

Canada Labour Code
Part II
Occupational Health and Safety

Air Canada
applicant

and

Canadian Auto Workers (CAW)
employee representative

Decision No. 04-020
21 May 2004

This case was heard by appeals officer Roger Lecourt in Montreal on 18 March 2004.

Appearances

For the employer

Carl Guérard, marketing strategy manager, Air Canada
Mr. Guérard was passenger service manager when the appeal was brought.

For the employees

Yves Leclair, employee co-chair, health and safety committee
Ted Moses, union representative, CAW

Health and safety officer

Mario Thibault, health and safety officer, Labour Program, Human Resources and Skills Development Canada (HRSDC)

- [1] On 26 March 2003, Carl Guérard, Air Canada's passenger service manager at Dorval Airport brought an appeal against a direction issued under section 145. (1) of the *Canada Labour Code* by health and safety officer Mario Thibault on 13 March 2003. The direction in question related to accident-prevention measures relating to the transportation of wheelchair passengers at Dorval's new cross-border pier. Mr. Guérard alleged that there was no violation of the *Code* because the new facility was not in operation when the direction was given.

The health and safety officer's inquiry

- [2] Officer Thibault's narrative assignment report and his testimony at the hearing provide the basis for establishing the main facts of the case.

- [3] On 12 March 2003, customer service manager Gehanne Chroucrallah asked officer Thibault to check whether the access ramps to the new cross-border pier were in compliance with requirements for the transportation of wheelchair-bound passengers. The request was made subsequent to a dispute between employer and employee representatives over the hazards entailed by the access ramps at the pier which was due to come into service on 1 April 2003. The officer went to the site in question on 13 March 2003 where he first met with five managers and service agents, including Ms. Chroucrallah and Yvon Leclair, employee co-chair of the health and safety committee.
- [4] The group then went to look at one of the access ramps at the new pier where the transportation of someone in a wheelchair was simulated. At the time, officer Thibault felt that, because of the lack of brakes on the wheelchair, as well as the slope of the ramp and the presence of raised metal edges between the ramp's telescopic sections, an employee could injure himself if he was pushing a passenger heavier than himself. However, this part of the inquiry showed that the ramp slope was in compliance with the *National Building Code*. It also emerged that, aside from general training on how to lift a load (Body Mechanics), the employees attending the inquiry had not received any specific training on how to move wheelchair passengers.
- [5] The narrative assignment report clearly indicates the conclusion the officer reached at the end of his inquiry: "Lastly, even if the new cross-border pier was not being used at the time, it would be as of 1 April 2003. If no action were taken, there would be a risk of injury for employees required to transport passengers of a certain weight, especially if the passenger service agent concerned was not physically strong enough to perform the task."
- [6] After his visit to the new cross-border pier, Mr. Thibault concluded that the employer was not in compliance with section 124 of the *Code* requiring employers to ensure that the health and safety at work of every employee is protected. He therefore drafted a direction that he handed to Mr. Guérard at a meeting during which he explained the reasons for his direction as well as certain actions that the employer might take to comply with the direction.
- [7] The direction of 13 March 2003 stipulates that "there exists a risk of back injury to passenger service agents who are not physically strong enough and who lack the necessary training to transport people of a certain weight on wheelchairs without readily accessible brakes on the decks used by Air Canada in the new cross-border pier and the future international pier." The direction also states that the *Code* violation should cease by 27 March 2003.
- [8] On 19 March 2003, Mr. Guérard wrote to officer Thibault to inform him that Air Canada was taking three corrective measures to avoid being in violation of section 145. (1) of the *Code*:
- Training for passenger service personnel on how to handle wheelchairs

- Creation of a work team charged with handling and transporting wheelchair passengers who could be called on by employees who were not physically strong enough themselves
- The provision of electrical wheelchairs and carts for the transportation of limited-mobility passengers.

[9] On 26 March 2003, Mr. Guérard again wrote to Mario Thibault to notify him that Air Canada was appealing his direction. According to the appellant, there was no *Code* violation because, at the time the direction was issued, wheelchair passengers were not yet being transported in the new cross-border pier. Both this letter, and the one of 19 March were received by officer Thibault on 2 April 2003.

