Occupational Health and Safety Tribunal Canada
Tribunal de santé et sécurité au travail Canada

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Canada Labour Code
Part II
Occupational Health and Safety

Annette Robitaille and Leonard Hawkins
and Canadian Auto Workers Union (CAW)
applicant

and

VIA Rail Limited
respondent

Decision No.: 05-055
December 20, 2005

This case was heard by appeals officer Douglas Malanka in Toronto, Ontario, on July 14 and 15, 2005.

Appearances

For the Applicant
Tony Blanchard, Regional Representative, CAW
Ken Cameron, Health and Safety Representative, CAW
Leonard Hawkins, Senior Service Attendant, VIA Rail Canada
Gisele Legault, Senior Service Attendant, VIA Rail Canada
Gary Lord, Senior Service Attendant, VIA Rail Canada
Joseph-Marco Labrie, Senior Service Attendant, VIA Rail Canada
Linda Poudrier, Service Manager, VIA Rail Canada

For the Respondent
John Campion, Counsel
Carole Mackaay, General Counsel, VIA Rail Canada
Brain Casey, Manager, Customer Services, VIA Rail Canada
Bernie LeBlanc, Director, Customer Services, VIA Rail Canada
Robert Gray, Senior Advisor, Occupational Health and Safety, VIA Rail Canada
Douglas Graham, Manager Customer Service, VIA Rail Canada

Health and Safety Officer
Michelle Cartmill, Health and Safety Officer,
Transport Canada, Toronto, Ontario

[1] On November 29, 2001, VIA Rail (VIA) substituted a VIA ONE service club car on a passenger train with a LRC[1] coach car. Hot meals are served aboard VIA ONE service club cars and these cars have a galley designed for that purpose.

[2] Prior to departure of the train, A. Robitaille and L. Hawkins, On-Board Service Attendants with VIA, refused to work. The two employees complained that it would be dangerous for them to prepare and serve hot meals from the galley of a LRC coach car for several reasons.

[3] According to the two employees, there was no storage area in the galley of a LRC coach car for safely storing and securing their food and drink supplies as in a VIA ONE club car. With this arrangement, A. Robitaille and L. Hawkins held that they were exposed to an ergonomic hazard when they stooped to lift heavy supplies from the bottom shelf of the baggage rack. They also held that they could be struck by the dry goods stored on the middle shelf if the train lurched when they opened the security mesh on the baggage rack to access the goods.

[4] A. Robitaille and L. Hawkins maintained that there was a further risk of being struck by baggage stored in the baggage rack on the left side of the coach while they stooped to access the dry goods. They maintained that the risk was exacerbated by the fact that:

- there was no netting on the baggage rack to prevent baggage from falling from the rack during movement of the train at level crossings and switches;
- the left side baggage rack would be overloaded with baggage (as the right side baggage rack was being used for storing dry goods); and
- the banking mechanism on the coach is turned off during winter.

[5] A. Robitaille and L. Hawkins also complained that they could be burned by the oven door or the hot food when preparing and serving hot food. They explained that LRC coach cars are not equipped with the type of ovens used in the VIA ONE service club cars. As a result the LRC coach car had to be retrofitted with the type of ovens used in VIA ONE club cars. Since there was insufficient counter space, there was only room for two ovens instead of the normal three ovens. Moreover, A. Robitaille and L. Hawkins stated that there was insufficient counter space for transferring hot food from the oven to the trays. While B. Casey suggested that the employees could transfer the hot food directly from the oven to a service cart instead of using a serving tray, A. Robitaille felt that they could still be burned by the oven door due to movement of the train.

[6] Additionally, the two employees held that a danger existed for them because there were only three cavities equipped with a door and safety bar on a LRC coach car for securely storing the six food distribution carts put on board that day. The employees explained that a VIA ONE club car has six security cavities. A. Robitaille and L. Hawkins feared that they could trip over or be struck by a loose food service cart that was not securely stored away or was not being used for serving food and beverage.

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[1] Type of passenger coach car operated by VIA Rail Canada.

[7] Following an investigation, HSO Cartmill decided that a danger did not exist for either employee. HSO Cartmill reported in her decision report that:

- dry goods used by the service attendants were relatively light;
- baggage racks are normally equipped with mesh netting to prevent objects such as baggage or dry goods from being ejected when the train is in motion;
- the dry goods in the baggage racks could be accessed by opening and closing the mesh netting;
- baggage was stored in the baggage rack in the normal way so it was speculation on the part of employees that baggage could fall from the baggage rack on the opposite side of the car and strike them as they accessed their dry goods;
- the employer stated that service attendants could transfer hot food directly onto the food service cart without the trays to avoid being burnt from the oven or the food;
- food service carts could be securely stored away when not in use and did not pose a hazard; and
- 189 LRC coaches had been used in VIA ONE service between January and November 2001 with no injuries reported.

[8] She decided that the potential hazards alleged by A. Robitaille and L. Hawkins in their refusals to work were solely based on speculation and without foundation.

[9] A. Robitaille and L. Hawkins appealed the decision of HSO pursuant to subsection 129(7) of the *Canada Labour Code*, Part II (the *Code*). They held that HSO Cartmill had failed to consider in her decision that the train would be moving.

