Occupational Health and Safety Tribunal Canada

Date: 2014-12-12
Case No.: 2014-38

Between:

Canadian National Railway Company, Applicant

and

Teamsters Canada Rail Conference, Respondent

Indexed as: *Canadian National Railway Company* v. *Teamsters Canada Rail Conference*

Matter:	Application for a stay of a direction issued by a health and safety officer.
Decision:	The stay of the direction is denied.
Decision rendered by:	Mr. Olivier Bellavigna-Ladoux, Appeals Officer
Language of decision:	English
For the applicant:	Ms. Lindsay A. Mullen, Dentons Canada LLP (Calgary)
For the respondent:	Mr. Ken Stuebing, CaleyWray
Citation:	2014 OHSTC 23

REASONS

[1] This application for a stay concerns a direction by Health and Safety Officer (HSO) TC (Tyronne) Kowalski on July 30, 2014, (the direction) to the employer Canadian National Railway Company (CN or the applicant). The respondent is Teamsters Canada Rail Conference.

Background

[2] On November 18, 2013, CN trainee conductor Jason Cluney was fatally injured during a switching operation at the train station known as "Murphy's" near Tisdale, Saskatchewan. A train was arriving two hours after sunset to deliver cars. Mr. Cluney was assigned the task of operating the rail switch to ensure the oncoming cars were delivered along the correct rail line. During the course of the switching, the conductor and Mr. Cluney became separated and unable to see each other. The conductor supervised Mr. Cluney via radio. The trainee was instructed to conduct the switch and then send a signal via radio to the oncoming train. Mr. Cluney made the switch and entered the other track to continue with his work. However, because he did not correctly align the rail switches, he was working in the track of the oncoming cars. He was struck and run over, and the injuries resulted in his death.

[3] The investigation determined that the trainee conductors are not adequately trained in handling switches, and that instructions for trainees' supervisors are also insufficient. In addition, record keeping with respect to a trainee's development was found to be lacking.

[4] Following his investigation, HSO Kowalski issued the following direction:

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

The undersigned health and safety officer investigated the death of an employee that occurred on November 18, 2013, in the work place that was operated by Canadian National Railway Company, being an employer subject to the Canada Labour Code, Part II, in the province of Saskatchewan on the Tisdale Subdivision, the closest milepost being 61, the said work place being sometimes known as Murphys.

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

1. **Paragraph 125(1)(g) of the Canada Labour Code, Part II (Part II) and subsection 10.12(2), Part X, of the On Board Trains Occupational Safety and Health Regulations**

   CN failed to keep and maintain rules examinations completed by operating employees at initial training. The operating rule examination of the employee trainee fatally injured could not be provided. Canadian National Railway Company's (CN Rail) standard practice is to destroy the operating rule examinations written by operating employees soon after the examination is completed, and even while the operating employee is still employed by CN Rail.

2. Section 124 of the Canada Labour Code, Part II

The employer failed to ensure that the health and safety of trainee conductors was protected, by failing to emphasize in training material the importance of visually confirming that the switch points were examined and target observed to ensure a switch was properly lined for the intended direction of travel. Railway Safety Act, Canadian Rail Operating Rules (CROR), rule 104 (b) requires performance of these checks each time an employee turns a switch. These operating rule checks function as a control measure, enabling identification and correction of the error, thereby eliminating the hazard produced when the wrong switch is lined. Considering the severity of consequences that switch handling errors pose, the amount of instruction provided during classroom training on rule 104 (b) was inadequate. Trainee conductors were examined on the CROR rules but the examination question on rule 104 (b) omitted a critical part included in the up to date rule: "to ensure that the switch is properly lined for the route to be used."

