

Canada Labour Code
Part II
Occupational Health and Safety

Randy Betts
Jay Sadowy
Applicants

and

Canadian National Railway
Respondent

Decision No. 05-051
December 19, 2005

This case was heard by Appeals Officer Tom Farrell in Winnipeg, Manitoba, on September 30th, 2005.

Appearances

For the Applicant

Gerry Michasiw, Co-Chairperson, Health, Safety and Environmental Committee,
Canadian Auto Workers Union (CAW), Canadian National (CN) Symington Locomotive
Reliability Centre (LRC), Winnipeg, Manitoba
Jay Sadowy, Hostler Helper, CN Symington LRC
Randy Betts, Hostler, CN Symington LRC
Rick Doherty, CAW Local 100

For the Respondent

L. Michel Huart, Counsel, CN Rail
Gary Foster, Assistant Manager, CN Symington LRC
Ed Falardeau, Risk Manager, CN Prairie Division
Douglas Wylie, Occupational Hygienist, O.H.G. Consulting

Health and Safety Officer

Alex Kozubal, Human Resources and Skills Development Canada (HRSDC),
Labour Program, Manitoba Region

- [1] This case concerns an appeal made under subsection 129(7) of the *Canada Labour Code*, Part II, by Gerry Michasiw, CAW Co-Chairperson of the Health, Safety and Environment Committee at the CN Symington Yard, Locomotive Reliability Centre, in Winnipeg, Manitoba, against a decision of absence of danger issued by Health and Safety Officer (HSO) Alex Kozubal, following the refusals to work made by two employees of Symington Yard.
- [2] On August 6, 2004, at approximately 16:30 hours, two employees of the Symington Yard, Jay Sadowy, a Hostler Helper, and Randy Betts, a Hostler, were assigned to wash locomotives in the yard.
- [3] Randy Betts stated that he requested personal protective equipment to do the job and was given a poncho-type rain coat. After 40 minutes of work, he was sweating, feeling shaky and nauseated. The poncho was loose-fitting and would catch on posts and hand grabs. When he requested that Gary Foster, Assistant Manager of the LRC, provide him with a Tyvek suit, he was told that he would instead be given a rain suit. He informed Gary Foster that it would be worse than the poncho, to which Gary Foster asked if he was refusing to work. Randy Betts replied that without the proper personal protective equipment, he did refuse to do the work. Gary Foster then called the Labour Program to request that a Health and Safety Officer investigate the situation.
- [4] For his part, Jay Sadowy stated that he was assigned to the wash pit. Prior to starting work, he requested proper personal protective equipment and was given a new poncho-type coat. After wearing it for approximately 30 minutes, he was soaked in sweat. He expressed further concern that the poncho was loose-fitting and caught on hand rails and stairways. He noted that another employee who had been off work due to heat exhaustion had been provided with a disposable paper coverall. He asked for another type of protective equipment than his poncho and was told that only a full rain coat was available. Jay Sadowy also refused to work if not provided with the proper equipment.
- [5] Health and Safety Officer Alex Kozubal, accompanied by Labour Affairs Officer Gord Logan, attended the workplace at approximately 18:20 hours to investigate both work refusals.
- [6] As a result of his investigation, HSO Kozubal concluded that based on the definition of danger in the *Canada Labour Code*, Part II, there was no danger for either employee. This decision was appealed by Gerry Michasiw on August 14, 2004.
- [7] Gerry Michasiw declared that the Union was of the opinion that the HSO's decision was based on information that was not accurate, because it was based on the report made by Industrial Hygienist Douglas Wylie. This Hygienist had been contracted by CN to examine the use of the personal protective equipment provided by CN.

- [8] Gerry Michasiw further stated that he could not direct the employer to provide a specific type of personal protective equipment, but pointed out that according to a 1989 decision by Health and Safety Officer Richard Dupuis in Montreal at CN's Point St. Charles Shop on February 23, 1989. His directive stated that the "protective clothing must be resistant to oil in order to prevent contact with the skin and must be comfortable for the worker to wear so it does not hinder the work or create other unnecessary risks to the workers' health and safety".
- [9] Gerry Michasiw indicated that he had reviewed the various types of personal protective equipment available. He believed that his position was based on the benefits of using disposable coveralls given the job in question, as compared to the rain suits. He expressed concern that the potential for heat stress and metabolic heat stroke increased significantly when workers used clothing that prevented air movement and was not suitable for the tasks involved and that personal protective equipment needed to fit the specific needs of each individual.
- [10] Gerry Michasiw noted that he had discussions with representatives of the Labour Program, CN Management and HSO Alex Kozubal relative to this matter prior to the work refusals. At the time, HSO Kozubal had indicated that he might issue a direction to CN to provide appropriate personal protective equipment. This did not happen.
- [11] Gerry Michasiw further indicated that the types of ponchos and rain suits provided were so uncomfortable that some workers were wearing plastic bags and the Health and Safety Officer issued a verbal directive to provide proper equipment and Gary Foster had rain suits issued.
- [12] L. Michel Huart pointed out that the issue was about the use of trademark garments. He noted that CN has discontinued the use of Tyvek coveralls for most of the washing process. He intended to provide information to the hearing related to the provision of personal protective equipment, as well as to give an overview of the training CN gave its employees on the use of personal protective equipment.
- [13] L. Michel Huart called Gary Foster and requested that he be sworn in.
- [14] Gary Foster indicated that a shift leader came into the office and informed him that there would be a work refusal. He asked for details and while this conversation was going on, Randy Betts came into the office. Gary Foster explained the reasons that CN was doing things the way it did and Randy Betts said that he refused to work.
- [15] L. Michel Huart handed a copy of the Refusal to Work form to Gary Foster and asked him to comment on the statement related to Randy Betts that a worker on the previous shift was permitted to use a Tyvek suit. Gary Foster explained that a Tyvek suit was used because there were animal remains on the particular locomotive.
- [16] Based on information provided, Douglas Wylie, the Industrial Hygienist contracted by CN, reviewed the equipment being provided, i.e. the rain suits, and agreed that the personal protective equipment provided met the requirements for the job at hand.

