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

Jocelyn Thuot
Stéphane Moreau
applicants

and

Via Rail Canada
employer

Decision No. 04-030
August 17, 2004

This case was decided by appeals officer Michèle Beauchamp on the basis of documents submitted by the parties and the health and safety officer.

Representing the employees
Robert Massé, regional representative, National Council 4000, National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)

Representing the employer
Denis Hamilton, Senior Assistant to the Manager, Maintenance Operations

Health and safety officer
Pierre Morin, Human Resources and Skills Development Canada, Investigation Services Directorate, Montreal, Quebec

[1] This case concerns an appeal pursuant to subsection 129(7) of the *Canada Labour Code*, Part II, by Jocelyn Thuot and Stéphane Moreau, transfer hostlers employed by Via Rail Canada Inc. in Montreal, against a written decision of no danger issued by health and safety officer Pierre Morin on June 5, 2002.

[2] I have retained what follows from the report that the health and safety officer sent to the two employees involved, as well as to Denis Hamilton, Senior Assistant to the Manager, Maintenance Operations, and to Jacques Ouimet, employee member of the local health and safety committee, following his investigation and his decision on the refusal to work.

[3] This is the same report that officer Morin submitted for appeal purposes. The parties have not contested the facts described therein.

[4] On June 3, 2002, the two employees refused to work for the same reason, as described below in the investigation report by health and safety officer Pierre Morin:

> Reason for refusing to work: Health and safety. Neither of the two employees had received training on how to give work familiarization training. We do not feel at ease with being in charge of an unqualified person or moving equipment (a consist).

[5] Jocelyn Thuot said that when he was asked to show the work to a trainee, he felt that he had neither the patience nor the required knowledge to provide training on work equipment, such as the new AMT and Renaissance trains, whose operation he was not familiar with.

[6] For his part, Stéphane Moreau felt that it would be dangerous for both himself and the trainee if he were to train the trainee on work procedures while he himself had not been trained on how to give training.

[7] Another employee, Mr. Sauvé, told the health and safety officer that he had advised the employees to refuse to work if they did not feel comfortable providing training, adding that he did not know how the trainees would react on the job.

[8] The scheduled work familiarization course for the trainees was supposed to last five weeks and be under the continuous supervision of two “official” trainers.

[9] Employer representative Denis Hamilton explained that the training of new employees consists of a theoretical component, a mechanical component and a practical component. After this training, the trainees are introduced to the work itself by twinning them with experienced employees who are able to give them advice and also discuss with them about what they learned during their training.

[10] The employer had always operated in this way, he said. There had never been any difficulties in finding volunteers to look after this aspect of work familiarization for trainees and it had never caused any refusal to work.

[11] Until then, twinning had been arranged on a voluntary basis and the employees with whom the trainees were twinned were paid. However, that particular year, changes were made to the policy concerning payment and the voluntary aspect of twinning.

[12] Mr. Hamilton said that the trainees needed to have the knowledge required to perform the work, even before starting this phase of the familiarization program. He pointed out that four of the five trainees initially selected for this type of employment had passed the exams and assessments required to become a hostler.

[13] Another employer representative, Mr. Colette, confirmed to the health and safety officer that the purpose of this stage of training was to familiarize the trainees with the work and show them the "tricks of the trade." On the other hand, the experienced workers had control over the tasks to be performed, especially in terms of on-board locomotive operations.

[14] The co-chair of the health and safety committee, Mr. Ouimet, acknowledged that this procedure represented an integral part of the work and that, under an agreement with the employer, employees who agreed to familiarize trainees received a bonus for every work shift that was used in this way.

[15] Two instructors, Mr. De la Gave and Mr. Samson, explained that trainee training consisted of one week of theoretical work on the Canadian Rail Operating Rules (CROR), one week of courses on operating procedures, and one week combining this initial training with practicing shunting yard operations.

[16] The purpose of the familiarization stage is to give trainees an opportunity to see what the work consists of and to adapt to work procedures; this stage is complementary to the three-week training.

[17] In his report, health and safety officer Morin pointed out that the familiarization activities had been suspended during the time of the investigation into the refusal to work by employees Thuot and Moreau.