3. Section 124 of the Canada Labour Code, Part II

The employer failed to adequately provide on-the-job supervision of trainee conductors by allowing the supervising conductor assigned as trainer to utilize the trainee to perform safety critical tasks without direct observation, thereby failing to observe the trainee's performance of critical safe work practices that led to the accident. By failing to ensure adequate supervision was provided, the employer failed to ensure that the health and safety of trainee conductors was protected. The employer did not ensure the conductor trainee handled switches in the manner prescribed by the CROR rule 104 (b). The employer's system of operating employee proficiency testing did not include any field testing in the rule on the trainee conductor necessary in order to determine if performance was reliable and compliant. The effectiveness and reliability of the trainee to perform the safety critical task of handling switches in accordance with CROR rule 104 (b) was not otherwise recorded and not known to those supervising the trainee conductor. Intervention by those supervising that was necessary to prevent exposure to the hazard of operating over the wrong switch into the wrong track was not provided. During operation of the last switch the trainee lined in error, no other employee directly observed him in order to be able to correct such an error. Given the level of training then, the level of supervision was also inadequate to prevent the trainee from essentially steering the self-propelled rolling stock inadvertently into the wrong track. Not then expecting the movement of the rolling stock in the track the trainee entered, the trainee unknowingly placed himself in harm's way, once again without a level of supervision necessary to detect and remove the danger.

4. Paragraph 125.(1)(z) of the Canada Labour Code, Part II

The employer failed to provide adequate training, instructions, educational materials and policies on how on the job trainers (OJTs) and supervising conductors are to perform their duties as it pertains to trainee conductors. The employer failed to provide guidance to the supervising conductors and the OJT describing how they were expected to supervise

> the trainee. The OJT was not informed of how to access the supervising conductors' reports on the trainees' performance.
>
> Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the Canada Labour Code, Part II, to terminate the contravention(s) no later than September 30, 2014.
>
> Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the Canada Labour Code, Part II, to take steps no later than September 30, 2014, to ensure that the contraventions do not continue or reoccur.
>
> Issued at Saskatoon this 30th day of July, 2014.
>
> [signed]
> TC (Tyronne) Kowalski
> Health and Safety Officer
> # 7187
>
> To: Canadian National Railway Company
> 935 de La Gauchetière Street West
> Montreal, Quebec
> H3B 2M9

[5] CN applied for a stay of all four of the contraventions in the direction. It filed a notice of an appeal on August 25, 2014, followed by an application for stay on September 12, 2014. A teleconference was held on September 30, 2014, during which both parties presented their submissions on the application.

[6] On October 1, 2014, I rendered my decision not to grant the stay and the Occupational Health and Safety Tribunal Canada (the Tribunal) so informed the parties on the same day. The following are the reasons in support of my decision.

Analysis

[7] Subsection 146(2) of the *Canada Labour Code* (the Code) empowers an appeals officer to exercise his or her discretion to grant a stay of an HSO's direction:

> Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

[8] In exercising their discretion under subsection 146(2), appeals officers apply the following three part test. The elements of this test are as follows:

1) The applicant must satisfy the appeals officer that there is a serious question to be tried as opposed to a frivolous or vexatious claim.

2) The applicant must demonstrate that it would suffer significant harm if the direction is not stayed.

3) The applicant must demonstrate that should a stay be granted, measures will be put in place to protect the health and safety of employees or any person granted access to the work place.

[9] At all times, an appeals officer is guided by the purpose of Part II of the Code stated in section 122.1, "The purpose of this Part is to prevent accident and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies."

Is the question to be tried serious as opposed to frivolous or vexatious?

[10] The parties agreed that the circumstances of the current case, its implications on the applicant, and fundamental nature of a HSO's finding of a health and safety contravention make the questions to be heard on appeal serious.

[11] I agree and find that the applicant satisfied the first element of the test.

Would the applicant suffer significant harm if the direction is not stayed?

[12] I will address the parties' submissions on this part of the test in two separate stages. The first state will tackle the first contravention. In light of the similar and overlapping submissions of the parties, the second stage will tackle the second, third, and fourth contraventions.

Contravention No. 1

[13] The first contravention has to do with the keeping of records of trainee examinations on CN's operating rules.

[14] The applicant does not keep records of examinations on the Rules completed by operating employees at initial training, but claims to be in compliance with the demands of the Code.

[15] The applicant stated that there are approximately 16,500 new-hire rules examinations of 10 to 30 pages each per year. The direction also mentioned "operating employees", which the applicant claimed puts a highly burdensome onus on the employer with respect to the filing, indexing, and storage of hard copies of examinations for all conductors of all levels. Overall, the applicant asserted that establishing the kind of record keeping system it believes the direction to envision would require "substantial efforts and coordination that are not trivial or insignificant."

