

Canada Labour Code
Part II
Occupational Health and Safety

John Vukoja
applicant

and

Canadian National Railway Company
Concord (Ontario)
Respondent

Decision No.: 05-043
October 12, 2005

This appeal made pursuant to subsection 129 (7) of the *Canada Labour Code*, Part II, was decided by Katia Néron, Appeals Officer.

For the applicant

John Vukoja

For the respondent

Debbie Goulet, Risk Management Officer

Health and Safety Officer

Robert Maklan
Human Resources and Skills Development Canada
Labour Program, Toronto, Ontario

- [1] This case concerns an appeal that John Vukoja made on March 2, 2005, under subsection 129 (7) of the *Canada Labour Code*, Part II, against a decision of absence of danger rendered by health and safety officer (HSO) Robert Maklan on February 25, 2005.
- [2] According to HSO Maklan's investigation report, on February 18, 2005 at approximately 6:00 p.m., J. Vukoja refused to work as an extra gang foreman, level 2, at the MacMillan Yard located in Concord, Toronto, Ontario.
- [3] At the time, J. Vukoja's job required him to work twelve hours on Monday, Tuesday and Thursday and 13 hours on Wednesday of that week. The gang even worked extra time on Thursday in order to do some of the work scheduled for Friday. In doing so, there should have been less of a need for overtime on Friday.

- [4] The work consisted of setting up and maintaining the track. There was a considerable amount of physical labour such as manually placing iron plates and anchors on the ground near where they were to be installed. The plates and anchors weigh 25 to 35 pounds each.
- [5] On Friday, February 18, they worked on the main track “Hagerman Junction” situated near Kennedy Road and Highway 407 in Markham. They worked under C.O.R. rule 42 – “limited train speed and warning flags”. They were required to wait for one train but instead had to wait for three trains to pass with the last one passing at 16:15. They arrived at the location around 12:30 - 13:00 and set up, but could not start pulling ties until 16:30 because of the three passing trains. As a result, J. Vukoja did not expect to finish work until 20:00.
- [6] Since he lived in Sudbury, about a four hour drive from “Hagerman Junction”, J. Vukoja refused to work overtime on that Friday because he believed that after a 12 hour workday, he would be tired and the four hour drive home at night would be dangerous. He stated that dozing behind the wheel was a common experience after such a long workday.
- [7] J. Vukoja also exercised his right to refuse since the outside work was being conducted in winter conditions and he stated that this would have an affect on the driving conditions home.
- [8] J. Vukoja also stated that a few years ago, a maintenance of way worker was killed in an auto accident while driving several hours home after working overtime.
- [9] J. Vukoja agreed that the company did offer to put him up in a hotel that Friday, even if just for a few hours to rest before the long drive home. However, J. Vukoja said that the company had made this offer for the last five to six years, but after being away for up to several weeks, no one had taken the offer because they wanted to get home to their families as soon as possible.
- [10] J. Vukoja finally stated that he was scheduled to return to work on Monday morning and planned to drive to Toronto Sunday evening or Monday morning.
- [11] The statement of J. Vukoja’s refusal to work was as follows:

At approximately 1530 h on February 18, 2005, I contacted Wayne Dobbie, CN Assistant Superintendent SOZ. I discussed with him that Rail Gang 3Z29 had not been able to begin changing the approximately 100 ft of rail due to train traffic and would not be able to start for another hour. We had started work at 1000 h and there would be another 1 hour of traveling which gave us a half-hour to do at least 4 hours of work if we intended to finish within our 8-hour regular shift. This was our last day of the workweek so I as well as many others had long drives to get home for the weekend. My drive home to Sudbury typically takes 4 to 5 hours. I tried to explain to Mr. Dobbie that such a drive after working in sub-zero temperatures was dangerous in itself, but the cumulative effect of work long hours all week in such conditions compounded the danger. Mr. Dobbie was unsympathetic. He offered the standard answer, which was that the company

would pay for another night in a motel. I tried reasoning that people would be much to anxious to return home to their families and that ha knew full well that virtually no one would exercise this option. This alternative has been available to us for many years since one of our brothers, an employee under his charge fell asleep at the wheel, after working long hours on the last day of a work cycle and was killed when he drove off the road and struck a rock-cut on Highway 69. It is human nature to want to return home after working out of town for extended periods. It must be understood that most of us working “the gangs” are perpetually on the road and to expect us to delay our return is unreasonable. In fact, as Mr. Dobbie is fully aware this option is rarely if ever exercised. He realizes this because he would get the motel bill if we did. He is renowned for having a callous disregard for the employees under his charge. This is his nature. With all those driving under these circumstances perhaps someone should consider the traveling public.

