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

Air Canada Component of the Airline Division of the Canadian Union of Public employees (The Union)
applicant

and

Air Canada
employer

Decision No.: 04-019
April 21, 2004

This case was decided by Pierre Rousseau, appeals officer.

[1] This case concerns an appeal made on September 5th, 2003 by Beth Symes, from Eberts Symes Street Pinto and Jull, on behalf of the Air Canada Component of the Airline Division of the Canadian Union of Public employees (The Union) and the Policy Health and Safety Committee, under sections 146 and 146.1 of the *Canada Labour Code* (the *Code*), Part II.

[2] The appeal was made as a result of the decision of occupational health and safety inspector Chantal Parent not to pursue a complaint of the Union against Air Canada, for alleged violations of the *Canada Labour Code* Part II, paragraphs 125.(1)(*z.05*), 125.(1)(*z.08*), 125(1)(*z.10*), 125.(1)(*z.18*), 125.1(*f*) and subsection 134.1(4). To the effect that they had not received a written response to a recommendation of the Policy Health and Safety Committee concerning crew nourishment, also the complaint was addressing residual disinsection on flights to Australia and the consultation and participation of the Policy Health and Safety Committee.

[3] In her answer dated August 5th, 2003 to the complainant Ms. Charlene V. Elias, inspector Parent informed her that the specific incidents cited as the basis for the complaint (concerning crew nourishment) was not covered by the *Code* nor in its pursuant *Aviation Occupational Health and Safety Regulations*. In regard of the air Canada revised disinsection procedure, for flights to Australia, she concluded that:

> "It was therefore determined that, with respect to this particular incident, Air Canada did not contravene paragraph 125(1)(*z.05*) (*sic*) of the *Canada Labour Code*, Part II, because the policy committee was consulted on the issue of residual disinsection prior to its implementation.

The above concludes Transport Canada's investigation into this conmplaint."

[4] In her notice of appeal dated September 5th, 2003, pursuant to sections 146 and 146.1 of the *Code,* Beth Symes appeals for her client the Decision and Direction of health and safety officer Chantal Parent dated August 5th, 2003. The grounds for appeal included:

"1. The safety officer failed to investigate and / or to address one of the issues in the Union's complaint dated January 9, 2003, namely that the employer failed to respond in writing within thirty (30) days to a recommendation concerning crew nourishment made by the Policy Health and Safety Committee at the occupational health and safety meeting in May 2002; the failure to respond is contrary to section 125(1)(*z.10*) (*sic*) of Part II – Occupational Safety and Health of the *Canada Labour Code*.

2. In the alternative the Decision and direction contain serious errors of law in the interpretation of the *Code* and the *Occupational Health and Safety Regulations*.

3. The health and safety officer erroneously ruled that nourishment for cabin personnel was not covered by the *Code*. The employer's failure to provide nourishment to cabin personnel for very lengthy periods of work is contrary to the employer's obligation to protect the health and safety of its workers as set out in section 124 of the *Code*.

4. The health and safety officer was wrong in law to refuse to investigate and / or address the crew nourishment issue on the basis that there is provision for meal allowances in the collective agreement. Specifically, the employer's obligations under the collective agreement (which in this instance do not even apply) do not relieve the company from its health and safety obligations under the *Code*.

5. The health and safety officer was wrong in law in determining that Air Canada had met its health and safety obligations when it emailed the Union's health and safety representative on November 11, 2002 and advised her that the company would commence residual desinsection on flights to Australia on November 25, 2002 using 2% Permethrin. Permethrin is an insecticide that the Center for Disease Control in Atlanta (CDC) warns causes undue discomfort to many people, including headaches, nauseau (*sic*), seizures and memory loss and, in some cases, acute allergic (anaphylactic) reactions. Residual disinsection actually began on November 15, 2002, four days after the notice.

6. Such notice, without meaningful discussion with the Policy Health and Safety Committee, does not meet the company's obligation to consult the Policy Committee to plan the implementation of changes that might affect occupational health and safety as set out in section 125(1)(*z.05*) (*sic*) of the *Code*.

7. Such further and other grounds that may arise from the safety inspector's report.

Dated at Toronto this 5th day of September 2003."

[5] Despite what Ms. Symes may think, the decision of health and safety officer Parent not to pursue the Union complaint, 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 Ms. Symes the right to appeal, can only exist

after an employee has refused to work and, as stipulated in subsection 129(4) of the *Code*, a health and safety officer has rendered 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.

[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] As health and safety officer Parent in her intervention did not issue a direction but only sent a letter, and as section 146 refers only to a direction issued by a health and safety officer under Part II of the *Code* and not his decision, I don't have the authority to receive such an appeal. This even if the officer did not address all the items which were mentioned in the initial complaint. The present appeal should have been sent to health and safety officer Parent's supervisor as a complaint on her intervention.

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

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Pierre Rousseau
Appeals Officer

Summary of Decision

Decision No.: 04-019

Applicant: Air Canada Component of the Airline Division of the Canadian Union of Public employees (The Union)

Employer: Air Canada

Key Words: Decision, direction, complaint

Provisions:

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

Regulations:

Summary:

The applicant appealed a decision of not having found the employer in contravention with the *Code* by a health and safety officer, following the complaint investigation. The appeals officer concluded that he did not have the legal authority to hear the appeal and therefore dismissed it.