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

D. Bondy
applicant

and

Canadian National Railway (CNR)
respondent

Decision No. 04-017
April 14, 2004

Ms. Bondy, a Conductor with Canadian National Railway (CNR) on Go Train assignment, refused to work on May 26, 2002. Health and safety officer Andre Lalonde investigated into her refusal to work later that night on May 27, 2002, and, following his investigation, decided that a danger did not exist for Ms. Bondy. Ms. Bondy appealed his decision under subsection 129.(7) of the *Canada Labour Code* (*Code*), Part II, on June 1, 2002, and a hearing was held in Toronto, Ontario, on September 4, 2003, October 24, 2003 and January 26 2004,.

Appearances:

Applicant:
Ms. Denise Bondy.
Mr. Pierre Labbee, Health and Safety Committee Representative, CNR
Mr. Don Miller, Assistant Conductor, CNR

Respondent:
Mr. William McMurry, Counsel, CNR,
Mr. Richard Chorkawy, Senior Manager, Commuter Operations,
Mr. David Berard, Train Master, CNR
Mr. Robert Hayes, Risk Manager Officer, CNR

Mr. Andre Lalonde, Health and Safety Officer, Transport Canada

[1] Health and safety officer Andre Lalonde provided a copy of his decision report and testified at the hearing. I retain the following from his report and testimony.

[2] On May 26, 2002, Ms. Bondy, a Conductor with Canadian National Railway (CNR) on Go Train assignment reported for duty at Willowbrook, Ontario at approximately 16:20 hours to begin her 16:40 hours shift on Go Train number 924 departing Mimico to Scarsborough, Ontario. While it was a CNR requirement that she meet with her crew members for a pre-trip job safety briefing prior to departing, her Assistant Conductor, Mr. Don Miller, did not participate in the meeting. Ms. Bondy testified that she observed Mr. Miller in the accessibility coach prior to the train departing Mimico, but she did not see him again until the Pickering Station, and then again until the Port Credit Station. Knowing that Mr. Miller had been on duty since 08:40 hours that morning, Ms. Bondy was concerned that he was not carrying out his duties because he was too fatigued. She radioed to Mr. Miller over the short wave radio and asked him why he had not been on the station platforms as required, and if he was too tired. After that exchange, she noted that Mr. Miller was on every platform thereafter, and put down the accessibility platform at Oakville as required.

[3] At approximately 19:30 hours, Ms. Bondy contacted Mr. Mike Cameron at CNR's Communication Centre and asked him if Mr. Miller would be replaced as he was about to complete 12 hours of service in approximately 40 minutes. She held that Mr. Miller would be in contravention of the "*Maximum Hours of Service and Mandatory Time Off Duty regulations*" after completing 12 hours of service. Mr. Cameron reported back to Ms. Bondy that Mr. Miller would not be replaced. Mr. Cameron then radioed to Mr. Miller who reported back to him that he was fit to work and good to go.

[4] Ms. Bondy continued to observe the performance of Mr. Miller and noted that he was appearing on the station platforms, but had not put down the accessibility platform until Union Station. She further noted that Mr. Miller had not walked the train or patrolled the train as required. She stated that he always disembarked the train from the 5A/5B doors.

[5] When the Go Train reached Rouge Hill Station at approximately 20:42 hours, Ms. Bondy observed that Mr. Miller did not deploy the platform and that he jumped the gap instead of protecting the gap. She then communicated with Mr. Cameron by radio and invoked her right to refuse to work. The train proceeded no further and passengers were transported by bus.

[6] Mr. David Berard, CN Trainmaster with Mr. Richard Chorkawy, Director of Commuter Operations, and Mr. Pierre Labbee, employee health and safety representative conducted the employer's investigation of the refusal to work pursuant to subsection 128.(10) of the *Canada Labour Code, Part II* (hereto referred to as the *Code* or Part II). Ms. Bondy complained that Mr. Miller was too tired to perform his duties safely because he had doubled onto the afternoon assignment. Mr. Berard then spoke to Mr. Miller and observed his physical condition. Mr. Miller replied that he was fit and wished to continue to work. Ms. Bondy disagreed and continued to refuse to work.