Prior to ending our telephone conversation, I informed Mr. Dobbie that as I was compelled to drive home to my family, I felt that the situation he was forcing me into was unsafe and I was using my right to refuse under Part II of the *Canada Labour Code*.

I implore you to look at the whole picture and not just the company’s unrealistic offer to pay for a motel room. They are not offering a realistic solution, but merely attempting to wash their hands of the real problem and thereby absolving themselves of any responsibility. They decided to run trains instead of allowing us to complete this all-important 1000 feet of rail within our regular hours of work. If the rail did not get changed that day, that was their choice. We would not be made to pay the price of their decision with our safety. I was the only one to refuse, as many fear reprisals but I have received requests that the gang gets visited during the investigation. They wish the opportunity to speak without management present.

- [12] The employer believed that because a hotel was offered for a few hours or even the whole night if required in order to rest before the drive home, there was no danger for J. Vukoja to work overtime on that Friday.
- [13] Following the employer’s unsuccessful effort to resolve the matter, HSO Maklan investigated on February 22, 2005, into J. Vukoja’s continued refusal to work.
- [14] HSO Maklan decided that a danger did not exist for J. Vukoja because, by offering him a hotel room to rest before heading home, the company did make available corrective action to reduce the potential condition of fatigue. As a result, HSO Maklan believed that the potential risk of an accident when driving home was reduced to an acceptable level.
- [15] HSO Maklan confirmed his decision of absence of danger in writing on February 25, 2005.

- [16] Notwithstanding his decision, HOS Maklan pointed out the following in his investigation report dated on March 8, 2005:

It is important to consider Mr. Vukoja's argument that, after spending about five days away from one's family, a worker would want to quickly return home. This desire is further reinforced by the fact that the worker will only be leaving the family again for some time after the weekend. They, therefore, would be reluctant to delay their return by resting for several more hours at a hotel. In fact, to Mr. Vukoja's knowledge, despite the company offering for several years a hotel room to rest before a long drive home, no worker has taken advantage of it. This is only human nature and occupational health and safety cannot ignore human nature.

- [17] Consequently, HSO Maklan decided to request that the company sign an Assurance of Voluntary Compliance (AVC), to, among other things, develop, in consultation with the local and policy health and safety committees, a policy concerning the hours of work on the last day of a work period, taking into consideration the employees' long journeys home.

- [18] On September 30, 2005, J. Vukoja wrote to withdraw his appeal. According to J. Vukoja's letter, the United Steel Workers, his Union, will be ensuring through the local or policy health and safety committee that the AVC would be enforced as recommended by HSO Maklan. Therefore, he decided that the enforcement of such would be a satisfactory resolution of his appeal.

- [19] Based on J. Vukoja's letter and HSO's investigation report, I hereby accept the employee's withdrawal, and confirm that the file is closed.

Katia Néron
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 05-043

Applicant: John Vukoja

Respondent: Canadian National Railway Company
Concord (Ontario)

Keywords: Refusal to work, decision of absence of danger, overtime work prior to a lengthy drive home

Provisions: *Canada Labour Code* 129 (7)
Regulations

Summary:

The applicant appealed a decision of absence of danger issued by a health and safety officer following his investigation of a refusal to work. The employee withdrew his appeal because the company would develop, in consultation with the local and policy health and safety committees, a policy concerning the hours of work on the last day of a work period, taking into consideration the employees' long journeys home. The appeals officer accepted the employee's withdrawal, and confirmed that the file is closed.