

Canada Labour Code
Part II
Occupational Health and Safety

Ear Garland
applicant

Decision No. 04-029
August 12, 2004

This case was decided by appeals officer Michèle Beauchamp.

For the applicant

Ear Garland, Vice President (VP), Local 100, Rail Division, Atlantic Region, National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW)

For Transport Canada (TC)

Marcel Pelletier, Acting Regional Director, Surface Branch, Atlantic Region

- [1] This case concerns an appeal made on July 7, 2004 by Earl Garland, VP, Local 100, CAW, against a decision of Marcel Pelletier, Acting Regional Director, Surface Branch.
- [2] Marcel Pelletier's decision was the result of a formal complaint that Earl Garland had submitted on February 3, 2004, to express his concerns that functional brake tests were being performed by unqualified persons.
- [3] Earl Garland based his request for appeal on the reply that Marcel Pelletier had sent to him on February 16, to advise him that a TC Motive Power inspector had done an inspection and observed a functional test, and that that test met all the requirements of the Locomotive Safety Rules. Mr. Garland wrote:

... This inspection took place on February 10, 2004. During this inspection the Transport Canada inspector observed, during the brake test, the mechanical employee on the ground performing his checks while the locomotive engineer or conductor was in the locomotive cab performing the test.

In the CN Notice No. 011/2004 (A#3) Subject: Shop Track brake test- TO MEET TRANSPORT CANADA AND CN POLICY, PLEASE FOLLOW THE PROCEDURES STATED BELOW: ... clearly describes that the Motive Power employee (in this case the mechanic) will be the person situated in the cab and the locomotive engineer or conductor will be the person on the ground. In the case of

the inspection conducted by Transport Canada on this day, the rolls were completely reversed. The employee in the cab of the locomotive was the engineer or the conductor and the employee on the ground was the mechanic.

The Brake Test that was supposed to be performed in the presents of the Transport Canada Motive Power Inspector was a 16 step Functional Brake Test, found in the CN Mechanical Department Locomotive Hand Book. In a letter that I will attach A#5 from the Union Teamsters Canada Rail Vice General Chairman Mr. Chris Smith. Mr. Smith assures me that the Locomotive Engineers are not trained and therefore are not qualified to perform the 16 Point Functional Brake test required at inspection points such as the Gordon Yard.

[4] Earl Garland also wrote to the appeals officer about the timeliness of his appeal. He said:

I would like to address the issue of my appeal being timely. As a result of any and all of my correspondence with Transport Canada, I was never advised there was a process of appeal for decisions that were not favourable. I was told once by Transport Canada Officer Mr. Rick McLaughlin, that if I was not happy with a decision that I could take the issue up with his boss. I did just that. On March 18, 2004 I had a conference call with Transport Canada Director Mr. Paul Lepage, Regional Director T.C. Mr. Marcel Pelletier and Mr. Bob Bourrier Health and Safety Representative Local I OO/CA W. On this date we discusses the above issue. It was apparent that Mr. Lepage did not have the advantage of the necessary information so after our conference call I sent a letter with various correspondences and asked Mr. Lepage to overturn the previous decision of Transport Canada. I am still awaiting his response. See Attached letter A#7

[5] In Decision 04-002¹, I explained what duties the *Canada Labour Code*, Part II, specifically confers to the appeals officer. I wrote:

[7] Only two provisions of the *Canada Labour Code* Part II authorize the appeals officer to hear an appeal, these being subsections 129(7) and 146(1). These provisions address two entirely different situations.

[8] Under subsection 129(7), an employee who refuses to work may appeal the decision of no danger rendered by the health and safety officer investigating the employee's refusal to work. This subsection reads as follows:

¹ Appeals Officer Michèle Beauchamp, Decision No. 04-002, Mario Laroche and Canadian Auto Workers, February 2004

129(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.
(underlining mine)

[9] Under subsection 146(1), this appeal shall pertain to the direction issued by the health and safety officer and shall be filed by an employer, an employee or a trade union that feels aggrieved by the direction. The subsection reads as follows:

146(1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.

- [6] In the present case, the applicant appealed a decision made by an official of Transport Canada. However, that decision came as a result of a complaint submitted by the applicant, not from an investigation into a refusal to work that would have led to a decision of no danger.
- [7] Furthermore, following Mr. Garland's complaint, a Transport Canada inspector observed the procedure and concluded that it met all the requirements of Section 21, Part III of the Locomotive Safety Rules. The inspector therefore did not issue any direction relatively to that issue.
- [8] Consequently, the *Canada Labour Code*, Part II, grants me no legal authority to hear this case, as evidenced by the relevant provisions, subsections 129(7) and 146(1).
- [9] Finally, the issue of the timeliness of the appeal therefore becomes moot.
- [10] The case is dismissed.

Michèle Beauchamp
Appeals Officer

Summary of Decision

Decision No. 04-029

Applicant: Earl Garland

Key Words: Appeal

Provisions: *Code* 129(7), 146(1)
Regulations

Summary

The applicant appealed a decision made by an official of Transport Canada. However, that decision came not from an investigation into a refusal to work but as a result of a complaint submitted by the applicant.

Therefore, the appeals officer dismissed the case because the *Canada Labour Code*, Part II, grants her no legal authority to hear this case, as evidenced by the relevant provisions, subsections 129(7) and 146(1).