[7] Health and safety officer Lalonde arrived at the Rouge Hill Station at approximately 01:40 hours on May 27, 2002, to investigate Ms. Bondy's refusal to work pursuant to subsection 129.(1) of the *Code*. He immediately met with Ms. Bondy, Mr. Pierre Labbee, Mr. Richard Chorkawy, Mr. David Berard and Mr. Robert Hayes, CN Risk Management officer. In her statement of refusal to work to health and safety officer Lalonde, Ms. Bondy stated:

> I feel the Danger is my Assistant Conductor is (sic) not doing his job appropriately. I don't feel he would be able to back me up in an emergency situation. I feel that the Assistant Conductor is too tired and fatigued to perform his duties.

[8] However, when health and safety officer Lalonde asked Ms. Bondy if Mr. Miller appeared to be physically incapable of doing his job safety, she replied that she never got close enough to him during her shift to tell. She maintained, however, that she had worked with Mr. Miller previously and never had cause in the past to suspect his ability to work safely.

[9] Health and safety officer Lalonde interviewed Mr. Miller at approximately 01:30 hours on May 27, 2002, some 3 hours after the refusal to work. He observed and spoke with Mr. Miller for 15 to 30 minutes. Mr. Miller told health and safety officer Lalonde that he was regularly assigned Assistant Conductor on Assignment No. 6 and a typical 5 day work schedule had him start at 05:10 hours and end at 08:40 hours with 2 consecutive days of rest. On May 26, 2002, the day of the refusal to work, Mr. Miller completed his shift and had agreed to double on assignment 84 as the company was experiencing a shortage of employees. He stated that he often doubled and had never felt too tired to perform his job safely. He told health and safety officer Lalonde that he had felt fine when Ms. Bondy refused to work and never felt too fatigued to perform his duties that day.

[10] With regard to the accessibility platform and the station platform, he stated that he was only deploying the accessibility platform when a passenger was entraining or detraining at that particular door, and that he was on the station platform at all times when duty permitted. Health and safety officer Lalonde testified at the hearing that AC Don Miller did not show any outward signs of fatigue at the time of the interview.

[11] During health and safety officer Lalonde's investigation, Mr. Labbee opined that any employee who worked in excessive of 12 hours would not be able to do their job effectively in the event of an emergency, thereby impacting the safety of themselves and fellow employees.

[12] Following his investigation health and safety officer Lalonde decided that a danger did not exist for Ms. Bondy. He concluded in his report:

> The evidence offered by Ms. Denise Bondy was based on her opinion of Assistant Conductor Don Miller's potential inability to perform his duties safely in the event of an emergency. The refusing employee provided no other evidence to support this opinion. Additionally, at no time was Ms. Bondy close enough to

personally observe Mr. Miller's condition in order to visually assess any level of fatigue impairment. Ms. Bondy based her opinion solely on her perception of Mr. Miller's job performance.

It was my conclusion that there was "no danger" within the purview of Section 128.(1) of the *Canada Labour Code*, Part II to support Ms. Bondy's right to refuse dangerous work because the potential hazard was based on speculation of her fellow employee's condition and the employee's ability to perform his duties safely in the event of an emergency.

[13] Ms. Bondy submitted documents and testified at the hearing. I retain the following from her evidence.

[14] Ms. Bondy was involved with the union and the joint work place health and safety committee. She took her responsibilities seriously and took it upon herself to conduct research and to become more versed in applicable legislation on health and safety issues important to her members. Two such matters related to hours on duty, and the detrimental effects of fatigue and working excessive hours on work performance and safety.

[15] On the subject of permitted hours of duty for train crews, Ms. Bondy conducted a library research and consulted with the UTU Legislative Director, and with Transport Canada Railway Inspectors who she met at the 2001 Transport Canada Ontario Region Safety Congress. She submitted numerous documents related to permitted hours of duty for train crews and with emergency procedures. The documents will not be reproduced here, but form part of the file and were considered in this decision. Based on her research and consultation, she concluded that the maximum number of continuous hours on a work ticket was 12 (twelve).

[16] With regard to the issue of fatigue and working excessive hours, Ms. Bondy submitted some 16 documents which consisted of what could be characterized as public or generic advisories, union advisories, quasi-scientific and scientific articles. Essentially the advisories and articles indicated that fatigue and working excessive hours can result in compromised performance and safety and reduced ability to react in emergencies. Her documents will not be reproduced here, but form part of the file and were considered in this decision.