[16] The applicant cited *Canada Post Corporation* v. *Canadian Union of Postal Workers*, 2010 OHSTC 2, (*Canada Post*) for the proposition that a stay warrants consideration when an appeal involves interpretation of a section previously unexamined. Moreover, since the applicant claims to already be in compliance, it stated that having to implement interim measures and then be found on appeal to not have contravened the regulations would indeed be significant harm.

[17] The applicant submitted *Re Bell Mobility Inc.*, 2012 OHSTC 4, (*Re Bell*) as an example of how extensive interference with a company's operations is prejudicial to those who rely on that company's services.

[18] The respondent stated that the purpose of the direction is to ensure accountability of the employer by, for example, being able to review examinations to see whether trainees are actually qualified. Therefore, the respondent stated that the applicant must demonstrate significant harm flowing from the requirements of accountability, which it was not able to do.

[19] The respondent also noted that the cases cited by the applicant in its submissions can be differentiated from the present case. In *Canada Post*, the measures required by the direction were significantly disruptive to the work place and health and safety in the short term. In *Re Bell*, the changes required by the direction would have prevented Bell from working on rooftops and would paralyze its customer service activities. In this case, the respondent argued that the applicant did not demonstrate such significant harm to its work place, operations, or stakeholders, but merely expressed that compliance would be expensive and inconvenient.

[20] In reply, the applicant stated that it has experienced some harm and that significant harm ought to be measured based on the nature of the appeal; since the applicant claims compliance, it believes having to implement additional measures would be significant harm if it is successful upon appeal.

[21] The direction calls for the retention of rules examinations completed at initial training. While the applicant referred to the inconvenience of maintaining a large volume of records, nothing in the HSO's direction, the Code, or the *On Board Train Regulations* require retention of hard copies. I note that the direction only calls for retaining rules examinations at the *initial training* for as long as the examinee remains employed by CN. Based on the applicant's submissions, hard copies or not, I fail to see how record keeping can amount to significant harm to an employer.

[22] I therefore find that the applicant did not establish that it will suffer significant harm by having to comply with the first contravention identified in the direction. Given that the applicant has not met the threshold of the second part of the test, I do not need to proceed to the third part.

Contraventions Nos. 2, 3 and 4

[23] The second contravention deals with the lack of emphasis on Rule 104(b) of the *Canadian Rail Operating Rules* (CROR), which requires visual confirmation of the completion of a rail switching action. The third contravention addresses the applicant's failure to adequately supervise trainee conductors during the performance of safety critical tasks. Finally, the fourth contravention pertains to the inadequacy of training provided to those responsible for training and supervising trainee conductors.

[24] As stated earlier, the submissions on each of these contraventions by each party have substantial overlap. Therefore, the question of significant harm resulting from compliance with the HSO's direction can be dealt with together.

[25] In order to obtain a stay, the second part of the test requires the applicant to clearly and convincingly demonstrate harm that has a significantly adverse impact on the business or the work place in the absence of a stay (*VIA Rail* v. *Unifor*, 2014 OHSTC 5 para 30). Of primary

importance for an applicant is to acknowledge that a stay application takes place on the assumption that an HSO's direction is valid. Compliance with a direction pending appeal is the rule and a stay is the exception. Therefore, compliance in and of itself is not significant harm. An appeals officer determines significant harm based on the adverse consequences of the measures an applicant must implement in order to comply.

[26] In this case, the applicant submitted for each contravention that the HSO did not have the authority to issue direction in the manner he selected. The applicant submitted that imposing requirements on the content of the training provided to trainee conductors is *prima facie* extra-jurisdictional action by the HSO. On the direction requiring direct supervision of trainees performing safety critical tasks, the applicant said that it is significant harm to make an employer do something it is not legally required to do. Moreover, the applicant argued that since the HSO did not make a danger direction, he could not have ordered direct supervision in contravention no. 3. Finally, the applicant argued that the significant harm associated with complying with contravention no. 4 is that it claims to already be in compliance and that training its supervisors more than it already does goes beyond the scope of the code and amounts to making the employer do something it is not legally required to do.

