Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Mike Isinger et al.,

complainants,

and

TSI Terminal Systems Inc.,

respondent.

Board File: 29114-C
Neutral Citation: 2013 CIRB **688**
June 25, 2013

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 156(1) of the *Canada Labour Code* (*Part II–Occupational Health and Safety*) (*Code*). A hearing was held in Vancouver from Monday, March 18 to Wednesday, March 20, 2013.

Appearances

Mr. Bruce A. Laughton, Q.C., for Mike Isinger et al.;

Mr. Israel Chafetz, Q.C., for TSI Terminal Systems Inc.

I–Introduction

[1] On November 17, 2011, a group of foremen working at TSI Terminal Systems Inc. (TSI) filed a complaint alleging they had been disciplined for invoking their right to refuse unsafe

work under Part II of the *Code*. The foremen's bargaining agent, the International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 (ILWU 514) advised that it had been authorized to file their November 17, 2011 complaint:

> We act for the above noted trade union and are authorized by that trade union to make a complaint pursuant to s. 133 of the *Canada Labour Code* that TSI Terminal Systems Inc. has contravened s. 147 of the Code. The trade union has been designated by the named employees to bring this complaint.
>
> The complaint is based on the fact that TSI suspended Mike and Dave Isinger for a period of two months because they acted in accordance with the *Canada Labour Code* (Part II Occupational Health and Safety) by exercising their right to refuse to work under s. 128(1) of the Code.

[2] Besides contesting the two-month suspension TSI gave Messrs. Mike and Dave Isinger, who are brothers, the complaint also contested warning letters, and a related docking of 4 hours pay, for 33 other foremen.

[3] During final argument, the ILWU 514 advised that it was no longer pursuing the complaints on behalf of any foremen other than the two Isinger brothers.

[4] TSI, a member employer in the British Columbia Maritime Employers Association (BCMEA), alleged the Isingers had no "reasonable cause to believe" that a danger existed when they refused to work on October 26, 2011. Since they failed to meet this threshold requirement for a section 128(1) refusal, TSI argued the refusal, which led to a general work stoppage which paralyzed Vancouver's largest container terminal, became a regular labour relations issue.

[5] This decision examines whether the Isingers had reasonable cause to believe a danger existed. If they had reasonable cause, then TSI was obliged to follow the *Code*'s investigative process, even if it disagreed about the existence of danger. On the other hand, if the foremen had no reasonable cause to believe danger existed, then their subsequent discipline no longer fell within the Board's Part II jurisdiction.

[6] The Board has concluded, on the unique facts of this case, that the Isinger brothers did not have "reasonable cause to believe" danger existed on October 26, 2011. Rather, their actions arose principally from Mr. Mike Isinger's concerns about ongoing Part II compliance matters

with which a Health and Safety Officer (HSO) from Human Resources and Skills Development Canada (HRSDC) was already involved.

[7] A work refusal is not the next procedural step to resolve frustrations arising from ongoing compliance proceedings under Part II of the *Code*. A work refusal may only take place when an employee has reasonable cause to believe that a "danger", as defined broadly in section 122 of the *Code*, exists.

[8] These are the reasons for the Board's decision.

II–Facts

[9] TSI operates Deltaport and Vanterm, two container terminals located in the Lower Mainland of British Columbia. Deltaport is the larger of the two facilities and houses upwards of 15,000 containers. Deltaport is the largest single container terminal in Canada and is serviced by ship, truck and rail.

[10] While ILWU 514 represents foremen, another ILWU local, Local 502 (ILWU 502), represents longshoremen assigned to work at TSI. Longshoremen and some foremen are assigned work at TSI under a hiring hall process.

[11] The Isinger brothers have each worked for over 40 years in the longshoring industry. They are both "yard foremen".

[12] Mr. Mike Isinger sits on TSI's Safety Committee (Committee). As the Committee's Minutes illustrate (Ex-2 Tab 5), multiple representatives of TSI, ILWU 502 and ILWU 514 participate in safety discussions. TSI's Manager, Operations, Mr. Colin Parker, and ILWU 502's Mr. Tom Doran, are the Committee's Co-Chairs.

[13] The foremen's refusal took place on October 26, 2011. But that group refusal cannot be fully appreciated without examining the context of ongoing discussions about certain safety matters among TSI, Mr. Mike Isinger, the Committee and HRSDC representatives.

[14] For example, on June 22, 2011, HSO Betty Ryan issued TSI what is called an Assurance of Voluntary Compliance (Rail AVC). Under an AVC, an HSO may require an employer to

complete certain tasks by a fixed compliance date. The Rail AVC had resulted from an earlier compliance complaint filed by Mr. Mike Isinger.

[15] Occasionally, the HSO may modify the completion dates for compliance, depending on the circumstances.

[16] The Board understood that the June 22, 2011 Rail AVC concerned issues arising from the Canadian National Railway Company (CN) and the Canadian Pacific Railway Company (CP) conducting rail operations at TSI. Their rail maintenance operations could impact the work of TSI's longshoremen.

[17] The Committee's October 6, 2011 Minutes indicated that the Co-Chairs, Messrs. Parker and Doran, would be discussing the Rail AVC with Mr. Mike Isinger.

[18] TSI introduced various exhibits which referenced HSO Ryan's continuing involvement with the Rail AVC.