[18] Health and safety officer Morin received and analysed the following materials during his investigation:

- Participants' manual, Training Program for Locomotive Mechanics - Training Program for Locomotive Attendants
- Training bulletin with description of job requirements
- Applicants' examination (General Rules and Instructions – 50 questions) and results obtained
- Trainee eligibility pre-exam (Mechanical Ability) and results obtained
- Technical exam for hostlers and results obtained
- Pre-exam on outdoor work performed (Physical Ability) and results obtained
- Description of the position of transfer hostler
- Workplace evaluation sheet (Evaluator's Guide), containing the specific evaluations for each on-the-job task performed by trainees.

[19] Health and safety officer Morin decided that there was no danger for employees Thuot and Moreau while at work after taking into account the following facts:

- The existence of a training program for locomotive mechanics on the tasks to perform;
- The scores obtained by the trainees throughout their training;
- The comprehensive evaluation criteria for each task performed by the trainees;
- The strict process of eliminating candidates who failed at each stage of training;

- Evaluation of the tasks performed at every stage;
- The fact that the two employees who refused to familiarize the trainees had received the same training and had never considered that this activity was not safe;
- The danger that the employees evoked seemed to be associated more with discomfort and unease, since they said that they did not feel at ease in being responsible for an unqualified person;
- The interpretation of the concept of "danger" given by appeals officer Serge Cadieux in the Parks Canada case,[1] specifically subparagraphs 17 to 21 of subsection 138 of this decision, which reads as follows:

> [17] The current definition of "danger" sets out to improve the definition of "danger" found in the pre-amended Code, which was believed to be too restrictive to protect the health and safety of employees. According to the jurisprudence developed around the previous concept of danger, the danger had to be immediate and present at the time of the safety officer's investigation. The new definition broadens the concept of danger to allow for potential hazards or conditions or future activities to be taken into account. This approach better reflects the purpose of the Code stated at subsection 122.1, which provides:
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> *122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.*
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> [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.
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> [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.

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[1] Appeals Officer Serge Cadieux, *Parks Canada Agency vs. Doug Martin and the Public Service Alliance of Canada*, Decision No. 02-009, May 23, 2002.

> [20] The expression "*before the hazard or condition can be corrected*" has been interpreted to mean that injury or illness is likely to occur right there and then i.e. immediately. However, in the current definition of danger, a reference to hazard, condition or activity must be read in conjunction to the existing or potential hazard or condition or the current or future activity, thus appearing to remove from the previous concept of danger the requisite that injury or illness will likely occur right there and then. In reality however, injury or illness can only occur upon actual exposure to the hazard, condition or activity. Therefore, given the gravity of the situation, there must be a reasonable degree of certainty that an injury or illness is likely to occur right there and then upon exposure to the hazard, condition or activity unless the hazard or condition is corrected or the activity altered. With this knowledge in hand, one cannot wait for an accident to happen, thus the need to act quickly and immediately in such situations.
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> [21] The expression "*whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity*" added to the new definition of danger is not germane to the circumstances of the present case and will not be addressed in any detail. However, for clarity and precision purposes, I refer the reader to the French version of this portion of the definition, which has the same force in law and reads "*même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats*". Literally translated, this expression suggests that an injury or an illness can occur upon exposure even if the effects on the physical integrity or the health of the exposed person are not immediate. Finally, I will not address the changes in the definition of danger that concern exposure to hazardous substances since it is not an issue in the instant case.

[20] On May 29, 2003, Via Rail informed the appeals officer that it did not intend to forward additional arguments or observations to those that its representative, Denis Hamilton, had presented at his meetings with health and safety officer Pierre Morin on June 3, 2002.

[21] Nonetheless, Denis Hamilton pointed out that, in April 2003, the employer had twinned four trainees in the workplace and that everything had proceeded without any problems.

[22] On the other hand, in a letter dated July 10, 2003, CAW-Canada regional representative Robert Massé pointed out that, by exercising their refusal to work in potentially dangerous circumstances, employees Thuot and Moreau were clearly expressing that they had reasonable grounds for thinking that providing on-the-job training to a trainee, when they had not been trained in the aspect concerned and did not possess the knowledge and aptitudes required, constituted a danger for both themselves and the trainee.

[23] Robert Massé pointed out that a provision of the existing collective agreement awarded a bonus to employees providing on-the-job training during their work shifts. However, it was his view that the fact that both employees were specifically required to provide training to employees, whereas previously such training was provided on a voluntary basis, was essentially the underlying cause of why the two employees refused to work.

[24] Until then, experienced, qualified hostlers who willingly agreed to provide on-the-job training to trainees felt that they possessed the knowledge required to perform this task and that it did not constitute a danger for either themselves or the trainees.