- [17] L. Michel Huart then directed Gary Foster to Page 3 of Gerry Michasiw's 130 page Request For Review Under Section 146.1(1) *Canada Labour Code* Part II of Health and Safety Officer's Decision to the Employer, CN Rail, At Symington Locomotive Reliability Centre, Winnipeg, Manitoba, August 6, 2004. This report is dated September 3, 2004, the point that referred to a heat stroke claim submitted by another worker. Gary Foster indicated that the claim was denied by the Workers Compensation Board and that two other cases had not been filed as being work-related.
- [18] L. Michel Huart also introduced the following documents:
- CN Protective Clothing Standard
 - CN Personal Protective Equipment Standard
 - Memo of August 6, 2004, issued by Terry Corson, stopping the use of Tyvek suits
 - CN Safety Bulletin, re-issued June 2003 regarding Heat-Related Health Problems
- Gary Foster pointed out that the documents noted above are the standards set by CN to ensure that workers used the proper equipment necessary to provided protection and safe work practices. Gary Foster noted that although the workers did prefer the Tyvek suits over the rain coats, workers using Tyvek suits would get wet, but this did not happen when using the rain suits or the aprons.
- [19] Gary Foster introduced the personal protective equipment available to the workers doing this job. He further outlined equipment modifications that had been made to meet requests by the workers and improve their comfort.
- [20] Rick Doherty cross-examined Gary Foster regarding the fact that the three employees who claimed to be suffering from heat stress had in fact missed time. Gary Foster confirmed that they had missed work.
- [21] Rick Doherty questioned the non-availability of the black suits for six months and Gary Foster reported that he had picked up a black rain suit the day before the hearing. Rick Doherty asked Gary Foster if he was aware that some workers were wearing garbage bags with arm holes cut in them. Gary Foster confirmed that this had happened on a few occasions.
- [22] Gerry Michasiw stated that the black suits had not been purchased in the last six months and, further, that these suits were not ventilated and ventilated suits cost \$120.00 each. At this time, Gerry Michasiw introduced a Tyvek disposable suit that was dirty and explained that it had stopped the dirt, but had not stopped the moisture.
- [23] L. Michel Huart called Ed Falardeau, Risk Manager for CN Prairie Division, to provide further information on the personal protective equipment and CN's experience in trying to locate a good suitable rain suit that was breathable. Ed Falardeau stated that this had been before the Health and Safety Committee and that there had been no direct feedback on this equipment from the workers.

- [24] Ed Falardeau indicated the Tyvek suits were being misused by workers and it was decided to use the rain suits. This equipment was also used in an identical situation in the CN Edmonton Shops.
- [25] L. Michel Huart called Consulting Industrial Hygienist Douglas Wylie to comment on his report related to the hazards that could be encountered when conducting the cleaning of a locomotive. Douglas Wylie pointed out that his examination of the contaminants being removed from the locomotives determined that they were well below the established Threshold Limit Values, that the rain suits provided adequate protection for the workers when washing the locomotives and that the provision of frequent work breaks would address the heat stress issue.
- [26] This issue arose because two workers at CN Symington Locomotive Reliability Centre, Jay Sadowy, a Hostler Helper, and Randy Betts, a Hostler, exercised their right to refuse work on August 6, 2004.
- [27] The issue arose from a decision by the Employer to continue to provide personal protective equipment, i.e. ponchos, aprons and rain suits, to workers assigned to clean locomotives, but had withdrawn the disposable coveralls that had previously been available to them.
- [28] In hearing the evidence presented by the Applicants and the Respondent, I have concluded that this is an issue that should have been resolved by the Health and Safety Committee.
- [29] In my opinion, the use of Tyvek suits provide inadequate protection for the workers cleaning locomotives, and I am directed by comparisons made by Industrial Hygienist Douglas Wylie with firefighter turnout gear and the stress related to wearing such equipment. The personal protective equipment must provide the best protection available to the workers and paper does not meet that criteria.
- [30] The equipment provided to the workers tasked to wash locomotives and the procedures related to the frequency of breaks necessary to permit workers to re-hydrate establish that there was no danger as defined in the *Canada Labour Code*, Part II.
- [31] Therefore, I confirm the decision issued by Health and Safety Officer Alex Kozubal that the activity performed by employees Jay Sadowy and Randy Betts did not meet the definition of danger given in the *Canada Labour Code*, Part II, as the equipment provided gave the workers a much greater degree of protection than was provided by the paper Tyvek suits. The selection and availability of equipment necessary to protect the workers washing locomotives is an issue best addressed by the Shop Safety and Health Committee.

Tom Farrell
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 05-51

Applicant: Randy Betts, Jay Sadowy

Respondent: Canadian National Rail

Provisions: *Canada Labour Code*, 129(7), 146.1(1)

Keywords: Refusal to work, locomotives, washing, yard, personal protective equipment.

Summary:

Two employees of Symington Yard refused to work because they felt that they were not provided by their employer with proper personal protective equipment in order to perform their duty of washing locomotives in the yard. Following his investigation of the refusal to work, the health and safety officer decided that a danger did not exist for both employees.

Following a review of the appeal by employees, the Appeals Officer agreed with the decision of the health and safety officer that a danger did not exist for the employees and confirmed the decision of the health and safety officer.