[10] They further complained that HSO Cartmill had not determined the actual weight of the containers of dry good supplies or of the baggage, or if staff had received training related to hot food service on a LRC coach car.

[11] Finally, A. Robitaille and L. Hawkins held that the evidence that 189 LRC coach cars had been used in VIA ONE service without injury was not reliable since VIA did not maintain injury statistics specific to the use of LRC coach cars in VIA ONE service.

[12] A hearing was held in Toronto on July 14 and 15, 2005. I retain the following in support of the appeal from documents submitted by A. Robitaille and L. Hawkins prior to the hearing, and from testimony and documents presented at the oral hearing.

[13] In their written submission regarding their appeal of HSO Cartmill's decision, A. Robitaille and L. Hawkins stated:

- they had been employed by VIA for 15 and 20 years respectively and were experienced service attendants;
- the baggage in the LRC coach car had been moved during the employer investigation of their refusals to work to a more favourable location prior to HSO Cartmill's arrival;
- supplies for food and beverage service consist of 3 to 11 food distribution carts, six metal containers weighing up to fifty pounds and several milk crate type containers;

- several of the heavier metal containers were stored on the bottom shelf of the baggage rack and the containers had to be manually handled to access the goods;
- the remainder of the metal containers and the milk crates were stacked on the middle shelf;
- A. Robitaille had instructed more than sixty new service attendant hires over the past ten years on on-board service and safety. She stated that she had never received or given instruction on providing meal service from a LRC coach car used in VIA ONE service and, to her knowledge, there was no instruction manual or documentation on this;
- VIA policy in the past was that there was a 40-passenger limit when a LRC coach car was used for VIA ONE service because of the lack of secured storage space for baggage on the coach car;
- following recent derailments, Transport Canada recommended to VIA that baggage and supplies be stored more securely;
- the leading cause of injury after baggage lifting is from train lurches; and
- A. Robitaille and L. Hawkins confirmed that they had performed the work following the decision of HSO Cartmill that a danger did not exist. They stated that they both had to assist each other in retrieving meals from the oven as there was insufficient counter space for one to do it safely.

[14] According to the written documentation, G. Legault wrote to P. Coté, Vice-President, VIA, on February 6, 2001, to complain about conditions she had experience while employed on a LRC coach car in VIA ONE service. She complained that:

- baggage was loaded in the baggage rack over the safety bar;
- baggage kept falling down into the aisles;
- supplies were not secured;
- there was no VIA ONE club car adjoining the LRC coach car in VIA ONE service; and
- there was no instruction or training for dealing with hazards that were related to using a LRC coach car in VIA ONE service.

[15] Written documents submitted prior to the hearing included a copy of a letter dated September 9, 2002, that T. McArthur, a service attendant with VIA, wrote to the Canada Appeals Office – Occupational Health and Safety. In his letter, he wrote that he was also concerned with regard to loose food service carts on LRC coach cars used in VIA ONE service, and that there had never been any training or documentation to service attendants relative to the use of LRC coach cars in VIA ONE service.

[16] Written documents submitted prior to the hearing included a copy of a letter that A. Robitaille sent to her union on February 17, 2003. She informed her union that a health and safety committee organized by VIA to determine the adaptations required in connection with the use of LRC coach cars in VIA ONE service safe had been cancelled by VIA due to budgetary constraints. She emphasized the need for instruction regarding the safe storage of baggage and food service in a LRC coach car in VIA ONE service.

[17] Written documents submitted prior to the hearing included a copy of a letter that A. Robitaille sent to P. Coté on March 14, 2003. In her letter, she requested documentation on training that VIA provides to service attendants relative to LRC coach cars in VIA ONE service. She pointed out in the letter that there was less space for baggage in a LRC coach car and that there was a need for training and instruction regarding the relocation of excess baggage. She asked, for example, who was to relocate the luggage, where to and how. She further asked when a hazard assessment would be conducted to address B. Casey's suggestion that service attendants use a food distribution cart for serving food instead of a tray. She asked if attendants now require a new activity time standard for safely serving the food from a food service cart since it would take longer. She additionally requested clarification on which unsecured food containers were to be placed on the floor, e.g., the lighter ones or the more frequently used ones.

[18] L. Hawkins confirmed in his testimony at the hearing that the LRC coach car in VIA ONE service was full of baggage on the day of his refusal to work. He stated that there was baggage throughout the car and between the seats.

[19] G. Legault testified at the hearing in support of A. Robitaille and L. Hawkins. She testified that she had written to the Vice President of VIA on February 6, 2003, to complain regarding the use of coach cars in VIA ONE service following one of her trips. In her letter, she complained that:

- the coach car had not been converted for VIA ONE service and the ovens were simply placed on the counter and were not properly secured;
- the car was overloaded with passengers and baggage was loaded to the ceiling over the baggage safety bar limit. As a result, baggage kept falling into the aisles where the service attendants were working;
- the food service supplies were not secured; and
- there was no place for working with the hot meals.

[20] G. Legault also testified at the hearing and confirmed that she had worked many times on LRC coach cars used in place of VIA ONE service and had been injured on one occasion. She did not specify the nature of the injury or how it occurred.

