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
applicant

and

Canadian Union of Public Employees
Airline Division, Air Canada Component
(CUPE)
respondent

Decision No. 041
Date: September 16, 2005

This request for a stay was heard by Appeals Officer Richard Lafrance, on September 9, 2005.

For the applicant
Marie Cousineau
Counsel for Air Canada

For the respondent
James Robbins
Counsel for CUPE

[1] This decision concerns the request for a stay of a direction issued by health and safety officer (HSO) Frank Cook. In addition to written submissions, a teleconference was held on September 9, 2005 with both parties in attendance.

[2] The direction states that the HSO is of the opinion that Air Canada is in contravention with the following provisions of Part II of the *Canada Labour Code* and the *Aviation Occupational Health and Safety Regulations:*

> **124**. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.
>
> **125.(1)** Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

(l) provide every person granted access to the work place by the employer with prescribed safety materials, equipment, devices and clothing;

Aviation Occupational Safety and Health Regulations

Skin Protection

6.10 Where there is a hazard of injury or disease to or through the skin of a person on an aircraft, the employer shall provide to the person

(*a*) a shield or screen;
(*b*) a cream to protect the skin; or
(*c*) an appropriate body covering.

[3] Marie Cousineau, Counsel for Air Canada submitted that for a stay to be granted it must meet the test set by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311.

[4] In that case, the Supreme Court wrote in paragraph 43:

"Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a primary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."

[5] With regard to the above criteria, the parties agreed that there was a serious question to be tried.

[6] With regard to the second criterion, Marie Cousineau contended that Air Canada will suffer irreparable harm in the form of unnecessary expenditure and employee deployment because in order to comply with the direction they must :

(a) conduct a market study to find a product complying with the direction;
(b) do an analysis of the product in order to properly inform flight attendants of its content, side effects and other health issues;
(c) negotiate a contract for the supply of the insect repellent including cancellation penalties;
(d) determine when and how the product would be available to the employees;
(e) amend their publication *Performance and Operations Standards Manual*, which refers to traveling health and safety issues;
(f) develop a communications plan to inform the employees about the changes and
(g) pay for the insect repellent.

[7] Marie Cousineau, held that should Air Canada's appeal be granted and the direction be rescinded, the company will suffer an important loss in complying with the direction. It will have paid for the insect repellent and diverted the efforts of many employees, which are required elsewhere, to this new project. In the present circumstances, Air Canada could not recover such costs.

[8] In addition, Marie Cousineau alleges that there is no need for them to supply insect repellent for the time being because:

(a) the outbreak of malaria in the Dominican Republic is under control;
(b) the crews do not deplane in the summer months;
(c) mosquitoes are not really present in the urban area and the airport.

[9] James Robbins replied that the "irreparable harm" that Air Canada alludes to is monetary and trivial. He observed that in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, para 59,

> "irreparable refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."

[10] Finally, on the greater harm or balance of inconvenience test, Marie Cousineau submits that Air Canada will suffer greater harm than the interests represented by the respondent union should the stay of the direction be refused.

[11] She reiterated that the harm to the respondent is minimal if not non-existent. The outbreak of malaria in the Dominican Republic is under control. Travelers are no longer required to take medication in order to prevent infection (malaria). Similarly, the Public Health Agency of Canada recommends the use of insect repellent in order to prevent the West Nile Virus.

[12] James Robbins, citing documentation obtained from the Public Health Agency of Canada, presented a general profile of the disease as well as a description of the symptoms. He argues that the risk of being bitten by a mosquito, which are common in the island, and the risk of catching malaria surely outweighs the monetary issue that Ms. Cousineau raised in her arguments.

[13] In addition, James Robbins indicated that Air Canada already provides some employees on flights to other destinations with insect repellent and this attests to the fact that Air Canada is able to provide the product without suffering irreparable harm.

[14] Finally, James Robbins held that the products were reasonably priced off the shelf products and safe for the population at large. He added that the labelling of the products warns people of possible side effects, allergies etc., and it is the responsibility of the individuals

using the products to make sure that they use it safely. If an employee has problems with the product in question, it is his responsibility to bring it up with his employer and then find alternative protection.

[15] For deciding whether or not to grant a stay of direction to Air Canada, I have to consider the three criteria addressed in the *RJR-MacDonald Inc (supra).*

[16] With regard to the first criterion described in the case, I find that there is a serious question to be tried which deals with the occupational health and safety of the employees who are considered in the balance of inconvenience test.

[17] On the "irreparable harm" test, Marie Cousineau brought forward mostly monetary arguments such as: doing a market research performing a medical review of the products as well as providing an insect repellent to the crews of the aircrafts flying to Punta Cana. However, the evidence of Mr. Robbins was that the products are readily available, reasonably priced, generally approved and safe for the population. Therefore, it was not demonstrated that this would cause "irreparable harm" to Air Canada.

[18] On the balance of inconvenience test, I am asked by Air Canada to give more consideration to the possible effort and monetary cost to Air Canada than to the risk of an employee being bitten by a mosquito and potentially contracting malaria. Based on the evidence provided in the stay application, I am of the view that the employees risk the greater inconvenience.

[19] Based on the evidence provided by both parties as well as the cited jurisprudence[1] and for the reasons cited above, Air Canada's application for a stay is denied.

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Richard Lafrance
Appeals Officer

[1] *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311