision to be complied with.

In respect of the third item, Mr. Merritt recognizes the safety officer's "dilemma that he was faced with by trying to rely on a COSH Reg. that would not appropriately address the deplorable condition of the road vehicle being relied on by employees at the time of the incident." Indeed, the police investigation identified a serious deficiency with the braking system of the contact vehicle

in that the rear brakes were effectively not functioning at the time of the accident. Mr. Merritt is suggesting that the Regional Safety Officer vary the direction by referencing section 124 of the Code to ensure the employer meets the provincial standards on its vehicles.

Submission for the employer

In respect of the second item of the direction, Mr. Peel notes that while employees, including Mr. Crowe, are well aware of the employer's policies in regards to the use of personal protective equipment, he has no explanation as to why Mr. Crowe was not wearing the protective equipment, i.e. the high visibility vest and foot protection, on that day. Nonetheless, steps were taken following the issuance of the direction to make all employees working at the carload centre aware of their responsibility to wear the high visibility vests.

Mr. Peel feels that, in respect of the third item of the direction, "the provision of the Code which is referred to is probably the most appropriate one, i.e. paragraph 125(i). Furthermore, it is suspected that the maintenance of the vehicle was a concealed fraud which is currently under investigation by the police. Nonetheless, it has been shown that, while the brakes were heavily worn and not repaired as had been presented, this would not have prevented the accident. That assertion was corroborated by the police investigation.

Decision

There are two issues to be decided in this case which correspond to item number 2 and item number 3 of the direction. I will analyze each issue separately. It should be noted that the first item of the direction is not under review. However, this does not mean that I agree with the safety officer that this item of the direction is correctly formulated.

1. The first issue to be decided is the second item of the direction which reads as follows:

"Paragraph 125(v) of the Canada Labour Code, Part II.

The employer shall ensure that every person granted access to the workplace by the employer is familiar with and uses, in the prescribed circumstances and manner, all prescribed safety materials, equipment, devices and clothing."

Mr. Merritt is concerned with the format of this item for two reasons. Firstly, it fails to identify the appropriate provision of the Regulations as explained above. Secondly, in Mr. Merritt's opinion, the real issue in this instance should have been making the employees aware of the protective equipment that must be used at work and giving them the necessary training to ensure their protection. Therefore, the safety officer should have referenced paragraph 125(s) of the Code and identified section 12.15 of the Regulations to address that concern.

I must admit that, initially, I was somewhat confused with the wording of this item of the direction. The safety officer referenced paragraph 125(v) of the Code but rather than describing the infraction, as he did for the first item of the direction, he merely repeated the wording of paragraph 125(v) of the Code, thus making that item redundant as formulated. However, at the hearing the safety officer explained that he observed employees not wearing any personal protective equipment. He further explained that since the company had clear policies in regards to personal protective equipment, he issued a direction to the company to ensure that their policies are being enforced.

Mr. Peel is not objecting to the direction as formulated. In fact, Mr. Peel submitted that in response to the direction, the company issued a bulletin to all employees of the carload centre re-emphasizing the need to wear high visibility vests. The safety officer confirmed that, following his investigation, the area was posted with signs with regards to head and foot protection and that the safety and health policies and procedures had been upgraded with the employees.

In my opinion, all the safety officer needed to do to ensure compliance in this case was to issue a direction to the company, which he did, and identify the provisions of the Code and the Regulations which, in his opinion, were being contravened. The safety officer omitted to identify those latter provisions with the result that employee representatives felt aggrieved by the direction.

As Mr. Merritt explained in his submission, by using the word prescribe in the enabling legislation, which is the Code in this instance, the legislator intended to impose upon the employer a specific duty or, at least, ensure that it had the necessary authority to do so in the future. Mr. Merritt concluded that, for this item of the direction to have any meaning, a specific provision of the Regulations must be identified. I fully agree with Mr. Merritt's conclusion.

The proper provisions of the Regulations addressing protective headwear, protective footwear and high visibility vests are as follow:

protective headwear - section 12.4 of the Regulations

protective footwear - section 12.5 of the Regulations

high visibility vests - section 12.13 of the Regulations

In my opinion, the issue of ensuring compliance with paragraph 125(v) of the Code respecting the use of high visibility vests has not been addressed by the first item of the direction. Therefore, I will reference section 12.13 of the Regulations to ensure the employer complies with the law by enforcing its own policies in this respect.

Before closing the revision of this item of the direction, I must address Mr. Merritt's request to have the second item of the direction varied by referencing paragraph 125(s) of the Code and identifying section 12.15 of the Regulations on the basis that employees were not given adequate information and training in respect of personal protective equipment. While Mr. Merritt's concern may be very legitimate, it is an issue which was not addressed by the safety officer during his

investigation and for which no evidence has been gathered or submitted. If anything, the safety officer was of the opinion that CN had adequate policies in place in this respect and that he was satisfied that training was not an issue in this case. I do not believe I can address this particular issue any further.

For all the above reasons, I HEREBY VARY item number two of the direction by replacing the following reference and description i.e.

2. Paragraph 125(v) of the Canada Labour Code, Part II.

The employer shall ensure that every person granted access to the workplace by the employer is familiar with and uses, in the prescribed circumstances and manner, all prescribed safety materials, equipment, devices and clothing.

with the following references and description, i.e.

2. Paragraphs 125(v) of the Canada Labour Code, Part II and sections 12.4, 12.5 and 12.13 of the Canada Occupational Safety and Health Regulations.