[17] Ms. Bondy referred specifically to a CNR Alertness Series pamphlet in her package of documents which suggested that being awake in excess of 20 (twenty) hours is comparable to being intoxicated. She maintained that Mr. Miller's lack of responsiveness to his duties and his length of hours on duty convinced her that he was tired and a danger.

[18] Mr. Miller, Assistant Conductor with CNR on Go Train assignment testified at the hearing. I retain the following from his testimony.

[19] Mr. Miller had 9 to 10 hours of sleep prior to the commencement of his tour of duty on May 26, 2002, and anticipated the possibility of extra work. He did not feel fatigued at any time during either tour of duty and felt fit and ready to complete his shift at Rouge Hill. He confirmed that he had no face-to-face contact with Ms. Bondy prior to Rouge Hill.

[20] He confirmed that he had been cited by a Transport Canada inspector on May 15, 2002 for reading a newspaper while on duty and for leaving a radio on the crew seat area while he positioned himself at the other end of the coach creating an annoyance for passengers. The inspector also cited him for having cut out the accessibility platform door of the coach so that the door did not operate at the next station and then cut it back in. The inspector additionally wrote:

> "The door continued to operate without him present and no bridge plate deployed at Rouge Hill or Pickering where a large gap is present."

[21] Mr. Labbee testified at the hearing. He stated that, when it came time for health and safety officer Lalonde to interview Mr. Miller, he went to find Mr. Miller on the train and found him asleep in a darkened rail car. He held that Mr. Miller appeared to be fatigued and to have red eyes and slow speech. Even though Mr. Miller told him that he was fine, Mr. Labbee maintained that Mr. Miller was not in optimal condition and looked more tired than the rest of the crew.

[22] Mr. Robert Hayes, Risk Management Officer, CNR testified that he spoke to crew members before health and safety officer Lalonde arrived to conduct his investigation of Ms. Bondy's refusal to work. When he met with Mr. Miller in a separate coach, he noted that Mr. Miller stood and discussed the situation in a normal manner. He felt that Mr. Miller appeared alert.

[23] Mr. Chorkawy testified at the hearing. I retained the following from his testimony.

[24] Accessibility ramps are made available on trains for persons with disabilities and for expectant mothers. The accessibility ramp is located on a car designated for this and the conductor or assistant conductor is positioned at the set of doors for this. Instructions state that the accessibility ramp must be deployed at all times but the accepted practice in commuter service is that it is only deployed if someone is there who needs it.

[25] Finally, Mr. Barry Hogan, Manager of Workforce Strategy testified at the hearing. He explained the hours of duty rules as they operate at CNR.

[26] In her summation, Ms. Bondy confirmed that her refusal to work was based on her belief that Mr. Miller was unable to perform his duties due to fatigue caused by excessive work hours on duty and could not be relied upon in an emergency. She indicated that she arrived at her belief based on the literature she had gathered on the subject of fatigue and working excessive hours and on her observations of Mr. Miller's performance.

[27] She reiterated that Mr. Miller did not perform his duties relative to deploying the accessibility ramp at stops, guarding the gap or inspecting the train. While she did not have face-to-face contact with Mr. Miller prior to her refusal to work, she reminded me that Mr. Labbee had assessed that Mr. Miller was fatigued when he saw him a few hours later. She reiterated that Mr. Miller was not performing his duties and he did not offer any other explanation for this.

[28] She referred to the articles she had gathered on fatigue and working excessive hours and held that the research shows that it's impossible for one to be at the same state of alert after 12 hours into a shift. She opined that the research also shows that one is not a very reliable judge of their own fitness and alertness. She held that, if Mr. Miller had not been tired, the ramp would have been deployed and the train patrolled as required. She added that there is always a potential for a train going into emergency mode, and since Mr. Miller was fatigued and could not be relied upon, the potential for danger was also there.