[19] For example, in a July 6, 2011 email (Ex-5), HSO Ryan agreed to extend some of the Rail AVC's compliance dates to October 31, 2011:

> Thank you Colin,
>
> I agree to your proposed dates. I will change the AVC to reflect the new dates. I will put Oct 31, 2011 for the last two items. As we discussed, the items do not have to be completed by the dates specified but an action plan needs to be provided for any outstanding items. This will be sent as a pdf file.
>
> When you receive the amended AVC please review and sign each page. A signed copy should be faxed or emailed back to me and a copy provided to the committee.
>
> I do appreciate your attention and cooperation in dealing with this matter.
>
> Regards,
>
> Betty Ryan

[20] Later on July 6, 2011, HSO Ryan sent Mr. Parker a revised Rail AVC (Ex-8):

> Hi Colin,
>
> As discussed here is the revised AVC. **The dates have been amended, and please realize that as long as TSI Deltaport is able to provide a written action plan as described in sentence 2, on the last page and demonstrate genuine progress on the matters, we will be satisfied.**
>
> Please review as necessary and sign (or another manager) each page. A copy shall be returned to me by Friday July 8, 2011 indicating that TSI Deltaport agrees with the AVC. Please also provide a copy

to the safety committee and post a copy in an accessible location in the workplace. <<deltaportrailavc.pdf>>

Regards,

Betty Ryan

(emphasis added)

[21] Later in July 2011, Mr. Parker wrote an email to HSO Ryan (Ex-6) following his discussions with ILWU 502's Mr. Doran, as well as with ILWU 514's Mr. Mike Isinger:

Betty,

I had my first meeting with Mike Isinger and Tom Doran as per the plan Tuesday unfortunately we did not progress very far as the AVC took over the meeting.

My understanding was that we would be discussing the existing policies and procedures concerning the Internal Complaint and look at what is still applicable today (if any) and create new procedures that promote a safe working environment.

We actually ended up spending a lot of time on Canada Labour Code 19.7 (1) and the criteria laid out in this section, most of it surrounding the HPP and the absence of such a program.

Discussions were not moving ahead and reports have been requested as outlined in section 2 – I have no problem providing the reports we have covering this section of the labour Code. I impressed the fact that this data would be beneficial for the HPP but should be done in conjunction or after we have reviewed and amended policy concerning Carmen working at Deltaport. This was not agreed and further clarity required (hence the call)

In closing the meeting I tried to explain that if this is the path we go down I will need speak to Betty Ryan as I cannot achieve this in the time frame laid out in the initial AVC, and it will need to be revisited.

Both gentlemen insisted that a full HPP for the entire rail operation needs to be done before we can move forward – This will take a lot of time and delay the resolving of the initial conflict resolution.

I appreciate your thoughts on this, if I misunderstood then I have made an error in signing in good faith the AVC so both parties can get round the table and sort the relevant issues out.

Unfortunately I will not be in the office Friday but will be here all next week if you wish to talk, e mail is always fine

Regards

Colin Parker

[*sic*]

[22] On July 18, 2011, HSO Ryan responded to Mr. Parker by email (Ex-6) regarding her expectations for the Rail AVC and noted that she had copied both Mr. Doran and Mr. Mike Isinger:

Hi Colin,

(I copied Tom and Mike in order to hopefully avoid further confusion).

> The purpose of the AVC was to address the concerns with respect to the complaint. That is the safety of the carmen while on site, and hazards they may create for TSI employees, while performing their work: and the safe movement of the trains (switching out). The AVC was written with the assumption that at one point a proper hazard prevention program, (with all of its elements except perhaps ergonomics) was in place for the area and that it needed to be reviewed and updated to take into account the increase in traffic, volume and congestion. In the course of that review and update all the factors listed in the AVC would be considered.
>
> It appears that assumption may have been incorrect. If this is the case a full hazard prevention program and all of its criteria will need to be developed in order to be in compliance with the legislation.
>
> However, the AVC is intended to only address those factors that are related to the complaint. As you have correctly identified, it would be impossible to meet the compliance dates in the AVC if you were looking at developing an entire program for all potential hazards.
>
> It would be prudent for TSI Deltaport to put together an implementation plan (as described in 19.2 of the Regulations) to address the overall HPP for the Intermodal yard…and the rest of the facility if necessary, as that responsibility lies with the employer whether or not specified in the AVC.
>
> Please call me on my cell if you would like to discuss further …
>
> Regards,
>
> Betty Ryan

[23] The above discussions provide just some of the context leading up to the events of October 26, 2011. The parties did not dispute that work ceased at TSI during the morning of October 26, 2011 and caused, besides a general shutdown, a five kilometer traffic jam from trucks which were unable to load or unload containers at TSI.

A–Events of October 26, 2011

1–Meeting #1 (7:00–8:30 a.m.)

[24] On October 26, 2011, Mr. Mike Isinger advised a TSI representative, a Mr. Vale, of a work refusal at the start of his morning shift. On the evening of October 25, 2011, Mr. Isinger had prepared a document (Ex-2 Tab 2) which set out the reasons for the refusal:

> **The unilateral changes made by the employer to work processes and procedures along with a continuing failure to comply with direction orders, assurances of voluntary compliance and certain provisions of the *Canada Labour Code* Part II has lead to us [*sic*] to believe that to continue to work presents a danger as defined in:**
>
> Canada Labour Code (R.S.C., 1985, c. L-2) Act current to 2011-09-21 and last amended 2010-01-01.
>
> Definitions,
>
> **122.1(1)** In this part,
>
> "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;

We believe that the employer is in violation of section 124 and has failed to ensure that the health and safety at work of the employees is protected.

We believe that the employer has failed to comply with a Direction order dated April 13, 2011 in that they unilaterally re-scheduled a Safety Committee meeting without Safety Committee co-chair involvement. (Changed from October 20, 2011 to October 31, 2011) (Complaint made to H.S.O. Betty Ryan on October 25, 2011)

We believe that the employer has failed to comply with a Direction order regarding the hazard for workers on the dock face and vehicular traffic.

