Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canadian National Railway Company v. Teamsters Canada Rail Conference, 2012 OHSTC 38

Date: 2012-10-22
Case No.: 2011-03
Rendered at: Ottawa

Between:

Canadian National Railway Company, Appellant

and

Teamsters Canada Rail Conference, Respondent

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of directions issued by a Health and Safety Officer
Decision:	The direction is rescinded
Decision rendered by:	Mr. Richard Lafrance Appeals Officer
Language of decision:	English
For the appellant:	Mr. Michel Huart, Counsel, Langlois Kronstrom Desjardins
For the respondent:	Mr. Ken Stuebing, Counsel, CaleyWray

Canada

REASONS

[1] This matter concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) of a Direction issued on December 6, 2010 by Health and Safety Officer (HSO) Mr. Michael Rodgers.

Background

[2] On October 27, 2010, HSO Rodgers visited the Canadian National Railway Company (CN) Edmundston Yard and in the course of his visit he attended a Health and Safety Committee meeting during which the matter of long versus short hood operation was mentioned. After the meeting, he inspected the locomotive on train 578 scheduled to travel from Edmundston to Grand Falls a distance of approximately 36 miles.

[3] This train at that time was pulled by Locomotive 4760, commonly referred to as a road switcher. When on this train, and when only one locomotive is required to pull the train, this engine normally operates with the short hood leading in one direction, returning with the long hood leading from Grand Falls to Edmundston.

[4] The pictures taken on the occasion of the HSO's visit show that only unionized employees and union representatives were in the locomotive. No representative of the employer was present.

[5] The HSO concluded that there was a *Canada Labour Code* infraction and issued the following Direction to CN:

> **IN THE MATTER OF THE *CANADA LABOUR CODE* PART II, OCCUPATIONAL HEALTH AND SAFETY**
>
> **DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)**
>
> On October 27th, 2010 the undersigned Health and Safety Officer conducted an inspection in the work place operated by Canadian National Railway (CNR), being an employer subject to the *Canada Labour Code*, Part II at 240 Saint Francois Street, Edmundston NB, the said work place being sometimes known as the CN Edmundston Yard.
> The said Health and Safety Officer is of the opinion the following provisions of the *Canada Labour Code*, Part II are being contravened.
>
> **1. Paragraph 125(1)(*k*) of the *Canada Labour Code*, Part II**
> 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;
>
> **2. Section 10.5, 10.6, 10.13 of the *On Board Train Occupational Safety and Health Regulations.***

> Controlling locomotives that were designed to operate primarily in a forward direction (Short Hood Lead) pose challenges when operating in Long Hood Lead. The dials such as the speedometer and air gauge are located in a position for Short Hood Lead. Because of the operator's position in the operating cab when operating Long Hood Lead, the controls such as the automatic brake handle, bail off on independent brake handle, and the throttle, limit the operator when controlling and stopping movement.
>
> Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1)(*a*) of the *Canada Labour Code*, Part II, to terminate the contravention immediately.
>
> Further, you are HEREBY DIRECTED, pursuant to subsection 145(1)(*b*) of the *Canada Labour Code,* Part II, to take steps no later than December 20th, 2010 to ensure that the contravention do not continue to reoccur.
> Issued at Moncton this 6th day of December 2010.
>
> Michael Rodgers
> Health and Safety Officer

[6] On January 4, 2011, CN appealed the Direction issued by HSO Rodgers on December 6, 2010.

[7] A site visit was conducted by the Occupational Health and Safety Tribunal Canada (the Tribunal) and the parties to have a view of Locomotive 4760. This visit was to view the control systems installed on the locomotives and their location in the locomotive as well as to get a sense of the operation of the various controls. Mr. Huart, counsel for CN indicated that the following features could be noted by all those who participated in the site visit:

- The locomotive engineer responsible for the operation of the locomotive is seated on the right hand side of the locomotive when travelling in short hood configuration and therefore on the left-hand side of the locomotive when traveling in the long hood configuration.
- The controls are not of the desk style configuration but of a conventional AAR[1] standard design and meets regulatory standards of Transport Canada.
- The controls and dials are fixed as required by the regulations but the engineer seat swivels and can be moved backward or forward as well up and down to suit the driving style of the operator as well as his size and dimensions.

[8] By correspondence dated April 13 and 22, 2011, and before commencement of the hearing in this matter, the Teamsters Canada Rail Conference (TCRC) informed the Tribunal and CN of its intention, and request for permission from CN, to conduct an ergonomic assessment of locomotive 4760 or a similar locomotive. The TCRC indicated

[1] Association of American Railroads, the standard setting organization for North America's railroads.

that they wished to do this in response to CN's intention to file an expert report addressing the seating of the operator of locomotive 4760. Such intention had been expressed in a letter from CN dated April 6, 2011.

[9] By way of written submissions dated May 5, 2011, CN contested the TCRC's request to access a CN locomotive. CN took the view that the TCRC was not a party having standing in this matter, and therefore could not make such a request. Further, CN stated that the evidence sought to be obtained through this request was irrelevant to the proceedings. Finally, it was urged that the Code does not provide to an Appeals Officer the authority to compel CN to grant such access.

[10] On May 12, 2011 the TCRC replied to CN's submissions. It took the view that it should be granted standing as a party in this matter. It also argued that the Appeals Officer possessed the authority, pursuant to the Code, to compel CN to grant it access to the locomotive.