[29] While she insisted that she did not base her refusal to work on the hours of service regulations, she continued to hold that the maximum permitted hour on duty in a tour of duty is twelve. She insisted that Mr. Miller was in contravention of the General Operating Instructions (GOI) – Hours of Work Operating Employees Canada at the time of her refusal to work and this gave credence to her belief that Mr. Miller's abilities were compromised. In this regard, Ms. Bondy observed that CNR had not offered any evidence to show that Mr. Miller was not fatigued and not posing a danger. She added that it was reasonable to expect Mr. Miller's condition would deteriorate, as it did.

[30] She asked that I rescind and overturn the May 28, 2002 decision of health and safety officer Lalonde that a danger did not exist for her.

[31] In his summation, Mr. McMurray held that an appeals officer can accept new evidence in an appeal but cannot ignore the facts and finding of the health and safety officer who investigated a refusal to work. He also held that any new evidence accepted must be relevant to the question of whether or not a danger existed.

[32] He cited relevant jurisprudence that he held confirmed three themes related to the right to refuse work provisions of the *Code* that he deemed to be relevant to this case. The first was that the danger must deal with employee safety and not public safety. The second theme was that right to refuse is an emergency measure to deal with dangerous situations that arise unexpectedly and that require immediate attention and not for resolving labour relations disputes. The third theme was that the right to refuse provisions are not to be used to interpret operating rules or collective agreements. Rather the role of health and safety officers in the first instance, and appeals officers on appeal, is to determine whether the facts support a finding of danger. The jurisprudence cited included the following:

1. *Brailsford v. Worldways (92) 87 Di (CLRB) per Mary Rozenburg*
2. *Montani v. CNR (94) Di 157 (CLRB) per Mary Rozenburg*
3. *Zafari v. CNR (96) Di 154 (CLRB) per Mary Rozenburg*

4. *Brunet v. St. Lawrence and Hudson Rwy Co. (98) 108 Di 24 per Véronique Marleau*
5. *Brulé v. CNR, (Feb. 18, 1999) Decision No. 2 (CIRB) per Michel Pineau*
6. *Janes v. Transport Solutions (Nov. 3/99) Dec. No. No. 38 (CIRB) per Sarah FitzGerald*
7. *Johnston v. CNR, (Dec. 3/1999) Decision No. 41 (CIRB) per Sarah FitzGerald.*

[33] Mr. McMurray then reminded me of Mr. Miller's statement to officer Lalonde that he doubled as often as he could and never felt too tired to do his job safely when doing so. Mr. Miller told health and safety officer Lalonde that he felt fine during his second tour of duty that day and never felt fatigued.

[34] With regard to being on the station platforms and using the accessibility platform, he noted that Mr. Miller told officer Lalonde that he was on the station platform at all times when duties permitted and that he only deployed the accessibility platform when a passenger required detraining or entraining at that particular door.

[35] Mr. McMurray also directed me to the decision portion of health and safety officer Lalonde's report wherein he wrote that Ms. Bondy's view that Mr. Miller was unable to perform his duties because of fatigue was based solely on her own opinion and she had no other evidence to support her opinion. Health and safety officer Lalonde also wrote that, after reviewing all applicable regulations, including *Maximum Hours of Service*, and *Mandatory Time Off Duty,* he determined that there had not been any violation with respect to Mr. Miller and his tours of duty on May 26, 2002.

[36] Next, Mr. McMurray referred to Ms. Bondy's formal statements to CNR on June 4, 2002 and July 10, 2002 regarding her refusal to work. He pointed out that Ms. Bondy's first physical contact with Mr. Miller on May 26, 2002, was after she had invoked her right to refuse under Part II. He held that she relied on material that she had gathered in her research as opposed to objective observation. He referred me to Ms. Bondy's summation where in she stated:

> I read in the CN material that proper sleep is an important factor for optimal performance. The staying awake for more than 20 hours has a similar effect on mind and body as being intoxicated. That sleep deprived worker can be a risk to other employees who work with them and themselves. I also read that smokers are at more risk. Mr. Miller is a smoker. I do feel Mr. Miller's alertness and cognitive abilities were impaired due to fatigue. I felt I was doing the right thing at the time.