[21] Prior to the hearing, B. Casey responded to the allegations by A. Robitaille and L. Hawkins in writing on behalf of VIA. In his letter, he provided statistics that confirmed that VIA routinely operated coaches in VIA ONE service from January, 2001 to November 2001. He also submitted an e-mail from B. Leblanc who confirmed that there were no work-related injuries reported during that period of time.

[22] B. Casey wrote that none of the dry good containers weighed more than twenty pounds and maintained that they are safe and secure when the mesh curtain on the baggage rack is closed.

[23] B. Casey confirmed that he had suggested to A. Robitaille and L. Hawkins that they could transfer hot food directly from the oven to the food service cart, rather than using the tray, to avoid being burned by the oven or the hot food.

[24] With regard to the food service carts, B. Casey wrote that there were only six food service carts that day and that three could be stored in the LRC car and the remaining three could be stored in the adjoining LRC car.

[25] Finally, B. Casey wrote that VIA provides training to entry level participants on VIA ONE service, but the training does not demonstrate the placement of containers.

[26] B. Casey also testified at the hearing. I retain the following:

- service attendants receive 5 weeks of training with regard to working on board trains. The training includes the use of food service equipment including food service carts, but he was uncertain as to whether the training covered VIA ONE service in LRC coaches or removing hot casseroles from an oven to a food service cart;
- the mesh netting enclosure on baggage racks can be opened in transit when the train slows just before a station stop so that passengers can retrieve their baggage; and
- on the day of the refusals to work, there was no baggage stored on the seats.

[27] In his summation, T. Blanchard held that the new definition of danger now includes potential hazards or conditions or future activities that could reasonably be expected to cause injury or illness. He maintained that work connected with a coach in VIA ONE service constitutes a potential hazard or future activity.

[28] T. Blanchard maintained that jurisprudence[2] in *Verville v. Canada (Correctional Services)*, (Verville) *F.C. 767 (Gauthier J.), May 26, 2004 (B.C.)* has established that the danger must be capable of causing injury at any time, but not necessarily every time. He stated that the jurisprudence further established that it is not necessary to establish precisely the time when the potential hazard or condition or future activity will occur. One need only ascertain in what circumstances the potential hazard or future activity could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.

[29] T. Blanchard added that the expression “before the hazard or condition can be corrected or the activity altered” has been interpreted to mean that the injury is likely to occur at any time.

[30] T. Blanchard disagreed with the finding of HSO Cartmill that the hazards raised by A. Robitaille and L. Hawkins were speculative. He maintained that the health and safety officer did not consider the ergonomics of the work given that the work is carried out on a fast moving train that banks, shakes and jolts on a regular basis.

[31] T. Blanchard further maintained that HSO Cartmill had not considered that the mesh netting on the baggage rack had to be opened while the train was in motion to access the food supplies. He wondered rhetorically why VIA policy is that the mesh netting on the baggage rack is to be kept closed during a trip while VIA expected its attendants to open the mesh netting to access the dry goods during a trip.

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[2] Referred to the decision but did not refer to specific paragraphs.

[32] T. Blanchard asked that I find that a danger existed for A. Robitaille and L. Hawkins and order VIA to cease putting LRC coach cars in VIA ONE service.

[33] In his summation, J. Campion noted that the nature of review by an Appeals Officer is *de novo*. He maintained that, since the review is *de novo*, I must have facts that the HSO did not have or find that the HSO missed something fundamental or misinterpreted the law. The facts must then be persuasive to me that a danger existed.

[34] J. Campion stated that this appeal of A. Robitaille and L. Hawkins was fatally flawed because A. Robitaille did not appear at the hearing to give evidence. Therefore, I have less evidence than HSO Cartmill had when she made her decision.

[35] With regard to the facts in the case, J. Campion held that the standard of review for determining whether or not the facts support a finding of danger is high as I enunciated in paragraphs 41 and 42 in the Canada (Correctional Service) and Schellenberg decision, [2002] C.L.C.A.O.D. No. 6, Decision No. 02-005. In that decision, I stated the following in paragraphs 41 and 42:

> *[41] For deciding if a danger exists, the health and safety officer must consider all aspects of the definition of danger and, on completion of his or her investigation, decide if the facts in the case support a finding of danger under the Code. This determination must be done on a factual basis and the facts must be persuasive since the right to refuse and danger provisions under the Code are considered to be exceptional measures. For a health and safety officer to find that a danger under the Code exists at the time of his or her investigation in respect of a potential hazard or condition, as in this case, the facts in the case must be persuasive that:*
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> - *a hazard or condition will come into being;*
> - *an employee will be exposed to the hazard or condition when it comes into being;*
> - *there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and*
> - *the injury or illness will occur immediately upon exposure to the hazard or condition.*
>
> *[42] It follows that, where a hazard or condition actually exists at the time of the health and safety officer's investigation, the facts in the case must only be persuasive that:*
>
> - *an employee will be exposed to the hazard or condition;*
> - *there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and*
> - *the injury or illness will occur immediately upon exposure to the hazard or condition.*

[36] J. Campion stated that the first bullet in paragraph 41 confirms that there must be a high level of probability that the potential hazard or condition of future activity will come into being.