[11] By letter dated May 12, 2011, CN provided its list of witnesses in advance of the hearing. CN no longer intended to call expert evidence in this matter.

[12] On May 27, 2011, I issued a decision granting standing to the TCRC. It read as follows:

> Further to an objection raised by Canadian National Railway Company (CN) to the TCRC being granted standing as a party in this matter, and having reviewed and considered the submissions of CN and the TCRC on this issue, I grant the TCRC standing as a party to this proceeding, pursuant to paragraph 146.2(g) of the Canada Labour Code (the Code). The TCRC shall have the right to examine and cross-examine witnesses, introduce evidence, and make submissions pertaining to any issue that arises in this matter.

[13] That same date, I also issued the following order regarding access to a locomotive by the TCRC:

> I hereby order that:
>
> CN provide, to the TCRC and to the individual(s) required to conduct such an assessment, access to Locomotive 4760 or a similar locomotive, for a time period not exceeding three (3) hours while the locomotive is in operation, for purposes of conducting an ergonomic assessment in relation to the issues raised in the Direction dated December 6th, 2010. Access to the locomotive shall be provided sufficiently in advance of the hearing, so that any report and accompanying material produced as a result of the ergonomic assessment may be provided to, and assessed by, CN, prior to the scheduled hearing.

[14] I also indicated to the parties that, with respect to both the standing decision and the order directing access, I would provide reasons in my final written decision. Below are my reasons.

TCRC Standing

CN Submissions

[15] In its submissions, CN argued that the TCRC should not be granted standing as a party in this matter. CN took the view that because of the wording of the Direction under appeal, the TCRC had an insufficient interest in the matter.

[16] Specifically, CN stated that the Direction's focus is whether locomotive controls meet prescribed standards set out at sections 10.5, 10.6 and 10.13 of the *On Board Trains Occupational Safety and Health Regulations* (OBTOSHR). The Direction pertains to a contravention of provisions referring to standards, and notes that a challenge may be present due to the operator's position when the locomotive is operating Long Hood Leading. CN also highlighted that the Direction and its covering letter do not refer to an imminent danger, or to a concern regarding long term effects of operating the locomotive in the Long Hood Leading (LHL) configuration. In CN's view, the TCRC's interest in seeking standing, as expressed in its correspondence dated April 13, 2011, is related to the long term effects of operating the locomotive in this configuration, and thus cannot be reconciled with the limited scope of the Direction which pertains to challenges posed by the position of controls.

[17] CN referred to the Canada Industrial Relations Board (CIRB) decision of *Desrosiers and Syndicat des Communications de Radio-Canada*[2], which provides criteria to apply in considering a request for intervention. These criteria are: (i) the assessment of whether an intervener's interest is direct and immediate; (ii) whether its rights will be affected; (iii) whether it can contribute positively to the dispute; (iv) whether the public interest and those of justice necessitate the intervention; (v) whether the matter can be settled without the intervener's presence, and; (vi) whether another party already adequately represents the intervener's interests.

[18] CN argued that the TCRC fails to meet these criteria, asserting that the latter: has no direct interest; its rights are not affected; cannot contribute positively to the dispute; and that public interest does not warrant TCRC's participation. Further, CN submitted that I can adequately deal with this matter without the TCRC's participation because, as noted above, the contribution it wishes to make is ancillary to the scope of the appeal.

TCRC Submissions

[19] The TCRC argued that it should have full standing in this matter. It is entrusted with ensuring the health and safety of its membership which includes engineers and conductors. In the TCRC's view, the issues raised by the Direction could clearly lead to

[2] *Desrosiers and Syndicat des Communications de Radio-Canada*, (2001) CIRB no. 124.

hazards. In this light, the TCRC emphasized its obligation to represent its members fairly with respect to safety issues.

[20] The TCRC urged that it meets the criteria reflected in paragraph 146.2(g) of the Code, which sets out the power of an Appeals Officer to make a person or group a party to the proceeding, if they possess the required interest and could be affected by the decision. By participating, the TCRC is ensuring that its members are not asked to work in unsafe conditions, and it wanted to raise evidence with respect to the challenges to employees of using the LHL configuration. It referred to two decisions of this Tribunal in support of the view that it meets the test set out at paragraph 146.2(g): *Canadian National Railway Company and J. Poirier and Teamsters Rail Canada Conference*[3], as well as *Canada Post Corporation and Doreen Radcliffe*[4].

Decision on the TCRC's Standing

[21] In my view, a determination of whether the TCRC may participate in this proceeding as a party with full rights afforded to it turns on an interpretation of paragraph 146.2(g) of the Code, which reads as follows:

> 146.2 For the purposes of a proceeding under subsection 146.1(1), an Appeals Officer may
>
> [...]
>
> (g) make a party to the proceeding, at any stage of the proceeding, any person who, or any group that, in the officer's opinion has substantially the same interest as one of the parties and could be affected by the decision;

[22] The Direction in this matter suggests that controlling locomotives "that were designed to operate primarily in a forward direction (Short Hood Lead) pose challenges when operating in Long Hood Lead." The HSO noted what were, in his view, limits to the operator "when controlling or stopping the movement." He also concluded that "the location of conductor's emergency brake valve is hindered" when operating Long Hood Lead. The OBTOSHR referenced by the HSO require, for instance, that the arrangement of dials and controls, and the general layout and design of the operator's compartment or position not hinder or prevent the operator from operating the rolling stock (section 10.5). They require that control systems be capable of safely controlling the movement, and that they respond reliably and quickly to moderate effort (section 10.6). They further prohibit an employer from requiring an employee to operate rolling stock unless the employee can do so safely (section 10.13).