[37] In connection with this, Mr. McMurray referred me to Ms. Bondy's letter to Ms. Paris, Canada Appeals Officer on Occupational Health and Safety (CAO-OSH) where in she wrote:

> The information that has been provided in regards to lack of sleep, (sic) is overwhelming. Why would CN Rail waste money on a study and then publish its' (sic) findings, if they did not endorse the contents? I did not have to be face to face with Mr. Miller, (sic) to be able to ascertain whether or not he was fatigued.

[38] Mr. McMurray then referred me to Ms. Bondy's final statement in her June 10, 2002 declaration to Ms. Paris of the CAO-OHS that she had a duty to ensure the train is run safely, that there is no danger to passengers, crews and other trains that can be prevented. Mr. McMurray held that public safety and operational safety were not within the jurisdiction of the *Code* or the right to refuse work provisions contained therein.

[39] Finally, Mr. McMurray confirmed that there was an ongoing debate as to the proper interpretation and application of section 4.3 of the GOI relative to permitted hours of work on "covered service." However, in her claim that Mr. Miller had exceeded Hours of Work Operating Employees Canada, he noted that Ms. Bondy had placed her interpretation above that of CNR, her union and her co-employees. In addition, he pointed out that Ms. Bondy's interpretation did not take into account the "covered service" exemption that applied in respect of commuter service. He concluded that there was no evidence that Mr. Miller's state of alertness constituted a hazard or condition by any reasonable or objective parameter and asked that I confirm health and safety officer Lalonde's finding that a danger did not exist for Ms. Bondy.

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[40] The issue in this case is whether or not a danger existed for Ms. Bondy at the time when health and safety officer Lalonde conducted his investigation of her refusal to work on May 26, 2002 and decided on May 27, 2002 that a danger did not exist for her.

[41] According to the definition in section 122.1 of the *Code*, "danger" includes any existing or potential hazard or condition that could reasonably be expected to cause injury or illness before the hazard or condition can be corrected. The definition of "danger" reads:

> 122.1 "danger" means any existing or **potential hazard** or condition or any current or future activity <u>that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected</u>, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system; [My underline.]

[42] In the Welbourne Case, Appeals Officer Cadieux wrote in paragraph [18] that danger can be prospective to the extent that the potential hazard, condition or future activity is capable of coming into being or action and is reasonably expected to cause injury or illness before the hazard or condition is corrected or activity altered. He qualified in paragraph [19] that, since the existing or potential hazard or condition, or current or future activity must be one that can reasonably be expected to cause injury or illness to a person exposed thereto before the hazard, condition can be corrected or activity altered, the concept of reasonable expectation excludes hypothetical or speculative situations. He wrote:

> [18] Under the current definition of danger, the hazard, condition or activity need no longer only exist at the time of the health and safety officer's investigation but can also be potential or future. The New Shorter Oxford Dictionary, 1993 Edition, defines "potential" to mean "possible as opposed to actual; capable of coming into being or action; latent." Black's Law Dictionary, Seventh Edition, defines "potential" to mean "capable of coming into being; possible." The expression "future activity" is indicative that the activity is not actually taking place [while the health and safety officer is present] but it is something to be done by a person in the future. Therefore, under the *Code*, the danger can also be prospective to the extent that the hazard, condition or activity is capable of coming into being or action and is reasonably expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected or the activity altered. [My underline.]
>
> [19] The existing or potential hazard or condition or the current or future activity referred to in the definition must be one that can reasonably be expected to cause injury or illness to the person exposed to it before the hazard or condition can be corrected or the activity altered. Therefore, the concept of reasonable expectation excludes hypothetical or speculative situations. [My underline.]

[43] In this regard, I would refer Ms. Bondy to paragraph [33] of my decision in the Byfield and Canada (Correctional Service) [2003] C.L.C.A.O.D. No. 7, Decision No. 03-007 and dated March 10, 2003 and to paragraphs [80] and [81] of my decision in the Chapman and Canada (Customs and Revenue Agency), [2003], C.L.C.A.O.D. No. 17, Decision No. 03-019 and dated October 31, 2003 wherein I proposed the standard of proof that applies for a finding of danger. Paragraph [33], [80] and [81] read respectively:

> [33] Thus her refusal to work of October 25, 2001, was not based on anything specifically occurring or expected to occur on or in connection with the SLE. Rather it was based on PW staffing levels in the SLE and her conviction that her numerous health and safety concerns confirmed the danger. However reasonably this may have seemed to PW Byfield, such a view is not consistent with the definition of danger in the *Code* or the case law cited. To the contrary, the definition establishes that a hazard, condition or activity only constitutes a danger if the hazard, condition or activity is one that could reasonably be expected to cause injury to any person exposed thereto before the hazard or condition can be corrected or activity altered. That is, the mere existence of one or more hazards,

conditions or activities does not automatically confirm the existence of a danger. Instead, a danger is confirmed where the relevant facts confirm the reasonableness of the expectation that the hazard, condition or activity in question exists, or is capable of coming into existence; that the hazard, condition or activity will cause injury or illness to a person exposed thereto and that the injury or illness will occur immediately, even if the injury or illness is latent; that the illness or injury is serious as opposed to an irritation; and that the hazard, condition or activity is one that arises out of, linked with, of occurring in the course of employment to which Part II applies. None of this was established in connection with PW Byfield's refusal to work.

[80] Taking all of this into account, and with reference to the aforementioned criteria, it is my opinion that, for a finding of danger in respect of a potential hazard or condition or future activity, the health and safety officer must form the opinion, on the basis of the facts gathered during his or her investigation, that:

- the potential hazard or condition or future activity in question will likely present itself;
- an employee will likely be exposed to the hazard, condition or activity when it presents itself;
- the exposure to the hazard, condition or activity will likely cause injury or illness to the employee exposed thereto; and,
- the injury or illness will likely occur before the hazard or condition can be corrected or activity altered.

[81] It follows, in the case of an existing hazard or condition or current activity, the health and safety officer must form the opinion, on the basis of the facts gathered during his or her investigation, that

- an employee will likely be exposed to the hazard, condition or activity;
- the exposure to the hazard, condition or activity will likely cause injury or illness to the employee exposed thereto; and,
- the injury or illness will likely occur before the hazard or condition can be corrected or activity altered.

[44] As argued by Mr. McMurry, the jurisprudence is clear that the right to refuse is an emergency measure not to be used to bring labour relations issues to a head. In her decision in the *Montani v. CNR (94) Di 157 (CLRB)* case, Mary Rozenburg wrote:

> The right to refuse is an emergency measure. It is to be used to deal with situations where employees perceive that they are faced with immediate danger and where injury is likely to occur right there and then. It cannot be a danger that is inherent to the work or that constitutes a normal condition of work. Nor is the possibility of injury or possibility for danger sufficient to invoke the right to

> refuse provisions; there must in fact be a danger. See **Stephen Brailsford** (1992), 87 di 98 (CLRB no. 921); and **David Pratt, supra.** Nor is the provision meant to be used to bring labour relations issues and disputes to a head. [My underline]

[45] According to the evidence, Ms. Bondy refused to work because she believed that her assistant conductor was on his second shift and must be tired. During the shift, she noted that Mr. Miller was not deploying the accessibility ramp, was not patrolling and observing the train and not appearing on the station platforms as required. She concluded that his lack of attention to his full duties was caused by sleep deprivation and evidence that Mr. Miller could not be relied upon to act attentively in the event of an emergency. She held Mr. Miller's inability to react properly during an emergency constituted a danger for her, her train crew, other trains and for the public. While Ms. Bondy regarded her rationale as being incontrovertible, it was, in my opinion, fraught with assumptions and wanting, in the end.

[46] When Ms. Bondy became involved as a member of her work place health and safety committee and as a legislative representative in her union, she took her responsibilities seriously and conducted research to become more versed in legislation in order to inform members and address their health and safety concerns. Two of the issues that concerned her were fatigue and hours of work.

[47] It is apparent from the evidence that Ms. Bondy interpreted the GOI – Hours of Work Operating Employees Canada as establishing the maximum permitted hours of duty after which performance becomes diminished to the point of danger. Ms. Bondy submitted that government would not have enacted legislation limiting the maximum number of permitted hours of duty unless working beyond them constituted a danger.