We believe that the employer has failed to comply with assurances made regarding an Assurance of Voluntary Compliance with a compliance date of December 31, 2010. The employer has failed to consult with the work place committee regarding the planning of changes that may affect occupational health and safety, including work processes and procedures. Consultation with the union local does not replace the need to consult with the committee.

The employer has also failed to consult with the work place committee in the implementation of changes that may affect occupational health and safety, including work processes and procedures.

Assignment No. M7KC00353

We believe that the employer had failed to live up to assurances made regarding an Assurance of Voluntary Compliance regarding the Intermodal yard dated June 22, 2011.

Assignment No. M7KC00394

We believe that the employer has failed to adequately investigate a hazardous occurrence report regarding the safe handling of tank containers at the terminal dated June 24, 2011.

We believe that the employer had failed to satisfy the requirements of the code in their recent change to a work process and (or) procedure for equipment tasking. (Commonly known as geo-fencing)

And further we believe that the employer has failed to comply with the following provisions under the Canada Labour Code Part II:

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,

(k) ensure that the vehicles and mobile equipment used by the employees in the course of their employment meet prescribed standards;

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

(o) comply with prescribed standards relating to fire safety and emergency measures;

(q) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work;

(s) ensure that each employee is made aware of every known or foreseeable health or safety hazard in the area where the employee works;

(t) ensure that the machinery, equipment and tools used by the employees in the course of their employment meet prescribed health, safety and ergonomic standards and are safe under all conditions of their intended use;

(u) ensure that the work place, work spaces and procedures meet prescribed ergonomic standards;

(v) adopt and implement prescribed safety codes and safety standards;

(w) ensure that every person granted access to the work place by the employer is familiar with and uses in the prescribed circumstances and manner all prescribed safety materials equipment, devices and clothing;

(x) comply with every oral or written direction given to the employer by an appeals officer or a health and safety officer concerning the health and safety of employees;

(y) ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees;

(z) ensure that employees who have supervisory or managerial responsibilities are adequately trained in health and safety and are informed of the responsibilities they have under this Part where they act on behalf of their employer;

(z.02) respond as soon as possible to reports made by employees under paragraph 126(1)(g);

(z.03) develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters;

(z.04) where the program referred to in paragraph (z.03) does not cover certain hazards unique to a work place, develop, implement and monitor, in consultation with the work place committee or the health and safety representative, a prescribed program for the prevention of those hazards that also provides for the education of employees in health and safety matters related to those hazards;

(z.05) consult the policy committee or, if there is no policy committee, the work place committee or the health and safety representative to plan the implementation of changes that might affect occupational health and safety, including work processes and procedures;

(z.06) consult the work place committee or the health and safety representative in the implementation of changes that might affect occupational health and safety, including work processes and procedures;

(z.07) ensure the availability in the work place of premises, equipment and personnel necessary for the operation of the policy and work place committees;

(z.08) cooperate with the policy and work place committees or the health and safety representative in the execution of their duties under this Part;

(z.09) develop health and safety policies and programs in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative;

(z.10) respond in writing to recommendations made by the policy and work place committees or the health and safety representative within thirty days after receiving them, indicating what, if any, action will be taken and when it will be taken;

(z.11) provide to the policy committee, if any, and to the work place committee or the health and safety representative, a copy of any report on hazards in the work place, including an assessment of those hazards;

(z.12) ensure that the work place committee or the health and safety representative inspects each month all or part of the work place, so that every part of the work place is inspected at least once each year;

(z.13) when necessary, develop, implement and monitor a program for the provision of personal protective equipment, clothing, devices or materials, in consultation, except in emergencies, with the

policy committee or, if there is no policy committee, with the work place committee or the health and safety representatives;

(z.14) take all reasonable care to ensure that all of the persons granted access to the work place, other than the employer's employees, are informed of every known or foreseeable health or safety hazard to which they are likely to be exposed in the work place;

(z.15) meet with the health and safety representative as necessary to address health and safety matters;

(z.16) take the prescribed steps to prevent and protect against violence in the work place;

(z.17) post and keep posted, in a conspicuous place or places where they are likely to come to the attention of employees, the names, work place telephone numbers and work locations of all of the members of work place committees or of the health and safety representative;

(z.18) provide, within thirty days after receiving a request, or as soon as possible after that, the information requested from the employer by a policy committee under subsection 134.1(5) or (6), by a work place committee under subsection 135(8) or (9) or by a health and safety representative under subsection 136(6) or (7); and

(bold text in original)

[25] Mr. Isinger made five copies of his refusal document at his home and brought them to TSI on the morning of October 26, 2011. Mr. Isinger testified that he had not spoken with the ILWU, his brother Dave Isinger, or anyone else about his intention to refuse to work on the morning of October 26, 2011.

[26] Mr. Mike Isinger also brought with him an information bulletin from HRSDC (Ex-3) describing the procedure for exercising the right to refuse dangerous work. He testified it was important to him to follow the correct process. Mr. Isinger did not dispute TSI's evidence that when they asked him to describe the specific danger(s) behind his refusal, he limited himself to reading aloud the typed document (Ex-2 Tab 2) he had prepared.

[27] During TSI's initial meeting with Mr. Mike Isinger, two other yard foremen, his brother Mr. Dave Isinger and Mr. Lawrence Cameron, who were at the office door, alluded to additional issues they thought constituted a danger. They, along with two other yard foremen, had joined in the work refusal. In all, TSI's five yard foremen refused to work.

[28] The Board heard evidence from TSI about its attempts to obtain specifics about the danger which caused Mr. Mike Isinger's refusal. The only contemporaneous notes (Ex-2 Tab 3) provided at the hearing (by TSI) contained the following about this issue:

...