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[3] *Canadian National Railway Company and J. Poirier and Teamsters Rail Canada Conference*, 2008 LNOHSTC 18.

[4] *Canada Post Corporation and Doreen Radcliffe*, 2008 LNOHSTC 29.

[23] Having considered the parties' submissions above, I find that the TCRC in this case has a clear interest in the outcome in this matter. It represents, in health and safety matters, the employees who are impacted by the Direction. The Direction itself, as noted immediately above, purports to raise health and safety issues which are directly related to the employees represented by the TCRC. The decision which I will render may directly affect the health and safety of these same employees.

[24] I have considered CN's argument with respect to the TCRC's intention, stated in correspondence dated April 13, 2011, of obtaining expert evidence pointing to long-term ergonomic effects of LHL operations, and I have considered CN's argument with respect to the relevance of such evidence and its impact on the TCRC's standing. I note that in its subsequent submission dated May 12, 2011, the TCRC suggested that ergonomic evidence could pertain to the operating efficiency of controls. In any event, I do not believe that the TCRC should be denied standing on the basis that it is seeking to adduce evidence which, according to CN, is not relevant to the scope of the Direction issued. CN will have ample opportunity to argue the relevance of any evidence the TCRC wishes to call. In my view, there is no doubt that the TCRC's interest, being the bargaining agent of the employees affected by this Direction, is significant enough for them to be granted full participatory rights.

[25] It is for the above reasons that, on May 27, 2011, I granted the TCRC standing as a party to this proceeding, pursuant to paragraph 146.2(g) of the Code, with the right to examine and cross-examine witnesses, introduce evidence, and make submissions pertaining to any issue that arises in the matter.

Access to locomotive by the TCRC

CN Submissions

[26] In objecting to the TCRC's request to access the locomotive, CN first called into question the relevance of the evidence which the TCRC sought to obtain through such access. In so doing, CN reiterated that the TCRC intended to examine the long term effects of such a configuration over long periods, which is not what the Direction seeks to address.

[27] CN also urged that as an Appeals Officer whose powers are prescribed by the Code, I do not possess the authority to grant the TCRC's request to access the locomotive. Specifically, if such a power is not found explicitly in the lists appearing in sections 141 and 146.2 of the Code, I cannot compel a party to give another entity access to its facilities.

[28] CN argued that the only power that I would dispose of in this case would be that of compelling a witness to attend and produce documents and things necessary to consider the matter, pursuant to paragraph 146.2(a) of the Code. However, CN emphasized that the power at paragraph 146.2(a) could not be invoked in this case given

that the evidence the TCRC sought to obtain, namely that of the long term effects of operating in LHL configuration, is irrelevant to the matter at hand.

TCRC Submissions

[29] The TCRC took the view that an ergonomic assessment of the locomotive's cab operating in the LHL configuration would be highly relevant to the present dispute. The Direction at issue is concerned with operational challenges posed by the layout of the locomotive in LHL configuration. According to the TCRC, an ergonomic assessment could "provide an expert evaluation as to the degree to which long hood lead operations inhibit or impair Locomotive Engineers and Conductors' optimal access to necessary controls", and thus would be of great utility for the Tribunal in resolving the issues arising from the Direction.

[30] As for my authority to compel any such result, the TCRC relied on paragraphs 146.2(a), (c) and (d) of the Code which allow an Appeals Officer to summon witnesses and compel them to give evidence and to produce any documents and things necessary to decide the matter. These provisions also provide for the receipt of evidence whether or not admissible in a court, as well as the examination of records and conduct of inquiries as the Appeals Officer considers necessary.

[31] According to the TCRC, these provisions implicitly provided me with the power to summon an expert witness in the form of an ergonomic assessor to access and report on the ergonomic suitability of locomotive 4760's cab for LHL operations.

Decision on Access to the Locomotive by the TCRC

[32] As both parties have noted, the Code sets out certain powers, at section 146.2 of the Code, which an Appeals Officer may use for the purposes of a proceeding under subsection 146.1(1). Subsection 145.1(2) also gives to an Appeals Officer all the powers of a Health and Safety Officer, for the purposes of conducting an inquiry. Those powers are listed at subsection 141(1) of the Code.

[33] I agree with CN that the provisions granting various powers to Appeals Officers, which I will refer to in more detail below, do not explicitly grant the authority to compel a party to give another party access to its facilities.

[34] Both parties suggested that the only mechanism by which I could order that such an ergonomic report be prepared and produced for the purposes of this inquiry is that of the issuance of a summons compelling testimony and production of the actual report, although CN urged that this cannot be done here because the evidence which the TCRC seeks to adduce is irrelevant. However, I do not see how the issuance of a summons would solve the issue which had arisen with respect to access to the locomotive and the preparation of an ergonomic assessment. Although a summons would certainly compel the witness to appear before this Tribunal and produce an assessment, such a document did not exist at that time as the issue of access for purposes of generating an expert

assessment was contested. Before any summons can be issued directing that a particular document be produced, such document must exist.

[35] The issue to me, therefore, is whether I can order CN to give access to a locomotive for the purposes of preparing evidence which, according to the TCRC, will contribute to this matter. Because no such power is granted to an Appeals Officer explicitly, I must therefore consider whether such a power is implicit, in that it is practically necessary to enable me to effectively and efficiently carry out my role pursuant to the Code. To make that determination, I need to examine not only the purpose of Part II of the Code, but also the statutory scheme which defines my role.

