

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  
Charny, Quebec  
Represented by: L Michel Huart, counsel

Interested party: Brotherhood of Maintenance of Way Employees  
Represented by: André Trudel, General Chairman

Mis-en-cause: Claude Léger  
Safety Officer  
Human Resources Development Canada

Before: Serge Cadieux  
Regional Safety Officer  
Human Resources Development Canada

A hearing was held at Ste-Foy, Quebec on March 28, 1996.

**Background**

Around 2:30 p.m. on August 29, 1995, Mr. Christian Harvey, a CN employee who was working on scaffolding erected under the bridge at mileage 97.6 of the Montmagny subdivision, exercised his right to refuse to perform "dangerous" work. Mr. Harvey was "refusing to work under a railway bridge while a train was crossing the bridge because of safety risks owing to the fact that objects and hazardous substances could fall on him and injure him". It should be noted that, in this case, the employee did not express any concern about working on scaffolding under the bridge and that the safety officer's investigation was confined to the reason for refusing to work given by Mr. Harvey.

Safety officer Claude Léger intervened in this case on August 30, 1995 around 8:00 a.m. The employee was not present during this investigation because he was apparently ordered off the work site following his refusal to work. The safety officer's investigation report stated that no representative of the employee was present at the scene of the refusal to work. The safety officer nevertheless decided to continue his investigation and met with Mr. Morel, supervisor of structural works for CN. He told the safety officer that "based on his work experience and to his knowledge, no train part and no hazardous substance fell on employees when they were working under a bridge while a train was crossing the bridge. Moreover, in Mr. Morel's opinion, the risk of a hazardous substance spilling or escaping while a train was crossing the bridge was extremely low.

The safety officer stated that, during his investigation, he noted the following facts:

- the bridge in question is a single-track bridge;
- the deck of the bridge is approximately 17 feet 2 inches wide and the scaffolding located under the bridge was approximately 17 feet 6 inches wide;
- the scaffolding was installed directly beneath the bridge; one section was approximately 10 feet 3 inches tall and another section was approximately 12 feet 4 inches tall (measurements taken between the floor of the scaffolding and the base of the railway ties);
- there is a space of approximately 4 inches between each of the bridge's ties;
- trains are ordered to reduce their speed to a maximum of 20 miles/hour when crossing a bridge;
- the work being done on the scaffolding installed beneath the bridge stopped when the Rule 42 foreman announced that a train was going to cross the bridge;
- the employees remained on the scaffolding beneath the bridge while trains were crossing it;
- there were pieces of crushed stone approximately 2 inches in diameter on the beams supporting the ties and these stones fell onto the scaffolding when a train crossed the bridge, according to the testimony of a witness;<sup>1</sup>
- no measure is taken by the employer just prior to a train's crossing the bridge to ensure that no object or any other substance can fall during the crossing;
- no device or material such as wood, screening, etc. was installed on or underneath the deck of the bridge to prevent any object or substance from falling between the bridge's ties and reaching the scaffolding.

The safety officer made the following four specific observations:

- parts, objects or substances forming part of or being transported by trains can fall from moving trains;
- there are stones lying on the ties of the bridge and these stones can move and fall while trains are crossing the bridge;
- no specific measure is taken by the employer to ensure that no object or substance being transported by trains can fall from the trains while the latter are crossing the bridge;

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<sup>1</sup> It was impossible to identify the witness in question and little credibility can be given to this testimony.

- the location of the scaffolding at the time, i.e., directly beneath the deck of the bridge, did not did allow the employees to take cover while a train was crossing the bridge.

Based on the above four specific observations, the safety officer decided that there was a danger to Mr. Harvey in working under such conditions. He issued a direction (APPENDIX) under paragraph 145(2)(a) of the Canada Labour Code, Part II (hereinafter the Code). Moreover, at the hearing in the case, the safety officer explained that the direction issued was in keeping with the intent of subsection 3.13(1) of the Canada Occupational Safety and Health Regulations (hereinafter the Regulations).