07:59 CP asks MI "what is the specific danger"
MI says the nature of the refusal is listed in the document
MI says all the issues in the document constitute danger
MI says he feels "badgered" by our questioning
08:05 CP & NW asking again what is the specific danger
MI refuses to be specific about he [sic] danger
08:11 CP asking what specifically is the danger
MI will not give an answer
08:14 MI keeps complaining about CP/NW trying to narrow the scope of the complaint/danger
08:18 CP to MI: There is a list of approximately 30 things that are on your list. What specific issue do you have ?
08:18 MI states "I can't do anything more for you"
08:23 CP confirms with MI that MI, DI, SP, JB, LC are refusing to work
08:24 MI to CP's question "Yes"

...

[29] After this initial meeting, the five yard foremen returned to their lunchroom. Roughly 33 other foremen also refused to work. The longshoremen represented by ILWU 502 were also not working, since the foremen had not dispatched them. They did not want to work without supervision from the foremen.

[30] The TSI terminal at Deltaport had effectively shut down.

2–Meeting #2 (mid-morning)

[31] As events unfolded, Mr. Frank Morena, the Secretary-Treasurer of ILWU 514, who also handled health and safety matters, met with the foremen in their lunchroom. TSI representatives arrived and asked if the foremen would return to work. According to the evidence, the foremen collectively advised TSI that they "were not working in support of the safety committee".

3–Meeting #3 (11:30)

[32] TSI representatives met again with the foremen in their lunchroom at approximately 11:30 that morning.

[33] TSI again asked the foremen for the specifics of their work refusal. TSI ultimately surmised that two issues were behind the dispute. The first issue was the Rail AVC. The second issue concerned mixed cargo (related to the stacking of containers) and the fact that it had allegedly not been processed through the safety committee.

[34] The Board heard contradictory testimony on certain points. For example, TSI and Mr. Mike Isinger, along with Mr. Morena, differed on who called the 11:30 meeting. TSI alleged the foremen asked to meet.

[35] Another evidentiary dispute arose over whether TSI offered to call in an HSO. TSI's witnesses testified the foremen advised that that step would not be necessary. The only contemporaneous notes (Ex-2 Tab 4) taken of this meeting were by TSI's Dustin Stoker, who is the Director, Terminal Operations at Deltaport. Neither the foremen, nor Mr. Morena, had taken any notes.

[36] Ultimately, the Board did not have to sort out these evidentiary differences in order to reach its conclusion.

[37] Shortly after the conclusion of this meeting, the foremen decided to return to work. All of the longshoremen similarly returned to work.

[38] On October 26, 2011, TSI imposed two-month suspensions on both Mike and Dave Isinger for what it described as "an illegal work stoppage" (Ex-2 Tab 7):

> On October 26, 2011 you were one of the leaders in an illegal work stoppage at TSI Delta Port. This illegal work stoppage not only disrupted the TSI business but it also interfered with container trucking, CNR container traffic and vessel operations. This type of disruption is costly to all concerned and reflects poorly on us in the opinion of our customers. We consider your actions of intentionally disrupting the business as one of the most serious disciplinary matters in violation of your obligations as an employee. In addition, we reviewed your prior record in deciding the level of discipline to impose.
>
> You are suspended for two months commencing October 27th 2011. You are expected to be back at work on December 27th 2011 and resume your normal duties. Any further involvement in an illegal work stoppage or other serious breaches of your employment obligation will lead to further discipline including the possibility of your termination.

III–Analysis and Decision

[39] ILWU 514 argued that a routine work refusal under the *Code* had escalated when TSI, rather than investigating the circumstances of the work refusal, decided to discipline the foremen.

[40] TSI maintained that the foremen's mass refusal on October 26, 2011 lacked the essential requirement in section 128(1) of a "reasonable cause to believe" that a danger existed. As a result, TSI argued it was entitled to deal with the matter as a labour relations issue.

[41] Part II of the *Code* contains provisions designed to protect workers' safety. It allows for a work refusal which, but for the *Code*, might otherwise constitute insubordination.

A–Relevant statutory provisions

[42] Section 128(1) of the *Code* establishes employees' right to refuse to work if there is danger:

> 128(1) Subject to this section, **an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe** that
>
> (*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
>
> (*b*) a condition exists in the place that constitutes a danger to the employee; or
>
> (*c*) the performance of the activity constitutes a danger to the employee or to another employee.
>
> (emphasis added)

[43] Sections 128 and 129 of the *Code* create the process for investigating a work refusal. This process initially involves the refusing employee, the employer and either the work place committee or the health and safety representative. If the matter is not resolved internally under section 128, then the employer must notify an HSO who will investigate (section 129).

[44] The definition of "danger" for the purposes of a section 128(1) refusal is found in section 122(1):

> 122. (1) In this Part,
>
> …
>
> "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;

[45] Section 147 of the *Code* prohibits employers from taking reprisals against employees who seek to exercise their rights under Part II:

> 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 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] However, and subject to some procedural protections, section 147.1(1) does permit an employer to discipline an employee who has wilfully abused the right to refuse process:

> 147.1(1) An employer may, after all the investigations and appeals have been exhausted by the employee who has exercised rights under sections 128 and 129, take disciplinary action against the employee who the employer can demonstrate has wilfully abused those rights.