[36] The purpose of Part II is set out in section 122.1 of the Code:

> 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.

[37] In addition to this preventative purpose, the appeal scheme as set out in Part II of the Code clearly contemplates that Appeals Officers have the most complete evidentiary basis possible through which to inquire into the circumstances of a Direction and the reasons for it. Specifically, section 146.2 allows an Appeals Officer to receive and accept evidence regardless of its admissibility in a judicial proceeding, and allows an Appeals Officer to examine records and make inquiries as considered necessary.

[38] In addition, paragraph 146.2(h) allows an Appeals Officer to determine the procedure to be followed while requiring at the same time that parties be given an opportunity to present evidence.

[39] With these provisions in mind, it is clear that CN and the TCRC, as parties to this appeal, must have the opportunity to provide their evidence in relation to the issues arising from the Direction issued on December 6, 2010, and it is also clear that I require as complete a record as possible in order to inquire into the circumstances of the Direction and the reasons for it.

[40] I note that the TCRC, in its submissions dated May 12, 2011, suggested that the evidence obtained from its examination of the locomotive cab could "provide an expert evaluation as to the degree to which long hood lead operations inhibit or impair Locomotive Engineers and Conductors' optimal access to necessary controls", and thus be of great utility for the Tribunal in resolving the issues arising from the Direction. This is to be contrasted with its original request which appeared to be focussed on long term effects of operating the locomotive in LHL configuration. At this stage, it is the TCRC, as representing the employees affected, that is positioned to guide the instruction and retention of an expert in light of concerns which they apparently feel should be brought forward at this hearing. Inasmuch as the TCRC stated at that point, that its access to the locomotive may produce an assessment pertaining to impairment of access to controls in the locomotive, it should be able to pursue such an assessment. I am mandated by the

Code to fully examine this appeal and allow parties to present their evidence. CN will have ample opportunity to contest the relevance and weight of any report that is generated, if the TCRC chooses to rely on it.

[41] A review of the legislative framework which governs appeals before an Appeals Officer makes it clear that the issuance of an order directing CN to give the TCRC access to the locomotive, for purposes of preparing evidence related to this proceeding, is an implied power reasonably necessary for the accomplishment of my mandate. Significantly, Parliament has entrusted Appeals Officers with the powers of a HSO for the purposes of their proceedings, through subsection 145.1(2), which reads:

> (2) For the purposes of sections 146 to 146.5, an Appeals Officer has all the powers, duties and immunity of a Health and Safety Officer.

[42] The powers of a Health and Safety Officer are listed at subsection 141(1). That subsection allows a Health and Safety Officer to enter a work place controlled by an employer and, in respect of any work place, do various things, which include:

- directing the employer to ensure that any place or thing specified by the officer not be disturbed for a reasonable period pending an examination, test, inquiry, investigation or inspection in relation to the place or thing;
- direct any person not to disturb any place or thing specified by the officer for a reasonable period pending an examination, test, inquiry, investigation or inspection in relation to the place or thing;
- direct the employer to produce documents and information relating to the health and safety of the employer's employees or the safety of the work place and to permit the officer to examine and make copies of or take extracts from those documents and that information.

[43] Significant powers to direct and obtain information from the employer is normally attributed to an HSO and have thus been, through subsection 145(2), provided to Appeals Officers for the purposes of their inquiry into the circumstances of the Direction and the reasons for it. Therefore, those powers must be read in conjunction with the provisions at section 146.2 which include the power to determine the procedure to be followed, yet also an obligation to allow parties to present evidence. They must also be read keeping in mind the purpose of the Part II which is to prevent accidents and injury to health. In my view the framework created by these provisions supports an implied authority by the Appeals Officer to order that an employer allow access to the workplace to the union representing the employees affected by the Direction, for purposes of preparing an expert report which relates to the matter under appeal. Such an Order is necessary for this proceeding as it will enable me to fulsomely inquire into the circumstances of the Direction and the reasons for it, and, possibly, reach a more informed decision with respect to this appeal - all with a view to respecting the purpose of the Code in ensuring the prevention of accidents and injury to health. In the absence of such an order, my concern is that I would not necessarily have before me a full canvassing of the concerns which may be related to the circumstances surrounding the Direction.

[44] It is for the above reasons that, on May 27, 2011, I ordered that CN provide to the TCRC access to a locomotive, for purposes of conducting an ergonomic assessment in relation to the issues raised in the Direction dated December 6, 2010.

Issue

[45] The issue that I must determine is whether CN is in contravention of paragraph 125(1)(k), and sections 10.5, 10.6 and 10.13 of the *On Board Train Occupational Safety and Health Regulations*.

Appellant's evidence

[46] The following witnesses testified for the appellant, CN:

- Mr. N. Gagnon, Manager of Operations for New Brunswick; Mr. B. Glass, Senior Service Officer; Ms. S. Miller, Disability Case Manager; Mr. M. Rose and Ms. E. Tharoo, Occupational Therapists.

[47] Mr. Gagnon testified that the locomotive in question is a yard switcher which can operate both ways as it is equipped with lights and pilots at both ends. While it is designed to operate in the yard, it also can go on the main line up to a distance of 50 km according to the collective agreement. He indicated as well that the reason for using multiple locomotives on a train has to do with the number of cars that there are to pull; the more cars that are on the train, the more power needed to pull the train. If one locomotive is sufficient to pull the load, then only one locomotive is used.