Employees of the carload centre were not wearing the prescribed protection equipment.

2. The second issue to be decided is the third item of the direction which reads as follows:

Paragraph 125(i) of the Canada Labour Code, Part II.

The employer shall ensure that the vehicles and mobile equipment used by the employees in the course of their employment meet prescribed safety standards.

As noted by Mr. Merritt, paragraph 125(i) of the Code calls for a specific provision of the Regulations that addresses safety standards for motor vehicles, a provision which manifestly does not exist. It is a well known fact that motor vehicles in general are subject to provincial legislation. It is likely for this reason that Part XIV (Materials Handling) of the Regulations does not apply to or in respect of the use and operation of motor vehicles on public roads (para. 14.2(a)). Evidently then, the reference to paragraph 125(i) of the Code was inappropriate since nothing in the Regulations specifically addresses safety standards for motor vehicles used and operated on private properties such as the McGregor Yard.

Nonetheless, compliance with provincial safety standards is a pre-requisite to using any licensed motor vehicles. Failure to meet these minimum standards, which in this case corresponds to a deficient rear brake system, demonstrates that, whether intentionally or not, the employer has not taken the necessary measures to protect the safety and health of its employees at work, a fundamental requirement which is expressed by section 124 of the Code. As a minimum, a motor vehicle must be safe under all conditions of its intended use.

Mr. Peel stated that the deficiencies to the braking system would have made no difference in this situation. That argument does not justify the poor condition of the vehicle which could have jeopardized the safety and health of any of CN's employees that was using or was in the vicinity of the truck in question. Mr. Peel also stated that CN has a rigorous maintenance program and that the deficiencies identified are probably the result of a concealed fraud. However, the safety officer did not have that information at the time of his investigation and, I understand that the police investigation is in progress but is not completed. Depending on the result of that investigation, the employer could certainly use the alleged fraud as a defense in other proceedings, if any are instigated.

In my opinion, the employer was in non-compliance with section 124 of the Code for not ensuring that its motor vehicles were safe under all conditions of their intended use, whether they are used on public or private roads and whether or not they meet provincial safety standards. Evidently, the vehicle involved in the collision was not safe for its intended use, due to the condition of the brake system, regardless of whether that would have changed anything to the situation at hand or not.

For all the above reasons, I HEREBY VARY item number three of the direction by replacing the following reference and description i.e.

3. Paragraph 125(i) of the Canada Labour Code, Part II.

The employer shall ensure that the vehicles and mobile equipment used by the employees in the course of their employment meet prescribed safety standards.

with the following reference and description i.e.

3. Section 124 of the Canada Labour Code, Part II.

Motor vehicle #078446, which was in contact with Mr. Crowe, was found to be in an unsafe condition due to the deficiency in the brake system.

Decision rendered on February 14, 1996

Serge Cadieux
Regional Safety Officer

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

DIRECTION TO CN RAIL NORTH AMERICA
UNDER SUBSECTION 145(1)

On April 26, 1995, the undersigned safety officer conducted an accident investigation in the work place operated by CN North America, being an employer subject to the Canada Labour Code, Part II, at CN North America, Sarnia, Ontario, the said work place being sometimes known as CN McGregor Yard.

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

1. Paragraph 125(j) of the Canada Labour Code, Part II.

Paragraph 12.13 of the Canada Occupational Safety and Health Regulations.

Employees required to work in the yard area who are exposed to contact with moving vehicles are to wear high-visibility vests or other similar clothing.

2. Paragraph 125(v) of the Canada Labour Code, Part II.

The employer shall ensure that every person granted access to the workplace by the employer is familiar with and uses, in the prescribed circumstances and manner, all prescribed safety materials, equipment, devices and clothing.

3. Paragraph 125(i) of the Canada Labour Code, Part II.

The employer shall ensure that the vehicles and mobile equipment used by the employees in the course of their employment meet prescribed safety standards.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contraventions immediately.

Issued at LONDON, ONTARIO, this 12th day of MAY 1995

R.D. (Bob) Fortner
Safety Officer #1705

To: CN North America
277 Front Street West, Suite 405
Toronto, Ontario M5V 2X7
Attention: Pat L. Ross, Manager

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Canadian Auto Workers, Local 100

Respondent: CN North America

KEYWORDS

High visibility vest, motor vehicle, protective headwear, protective footwear.

PROVISIONS

Code: 124, 125(i), 125(s), 125(v) COSHRegs: 12.4, 12.5, 12.13, 12.15, 14.2

SUMMARY

A safety officer gave a direction under subsection 145(1) of the Code to CN Rail as a result of a serious accident that occurred around 4:00 p.m. when a motor vehicle hit a CN transportation clerk. At the time of the accident, the clerk was bent over in front of his vehicle, with headlights on and trying to read something. The investigation of the safety officer revealed that the injured employee was not wearing a high visibility vest and neither personal protective equipment such as foot protection or head protection. It was also determined that the vehicle involved in the collision had serious deficiencies in the rear brakes. The direction addressed each issue separately. CAW appealed the last two items of the direction.

The second item was appealed because the safety officer omitted to reference any provision of the Regulations addressing protective equipment while paragraph 125(v) of the Code required an infraction of the Regulation to be identified. The RSO agreed and VARIED the direction by referencing sections 12.4, 12.5 and 12.13 of the Regulations.

The third item of the direction was appealed because it referenced a prescribed standard for motor vehicles while it was agreed that no such standard existed. The RSO agreed to some extent and VARIED the direction by referencing section 124 of the Code.