Arguments from the applicant (employer)

[10] Representing Air Canada, Mr. Guérard immediately pointed out that the decision to appeal the direction was based on a “technicality.” In his view, it was not possible to have a *Code* violation that should cease by 27 March 2003, since the new cross-border pier was not in operation and would not be so before 1 April 2003.

[11] Mr. Guérard continued his argument by acknowledging that the transportation of wheelchair passengers did indeed entail a risk of injury. Although Mr. Guérard described the measures Air Canada had taken to prevent such injury, the presentation and the assessment of these measures would not be relevant under the circumstances since, in this particular case, the essential question consisted in deciding whether a violation can be determined in a situation where a potentially hazardous activity has not yet started.

Arguments from the employees (union)

[12] Yvon Leclair, employee co-chair of the health and safety committee, presented the viewpoint of the employees and their union. He pointed out that the question of occupational risk associated with the transportation of wheelchair passengers has posed a problem since at least 1989, the year when the first direction in this regard was issued at Dorval Airport. He objected to the fact that no standard had been established in this regard, aside from the general standard in the *National Building Code* concerning the angle of slopes in a building. He did not find that this was an appropriate response to prevent the risks of workplace accidents when using wheelchairs on access ramps. Mr. Leclair also argued that the measures taken by Air Canada in response to officer Thibault’s direction had been more or less effective.

[13] On the other hand, Mr. Leclair’s contentions did not contain any direct or indirect argument in response to Mr. Guérard’s contentions regarding the premature nature of both the determination of violation and the issuance of a direction.

Reasons for the decision

- [14] The question to be resolved is as follows: Was officer Thibault in a position to determine a *Code* violation and issue a direction when the new cross-border pier was not yet in operation?
- [15] I would first point out that the direction also covered the future international pier, which was still being built at the time of the inquiry. I also note that neither officer Thibault's testimony nor his narrative assignment report mentioned this other facility. I therefore consider that officer Thibault was not entitled to issue a direction concerning the future international pier since his inquiry was not related to that facility.
- [16] The concept of contravention implies the violation of a statute or regulation in the sense that a statute or regulation has been or is in process of being violated at the time the contravention is noted. In this particular case, how could the officer determine a violation of the Act when operations at the new cross-border pier, including the transportation of wheelchair passengers, had not yet started?
- [17] Even if the officer could anticipate an accident risk because of the various factors involving the design of the access ramps, the work tools that were going to be used or shortcomings in personnel training or work methods, the fact of determining a violation and issuing a direction before activities have even started is the equivalent of giving an across-the-board direction. Granted that the purpose of Part II of the *Code* is to prevent occupation-related accidents and illness, it does not however authorize a health and safety officer to determine a violation before it has even occurred.
- [18] It would have been preferable that the officer, after conducting his inquiry, had submitted a recommendation to the employer and the employees on the best ways of preventing the accident risks associated with transporting wheelchair passengers.
- [19] By virtue of the powers vested in me by section 146.1 (1) of the *Code*, I hereby revoke the direction issued by the health and safety officer on 13 March 2003. However, I would also point out that Air Canada acknowledged on 19 March that corrective action was required. I therefore invite the management and union parties to work closely together to set up or maintain appropriate preventive measures.

Roger Lecourt
Appeals Officer

Summary of Appeals Officer Decision

Decision No.: 04-020

Applicant: Air Canada

Employee representative: Canadian Automobile Workers (CAW)

Key words: Accident, wheelchair transportation, violation, direction

Provisions: *Code* 124, 145. (1), 146. (1), 146.1 (1)
Regulations

Summary:

The applicant asked a health and safety officer to intervene following a dispute over the potential accident risks entailed in transporting wheelchair passengers at the new cross-border pier at Dorval Airport.

After conducting an inquiry that simulated the transportation of wheelchair passengers at the site in question, the health and safety officer determined that there was a risk of injury and issued a direction in consequence. The employer brought an appeal against this direction on the grounds that the new cross-border pier was not in operation when the direction was issued.

The appeals officer revoked the health and safety officer's direction since a violation implies that a statute or regulation has actually been contravened. However, in this particular case, no such violation could have been committed or could be in the process of being committed since no transportation of wheelchair passengers had yet taken place.