### **Submission on behalf of the employer**

Mr. Huart's detailed arguments were entered in the record. He stated that CN's records revealed that, during approximately 850,000 hours of work performed under similar conditions, there had been no accident associated with the type of danger described by the safety officer. Moreover, Mr. François Laporte, loss control specialist, estimated the probability of an accident of the type described above occurring at 10-20, which is an infinitesimal risk.

Moreover, if a piece of equipment came loose from a moving train, or a rock<sup>2</sup> managed to fall through one of the spaces separating the ties - and these spaces were only four inches wide - the movement and rubbing between the ties would reduce the speed at which the object fell, thereby reducing the impact of its fall. In fact, even if an object was thrown up by the movement of the train, it would probably be directed to the side of the track, and not downward.

Mr. Huart pointed out at the hearing in this case that it was virtually impossible for a hazardous substance being transported by train to escape from tank cars because of safety devices specifically designed to prevent such leakages. For example, tank car valves were equipped with bells that prevented leakages from occurring. The safety officer admitted that he was not familiar with the devices that these tank cars were required to carry.

Mr. Huart noted that, insofar as a real danger was concerned, Mr. Harvey did not provide any real evidence to support his reason for refusing to work. Moreover, Mr. Harvey had been working for years on these bridges and had never before expressed any fear about a danger of injury. Mr. Richard Gauthier, supervisor of the site, stated that when Mr. Harvey refused to work, he was in the centre of the bridge on the scaffolding and was cutting some rivets. Mr. Gauthier stated that Mr. Harvey, like all the other employees, had been informed of the application of Safety Rule 42 to this workplace. Under this rule, communication is established between the train crew and an employee on the ground where the work is being done. The train cannot cross the bridge until it receives permission to do so from the designated employee on the ground. At that point, work stops until the train has crossed the bridge. The train's speed at that point is approximately 20 miles/hour.

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<sup>2</sup> It was established that there was ballast, i.e., the crushed stone on which the ties rest, on the first ten ties at each end of the bridge.

Finally, the safety officer neglected to take into account the fact that employees working on scaffolding wear personal protective equipment that should be sufficient to protect them should any material, like stones lying on the track, fall between the ties.

### **Submission on behalf of the employee**

Mr. Trudel was of the view that one should not wait until an accident happens to act even if the probability of an accident happening is infinitesimal. Installing sheets of plywood the width of the bridge would suffice to protect employees because, in some cases, it was almost impossible to leave the work site under the bridge. Moreover, the company's attitude in this case was not beyond reproach. Mr. Harvey was ordered off this work site, whereas in other situations, employees were offered other work assignments. In addition, Mr. Trudel argued that the situation must be viewed from another angle. If, for example, one was dealing with a bridge of more than 200 feet, would measures be necessary? According to Mr. Trudel, the regional safety officer's decision should reflect this consideration.

### **Decision**

The question to be answered in this case is the following: at the time of the safety officer's investigation, did Mr. Harvey's workplace present such dangers that he was justified in refusing to work there until the situation was rectified? In fact, it was the Federal Court of Appeal that clarified the safety officer's role in *Bonfa v. Minister of Employment and Immigration*, decision No. A-138-89, in which Mr. Justice Louis Pratte wrote as follows:

"...the function of the safety officer is solely to determine whether, at the time he does his investigation, that place presented such dangers that employees were justified in not working there."

Consequently, the safety officer had to determine whether, at the time he did his investigation, i.e., on August 30, 1995 around 8:00 a.m., Mr. Harvey's workplace presented such dangers, namely, the possibility of objects and hazardous substances falling on him and injuring him, that he was justified in not working there. I had occasion to deal with the notion of danger in *Air Canada v. Canadian Union of Public Employees*, unreported decision No. 94-007 (R), in which I wrote as follows:

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:

"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)

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.

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:

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

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."

I draw the following conclusions from the instant case:

- Mr. Harvey was not present during the safety officer's investigation and was not therefore in a situation that posed a danger at the time;

Note: This point was not debated before me. However, this raises some very serious questions concerning the relevance for the safety officer of pursuing his investigation based on a refusal to work under such conditions.

