Canada Appeals Office on Occupational Health and Safety
Bureau d'appel canadien en santé et sécurité au travail

275 rue Slater Street, Ottawa, Ontario, K1P 5H9 – Fax : (613) 953-3326

Canada Labour Code
Part II
Occupational Health and Safety

Erb Transport Limited
Applicant

and

David Vey
Respondent

Decision No.: 06-010
March 27, 2006

This case was heard by Appeals Officer Pierre Guénette in Cambridge, Ontario, on January 11, 2006.

Appearances

For the applicant
Ian S. Campbell, Counsel
Floyd Gerber, Vice President, Human Resources, Erb Transport Limited
Tom Broda, Health and Safety Manager, Erb Transport Limited
Wilson Milley, Barrie Terminal Manager, Erb Transport Limited
Jack Sutton, employee member of the health and safety work place committee, Erb Transport Limited

For the Respondent
David Vey did not attend the hearing nor was he represented.

Health and Safety Officer
Ken Manella, Human Resources and Skills Development Canada (HRSDC), Labour Program, Toronto District Office, Toronto, Ontario

[1] On May 10, 2005, health and safety officer (HSO) Ken Manella issued a direction to Erb Transport Limited pursuant to subsection 145(1) of the *Canada Labour Code*, Part II (the *Code*). HSO Manella's direction alleged two violations and ordered Erb Transport Limited to terminate the contraventions by May 10, 2005.

[2] On May 25, 2005, Ian S. Campbell, Counsel, appealed the direction to an Appeals Officer pursuant to subsection 146(1) of the *Code* on behalf of Erb Transport Limited, requesting that the direction be rescinded.

[3] For immediate reference, the direction reads as follows:

IN THE MATTER OF THE *CANADA LABOUR CODE*
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On April 14, 2005, the undersigned health and safety officer conducted an investigation in the work place operated by ERB TRANSPORT LIMITED, being an employer subject to the *Canada Labour Code*, Part II, at 1889 Britannia Road East, Mississauga, Ontario L4W 3C3 with regards to the 75 Ellis Drive, Barrie Terminal, Barrie, Ontario, L4M 4H7, the said work place being sometimes known as ERB TRANSPORT LIMITED.

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:

1. Sub-section 128.(10) of the *Canada Labour Code* – Part II.
An employer shall immediately on being informed of the continued refusal under subsection (9), investigate the matter in the presence of the employee who reported it and of

(a) at least one member of the work place committee who does not exercise management functions;
(b) the health and safety representative; or
(c) if no person is available under paragraph (*a*) or (*b*), at least one person from the work place who is selected by the employee.

2. Sub-section 128.(13) of the *Canada Labour Code* – Part II.
If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.

This officer is of the opinion that on March 28, 2005[1] a Refusal To Work took place involving former employee David Vey.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*a*) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than May 10, 2005.

[1] Although HSO Manella indicated March 28, 2005 as the date of the alleged refusal to work, it is obvious from the submitted evidence that this is a typo and that the date should read March 29, 2005.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*b*) of the *Canada Labour Code*, Part II, to take steps to ensure that the contravention does not continue or reoccur.

[4] In this regard, counsel Campbell held that HSO Manella erred because he did not rely on solid evidence for his opinion that a refusal to work did take place on March 29, 2005 pursuant to the Code. He added that, whether the situation that arose on March 29, 2005 was characterized as a refusal to work, a continued refusal to work did not take place because the situation was resolved at the time. For this reason, there was no obligation to contact a health and safety officer and such conclusions were wrong. Therefore, counsel Campbell held that there was no basis for the issuance of the direction.