[25] According to Robert Massé, the situation was totally different at the time of the employees' refusal. In fact, as the employer had decided that trainees would receive on-the-job training during the evening and night shifts, he ended up with an insufficient number of volunteers to provide this training, and that is why, for the evening shift, he was obliged to assign this on-the-job training to employees Thuot and Moreau.

[26] In the circumstances and taking into account the objective conditions of the two employees' refusal to work, health and safety officer Morin, in Robert Massé's view, should have interpreted and applied more liberally the provisions of section 128 of the *Canada Labour Code* Part II and the concept of "danger," as defined in section 122 and interpreted in the subparagraphs of the Parks Canada decision.

[27] On the contrary, health and safety officer Morin did not take into account this new situation and, by basing his conclusions on the fact that on-the-job training had taken place in the past without causing any workplace health and safety problems had, in a *de facto* way, formulated a banal interpretation of the health and safety conditions of the trainees' on-the-job training.

[28] In another letter submitted on July 15, 2003, Robert Massé argued that the health and safety officer's investigation had neglected to verify onsite, in the shunting yard, the kind of tasks and functions performed by the hostlers during their work shifts, as well as the type of on-the-job training provided to trainees during these time periods.

[29] In conclusion, the union representative stated that health and safety officer Morin justified his decision only on the basis of theoretical material evidence and the testimony gathered from the employees cited in the investigation report. The union representative thus considered that he had not correctly and adequately assessed the existing or potential health and safety risks associated with the trainees' tasks and with the on-the-job training provided by designated hostlers.

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[30] In this particular case, were the two employees Thuot and Moreau in a situation of danger according to the *Canada Labour Code*, Part II, when they refused to work? I don't think so for the following reasons:

[31] The *Canada Labour Code* Part II defines danger as follows:

> 122(1) "danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, 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.

[32] In addition, the Code allows employees to refuse to work in the circumstances described in subsection 128(1):

> 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
>
> (*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
> (*b*) a condition exists …that constitutes a danger to the employee, or
> (*c*) the performance of an activity … by the employee constitutes a danger to the employee or to another employee.

[33] Health and safety officer Pierre Morin and union representative Robert Massé both cited the same legal precedent to defend two opposite viewpoints concerning the actual or potential presence of danger for employees Thuot et Moreau.

[34] The standard set by appeals officer Cadieux in decision 02-009 for determining the existence of a danger obliges us to establish that:

- the task in question will eventually be accomplished;
- an employee will be expected to perform it when the time comes;
- it could reasonably be expected that this task would cause injury or illness to the employee called upon to perform it,
    - providing that the task is not corrected before the employee performs it.

[35] Could it reasonably be expected that the task that employees Thuot and Moreau would eventually have to perform, namely, familiarize trainees with work procedures, be likely to injure them?

[36] None of the facts presented by either health and safety officer Morin or employer representative Denis Hamilton, or union representative Robert Massé leads me to reach such a conclusion.

[37] In fact,

- this activity of familiarizing trainees with work procedures had existed for several years without causing any problems;

- employees Thuot and Moreau had themselves gone through this stage during their training without experiencing any fears or problems,

- all the trainees that they were expected to look after had successfully gone through all stages of the training; and

- as testified by the employees themselves, their fears of danger were based on the fact that they did not feel at ease being in charge of a trainee.

[38] For these reasons, I confirm health and safety officer Pierre Morin's decision of no danger.

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Michèle Beauchamp
Appeals Officer

Summary of Appeals Officer Decision

Decision No.: 04-030

Applicants: Jocelyn Thuot and Stéphane Moreau

Employer: Via Rail

Key words: Refusal to work, danger, on-the-job training

Provisions: *Code* 122(1); 128
Canadian Occupational Health and Safety Regulations: N/A.

Summary:

Two Via Rail employees refused to work because they believed that providing on-the-job training to trainees without having been trained themselves on how to give training constituted a danger for both themselves and the trainees.

After conducting an investigation into the refusal to work, the health and safety officer decided that the situation did not represent any danger for the employees.

The appeals officer confirmed the health and safety officer's decision for the following reasons: the activity of familiarizing trainees with work procedures had existed for several years without causing any difficulties; the two employees themselves had gone through this stage during their own training without experiencing any fears or problems; all the trainees that they were expected to look after had all succeeded in all stages of the training; and, lastly, as testified by the employees themselves, their fears of danger were based on the fact that they did not feel at ease in being responsible for a trainee.