[48] He stated that it is the conductor of the train that is in charge of the train while the engineer controls the movements, speed, etc., of the locomotive. He further indicated that the locomotive is equipped with two brake valves which are situated to accommodate operations by both employees. One is situated on the main control panel operated by the engineer and the other one on the conductor's side.

[49] He confirmed that both employees are trained on their respective positions in accordance with the requirements of Transport Canada.

[50] Mr. Gagnon further indicated that there is no difference in the requirements, in terms of rules, regulations or locomotive equipment in operating long hood versus short hood leading. He also testified that that the locomotive in question is equipped with lights and pilots in order to be capable of operating in both directions on a main line.

[51] Mr. Glass provided photos of the interior of the locomotive cab to explain the lay-out of the equipment and the seats adjustments Mr. Glass further explained that the design cab of locomotives is based on the AAR which is a standard that applies to all North American railways.

[52] Mr. Glass also testified that the design of the cab is in conformity with the AAR rules. He confirmed that in accordance with those rules, the locomotive can operate both ways.

[53] Mr. Glass explained that in order to properly operate the controls in both directions, it is crucial that the seats be properly adjusted for comfort as well as easy access to all controls. He indicated that the controls and operating rules were the same going short or long hood lead.

[54] Ms. Miller testified that she manages cases of employees returning to work after having been injured at work. She stated that she evaluates the employees' condition upon their return to work and assists in the training of the employee to be capable of doing their work safely.

[55] Depending on the specific condition of the employee, she develops training on how to best position themselves to do their work in a safe manner. The training is customized for each employee, depending on restrictions, if any, of their doctor.

[56] She explained that the training is basically the same as for all the employees when they learn about their job; it consists of reviewing safe work practice and comfort of the employee.

[57] On the ergonomics issue, Mr. Rose and Ms. Tharoo jointly gave expert testimony as occupational therapists hired by CN to identify the level of risk for locomotive engineers developing musculoskeletal injuries associated with operation of locomotives in the Long Hood Leading direction.

[58] Their report was received in evidence and is part of case file and will not be repeated here.

[59] Their testimony indicated that there is no Canadian standardized process for determining the risk of developing work place musculoskeletal disorders (MSD). Therefore they followed the Ontario Ministry of Labour Guidelines for assessing workplace MSDs.

[60] Their opinion was based on the results of the analysis they completed in accordance with the Ontario guideline for Strain Index, Rapid Upper Extremity and Rapid Entire Body Assessment. Their findings concluded that the level of risk of developing MSDs is at a negligible level.

[61] Finally, Mr. Huart reviewed the training program of the potential engineers indicating that there was classroom and simulator training which are then followed by on-the-job training, and lasts several weeks. At that time, students are informed on seat features and recommended seat positioning.

Appellant's arguments

[62] Mr. Huart submits that "prescribed standard" refer to actual written standards as indicated in the Tribunal decision *Viterra Inc.*[5]. Consequently, he argues that the applicable Standards were those referenced in the *Railway Safety Act*, as that is the Act that regulates the construction and operation of locomotives.

[63] Mr. Huart argues that there was no evidence in the issued Direction that any of the Standards incorporated in that Act have been infringed. He states that Locomotive 4760, the type of locomotive that is in question in this case, meets all the prescribed Standards for mobile equipment used by employees in the course of their employment. He maintains that this locomotive is a standard road switcher that can be used in either short or long hood configuration as its design allows.

[64] Mr. Huart submits that the training provided to train crews and in particular to engineers, according to Mr. Glass, includes explanations on how to use the seat, its features and also the preferred or recommended sitting position for an engineer. The pictures taken by the HSO as well as the pictures taken by the TCRC and CN experts and shown in experts reports as well as the testimony of the engineer and conductor TCRC witnesses and of Mr. William Glass make it clear that although there is a preferred positioning for an engineer, each engineer can choose a position which suits him to achieve comfort and access the controls whether in short or long hood lead while ensuring safe operations.

[65] Mr. Huart states that the site visit and the evidence clearly showed that all the instrumentation needed to operate the train are within range of the engineer, notwithstanding the direction of travel of the locomotive.

[66] He further notes that the other member of a locomotive crew is the conductor. The conductor has a different role and is not called to operate any of the controls or gauges or dials that are found on the panel regardless of whether the locomotive is operating short or long hood lead. However, it was clear during the site visit that the seat of the locomotive conductor is also capable of swivelling and can be adjusted upward and downward as well as can be moved back and forth to suit the comfort of the conductor.

[67] Mr. Huart submits that the evidence shows that a locomotive and, in particular Locomotive 4760, is equipped with two (2) emergency brake valves. One is on the main control stand of the locomotive and is accessible to the train engineer while an additional emergency brake valve is also accessible by the conductor on his side of the locomotive.

[68] The practice is for the engineer to be the primary decision maker to activate the emergency brake valve as it is directly within is reach beside him. As a backup, the

[5] *Viterra Inc.*, 2010 OHSTC 18.

conductor can also activate his emergency brake if the engineer is incapacitated or fails to react to a situation which warrants pulling the emergency brake valve.