[47] Section 133 of the *Code* creates the complaint mechanism for alleged violations of section 147. Section 133(1) mentions how the employee "or a person designated by the employee for the purpose" may make a complaint. Section 133(4) confirms the Board's exclusive jurisdiction over Part II complaints involving private sector federally regulated employers by preventing referrals of complaints to arbitration or adjudication. For those complaints involving the right to refuse, section 133(6) shifts the burden of proof to the employer:

> 133.(1) **An employee, or a person designated by the 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 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.**
>
> (emphasis added)

[48] The Board's predecessor, the Canada Labour Relations Board (CLRB) in *Snively* (1982), 48 di 93 (CLRB no. 373), commented on the importance of following the work refusal process in what was then Part IV of the *Code*:

> Part IV of the Code has been designed as a comprehensive, integrated progression of the procedures designed to provide protection for employees against injury and health hazards, and its clauses are intended, on a sequential basis, to progress the handling of safety problems through to orderly conclusion. Premature disciplinary action subverts the procedural requirements of the Code, because it constitutes a prejudging of the matter to be resolved. …
>
> (page 5)

[49] Amendments to Part II of the *Code* in 2000, such as the addition of section 147.1(1), *supra*, reiterated the importance of the *Code*'s procedural requirements. An employer does not decide the validity of an employee's work refusal. That analysis is carried out in conjunction with others, whether internally or externally through specially trained HSOs.

[50] Nonetheless, the Board may still be called upon to determine a key threshold question of whether an employee had "reasonable cause to believe" a danger existed when exercising the right to refuse. That requirement for a "reasonable cause to believe" remained unchanged in the *Code* after Part II was amended in 2000.

[51] The Federal Court of Appeal in *Saumier* v. *Canada (Attorney General)*, 2009 FCA 51 (*Saumier*) has summarized how these Part II provisions work together:

> [43] A close reading of these legislative provisions leads to the following conclusions:
>
> (i) subsection 128(1) provides that an employee is entitled, *inter alia*, to refuse to work in a place or to perform certain activities "if the employee while at work has reasonable cause to believe" that there is danger for the employee in working in his or her workplace or that the employee's performance of his or her activities constitutes a danger to the employee;

(ii) the exception to that principle is found at subsection 128(2), which provides that an employee cannot invoke section 128 to refuse to work in a place or to perform certain activities if "the danger referred to in subsection (1) is a normal condition of employment";

(iii) under section 147, an employer shall not take any disciplinary action against or threaten to take any such action against an employee who is legitimately exercising his or her rights pursuant to Part II of the *Code*, entitled "Occupational Health and Safety", which includes section 128;

(iv) if the employer has acted in contravention of section 147, an employee may file a written complaint "of the alleged contravention" with the Board;

(v) however, after all investigations and appeals provided at sections 128 and 129 have been exhausted, section 147.1 allows an employer to take disciplinary action against an employee who has "wilfully" abused those rights.

[44] That is the legislative context of the complaint lodged by the applicant, who alleges that following the exercise of her rights under section 128, the RCMP issued her a return-to-work order, an order that it reiterated on more than one occasion, threatening her with disciplinary action if she continued her refusal.

[52] Section 128(1) has two threshold questions: i) was the employee "at work" and/or ii) did he/she have a "reasonable cause to believe" danger existed. In *Saumier*, *supra*, the Court held that the complainant had not met the condition of being "at work" when she exercised her right to refuse. Given its conclusion that the complainant had not been at work, the Court did not decide the second issue of whether she had a "reasonable cause to believe".

B–Who are the parties to a safety complaint?

[53] During this proceeding, the Board asked both TSI and ILWU 514 for their submissions on the proper parties to a Part II complaint. They both provided compelling, but contradictory, legal interpretations. Section 133(1), which contemplates that an employee may use a designate, could be read in different ways:

133. (1) An employee, or a person designated by the 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.

[54] Given this wording, at least three different interpretations might arise: i) that the employee remains the party, but the designate may file the complaint on his/her behalf; ii) that if the designate files the complaint, then the designate becomes the party; or iii) both the designate and the employee become parties to the complaint.

[55] In order to resolve any confusion about the proper parties to a Part II complaint, the Board interprets section 133 to mean that the employee always remains the party/complainant, even if a "person designated by the employee" may have filed the complaint with the Board. The

designate, including a trade union, may represent that employee or, as in this case, employees, but that representation role does not give it sole or separate party status.

[56] If an employee files the complaint directly, this does not preclude another person or entity from asking for intervenor status, if they satisfy the requirements at section 12.1 of the *Canada Industrial Relations Board Regulations, 2012*.

[57] Various reasons support the Board's interpretation of section 133. For example, there is no further reference in section 133 to the "person designated" after its initial mention in subsection (1). While section 133(2) does use the potentially ambiguous term "complainant", sections 133(3), and especially section 133(4), refer solely to the "employee".

[58] For ease of reference, section 133(4) reads:

> 133.(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.
>
> (emphasis added)

[59] The Board has exclusive jurisdiction for Part II complaints involving federally regulated private sector employers. Section 133(4) clearly intends that the Board will decide Part II complaints in accordance with the *Code*.

[60] The Public Service Labour Relations Board (PSLRB) has an identical role to this Board for section 133 complaints, but for employees working in the federal public service. A Part II complaint before the PSLRB cannot be referred to "adjudication". The term "adjudication" refers to the process the PSLRB uses for resolving public sector grievances, usually pursuant to a collective agreement, but not exclusively.

[61] The result for both Boards is that the Part II complaints they receive must be decided pursuant to section 133 of the *Code*.

[62] Section 133(4) specifically prohibits "an employee" from referring a Part II complaint to arbitration or adjudication. If a designate, such as a trade union, became the party, then it might argue, since it was not "an employee", that the *Code* did not prevent it from referring a Part II complaint to either arbitration or adjudication.