[37] J. Campion maintained that the second bullet in the same paragraph also establishes that the facts must confirm a high probability that the employee will be exposed to the potential hazard or condition or future activity and, for this, it is necessary consider any mitigating facts in connection with exposure. He pointed out in this case that A. Robitaille and L. Hawkins:

- were experienced in the work;
- received training and instruction on using the food preparation and distribution equipment;
- were protected by mesh curtain from being struck by the dry goods or baggage that could otherwise fall from the baggage racks; and
- had alternate means of doing the work to avoid the hazard of being burned by the hot food or oven.

[38] With regard to the third bullet, J. Campion maintained that the certainty that the hazard, condition or activity would cause injury or that the injury would occur upon exposure was also mitigated by the above noted factors.

[39] J. Campion argued that I had no jurisdiction to direct VIA to cease and desist from the implementation of the coach cars as VIA ONE service as requested by T. Blanchard. He reasoned that neither party in the case had submitted evidence relative to the financial impact on VIA of my altering an existing VIA policy on railway equipment. In addition, there was no evidence in the case to support an argument that it was impossible to mitigate the hazards expressed by A. Robitaille and L. Hawkins making it necessary to ban the use of coach cars in VIA ONE service.

[40] J. Campion held that the only reliable evidence in the case was B. Casey's testimony. In that testimony, B. Casey confirmed that he had proposed to A. Robitaille and L. Hawkins to place the hot casseroles directly on the food service cart as an alternative to using a tray. As A. Robitaille and L. Hawkins were willing to work if VIA cancelled the hot food service, J. Campion maintained that this eliminated any notion of danger.

[41] With regard to G. Legault's testimony that she had been injured in LRC coach in VIA ONE service, J. Campion pointed out that I could not consider this as she had not specified how she had been injured.

[42] In the alternative, J. Campion referred me to paragraph 128(2)(*b*) of the Code that specifies that a refusal to work is not permitted under the Code if the danger is a normal condition of work. He maintained that the use of a coach in VIA ONE service, the serving of hot meals and the use of trays and food service carts has been going on for the past twenty years without injury. He further held that the serving of food using a cart or a tray was also normal to the work and not dependent on whether the work was carried out in an LRC coach in VIA ONE service or a VIA ONE service club car.

[43] J. Campion submitted the following citations which were considered in connection with his summation:

- *Martin v. Canada (Attorney General), [2005] F.C.A. 156 (Rothstein, Noel and Sexton JJ.A.), May 6, 2005.* Reference made to paragraph 28 which reads as follows*:*

  > *[28] An appeal before an appeals officer is de novo. Under section 146.2, the appeals officer may summon and enforce the attendance of witnesses, receive and accept any evidence and information on oath, affidavit or otherwise that he sees fit, whether or not admissible in a court of law, examine records and make inquiries as he considers necessary. In view of these wide powers and the addition of subsection 145.1(2), there is no rationale that would justify precluding an appeals officer from making a determination under subsection 145(1), if he finds a contravention of Part II of the Code, notwithstanding that the health and safety officer had issued a direction under subsection 145(2).*

- *Verville v. Canada (Correctional Services),* (Verville) *F.C. 767 (Gauthier J.), May 26,2004 (B.C.).*
- *Canada (Attorney General) v. Fletcher (C.A.) [2002 F.C.A.424 (Desjardins, Decary and Noel JJ.A.), November 5, 2002.* (Fletcher).
- *Charmard and Canada (Correctional Service), [2005] C.L.C.A.O.D. No. 4 (M. Beauchamp, Appeals Officer), January 20, 2005.*
- *Canada (Correctional Service) v. Shellenberg (May 9, 2002) Decision No. 02-005) (Malanka).* Reference made to paragraphs 41 and 42 which read as follows*:*

  > *[41] For deciding if a danger exists, the health and safety officer must consider all aspects of the definition of danger and, on completion of his or her investigation, decide if the facts in the case support a finding of danger under the Code. This determination must be done on a factual basis and the facts must be persuasive since the right to refuse and danger provisions under the Code are considered to be exceptional measures. For a health and safety officer to find that a danger under the Code exists at the time of his or her investigation in respect of a potential hazard or condition, as in this case, the facts in the case must be persuasive that:*
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  > - *a hazard or condition will come into being;*
  > - *an employee will be exposed to the hazard or condition when it comes into being;*
  > - *there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and*
  > - *the injury or illness will occur immediately upon exposure to the hazard or condition.*

[42] It follows that, where a hazard or condition actually exists at the time of the health and safety officer's investigation, the facts in the case must only be persuasive that:

- *an employee will be exposed to the hazard or condition;*
- *there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and*
- *the injury or illness will occur immediately upon exposure to the hazard or condition.*

- *Welbourne v. Canadian Pacific Railway (Mar 22, 2001) Decision No. 01-008 (Cadieux)* (Welbourne decision). Reference made to paragraphs 13, 17, 18, and 23 which read as follows*:*

[13] The role of the appeals officer in hearing an appeal of a decision of no danger issued by a health and safety officer following a refusal to work is not to carry out a new investigation into the matter under appeal. The inquiry of the appeals officer begins with and builds on the health and safety officer's initial investigation and report. The appeals officer looks at the same circumstances investigated by the health and safety officer, appreciates the facts that were considered or available to the officer, determines and interprets the legislation applicable to the relevant facts, and makes a ruling. In the end, the appeals officer decides, like the health and safety officer before him or her, if the refusing employee was in a situation of danger as contemplated by the Code and, if so, issues the appropriate directions under subsection 145(2) or (2.1).