[69] M. Huart argues as well that evidence provided that the time to react and pull the emergency brake valve range between no more than two (2) and four (4) seconds even if the locomotive is operating in the long hood leading configuration. Since the distance to stop a train can be significant and since the time to come to a full stop is a function of the speed at which it is travelling and of the general conditions of the line, a variance of up to four (4) seconds will have little impact on the distance to stop a long train. Therefore, the time needed to activate the emergency brake system is only a fraction of the overall time required to stop a train. In addition, the evidence of CN's experts is that the emergency brake valve is not difficult to manipulate.

[70] M. Huart notes that Mr. Normand Gagnon described the operations as they took place until the issuance of the Assurance of Voluntary Compliance. He indicated that the locomotive used for the train was Locomotive 4760 or similar locomotive, that it is a road switcher, and, therefore is designed to operate in both long hood and short hood leading configuration. Mr. Gagnon further indicated that this kind of locomotive was used all over North America.

[71] Mr. Huart further submits that the evidence shows that there is no difference in the requirements, in terms of rules, regulations or locomotive equipment in operating long hood leading versus short hood leading. This particular locomotive was equipped with lights and pilots in order to be capable of operating in both directions on a mainline.

[72] He points out that during the site visit, Mr. Glass demonstrated that all the dials, gauges and controls can be accessed when the seat is properly positioned and when the engineer's position in the seat complies with training provided in classes as well as during on-board training provided to employees who want to become engineers.

[73] M. Huart argues that the evidence of the expert clearly show that the reach to access the various controls as well as the dials are all within reach of the locomotive engineers and that differences in reach is only a matter of a few centimetres if the train is operated in long hood versus short hood configuration; when the seat is properly positioned.

[74] Mr. Huart further submits that as indicated in the expert's report and in direct as well as under cross-examination of the employees, repetition and frequency of movements is not in itself an issue. The assessment conducted by CN's expert establish that repeated and frequent movements dealing with awkwardness of the posture and sustained effort are not present in this case.

[75] M. Huart disagrees with the conclusions of the TCRC expert, stating that her assessment is based on a questionnaire and methodology taken from a draft standard, not accredited by the American National Standard Institute (ANSI). He noted that the union's expert could not explain most of the criteria she used to come to her conclusion.

[76] On the issue of dealing with the capability of employees (section 10.13 of the OBTOSHR) to operate the rolling stock safely, Mr. Huart pointed out that both of the union's witnesses described themselves as experienced locomotive engineer and conductor. Both confirmed that they had received training in accordance with the Transport Canada laws and regulations.

[77] Mr. Huart referred the Appeals Officer to the *Railway Employee Qualification Standards Regulations* which applies to all railway companies operating in Canada. He argued that by being qualified under this standard, it implies that that the employees are capable of operating rolling stock safely, having received all the appropriate training as evidenced by a certificate issued to the employees pursuant to section 13.1 of the above noted Regulation.

[78] In conclusion, M. Huart submits that none of the sections referred to in the direction have been contravened. He argues that each section of the OBTOSHR (10.5, 10.6, 10.13) have been complied with by CN. Therefore he request that the direction issued by HSO Rodgers be rescinded.

Respondent's Evidence

[79] The respondent TCRC submitted evidence with the following witnesses:

- Mr. L. Pednaud, Conductor for CN; Mr. M. Jessom, Engineer for CN; Ms. L. Daley, Occupational Therapist.

[80] Mr. Pednaud testified that he is regularly assigned to yard switch in the Edmundston Yard. He has worked in the railroad industry for more than 13 years. His work includes going to service customer yards all the way to Grand Falls N.B. a distance of about 59 km. They normally use only one locomotive and travel long hood lead one way and short hood lead coming back.

[81] Mr. Pednaud testified that he never received any specific training to work long hood with the locomotives. He stated that he finds going long hood difficult as the vision is limited and he cannot see both side of the track and therefore could miss some signals as they are situated only on one side of the track. However, he concurred that he always has the track profile with him, so that he knows in advance what signals, curves, etc., are coming up. He also stated that both himself and the engineer call the signals to each other all the time.

[82] He stated that while they could turn the locomotive around about half way through, they never do it because it comes back to the same and would still do half the trip long hood lead.

[83] Mr. Jessom is an engineer for CN and has worked in the railroad industry for more than 20 years. He is normally assigned to yard switching, which includes going out

of yard to service customer sidings up to Grand Falls, New Brunswick. He stated that he never had specific training to drive the locomotives long hood, as he stated "you learn on the job."

[84] He agreed with the HSO that the locomotive in question was designed to drive forward, or at it is called, short hood lead. He finds it uncomfortable to drive long hood as the controls are really in his back, he has to turn around to see the dials such as the speedometer. He noted that in the past, they always had two locomotives to pull the train; each locomotive was pointed in a different direction; so that they could always pull the train on short hood configuration.

[85] M. Jessom testified as well that while he is capable of operating the locomotive safely long hood, there are other issues at stake such as the visibility. As well he believes that if he has to turn around to look at the dials, gauges, etc., he might miss something on the track, such as a signal. Then again he stated he does feel pain in his back and neck from having to turn around to look at the controls. He admitted however that he doesn't have to look at the controls to operate them.

[86] Ms. Daley testified as an expert pursuant to her profession as an occupational therapist. Ms. Daley was hired by TCRC to conduct an assessment of whether risk factors for musculoskeletal injury exist when operating locomotives Long Hood Lead.

[87] The report provided by Ms. Daley was received in evidence and will not be repeated here.

[88] Ms. Daley testified that the information gathered for the assessment was based on observations of the worksite with workers present to demonstrate job tasks, relevant worksite measurements, as well as an interview with the employees performing the job.