[63] That scenario would go against the otherwise plain meaning of section 133(4). In the federal private sector, trade unions almost always have the sole discretion to decide whether to refer a matter to arbitration. Section 133(4) would lose most of its meaning if an employee's trade union became the party to a Part II complaint and then could refer Part II complaints to arbitration. A more compelling interpretation of section 133 ensures the employee retains party status and that the relevant Board decides the Part II complaint under the *Code*.

[64] In arriving at its interpretation, the Board also considered the fact that section 133 applies to both unionized and non-unionized employees. Any section 133 interpretation needs to be equally sound for non-union employees. If a non-union employee asked a person to file the complaint as his/her section 133(1) designate, it would make little sense to treat that third person, who is essentially a stranger to the matter, as the party to the complaint. The designate would remain, if anything, a representative of the employee, much as a lawyer is for a client.

[65] For these reasons, the Board is satisfied that only an employee, and not his/her designate, is the properly named party to a Part II complaint. Section 133(1) does not give the employee's designate party status. As a result, the ILWU 514 is not a party in this case, but has acted instead as the employees' designate throughout, just as a lawyer or paralegal would for a client.

[66] The style of cause used for this case reflects the Board's interpretation of section 133.

C–Did Messrs. Mike and Dave Isinger have "reasonable cause to believe"?

[67] For ease of reference, section 147.1(1) reads:

> 147.1 (1) An employer may, after all the investigations and appeals have been exhausted by the employee who has exercised rights under sections 128 and 129, take disciplinary action against the employee who the employer can demonstrate has willfully abused those rights.

[68] The Board has previously considered the impact of the addition of section 147.1(1) to the *Code* for right to refuse cases. Historically, the Board, and its predecessor the CLRB, would consider the threshold questions arising from the wording of section 128(1) regarding whether a complainant had been "at work" or had had "reasonable cause to believe" a danger existed.

[69] If those threshold issues were met, then the jurisprudence demonstrated that the Board treated work refusal complaints much as it would unfair labour practice complaints under Part I

of the *Code*. If the Board found that safety concerns were in any way a proximate cause for the employer's discipline, then a *Code* violation would result.

[70] Conversely, if the employer imposed discipline for reasons unrelated to the *Code*'s safety provisions, then the Board would not intervene, regardless of the penalty imposed on the employees.

[71] The 2000 amendments to Part II of the *Code* gave rise to the question of how to reconcile the "reasonable cause to believe" requirement in section 128(1), with the new section 147.1(1) which, subject to certain procedural protections, allowed an employer to impose discipline if the employee had "wilfully abused" the right to refuse process.

[72] Given the principles the Federal Court of Appeal summarized in *Saumier*, *supra*, the Board must be careful when interpreting the "reasonable cause to believe" threshold in section 128(1) and the wilful abuse concept in section 147.1(1). One cannot be interpreted so as to render the other illusory; the Legislator clearly intended these principles to coexist.

[73] In *Court*, 2010 CIRB 498 (*Court 498*), the Board described how the addition of section 147.1(1) to the *Code* impacted its traditional analysis in right to refuse complaints:

> [115] Section 147.1(1) impacts the Board's analysis of safety complaints. Before the addition of section 147.1(1), if the Board found any employer discipline resulted from an employee's exercise of safety rights, then the Board would intervene. Its practice was comparable to that used for unfair labour practices under Part I, where, if the contested discipline was related, in whole or in part, to anti-union animus, then the Board would grant a remedy.
>
> [116] By contrast, section 147.1(1) now explicitly allows employers to impose discipline, even if it is related to the raising of safety concerns. However, there are temporal limitations for the imposition of such discipline. The employer must also demonstrate that an employee wilfully abused the important rights granted by Part II.
>
> [117] Employees have important procedural protections in section 147.1(1) since a full independent investigation, and any appeals if applicable, would have to take place before any discipline for wilful abuse could be imposed. This restriction ensures a full evidentiary record exists before the matter comes to the Board.
>
> …
>
> [121] As a result of the addition of section 147.1(1) of the *Code*, there can now be three steps to examine in a safety case:
>
> i) Has the employee met the low threshold of having reasonable cause to believe a danger existed?
>
> ii) Did the employer impose discipline, contrary to section 147 of the *Code*, because an employee invoked Part II safety rights? and

> iii) Even if the employer imposed such discipline, did it wait until after a full investigation and any appeals, and did the discipline result solely from the employee's wilful abuse of those Part II rights?

[74] Both the CIRB and the CLRB have commented on the importance of ensuring that an employee has reasonable cause to believe there is danger. Without this pre-condition, any subjective belief, no matter how unrealistic, could give rise to the important, and often demanding, investigation requirements under the *Code*.

[75] The question for the Board is whether Messrs. Mike and Dave Isinger had reasonable cause to believe danger existed on October 26, 2011.

[76] In *Court 498, supra,* the Board noted it did not set a high hurdle for an employee to demonstrate that he/she had reasonable cause to believe that a danger existed. Moreover, the test does not examine whether an employee is correct that a danger existed, but only whether he/she had a reasonable cause to believe in a danger:

> [107] The threshold for finding a "reasonable cause to believe" is necessarily low. The issue is distinct from the question of whether danger actually existed. The Board has applied its reasonable cause test for exceptional situations. In the vast majority of cases, the Board has found that an employee had reasonable cause, even if the evidence later shows the employee was mistaken in his or her belief about danger existing.