[27] The applicant also contested contraventions 2 and 3 because the HSO used section 124 under which to designate his noted contraventions instead of a more specific paragraph under subsection 125(1).

[28] The respondent submitted that the applicant's claim that the HSO acted in excess of his powers did not address the actual significant harm of compliance. It also noted that the applicant only mentioned one person in its quality assurance process is responsible for the training program and that enhancing this process is not significant harm. Specifically regarding contravention no.2, respondent stated that the applicant failed to explain how spending time on making better training materials is significant harm, particularly in light of an employee's death while on the job.

[29] With respect to contravention no.3, the respondent submitted that a direct check of a trainee conductor's work cannot amount to significant harm as it was explained by the applicant. The HSO's report suggested direct supervision "at least until consistency in performance is demonstrated," which is a flexible and realistic standard. Moreover, the respondent stated that the August bulletin did not address the harm that results from lack of direct supervision and that the employer simply does not want to be told to have better safety practices.

[30] Finally, regarding contravention no.4, the respondent argued that the applicant was not able to demonstrate what significant harm would flow from enhancing the training of supervising conductors that the claim of "en masse" re-training of supervisors is disingenuous. Finally, as a general response to the applicant's submissions, the respondent stated that penalties arising out of non-compliance with an HSO's direction are not the kind of significant harm contemplated by the code or the test for a stay.

[31] A disagreement on the interpretation of the Code and its Regulations is a matter for the appeal on the merits and do not assist in determining whether compliance with an HSO's

direction pending appeal will bring significant harm to an employer. As a result, these arguments do not assist the applicant in advancing its claim of significant harm.

[32] I have been made aware that changes to training go through a quality assurance process that is "not a simple matter" that is more than a mere inconvenience in light of the applicant's interpretations of the Code and Regulations, which differ from those of the HSO. The applicant submitted that compliance would require,

> "further review of training processes and procedures [that] will require an undertaking by CN's quality assurance staff, and a consideration, evaluation, and approval of changes, taking into account the entirety of the railway operations to eliminate or otherwise minimize any impacts that may result therefrom will be required."

[33] Generally, this might be true, however, what specific impacts on the applicant's operations or work place make the matter more than a mere inconvenience and brings it to the greater standard of significant harm remains unknown. The applicant acknowledges this reality in its written submissions: "Depending on the nature and extent of the changes that the HSO deems to be required to satisfy the Direction, [compliance with contraventions 2, 3, and 4] could create serious disruptions to CN's workforce". Almost the exact sentence is repeated at paragraph 55 with respect to the conductor trainee program. These statements make it clear that the applicant does not know what would constitute compliance and it therefore cannot demonstrate significant harm caused by those unknown compliance measures.

[34] The applicant also claimed that the HSO's direction was vague as to what is required to comply with the contraventions. For the third contravention, the HSO specifically requires direct supervision of trainee conductors performing safety critical functions. For contraventions 2 and 4, there is no evidence of the applicant corresponding with the HSO in order to determine what would satisfy compliance. Again, because the applicant does not know what measures would satisfy the HSO, it is not in a position to demonstrate significant harm flowing from those measures.

[35] Despite admitting that it does not know what the HSO requires for compliance, the applicant insisted that its August 2014 bulletin to supervising conductors, targeted to the applicant's British Columbia North Sub Region but sent to all supervising conductors, is indeed compliance. Without commenting on whether a bulletin is a reasonable way to train supervising conductors on ensuring the safety of trainees in the circumstances of this case, I find that it does not assist the applicant in establishing significant harm in an application for a stay.

[36] I find that the applicant's submissions do not articulate the measures it would take in order to comply with the HSO's direction. Therefore, given the above framework at paragraph 25 for determining whether compliance with a direction will result in significant harm for an employer, without any indication of the applicant's measures, I cannot answer the second question let alone find significant harm. As such, the applicant has not demonstrated it would experience significant harm.

[37] I therefore do not need to proceed to the final element of the test.

Decision

[38] For the reasons set out above, the application for a stay of the direction issued by HSO Kowalski on July 30, 2014, is denied.

Olivier Bellavigna-Ladoux
Appeals Officer