[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:

> 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.

[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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> *[28] There is no doubt in my mind that operating the blow pipe under the current conditions entails some risks. It was generally acknowledged that the blow pipe can and does come apart. Contrary to Mr. Veith's proposal that injury is unlikely to occur, Mr. Scammell asserted that if the blow pipe blows apart, it will be projected at an angle and possibly injure an employee. Therefore, Mr. Welbourne is open to being injured as a result of operating the blow pipe. The question to be answered is whether this situation could reasonably be expected to cause injury to him.*

- *Jeanson v. Canada (Correctional Service) (June 1, 2001) Decision No. 01-023 (Beauchamp).*
- *Bouchard v. Canada (Correctional Service) (Dec. 12, 2001,) Decision No. 01-027 (Beauchamp).*
- *Paul Stein et al. CLRB Dec. No. 760 (October 30, 1989).*

[44] J. Campion maintained that there was no basis for the appeal by A. Robitaille and L. Hawkins and asked that it be dismissed.

[45] The issue in this case is whether or not HSO Cartmill erred when she decided in the circumstances that a danger did not exist for either A. Robitaille or L. Hawkins in connection with their preparation and serving of hot food and beverage on the LRC coach being used in VIA ONE service.

[46] For deciding the matter, I must consider the interpretation and application of the applicable provisions in the Code, the facts in the case and any relevant jurisprudence.

[47] In September of 2001, the definition of "danger" was redefined at subsection 122(1) of the Code as follows:

"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.	*"danger" Situation, tâche ou risque - existant ou éventuel - susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade - même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats -, avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.*

[48] The first decision of an Appeal Officer regarding the interpretation and application of the new definition of danger was issued by Appeals Officer Serge Cadieux in the Welbourne v. Canadian Pacific Railway (Mar 22, 2001) Decision No. 01-008. The relevant excerpts highlighted by J. Campion have already been cited in this decision and will not be repeated here. That stated, however, I would make the following observations with regard to paragraphs 17, 18 and 19 of the Welbourne decision.

[49] In paragraph 17 of the Welbourne *supra* decision, Appeals Officer Serge Cadieux explained that the previous definition of danger[3] was believed to be too restrictive to protect the health and safety of employees. He stated that the new definition broadened the concept of danger and allowed for potential hazards or conditions or future activities to be taken into account. He opined that this better reflected the purpose clause in section 122.1 of the Code.

[50] Following his review of the dictionary definition for the terms "potential" and "future activity", Appeals Officer Cadieux concluded in paragraphs 18 and 19 that "danger" can be prospective to the extent that the hazard or 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 could be corrected or the activity altered. In my opinion, this does not express a particularly high degree of probability of occurrence. (The difference between hazard and risk is that risk reflects a higher level or degree of probability of occurrence and/or severity of adverse outcome).

[51] This is contrasted with what I expressed in paragraph 41 and 42 of Schellenberg *supra* decision. In those paragraphs, which have already been cited in connection with J. Campion's summation and will not be repeated, I specified that the standard of review was "likely", which represents a higher degree of probability of occurrence.

[52] Appeals Officer Cadieux similarly indicated a high standard of review in paragraph 144 of his decision in the case of Parks Canada Agency and Mr. Doug Martin and Public Service Alliance of Canada, Decision No. 02-009, May 23, 2002. Appeal Officer Cadieux's words in paragraph 144 were:

> *[144] The Code allows for a future activity to be taken into consideration in order to declare that "danger" as defined in the Code exists. However, this is not an open-ended expression. In order to declare that danger existed at the time of his investigation, the health and safety officer must form the opinion, **on the basis of the facts gathered during his investigation**, that:*
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> - *the future activity in question will take place[4];*
> - *an employee will be exposed to the activity when it occurs; and*

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[3] Code was amended in September of 2000. Prior to this amendment, the definition of danger read: "danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected.

[4] This first condition is redundant in cases where the health and safety officer has established that the activity is taking place at the time of his investigation.

- *there is a reasonable expectation that:*

  the activity will cause injury or illness to the employee exposed thereto; and,

  the injury or illness will occur immediately upon exposure to the activity.

[53] In my view, both decisions exceeded the standard of review that Appeals Officer Cadieux had specified in his Welbourne *supra* decision.

[54] For my part, I can only suggest that the criterion I used in Schellenberg *supra* decision reflected a reluctance to depart from the long held notion by the Federal Court and of this Tribunal that the right to refuse provisions in the Code existed only to address emergency situations.