[48] The numerous articles and documents that Ms. Bondy submitted concerning fatigue and working excessive hours consisted of hazard-alert-type notices, scientific and quasi-scientific articles dealing broadly with hazards related to fatigue and operating excessive hours. Several were, in fact, CNR articles. While some of the documents addressed symptoms related to fatigue that may indicate when a person's performance might be compromised, none, in my opinion, identified an objective test which experts would agree confirms that a person is incapable of working safely due to lack of sleep or excessive work hours. In the absence of specificity in the literature regarding an objective test for determining the degree of diminished ability caused by lack of adequate sleep, Ms. Bondy relied on her own observation and interpretation for deciding that Mr. Miller's performance equated to serious and dangerous sleep deprivation.

[49] However, the problem that I had with this is fivefold. First Ms. Bondy did not actually meet directly with Mr. Miller until after her refusal to work and so was unable to assess his physical state first hand.

[50] Second, Mr. Miller had been cited by a Transport Canada inspector on May 14, 2002, for having failed to deploy the accessibility ramp, for leaving his radio on his seat, for reading a newspaper while on duty and for continuing to operate without being present and no bridge plate deployed at Rouge Hill or Pickering where a large gap is present. No where in his written report did the inspector note or suggest that Mr. Miller appeared tired or fatigued, as an explanation for the omissions of duty observed. This suggests that the performance omissions alleged by Ms. Bondy on May 26, 2002 could be attributed to some other reason besides fatigue.

[51] Third, evidence showed that Locomotive Engineer Mr. Joe Webb testified at a CNR hearing that he spoke with Mr. Miller at Rouge Hill after Ms. Bondy had refused to work and did not see anything unusual with him. Evidence also confirmed that Locomotive Engineer, Mr. Henry Schmitt had similarly testified at a CNR hearing that he had spoken to Mr. Miller following Ms. Bondy's refusal to work and that Mr. Miller appeared fine to him. In addition, Mr. Hayes met and spoke to Mr. Miller in a separate coach for 5 minutes in connection with his investigation of Ms. Bondy's refusal to work. He stated that he found Mr. Miller alert. Only Mr. Labbee agreed with Ms. Bondy that Mr. Miller appeared fatigued on the day of her refusal to work.

[52] Fourth, health and safety officer Lalonde reported that he spoke to Mr. Miller in connection with his investigation of Ms. Bondy's refusal to work some 3 hours after her refusal. He held that Mr. Miller did not show any outward signs of fatigue.

[53] Finally, Mr. Miller maintained throughout that he had performed his duties during his tour of duty and was never fatigued during either tour of duty.

[54] Ms. Bondy refused to work because she felt Mr. Miller was too fatigued to perform his duties and she could not rely on him in the event of train emergency. However, the objective evidence in the case failed to establish that Mr. Miller was too fatigued at the time of health and safety officer Lalonde's investigation to perform his regular duties safely, or duties connected with a train emergency should one occur. Concurrently, the evidence failed to establish that a train emergency was about to occur or expected to occur before Ms. Bondy's tour of duty ended. Health and safety officer Lalonde concluded from his investigation that the hazard feared by Ms. Bondy was based on speculation regarding Mr. Miller's physical condition and his ability to perform his duties, especially in the event of an emergency. I agree with this assessment and find that his decision that a danger did not exist for Ms. Bondy was both reasonable and correct. I, therefore, confirm his decision.

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Douglas Malanka
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 04-017

Appellant: D. Bondy

Respondent: Canadian National Railway (CNR)

Keywords: conductor, assistant conductor, danger, fatigue, excessive hours of work, commuter service, trains, emergency, platform, accessibility platform.

Provisions: *Canada Labour Code* 122(1), 128, 129, 145, 146.
Regulations

Summary:

On May 26, 2002, a Conductor with Canadian National Railway (CNR) on Go Train assignment refused to work because she believed that her assistant conductor was on his second shift and must be tired. During the shift, she noted that her assistant conductor was not deploying the accessibility ramp, was not patrolling and observing the train and not appearing on the station platforms as required. She concluded that his lack of attention to his full duties was caused by fatigue and evidence that he could not be relied upon to act attentively in the event of an emergency. She held that his inability to react properly during an emergency constituted a danger for her, her train crew, other trains and the public.

The Appeals Officer reviewed the facts in the case and determined that there was no factual basis for a finding of danger in this case and confirmed the health and safety officer's decision that a danger did not exist.