



Occupational Health and Safety Tribunal Canada

Citation: Canadian National Railway Company v. Teamsters Canada Rail Conference,
2012 OHSTC 30

Date: 2012-08-29
Case No.: 2012-48
Rendered at: Ottawa

Between:

Canadian National Railway Company, Appellant

and

Teamsters Canada Rail Conference, Respondent

Matter: An application for a stay of a Direction

Decision: The stay of the Direction is denied

Decision rendered by: Pierre Guénette, Appeals Officer

Language of decision: French

For the appellant: Michel Huart, Counsel, Lawyer, Langlois Kronstrom
Desjardins

For the respondent: François Moreau, Local Chairman, Teamsters, Division 89

REASONS

[1] On July 13, 2012, Michel Huart, counsel for the Canadian National Railway Company (CN), filed a written application for a stay of a Direction pursuant to subsection 146(2) of the *Canada Labour Code* (the Code), following a Direction issued by health and safety officers (HSOs) Pierre Pilon and Monique Blais on June 13, 2012.

Background

[2] The Direction under appeal reads as follows:

[Translation]

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On May 22, 2012, the undersigned health and safety officers conducted an inspection in the workplace operated by the Canadian National Railway Company, an employer subject to the *Canada Labour Code*, Part II, located at 8050 Cavendish Boulevard, Tower A, Saint-Laurent, Quebec, H4T 1T1, a workplace sometimes known as the Taschereau Yard.

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

(a) Section 124 of the *Canada Labour Code*, Part II, and subsection 10.3(1) of the *On Board Trains Occupational Safety and Health Regulations*

The employer has failed to ensure that the health and safety at work of every person employed by the employer is protected. The employer issued circular no. 2011-001, a follow-up to circular no. 2010-001, which indicates that employees are prohibited from entering the locomotive cab to protect themselves from exposure to any weather condition that is likely to be hazardous to their safety or health, in contravention of subsection 10.3(1) of the *On Board Trains Occupational Safety and Health Regulations*. This applies regardless of the weather conditions, duration of exposure and distance to cover.

(b) Section 122.2 of the *Canada Labour Code*, Part II

The employer has failed to implement compensatory measures to eliminate the hazards associated with such a work environment because employees stationed on the locomotive are prohibited from taking shelter from the weather inside the cab and from guarding against all other hazards related to accomplishing locomotive remote control operation tasks.

(c) Paragraph 125(k) of the *Canada Labour Code*, Part II

Given that paragraph 125(k) of the *Canada Labour Code* stipulates that vehicles and mobile equipment used by the employees in the course of their employment must meet prescribed standards, the employer is contravening subsection 10.3(1) of the *Occupational Safety and Health Regulations* by prohibiting employees from taking advantage of the protection offered by the locomotive's structure.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate all contraventions immediately.

Furthermore, 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 re-occur on CN territory in the Greater Montreal Area.

Issued at Montreal, on June 13, 2012.

[3] The stay application hearing took place on July 31 and August 1, 2012, by conference call. Prior to the telephone hearing, Mr. Huart made written submissions.

[4] Following a review of the oral and written submissions provided by Mr. Huart and the oral submissions provided by François Moreau (on behalf of the respondent), I denied the application for a stay of the Direction. The reasons for which I did not grant a stay of the Direction are what follow.

Analysis

[5] The authority of an appeals officer to grant a stay is derived from the aforementioned subsection 146(2). The exercise of this discretion must be consistent with the purpose of the Code, as set out in section 122.1, and with any other applicable provisions.

122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[6] In deciding this stay application, I applied the three criteria adopted by the Tribunal. The criteria 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 complaint.
- 2) The applicant must demonstrate that he or she would suffer significant harm if the Direction is not stayed by the appeals officer.
- 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 workplace.

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

[7] Mr. Huart argued that the Direction issued had no basis in law, because whereas the HSOs alleged that CN contravened section 122.2 of the Code, that section is only a statement of the purpose of Part II of the Code.

[8] In addition, Mr. Huart stated that the letter attached to the Direction and the Direction itself were contradictory. In the Direction, the HSOs referred to a violation of paragraph 125(k) of the Code and subsection 10.3(1) of the *On Board Trains Occupational Safety and Health Regulations*. However, the letter indicated that CN was compliant with subsection 10.3(1) of the Regulations.

[9] Mr. Huart added that the HSOs did not submit any evidence to show that CN had contravened the Code and the Regulations.

[10] For these reasons, Mr. Huart was of the view that the question was serious and involved serious implications for CN with respect to its obligations as an employer to protect its employees.

[11] Mr. Moreau stated that while the complaint was not frivolous, it did not help employees.

[12] Given the points raised by Mr. Huart and Mr. Moreau, I am satisfied that there is a serious question to be tried.

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

[13] Mr. Huart stated that to comply with the Direction, CN had to withdraw circular no. 2011-001 concerning access to the inside of the locomotive. As a result, CN increased inspections to ensure compliance with Rule 115 of the *Canadian Rail Operating Rules*, which specifies that a locomotive operator must be on the outside of the locomotive or on the ground to have better visibility in preparation for the movement of rolling stock. In addition, it creates a gap in terms of instructions for remote control operators on accessing the locomotive under specific circumstances, such as certain weather conditions. Safety is thus reduced for remote control operators and for all rail yard employees.

[14] Mr. Huart added that since the withdrawal of circular no. 2011-001, employees have been entering the locomotive cab regardless of weather conditions. As a result, locomotive operators have less visibility when operating the locomotive from the inside. This method of operation leads to greater safety risks for operators and other rail yard employees. Mr. Huart stated that visibility is better in the rail yard when the locomotive is operated from the outside or the ground.

[15] Mr. Huart referred to data indicating that the number of train accidents and injuries had significantly decreased since locomotives equipped with LCS began being operated from the outside.

[16] Mr. Huart argued that CN would suffer significant harm if the stay of the Direction was denied because according to him, the safety of employees would be reduced.

[17] Mr. Moreau specified that, contrary to Mr. Huart's arguments, there have been almost no accidents related to the fact that employees enter the locomotive under certain circumstances. He stated that an employee is safer inside the locomotive than at the tip.

[18] Mr. Moreau argued that complying with the Direction does not cause harm to CN.

[19] As stated by Mr. Huart in his written submissions, I am of the view that the two health and safety officers issued the Direction to ensure that employees could enter the locomotive in any weather condition that is hazardous to their safety or health.

[20] It is important to specify that the Direction in no way requires CN to withdraw circular no. 2011-001. Therefore, I am not satisfied that the Direction aimed at allowing employees to enter the locomotive in bad weather would have an impact on the safety or health of employees or of any person granted access to the workplace.

[21] For these reasons, I am not satisfied that CN would suffer significant harm if I deny the application for a stay of the Direction.

What measures will be put in place to protect the health and safety of employees or any persons granted access to the workplace should the stay be granted?

[22] Given my rejection of the second criterion, I do not need to consider the third criterion.

Decision

[23] For these reasons, the stay of the Direction issued by HSOs Pierre Pilon and Monique Blais to CN, on June 13, 2012, is denied.

Pierre Guénette
Appeals Officer