[55] Consistent with the view that right to refuse is limited to emergencies, J. Campion cited the Fletcher *supra* case in his summation. Paragraphs 18 and 19 of the Fletcher *supra* decision read:

> *[18] The mechanism is an ad hoc opportunity given employees at a specific time and place to ensure that their immediate work will not expose them to a dangerous situation. It is the short-term well-being of an employee which is at stake, not a hypothetical or speculative one.*
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> *[19] The mechanism is an emergency measure. It is a tool placed in the hands of the employee when faced with a condition that could reasonably be expected to cause injury or illness to him before the hazard or condition can be corrected. See Scott C. Montani (1994), 95 di 157, at page 7:*

[56] Recently, two decisions have emanated from the Federal Court that represented a significant searching and testing of the interpretation and application of the revised definition of danger. These decisions include the decision of.

- Justice Tremblay -Lamer in the case of Douglas Martin and Public Service Alliance of Canada and the Attorney General of Canada, Citation: 2003 FC 1158, Docket T-950-02, 2003/10/06, and
- Justice Gautier in the case of Juan Verville and Correctional Service Canada, Citation: 2004 FC 767, Docket T-1207-02, 2004/05/26.

[57] In her decision, Justice Tremblay-Lamer confirmed the Parks Canada *supra* decision which included reference to the Welbourne *supra* decision. She did not comment on the standard of review described in each decision, except to clarify that the Code does not specify that the injury or illness must occur immediately for a finding of danger. However, she wrote that the new definition of danger still requires an impending element because the injury or illness has to occur before the hazard or condition can be corrected or future activity altered.

[58] In her decision, which followed and considered the decision of Justice Tremblay-Lamer, Justice Gauthier specified in paragraph 36 of her decision that:

> *…the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.*

[59] In my opinion, the above noted extract from paragraph 36 of Justice Gauthier's decision corroborates Appeals Officer Cadieux's assessment in the Welbourne *supra* decision that the standard of review for a finding of danger under the current Code is moderate relative to the degree of probability of occurrence. For Justice Gauthier, it is a "reasonable possibility" that exceeds a "mere possibility".

[60] It is my further view that the above noted criteria confirms that the refusal to work mechanism in the Code is no longer limited to exceptional or emergency situations, or redefines what constitutes an exceptional or emergency situation in the amended Code.

[61] In connection with this, I would point out that the Code was amended in 1984 and the word "imminent" was removed from the revised definition of danger. However, in its first appeal review, the Canada Labour Relations Board interpreted the revised definition to still include the concept of "imminent" danger. So the amendment to the Code in 2000 was the second effort of Parliament to clarify that the danger does not have to be imminent.

[62] Following these decisions of Justices Tremblay -Lamer and Gauthier, I issued a decision in the case of C. Brazeau, B. Martin, B. Thoms, B. Woods, A. Ozga and P. Gour and CAW-Canada and Securicor Canada Limited, (Securicor) Decision No. 04-049, December 16, 2004. In paragraphs 172 and 173 of that decision, I highlighted what I regarded to be the major finding of the Justices relative to interpreting and applying the current definition of danger in the Code to reflect my whole hearted conformity with their findings. Those paragraphs will not be repeated here, but they were considered in this decision.

[63] For interpreting and applying the definition of danger in the context of the rest of the Code and the facts in the case, it is necessary to consider various provisions of the Code. In this regard, I note that section 124 establishes, as a general duty, that every employer is required to ensure that the health and safety at work of every employee is protected. Subsection 125 and section 125.1 specify the minimum prescribed standards which, in my opinion, must be respected in the work place health and safety prevention program. Sections 124, subsection 125(1) and section 125.1 read as follows:

> 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,
>
> (*a*) ensure that all permanent and temporary buildings and structures meet the prescribed standards;
>
> (…)
>
> (*z19*) consult with the work place committee or the health and safety representative on the implementation and monitoring of programs developed in consultation with the policy committee.
>
> 125.1 Without restricting the generality of section 124 or limiting the duties of an employer under section 125 but subject to any exceptions that may be prescribed, 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,
>
> (*a*) ensure that concentrations of hazardous substances in the work place are controlled in accordance with prescribed standards;
> (…)
>
> (*g*) ensure that all records of exposure to hazardous substances are kept and maintained in the prescribed manner and that personal records of exposure are made available to the affected employees.

[64] Section 122.2 further specifies, (albeit not a mandatory part of the Code) that compliance with the Code should respect the following priorities:

> 122.2 Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

[65] So in order of priority, the prevention program should make every reasonably effort to eliminate the hazards. If the risk(s) associated with a hazard, condition or activity cannot be eliminated, the next priority should be to control the risk(s) so that employees are protected. This would include complying with every prescription found in section 125 to 125.2 of the Code which, in terms of the prevention program, includes everything from machine guards, to hazard assessment and to training, to name but a few.