[5] The following evidence is not in dispute:

- on July 9, 2004, David Vey, at the time employee of Erb Transport Limited, sustained an injury to his back while he was working;
- following this event, D. Vey was assigned modified duties;
- on March 3, 2005, D. Vey declared a re-injury at work;
- on March 21, 2005, D. Vey returned to work after an absence following his re-injury;
- on the morning of March 29, 2005, D. Vey discussed with Wilson Milley, his manager at the Barrie Terminal, his timely return to work process following his work related re-injury. When D. Vey spoke with W. Milley on March 29, 2005, W. Milley asked him to return as a truck driver;
- due to his medication, D. Vey refused W. Milley's request that he drive a truck even with another driver in the cab;
- at this point, W. Milley contacted Tom Broda, health and safety manager, Ontario Region, for Erb Transport Limited;
- T. Broda was advised that D. Vey did not feel he could drive due to his medication;
- neither the word "danger" nor the *Code* was ever mentioned to W. Milley or T. Broda by D. Vey at the time, but he did say that he did not feel safe to drive a truck due to his medication;
- at the end of the meeting, D. Vey left W. Milley's office without more explanation;
- on March 30, 2005, HSO Manella received a call from D. Vey;

- D. Vey complained to HSO Manella that, the day before, he had received a letter from Floyd Gerber, Vice President of Erb Transport Limited, advising him that he had been fired;

- D. Vey alleged to HSO Manella that his termination was a disciplinary action following his refusal to drive a truck on March 29, 2005.

[6] D. Vey wrote the following statement on the complaint registration form that he completed under the *Code*:

> I was dismissed because I refused to drive a truck while on medication that prohibits driving while taking them, and, that the time I was on a "WSIB"[2] claim for "light duties".

[7] HSO Manella submitted a copy of his investigation report prior to the hearing and testified at the hearing. I retain the following from his report and testimony.

[8] HSO Manella stated that, at the end of the call with D. Vey on March 30, 2005, he suggested that he file three complaints: the first one under the *Canada Labour Code*, Part II (the *Code*), for the refusal to work, the second one under the *Canada Labour Code*, Part III, for unjust dismissal, and the third one with the Canada Industrial Relations Board (the Board).

[9] HSO Manella also stated that, at the time, during the last six months, his office had received two other complaints from employees of Erb Transport Limited alleging that they had been disciplined following the exercise of their right to refuse to work.

[10] Based on this, HSO Manella decided to conduct an investigation on D. Vey's complaint to determine whether or not Erb Transport Limited had complied with the refusal to work provisions under the *Code*. He first met with F. Gerber, Vice President, Human Resources, and W. Milley, Barrie Terminal Manager, on April 14, 2005. He also met with D. Vey on April 24, 2005.

[11] HSO Manella affirmed that, when he met with D. Vey on April 24, 2005, D. Vey refuted the allegation that W. Milley or T. Broda had offered him alternate work during their discussion on March 29, 2005.

[12] HSO Manella declared that D. Vey also held that the reason he left W. Milley's office on that day was because neither W. Milley nor T. Broda offered him alternate work and he had a doctor's appointment later on that day.

[13] HSO Manella stated that D. Vey told him that later on March 29, 2005, he received a call from W. Milley asking him to come back to the office. He agreed to do so after his scheduled doctor's appointment. D. Vey also claimed to HSO Manella that when

---

[2] Workplace Safety & Insurance Board of Ontario.

he arrived at the office with his doctor's note that he should not drive while under medication, W. Milley gave him a termination letter without reading the doctor's note.

[14] Based on the information gathered during the course of his investigation, HSO Manella concluded that a refusal to work had taken place on March 29, 2005.

[15] HSO Manella also concluded that the refusal to work was ongoing because, whether W. Milley and T. Broda offered alternate work to D. Vey or not, there was no agreement between the parties on whether or not a danger did exist. Therefore, he concluded that an employee member of the health and safety work place committee should have been contacted as well as, ultimately, the Labour Program Office.

[16] W. Milley, T. Broda, F. Gerber and Jack Sutton testified for the applicant at the hearing. I retain the following from their testimonies and the written documents provided by them at the hearing.

[17] W. Milley held that after D. Vey's first injury on July 9, 2004, everything possible was done to help D. Vey return to work with modified duties but it was difficult to get him back on light duties.

[18] W. Milley stated that, after returning to work on March 21, 2005, D. Vey mostly did nothing during his first week and did not perform his modified duties.

[19] W. Milley also stated that, on the week of March 28th, D. Vey was at work but again did nothing.