[89] She testified that while the locomotive is capable of operating in both Short Hood and Long Hood Lead, CN employees reported that the controls of the locomotive are designed to operate short hood lead. She indicated that the controls are positioned within near reach and the gauges are positioned so they only require minimal neck rotation movements to monitor when on short hood configuration. She concluded that operation in short hood is not indicative of risk of injury to the neck and/or back based on the result of this assessment.

[90] Ms. Daley testified as well that she observed that to operate the locomotive in Long Hood requires a viewing area estimated at approximately 150 degrees. This she believes requires excessive and repetitive neck rotation posture to view the work area required to effectively perform their duties.

[91] She further stated that in combination with excessive neck rotation postures, the job task also requires repetitive weight shifting and trunk rotation posture. She finally concluded that the repetition and frequencies of these non-ergonomic movements indicate that risk exists for the possibility of neck and back musculoskeletal injuries.

[92] Finally, in answer to my question about limits or impediments to the safe operations of the locomotive controls, she replied that she had not noted any such restrictions.

Respondent's arguments

[93] Mr. Stuebing submits that TCRC's concern can be summarised in two broad categories of hazards: operational hazard and ergonomic hazards.

[94] He argues that the evidence provided on the operational concern establish the existence of sub-optimal access to dials, alerts and other indicators which are located in the engineer's field of vision when traveling short hood lead. These indicators are viewable only in the opposite direction from the direction the engineer is facing when traveling long hood lead. As well he argues that access to the controls such as brake handle in impeded because of their position which he maintains is designed primarily to be used in the short hood lead traveling position.

[95] Mr. Stuebing advances that crucial external signals, including traffic control lights, mile posts and whistle post, etc., are frequently obscured by the long hood of the locomotive when traveling long hood lead. He indicated that testimony from Mr. Pednault recognized an apprehension of significant hazards associated with obscure sighting on long hood lead operations.

[96] In addition, Mr. Stuebing advances serious concerns regarding the ergonomic hazards of long hood lead operations. As indicated in Mr. Jessom's testimony, where he indicated that he experiences neck pain while having to twist his neck to look at dials and controls.

[97] Mr. Stuebing argues that the short hood *vs.* long hood lead has been a long standing issue as demonstrated by the various minutes of the local health and safety committee, provided in evidence. Among the issues, Mr. Stuebing raises again the issue of blind spots along the line while traveling long hood lead.

[98] He submits that, as indicated by both witnesses, there is no specific training provided on safe long hood lead practice, nor any specific instructions on ergonomic positioning for operators of locomotive traveling long hood lead. As well, none of the witnesses were able to recall any specific ergonomic instruction with regard to how to adjust the seats and position their bodies safely for operating in long or short hood lead.

[99] Mr. Stuebing argues that their expert's assessment raises *prima facie* ergonomic issues. The HSO's direction indicates that the awkward and limited ability of conductors and engineers to control locomotives long hood lead as to adversely affect the health and safety of the conductor and locomotive engineers.

[100] He maintains that the controls should be arranged to minimize the requirements for locomotive engineers to frequently rotate and change position solely to operate a control. The controls should be accessible without need for excessive trunk and neck rotation. Furthermore, he submits that the engineers' ability to "reliably" control and stop the movements in response to necessary whistle posts, mile posts and traffic signals is significantly impeded by the blind spot of between 200 to 400 feet of the track.

[101] Mr. Stuebing argues that based on the Federal Court Decision in *Martin*[6], the Appeals Officers has broad powers to make inquiries and issue such directions as may flow from the Appeals Officer's review of the circumstances flagged in a Health and Safety Officer's direction. He stated that the scope of the Appeals Officer's review is not limited to the specific sections of the Code cited by the HSO nor by the scope of the HSO's own analysis.

[102] Finally, Mr. Stuebing requests that the Tribunal confirm the Direction issued by HSO Rodgers and order the employer to cease and desist from long hood lead operations on the mainline.

Reply

[103] Further to the submission of Mr. Stuebing, counsel for TCRC, Mr Huart, filed a motion requesting that certain parts of Mr. Stuebing submission be struck down. I received submission on this motion from both parties and January 12, 2012, I rendered a decision with reasons to grant the motion in part[7].

[104] Mr. Huart argues that the case as presented by Mr. Stuebing in certain paragraphs of his submission, such as potentially deadly consequences, is beyond the scope of the mandate of the Appeals Officer as there was no finding of "danger" in the HSO's findings.

[105] On the issue of time spent twisting their neck for up to four hours as pleaded by Mr. Stuebing, records indicate that a locomotive engineer will operate in a long hood configuration for an average of 67.5 minutes per shift. The remainder of the eight hour shift is spent stopped or switching or operating short hood lead.

[106] Mr. Huart maintains that regarding the seating position of the engineer, both witnesses for the respondent as well as the CN witnesses indicated that the position pictures in the HSO's report are not reflective of reality.

[107] Mr. Huart points out that, as indicated in their expert's report, the seating arrangement and control display allows the engineer to assume a position that allows visibility in either direction. This arrangement allows the engineer the option to position

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[6] *Martin v. Canada (Attorney general)*, 2005 FAC 156.
[7] *Canadian National Railway Company and Teamsters Canada Rail Conference*, 2012 OHSTC 2.

himself to ensure that he is comfortable, and that he can operate safely in the manner he wants. That is why training provides for how to use the seat and not how to position the seat as each engineer needs to find what is best for him or her.