[66] Where it is not reasonably practicable to eliminate or control a health and safety risk, section 12.1 of the *Canada Occupational Health and Safety Regulations* (COHSR) specifies that every person granted access to the work place who is exposed to the hazard is required to use personal protection equipment prescribed in the Part. Section 12.1 reads:

> *Where*
>
> *(a) it is not reasonably practicable to eliminate or control a health or safety hazard in a work place within safe limits, and*
>
> *(b) the use of protection equipment may prevent or reduce injury from that hazard,*

> *every person granted access to the work place who is exposed to that hazard shall use the protection equipment prescribed by this Part. SOR/94-263, s. 44(F); SOR/95-533, s. 2(F); SOR/2002-208, s. 39.*

[67] Taking the above noted Code provisions and the findings of Justices Tremblay -Lamer and Gauthier, it is my opinion that a danger exists where the employer has failed, to the extent reasonably practicable, to:

- eliminate a hazard, condition, or activity;
- control a hazard, condition or activity within safe limits; or
- ensure employees are personally protected from the hazard, condition or activity; and

one determines that:

- the circumstances in which the remaining hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed thereto before the hazard, condition or activity can be corrected or altered; and
- the circumstances will occur in the future as a reasonable possibility as opposed to a mere possibility or a high probability.

[My underline]

[68] In his submission, J. Campion held that any danger that may have existed for A. Robitaille and L. Hawkins was normal to their work as on-board service attendants work because they had provided food service in a LRC coach substituted for a VIA ONE coach for more than twenty years.

[69] Justice Gauthier addressed the concept of danger normal to the work in paragraph 55 of her decision, and this concept was cited by J. Campion in his summation. She stated in paragraph 55 of her decision that a danger normal to the work includes a risk that is an essential characteristic of the work but logically excludes a risk which depends on the method used to perform the job or activity. Justice Gauthier wrote in paragraph 55 of her decision that:

> *The customary meaning of the words in paragraph 128(2)(b) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. In that sense and for example, would one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car?*

[70] In this case, J. Campion did not submit any evidence to establish that a level of risk related to the work of a service attendant existed as an essential characteristic of the work that could not be eliminated, controlled or protected against despite VIA's best efforts. Rather, the risks reviewed in this case related to methodology. Therefore, I did not

accept J. Campion's argument that any danger associated with the complaint of A. Robitaille and L. Hawkins was a normal danger to their work.

[71] With regard to methodology connected with the work of on-board service attendants and the specific health and safety concerns of A. Robitaille and L. Hawkins regarding the use of LRC coach cars in VIA ONE service, I make the following findings.

[72] A. Robitaille and L. Hawkins complained that they were exposed to an ergonomic hazard as they had to stoop and lift heavy supplies from the bottom of the baggage rack. However, no evidence was submitted regarding the specific nature of the ergonomic injury to which they were exposed, the seriousness of the injury expected, or, in fact, that anyone had been injured.

[73] The contrary evidence of B. Casey was that LRC coaches have been used in VIA ONE service for more than twenty years without injury and the weight of the dry good containers did not exceed twenty pounds.

[74] Given the circumstances in this regard I am not persuaded that handling the dry goods could reasonably be expected to cause injury to A. Robitaille and L. Hawkins before the hazard, condition or activity could be corrected or altered, or that the circumstances would occur beyond a mere possibility.

[75] A. Robitaille and L. Hawkins complained that there was a risk of being struck by baggage stored in the baggage rack beside the galley because there was no mesh netting to prevent objects from falling from the rack as the train moved. At the hearing, L. Hawkins testified that there was baggage throughout the car and between the seats at the time of his refusal to work.

[76] In equally reliable testimony, B. Casey testified that there was no baggage on the seats which prompted T. Blanchard to ask him if the baggage in the car had been moved.

[77] While B. Casey may not have personally moved the baggage, I am persuaded that someone involved in the investigation of the refusals to work had moved them. This singular act of reorganizing/relocating the baggage before the train departed demonstrated that the baggage did not constitute a danger because it was possible to correct the hazard or condition before it could reasonably be expected to cause injury or illness.

[78] With regard to the allegation by A. Robitaille and L. Hawkins that the dry goods could fall on them when they removed the mesh netting to access the dry goods, I am not persuaded by the evidence provided in the case that this could occur more than a mere possibility. Also, being aware of the hazard, it was possible for them to avoid injury by exercising additional care and caution or working together to assist each other if required. Therefore, it was possible to correct the hazard or condition before it could reasonably be expected to cause injury or illness to A. Robitaille or L. Hawkins.

[79] A. Robitaille and L. Hawkins complained that a danger existed for them because they could trip over or be struck by food service carts used for serving food and drink. The evidence of L. Hawkins was that there were nine carts assigned to the train and only three

cavities in which to store the carts safely when not in use. The evidence of B. Casey was that there was only six food service carts assigned to the train, never nine, and that there were three cavities in which to safely store the carts. He added that A. Robitaille and L. Hawkins could have used the security cavities in the adjoining VIA ONE club cars in which to store the remaining three. Neither T. Blanchard nor A. Robitaille and L. Hawkins offered any evidence that this was not a viable alternative. Therefore, I must conclude that storing the six carts did not constitute a danger as it was possible to correct the hazard or condition before it could reasonably be expected to cause an injury or illness to A. Robitaille and L. Hawkins.