[77] In *Aleksandrov*, 2011 CIRB 602, the Board found that an employee had "reasonable cause" and later issued him a remedy:

> [26] The Board is satisfied that Mr. Aleksandrov had reasonable cause to believe danger existed. The Board does not examine whether Mr. Aleksandrov was correct in his belief. Indeed, the HSO's later investigation concluded that danger as defined in the *Code* did not exist.
>
> [27] However, the facts demonstrate that Mr. Aleksandrov had concerns that the skin rash which had forced him to see a doctor, and for which he received a medical prescription, resulted from a situation in his workplace. Moreover, Mr. Aleksandrov had asked for permission the day before to install in his truck his own mattress for those occasions when he slept in the truck when carrying out his assignments.
>
> [28] As noted in the HSO decision at section II subsection 5, Zavitz "suggested installing the new mattress **after** the assigned trip was completed" (emphasis in original).
>
> [29] Zavitz contested before the HSO, as it was entitled, whether any danger existed, but did not suggest that Mr. Aleksandrov's refusal was in any way a pretext designed to deal with some other work situation, such as an ongoing employment dispute.
>
> [30] Mr. Aleksandrov has met his obligation to have reasonable cause to believe there was a danger to him in the workplace. The *Code* foresees that such situations will then be properly investigated, including, if necessary, having an independent HSO review the situation.

[78] Nonetheless, this important threshold of having a reasonable cause to believe has obliged the Board to examine an employee's reasons for suggesting a danger existed. The CLRB at times examined situations carefully to ensure that the right to refuse was not being used for other purposes.

[79] In *Miller* (1980), 39 di 93 (CLRB no. 243), the CLRB described some of the factors it might examine when considering if reasonable cause existed:

> **The necessary determination of whether reasonable cause for belief in the presence of imminent danger [existed] will to a large extent depend upon an assessment by the Board of the various influences coming to bear upon the employee's decision to refuse to work. Some of the factors which should be examined in terms of their influence upon the employee's belief include his motivation, i.e., whether or not bona fides, the extent of his experience and familiarity with the job and work place in question, and the quality of his knowledge of the circumstances leading to his apprehension of danger.** Arguably another is the effect anxiety over safety concerns may have had upon his judgement at the time of his refusal to work. However, in order for this element to have a favourable bearing upon a determination of reasonableness of belief the state of mind must have been directly and understandably brought about by reasonably held safety related concerns already existing at the work place.
>
> (emphasis in original; page 103)

[80] The CLRB also noted in *Pratt* (1988), 73 di 218 (CLRB no. 686) (*Pratt*) that "...the right to refuse is not the primary vehicle for attaining the objectives of Part IV [now Part II] of the *Code*" (page 226).

[81] In *Berry* (1990), 83 di 86 (CLRB no. 837), the CLRB examined the employee's motivation in bringing his complaint:

> In making this determination, the Board recognizes that, under section 133(6), the respondent must demonstrate that Mr. Berry was not disciplined for having legitimately exercised his right of refusal. A crucial, yet difficult, aspect of this determination relates to the absence, in the instance case, of a clear safety object over which the parties might disagree as to its hazardous potential, such as a condition or a thing to use, again, the language of the Code. The issue here is not whether working without proper safety footwear in the dumping area of the glacis is dangerous or not; nor is it, in essence, the condition of the boots which, for reasons we will go into shortly, never got much attention; it is, pure and simple, the motivation behind Mr. Berry's decision to refuse his assignment to dump mail and the motivation behind the employer's decision to discipline him. Was Mr. Berry's decision motivated by genuine safety reasons? Did his supervisors have reasonable grounds to believe this not to be so? These are two questions the Board has to decide.
>
> page 92

[82] In *Simon et al.* (1993), 91 di 1 (CLRB no. 988), the CLRB considered the refusal by two letter carriers to deliver mail when it was snowing. The CLRB concluded that the abolition of a committee concerning adverse weather conditions had been the real motivating factor behind the refusal:

> 20 The reasons given by Messrs. Gélinas and Fontaine for their refusal do not constitute reasonable cause. The Board considers it unacceptable for letter carriers with extensive work experience to decide, inside a taxi, merely by looking outside, that delivering mail would pose a danger to their safety and health, and therefore constituting reasonable cause to refuse to work.
>
> 21 The complainants have not satisfied the Board that the reason alleged was the real and reasonable cause of the refusal. Rather, the Board is convinced that the reason for the refusal is the dissatisfaction and frustration resulting from the abolition of the committee on adverse weather conditions. The Board is prepared to concede that the employer's decision to terminate a negotiated agreement unilaterally, without informing the union and discussing alternative with it, would give rive [*sic*] to discontent and frustration.

[83] The Board must be careful when referring to CLRB cases. While they do consider the issue of "reasonable cause", they were decided at a time when the *Code* did not contain the section 147.1(1) procedural protections which must be completed before an employer can discipline an employee for the wilful abuse of the right to refuse.

[84] In *Caponi*, 2002 CIRB 177, this Board concluded a complainant did not have a reasonable cause to believe danger existed. Rather, the complainant had refused to work because she believed the work was governed by a different collective agreement:

> [22] Although the case law has given a broad interpretation to the expression "reasonable cause to believe," and although section 128 does not specify the wording to be used in expressing a refusal, the above conversation does not mention any concern about real or apprehended danger that might allow the Board to conclude that the complainant's health or safety was in jeopardy. The complainant quite simply refused to do the work because she has refused to do it for 15 years and she refuses to do the work of another bargaining unit.

[85] The Board has previously concluded in *Rathgeber*, 2010 CIRB 536 (*Rathgeber 536*) that Part II of the *Code* contains two regimes. The first is the compliance regime. The *Code* requires employers and employees to work cooperatively to ensure compliance.

[86] For example, section 127.1 creates the "Internal Complaint Resolution Process", which was added to the *Code* in 2000, and obliges employers and employees to attempt to resolve Part II contravention allegations themselves. An HSO may be called in, but only at the later stages of this process.

