Canada Appeals Office on Occupational Health and Safety
Bureau d'appel canadien en santé et sécurité au travail

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Canada Labour Code
Part II
Occupational Health and Safety

John L. Gouveia
applicant

and

Canadian National Railways (CNR)
employer

Decision No. 04-003
February 23, 2004

This case was decided by appeals officer Pierre Rousseau

Health and Safety Officer
Robert Maklan, Metro York District, Labour Program, Human Resources Development Canada

[1] This case concerns an appeal submitted on June 2nd, 2003 by John L. Gouveia, an employee of Canadian National Railways (CNR), under subsection 129(7) or section 146 of the *Canada Labour Code*, Part II.

[2] The appeal seemed to relate to a decision of refusal to prosecute CNR, in a letter issued by health and safety officer Robert Maklan.

[3] However, the facts were that health and safety officer Maklan had investigated a complaint made by Mr. Gouveia, requesting that : Following a Crane accident that occurred on February 27, 2003, at Canadian National Railway's Mac Millan Yard, he was of the view that Canadian National Railway and / or their managers, who bear responsibility for their operation on track E-09, should be charged pursuant to Section 148. (3) of Part II of the *Canada Labour Code*, because of their failure to provide, as required by subsections 125.(1) (*q*), 125.(1) (*s*) and 125.(1) (*t*) "each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work". After investigating, Mr. Maklan informs Mr. Gouveia, in a letter dated May 12, 2003, that he concluded as a result of his investigation that, it would be difficult to prosecute Canadian National Railways and / or its managers for wilfully contravening the *Canada Labour Code*, Part II, ss.125.(1) (*q*), 125.(1) (*s*) and 125.(1) (*t*).

[4] Despite what Mr. Gouveia may think, the decision of refusing to prosecute Canadian National Railway and / or its managers, does not constitute a decision that can be appealed under subsection 129(7) or section 146 of the *Canada Labour Code,* Part II. As specified in section 128 of the *Code*, a decision of no danger, which would give Mr. Gouveia the right to appeal, can only exist after an employee refuses to work and, as stipulated in subsection 129(4) of the *Code,* a health and safety officer renders a decision concerning the absence of danger. As indicated in subsection 129(7) of the *Code*, this is the only type of decision that can be appealed. These provisions read as follows:

> 128. (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
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> (*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
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> (*b*) a condition exists in the place that constitutes a danger to the employee; or
>
> (*c*) the performance of the activity constitutes a danger to the employee or to another employee.
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> 129. (1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is an employee member of the work place committee; the health and safety representative; or if a person mentioned in paragraph (*a*) or (*b*) is not available, another employee from the work place who is designated by the employee
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> (4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.
>
> (7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

[5] Since their was no refusal to work in this case, this situation does not apply to Mr. Gouveia. The only other situation where an appeals officer can intervene is when a direction has been issued.

[6] In short, an appeals officer only has the legal authority to intervene in a situation when, as stipulated in section 146.1 of the *Canada Labour Code*, the law authorizes him or her to do so: 146.1 (1). If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may…

[7] Mr. Gouveia's appeal concerns a decision to refuse to prosecute Canadian National Railway and not the direction issued by safety officer Maklan to Canadian National Railway, following his investigation of March 31, 2003.

[8] I conclude in this particular case that I have no legal authority to hear this case. I therefore dismiss Mr. Gouveia's request. This file is now closed.

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Pierre Rousseau
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 04-003

Applicant: John L. Gouveia

Employer: Canadian National Railways (CNR)

Key Words: Decision of no danger, direction, information letter, the legal authority of an appeals officer.

Provisions:

***Code*:** 128(1), 129(1), 129(4), 129(7), 146.1

Summary:

A health and safety officer received a complaint from a Canadian National Railways employee and then investigated it. The health and safety officer refused to prosecute the Company as requested by the employee. The employee filed an appeal claiming that an information letter that he had received from a health and safety officer constituted a decision and that he was appealing it. The appeals officer concluded that he did not have the legal authority to hear the appeal and therefore dismissed it.