- Mr. Harvey is an employee who has been working under the same conditions for a number of years and has never sustained any injuries;
- CN's records indicate that, during 850,000 hours of work, there have never been any accidents reported concerning the dangers alleged by Mr. Harvey, the danger being almost nil at the time;
- Mr. Harvey was beneath the centre of the bridge when he refused to work, and this eliminates the risk of injury from falling stones, these stones being found only on the first ten ties of the bridge;
- Rule 42 was in effect whenever a train crossed the bridge, and this significantly reduced the train's speed and halted work on the scaffolding;
- the risk of toxic substances leaking is minimal and highly unlikely because the valves of the tank cars are equipped with protective devices. With regard to the discharge of fecal matter from passenger cars, directives are in effect that prohibit the responsible railways from engaging in such practices; and
- all the employees, including Mr. Harvey, wear personal protective equipment, i.e., helmets, protective footwear, work gloves, etc., in the workplace. Only the face is exposed, but through the application of Rule 42, employees stop work while the train is crossing the bridge and do not have to work looking up.

Note: There was no discussion, in this case, of the wearing of safety goggles by employees required to look up while working. I am therefore assuming that this personal protective equipment is worn where the situation warrants.

Finally, I am of the opinion that subsection 3.13(1) has no application in the instant case. This provision reads as follows:

3.13 (1) Where there is a hazard that tools, equipment or materials may fall onto or from a temporary structure, the employer shall provide a protective structure or a safety net to protect from injury any employee on or below the temporary structure.

There was no tool or piece of equipment on the bridge that could have fallen through the openings between the ties. With regard to materials, this term, as defined in Webster's New World Dictionary, 1988 revised edition, must be taken to mean "implements, articles, etc. needed to make or do something". It was established that no piece of material small enough to fall through the openings was present on the bridge when the safety officer did his investigation.

Based on these findings, I conclude that there was no danger to Mr. Harvey, the only employee to have alleged that a danger existed, when the safety officer did his investigation. I conclude that the danger that Mr. Harvey feared and that the safety officer confirmed was based on a situation that had no factual basis and that was extremely hypothetical. The alleged danger was not therefore real, or immediate, and there was very little likelihood of its becoming a reality. Consequently, the situation investigated by the safety officer did not warrant the directions issued. For all these reasons, I HEREBY RESCIND the directions issued under paragraph 145(2)(a) of the Code by safety officer Claude Léger on September 5, 1995 to CN North America.

Decision rendered on April 16, 1996

Serge Cadieux  
Regional Safety Officer

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)

On August 30, 1995, the undersigned safety officer conducted an investigation in the workplace located at bridge 97.60 of the Montmagny subdivision and operated by CN North America, an employer subject to Part II of the Canada Labour Code, and located at 2600, avenue de la Rotonde, Charny (Québec), G6X 2M1.

The said safety officer is of the opinion that the situation that exists in the place in question constitutes a danger to an employee at work, namely:

That whenever a train crosses bridge 97.60 of the Montmagny subdivision, the employees on the scaffolding under the said bridge are exposed to falling objects or other substances that could cause injury.

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

Issued at Montreal, this 5th day of September 1995.

Claude Léger  
Safety Officer  
No. 1778

TO: CN North America  
2600, avenue de la Rotonde  
Charny (Québec)  
G6X 2M1

SUMMARY OF THE DECISION OF THE REGIONAL SAFETY OFFICER

Applicant: CN North America

Interested party: Brotherhood of Maintenance of Way Employees

**KEY WORDS**

Rule 42, bridge, scaffolding, ties, stones, ballast, personal protective equipment, absent employee, refusal, material.

**PROVISIONS**

Code: 145(20(a))

Regs: 3.13(1)

**SUMMARY**

A safety officer concluded that an employee of CN was in a situation that constituted a danger. The danger consisted of the fact that it was dangerous to work on scaffolding under a railway bridge while a train was crossing the bridge because objects or hazardous substances could fall on the said employee and injure him.

Upon review, the regional safety officer concluded that the alleged dangers were not immediate or real, but merely hypothetical. Moreover, the employee who had refused to work was not present at the work site when the safety officer conducted his investigation, and this same employee had years of experience working on this type of site without ever having sustained an injury. The regional safety officer also determined that subsection 3.13(1) did not apply in the instant case. No danger existed at the time the safety officer conducted his investigation and the regional safety officer RESCINDED the direction.