[80] Finally, with regard to the allegation by A. Robitaille and L. Hawkins that there was a risk that they would be burned by the oven door or the hot food because there was insufficient counter space in a LRC car for transferring hot food from the oven to the trays, I find that this did not constitute a danger.

[81] According to the evidence, B. Casey suggested to A. Robitaille and L. Hawkins that they could avoid being burned by transferring food directly from the oven to the food serving cart, as opposed to a tray and then the serving cart. Instead, A. Robitaille and L. Hawkins confirmed in a letter that they performed the work following the decision of HSO Cartmill that a danger did not exist an assisted each other in retrieving meals from the oven to avoid being burned. B. Casey's suggestion essentially demonstrated that there was a way of mitigating the risk before it could cause injury or illness.

[82] Having addressed the hazards raised by A. Robitaille and L. Hawkins in their refusals to work, I turn to the evidence of A. Robitaille that a work place health and safety committee formed to look into her concerns was instructed by VIA to abandon its review due to financial constraints before the issues were resolved.

[83] G. Legault appeared to be more successful with her complaint to VIA because B. Casey testified that the health and safety committee reviewed her complaints connected with the use of LRC coach cars in VIA ONE service and on March 19, 2003 recommended the following to B. Leblanc:

- whenever there is a LRC coach car in VIA ONE service, it is to be marshalled next to the regular VIA ONE service on all occasions;
- prior to departure, an employee, either standby or station staff, is to be assigned to the coach in VIA ONE service to ensure their group's baggage is stored in a safe manner;
- whenever an extra oven is placed in another coach car an extra employee is to be provided to assist with casserole transfer, and the safe storage of baggage; and
- all groups traveling with VIA are to be advised of VIA's baggage policy and service and that they must adhere to this policy as strictly as possible.

[84] On April 3, 2003 B. LeBlanc wrote to the co-chairs of the work place health and safety committee to confirm VIA's intent regarding the recommendations. In this regard, no evidence was submitted on behalf of VIA: to explain why B. LeBlanc was not instituting all of the work place health and safety committee recommendations which appear necessary to deal with the concerns of A. Robitaille and L. Hawkins; to detail what had been done; and to confirm how the changes would be communicated to VIA on board service attendants and other employees. Moreover, it is puzzling why it took VIA two years to respond to the complaints.

[85] In my opinion, the health and safety committee recommendations and VIA's response went a long way to confirming that the health and safety concerns of A. Robitaille and L. Hawkins were genuine, and does not support HSO Cartmill's assertion that the potential hazards alleged by both employees in their refusals to work were without foundation. Moreover, a hazard can exist even if it does not constitute a danger and the Code requires employers in paragraph 125(1)(*c*) to address hazards raised by employees as in paragraph 126(1)(*g*). Paragraphs 125(1)(*c*) and 126(1)(*g*) read as follows:

> 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,
> (…)
>
> (*c*) investigate, record and report in the manner and to the authorities as prescribed all accidents, occupational diseases and other hazardous occurrences known to the employer;
>
> 126. (1) While at work, every employee shall
> (…)
>
> (*g*) report to the employer any thing or circumstance in a work place that is likely to be hazardous to the health or safety of the employee, or that of the other employees or other persons granted access to the work place by the employer;

[86] In this regard, I note the VIA response did not address the concern of A. Robitaille and G. Legault that there is no training or instruction that addresses the work when a VIA ONE club car is substituted by a LRC coach car. Given their demonstrated experience and genuine dedication to health and safety, to their job and to passengers, it is my view that a health and safety officer should, on a priority basis, investigate into the adequacy of the measures taken by VIA to address the hazards identified by employees relative to the use of LRC cars used in VIA ONE service and verify that the measures taken have been communicated to employees.

[87] In conclusion, based on the evidence, the legislation and the jurisprudence, I, hereby, confirm the decision of HSO Cartmill rendered on January 4, 2002, that a danger did not exist for either A. Robitaille or L. Hawkins.

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Douglas Malanka
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 05-055

Applicant: A. Robitaille and L. Hawkins and Canadian Auto Workers Union

Respondent: VIA RAIL Canada

Key Words: danger LRC coach car, VIA ONE club car, ergonomic hazard, lifting, baggage, struck by, food service cars, galley, storage cavities, oven, hot food, drink, training, instruction, time management, train movement, lurching.

Provisions: Code: 122.(1), 122.1, 124, 125, 126,128, 129, 146.1.
COHSR: 12.1

Summary:

Two VIA RAIL Canada service attendants complained that the use of a LRC coach car in VIA ONE service exposed them to danger because the substituted car did not have proper facilities for safety storing the food service carts, the food and drink supplies and the baggage. They also complained that they were in danger of being burned by the oven or the hot food as there was insufficient counter space in the galley on the LRC coach car. Following her investigation, a health and safety officer decided that a danger did not exist for the two service attendants.

The Appeals Officer reviewed the evidence and confirmed that decision of the health and safety officer. Nonetheless, the Appeals Officer recommended that a health and safety officer should investigate into employee complaints to verify the adequacy of measures taken by VIA to address the concerns and that the measures have been communicated to employees. The HSO should also investigate into employee complaints that training and instruction was required relative to carrying out their work safely in a LRC coach car in VIA ONE service.