[20] W. Milley held that, on March 29, 2005, he saw D. Vey reading the newspaper when he went to the driver's room. He called him into his office and told him that reading the newspaper while at work was unacceptable.

[21] W. Milley held that, when he discussed this with D. Vey on that day, he told him that he could do some lights duties, for instance a trailer check to see which ones were clean and which ones were dirty and to wash the dirty ones. That is when D. Vey got upset and asked what work he would do if he could return to regular duties as W. Milley had put another driver on the peddle run that he had bid for. W. Milley told D. Vey that he wanted him to return to driving as there was nothing on his Functional Abilities Form for Timely Return to Work (FAF)[3] saying he could not do so. D. Vey replied that he could not drive because he was on medication.

[22] Following this discussion, W. Milley organized a teleconference call between himself, D. Vey and T. Broda. When T. Broda said there was nothing on D. Vey's FAF forbidding him to drive, D. Vey presented his doctor's prescription, which said that he had to be careful when operating a motor vehicle. D. Vey argued with T. Broda that it meant that he could not drive a truck for this reason.

---

[3] The purpose of the FAF is to provide the employer with a list of the physical (functional) abilities of the injured employee to assist in his return to work.

[23] W. Milley stated that when he got off the phone, he asked D. Vey to tell him what work he could do and told him that the only time he was expected to be seen reading the newspaper was during his break. D. Vey replied to W. Milley that that was enough and walked out of his office without any other explanation.

[24] W. Milley finally stated that D. Vey left the terminal by driving his own vehicle.

[25] T. Broda confirmed that he received a call from W. Milley on March 29, 2005 and was asked to hold a teleconference with W. Milley and D. Vey. He was advised by W. Milley during that call that D. Vey did not feel he could drive or do any other modified duties that were offered to him.

[26] T. Broda held that he asked D. Vey why he could not drive, as there was nothing on his FAF to indicate that, to which D. Vey replied that it was on his doctor's prescription. W. Milley then read the prescription, which said that D. Vey's medication could cause drowsiness.

[27] T. Broda declared that he advised D. Vey that there was nothing to indicate that he could not drive and that they wanted him to try. He also reminded D. Vey that someone would accompany him to do the lifting, as it was specified on his FAF that he could not do any. T. Broda also told him that the other employee could take over his driving duties if for some reason his medication made him feel drowsy.

[28] T. Broda finally stated that he ended his participation in the conference call by advising D. Vey that it was up to him to decide and he left D. Vey and W. Milley to their discussion.

[29] Both W. Milley and T. Broda held that when they spoke with D. Vey on March 29, 2005, they did not understand that D. Vey was making a refusal to work pursuant to the *Code*.

[30] F. Gerber stated that Erb Transport Limited provides to all employees a health and safety policy manual that explains the procedure to exercise the right to refuse to work under the *Code*.

[31] F. Gerber declared that he wrote the termination letter to D. Vey on March 29, 2005 because there was evidence that the employee had done nothing to cooperate and perform light duties. This situation had been going on for a long time, in fact, since the employee's first injury.

[32] F. Gerber also held that on that day, he did not understand that D. Vey was making a refusal to work because he thought that the issue of dealing with D. Vey's concerns had been resolved and that the employee could continue to perform his light duties.

[33] F. Gerber finally stated that there had been past instances where drivers on medication had been assigned to light duties.

[34] J. Sutton stated that he was never approached about D. Vey's concerns and that that issue was never raised during a health and safety committee meeting.

[35] In his final argument, counsel Campbell referred to jurisprudence to support his submission that no refusal to work had taken place on March 29, 2005, because D. Vey's concerns were not related to a condition of work.

[36] The respondent, D. Vey, did not attend the hearing and was not represented, even though he was given ample prior notice of the date and place of the hearing.

****

[37] In my view, the first matter to be decided in the present case is whether or not HSO Manella erred when he determined that he had authority under the *Code* to investigate D. Vey's complaint.