[87] The second regime under the *Code* concerns section 133 reprisal complaints. The *Code* gives the Board exclusive jurisdiction over section 133 complaints involving private sector federally regulated employers. Reprisals may relate to the exercise of the right to refuse work, or for exercising other Part II rights.

[88] In *Rathgeber 536*, the Board contrasted these two regimes:

> [36] To summarize, Health and Safety Officers deal initially with allegations of Part II contraventions. The Board only deals with reprisals with its limited regime created by sections 133 and 147. One matter could involve both a compliance issue and a reprisal complaint as described in *Tony Aker, supra*. However, the Board has no authority to police alleged Part II substantive contraventions. It is up to HRSDC to determine whether a contravention has taken place.

[89] The Board has concluded on the specific facts of this case that Messrs. Mike and Dave Isinger did not have reasonable cause to believe danger existed when they exercised their right to refuse.

[90] As was mentioned by the CLRB in *Pratt*, *supra*, the right to refuse is not the primary vehicle for attaining the objectives of Part II of the *Code*. In the Board's view, Mr. Mike Isinger's October 26, 2011 refusal document was an effort to bring to a head the ongoing compliance issues on which TSI, the Committee, the HSO and others had been working.

[91] The right to refuse is not an appeal mechanism to deal with frustrations arising from the *Code*'s compliance regime.

[92] The Board had no doubt when listening to Mr. Mike Isinger's testimony that he, along with his brother, has a sincere interest in safety at TSI. But despite their sincerity, the overall context must be examined when determining if they had reasonable cause.

[93] Mr. Isinger's typed refusal document (Ex-2 Tab 2), rather than identifying a specific danger or dangers, instead expressed frustration with multiple ongoing compliance issues. For example, his refusal document referenced the Rail AVC. TSI, the Committee and HSO Ryan were already involved in considerable detail with the Rail AVC as part of the ongoing compliance process.

[94] Mr. Mike Isinger testified that the Committee was not making progress on these issues. While Mr. Isinger may have been frustrated that his compliance complaint which had led to the

Rail AVC had not yet been resolved to his satisfaction, the right to refuse work process is not a "next step" to force matters to progress more quickly.

[95] Mr. Morena was candid in his evidence that the foremen believed that TSI had not complied with the Rail AVC. But Mr. Morena had not been aware of the HSO's decision to change some of the Rail AVC compliance dates to October 31, 2011, i.e. five days after the October 26, 2011 work refusal, which is at the heart of this case.

[96] Similarly, Mr. Mike Isinger's refusal document further alleged non-compliance with entire sections of Part II of the *Code*, i.e. sections 124 and 125. The lack of any specifics supporting these allegations constitutes another factor the Board must consider when examining whether reasonable cause existed.

[97] The group nature of the foremen's refusal also called into question the existence of reasonable cause. Mr. Isinger's document did not express solely his own views, but constantly used the expression "we". While one could argue the word "we" constituted the Royal "We", and referred solely to the author, the facts do not support this interpretation.

[98] Mike Isinger brought five copies of the document. This corresponded to the number of yard foremen at TSI. Moreover, the Board was struck with the uncontested comments attributed to the other 33 foremen who advised TSI they "were not working in support of the safety committee". Those comments could only refer to the Committee, and more particularly Mike Isinger's efforts on their behalf as the ILWU 514 representative on the Committee.

[99] This context again suggested to the Board that the work refusal was designed to bring to a head ongoing compliance issues, rather than to address any identifiable danger(s).

[100] During the hearing, and particularly during Dave Isinger's testimony, it became clear that the foremen raised other potential dangers when TSI attempted to obtain specifics for the refusal. The Board heard contradictory evidence about ongoing issues such as problems with reefers and the stacking of containers.

[101] The context persuaded the Board that the foremen started raising these other issues when Mr. Mike Isinger would only read the typed document he had prepared the night before his

refusal. The facts suggested this was a case of refusing to work first and then referencing alleged danger(s) later.

[102] The Board agrees with ILWU 514's suggestion that the mere fact an HSO has issued an AVC does not preclude an employee from invoking his/her right to refuse. A situation which meets the *Code*'s expanded definition of danger may still arise and justify a work refusal.

[103] But in this case, the lack of specifics provided by Mr. Mike Isinger when asked about the alleged danger(s), as well as the compliance issues referred to in his document, persuaded the Board that neither he nor his brother had a reasonable cause to believe this type of danger existed on October 26, 2011.

[104] Given this conclusion, the Board's role in this matter ends. The Board does not decide whether TSI had just cause to issue a two-month suspension on the Isingers.

IV–Conclusion

[105] The Board has examined whether Messrs. Mike and/or Dave Isinger had reasonable cause to believe a danger existed when they refused to work on October 26, 2011.

[106] The Board does not doubt that the Isinger brothers have sincerely held beliefs about safety issues. But those beliefs were not sufficient to constitute reasonable cause in the context of this case.

[107] Rather, the Board was satisfied that the refusal, which ultimately impacted the entire TSI workforce, arose out of frustration with ongoing compliance issues, including those for which an HSO was already heavily involved.

[108] The right to refuse is not the appropriate mechanism to attempt to move compliance issues forward. The *Code*'s compliance regime is distinct from the limited reprisal complaint regime assigned to the Board.

[109] The lack of any specifics about danger at the time of the refusal, and the significant references to ongoing compliance matters, satisfied the Board that the Isinger brothers did not have reasonable cause to believe specific identifiable danger(s), whether present or future, existed when they purported to exercise their right to refuse on October 26, 2011.

[110] Accordingly, the complaint is dismissed.

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Graham J. Clarke
Vice-Chairperson