[38] For his part, counsel Campbell argued that the two points in issue were:

- whether HSO Manella erred when he decided that a refusal to work took place on March 29, 2005; and

- whether HSO Manella erred when he also decided that a continued refusal to work took place on March 29, 2005,

and he presented some jurisprudence to support this point of view.

[39] If I decide that HSO Manella had the authority to investigate D. Vey's complaint, the second issue to be decided will be whether or not HSO Manella erred when he determined that a refusal to work did take place on March 29, 2005.

[40] If I decide that a refusal to work did take place, a third issue will have to be determined, that is whether or not HSO Manella erred when he became of the opinion that Erb Transport Limited was not in compliance with the *Code* because he did not follow the refusal to work procedure.

[41] In order to resolve this matter, I must consider the facts of the case and the relevant legislation.

[42] In light of the evidence, D. Vey sustained a work related injury to his back on July 9, 2004 and was put under light duties. On March 3, 2005, D. Vey declared a re-injury at work and took an absence from work until March 21, 2005. On March 29, 2005, when W. Milley asked D. Vey to resume work as a truck driver, D. Vey refused because he was taking medication. D. Vey was dismissed on that day.

[43] The evidence also shows that D. Vey's complaint under the *Code* was directly related to his dismissal alleging that it had been made following his refusal to work.

[44] Section 133 of the *Code* clearly stipulates that where an employee alleges that an employer has taken or threatens to take any disciplinary action against the employee because he or she exercised rights under the *Code*, the employee may make a complaint in writing to the Canada Industrial Relations Board. Pursuant to section 134 of the *Code*, the Board has exclusive jurisdiction to deal with contraventions of section 147 of the *Code* regarding disciplinary actions. In addition, no provisions of the *Code* give a health and safety officer a remedial power to deal with a complaint of an employee alleging that he or she has been disciplined by the employer following the exercise of his or her right of refusal to work under the *Code*.

[45] Sections 133, 134 and 147 read as follows:

Complaints When Action Against Employees

133(1) An employee, or a person designated by an employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

(3) A complaint in respect of the exercise of a right under section 128 or 129 section may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.

(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.

134. If, under subsection 133(5), the Board determines that an employer has contravened section 147, the Board may, by order, require the employer to cease contravening that section and may, if applicable, by order, require the employer to

(*a*) permit any employee who has been affected by the contravention to return to the duties of their employment;

(b) reinstate any former employee affected by the contravention;

(c) pay to any employee or former employee affected by the contravention compensation not exceeding the sum that, in the Board's opinion, is equivalent to the remuneration that would, but for the contravention, have been paid by the employer to that employee or former employee; and

(*d*) rescind any disciplinary action taken in respect of, and pay compensation to any employee affected by the contravention, not exceeding the sum that, in the Board's opinion, is equivalent to any financial or other penalty imposed on the employee by the employer.

Disciplinary Action

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period of time that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee

(*a*) has testified or is about to testify in a proceeding taken or an inquiry held under this Part,

(*b*) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer, or

(*c*) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

[46] Therefore, I conclude that HSO Manella had no authority under the *Canada Labour Code*, Part II, to investigate D. Vey's complaint.

[47] I also conclude that, pursuant to *Canada Labour Code*, Part II, HSO Manella had no grounds to investigate a refusal to work on March 29, 2005.

[48] Therefore, I am of the opinion that HSO Manella erred when he issued a direction to Erb Transport Limited pursuant to the *Canada Labour Code*, Part II, following his investigation into D. Vey's complaint.

[49] For this reason, I am rescinding the direction that HSO Manella issued to the employer.

[50] Given this decision, I therefore do not have to and will not decide on the second and third issues stated in paragraphs 39 and 40 of the present decision.

_____

Pierre Guénette
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 06-010

Applicant: Erb Transport Ltd.

Key Words: Refusal to work procedure, investigation, Board, disciplinary actions

Provisions: *Canada Labour Code*: 128, 129, 133, 134, 145(1), 146.1, 147

Summary:

Following an investigation, a health and safety officer issued a direction on …, 2005, under the *Canada Labour Code*, Part II, to Erb Transport Limited