[108] Mr. Huart maintains that most of the pleading notes deal with the issue of an alleged blind spot when traveling long hood lead. This is a very different issue from access to controls and not an issue in appeal. As well the TCRC's pleading deals with the positioning of signals along the track and not the issues of the appeal which deals with unhindered access to controls.

[109] For all of the above reasons, CN request that the appeal be granted and the direction rescinded.

Analysis

[110] My role as an Appeals Officer is to determine whether CN was in contravention of paragraph 125(1)(k) of the Code, and sections 10.5, 10.6 and 10.13 of the *On Board Train Occupational Safety and Health Regulations*. Based on all that follows, I find that CN did not contravene the cited section of the Code and the OBTOSHR. My reasons for my finding are what follow.

[111] The issue that I need to resolve is whether CN is in contravention of paragraph 125(1)(k) of the *Canada Labour Code*. This section reads:

> 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;

[112] The "prescribed standards" identified by HSO Rodgers as contravened in this case are sections 10.5, 10.6 and 10.13 of the *On Board Train Occupational Safety and Health Regulations*. These sections read as follows:

> Controls
> 10.5 The arrangement and design of dial displays and the controls and general layout and design of the operator's compartment or position on all self-propelled rolling stock shall not hinder or prevent the operator from operating the rolling stock.
>
> Control Systems
> 10.6 All self-propelled rolling stock shall be fitted with braking and other control systems that

> (a) are capable of safely controlling and stopping the movement of the rolling stock or any accessory equipment that is on or part of the rolling stock; and
> (b) respond reliably and quickly to moderate effort on the part of the operator.
>
> Operation
> 10.13 No employer shall require an employee to operate self-propelled rolling stock unless the employee is capable of operating the rolling stock safely.

The following paragraph included in HSO Rodgers' Direction explains the HSO's understanding of the violation of the above-mentioned sections of the Code and the OBTOSHR. That paragraph reads as follows:

> Controlling locomotives that were designed to operate primarily in a forward direction (Short Hood Lead) pose challenges when operating in Long Hood Lead. The dials such as the speedometer and air gauge are located in a position for Short Hood Lead. Because of the operator's position in the operating cab when operating Long Hood Lead, the controls such as the automatic brake handle, bail off on independent brake handle, and the throttle, limit the operator when controlling and stopping movement.

[113] The above paragraph cited from HSO Rodgers' Direction expresses what is at the heart of this dispute. Considering the issues identified in this paragraph, then, I will now move on to determining whether CN is in contravention of paragraph 125(1)(k) of the Code and sections 10.5, 10.6 and 10.13 of the OBTOSHR.

[114] The submissions of CN make reference to prescribed standards in the form of the *Railway Safety Act*. These submissions were helpful and informative. However, CN's submissions do not contest the applicability of the "prescribed standards" referenced in paragraph 125(1)(k) of the Code, which, for the purposes of the present appeal, are sections 10.5, 10.6 and 10.13 of the OBTOSHR. In light of this fact, and given that it is a contravention on the basis of these sections of the Code and the OBTOSHR that is at the centre of this appeal, it is on these sections of the Code and the cited prescribed standards from the OBTOSHR that I will restrict my analysis.

[115] Further supporting my decision to proceed in this way is my reading of subsection 122(1) of the Code, which indicates that "prescribe" means "prescribe by regulation of the Governor in Council or determine in accordance with rules prescribed by regulation of the Governor in Council." From this I gather the following: while the *Canada Labour Code* establishes a general legislative framework and outlines the occupational health and safety responsibilities and duties of the employer and employees, occupational health and safety regulations such as the OBTOSHR help to identify, in much greater detail the particular requirements that must be met to ensure that Canadian workplaces are healthy and safe.

[116] In other words, I find that although CN argues that it is not in contravention of other "prescribed standards", namely the *Railway Safety Act*, for the above reasons my decision will focus on the "prescribed standards" in the form of the OBTOSHR.

Is CN in contravention of section 10.5 of the OBTOSHR?

[117] Section 10.5 of the *On Board Train Occupational Safety and Health Regulations* reads as follows:

> Controls
> 10.5 The arrangement and design of dial displays and the controls and general layout and design of the operator's compartment or position on all self-propelled rolling stock shall not hinder or prevent the operator from operating the rolling stock.

[118] In order for me to find that CN is in contravention of this section, I must determine that the arrangement and design of dial displays and the controls and layout and design of the operator's compartment or position of Locomotive 4760 hinder or prevent the operator from operating this locomotive. I find that they do not and thus, that there is no contravention of this regulation. My conclusion is based on the following reasons.

[119] As a preliminary point, the parties should note that the AAR rules cited during these proceedings by CN inform my analysis of whether there is a contravention section 10.5 of the OBTOSHR. As mentioned earlier in my decision, the AAR is the standard-setting organization for North America's railroads. I have carefully reviewed and considered the AAR rules and find they provide useful assistance in the conduct of my analysis of whether railroad practices are safe. As such, I will consider these rules in my assessment of whether or not CN is in contravention of s. 10.5 of the OBTOSHR.

[120] I retain from the testimony of Mr. Glass that the design of the Locomotive 4760's cab conforms with the rules of the AAR. Mr. Glass has also persuaded me that in accordance with those rules, the design, controls and layout of the locomotive's operator's compartment do not hinder or prevent operators from operating the locomotive. I am also persuaded by his testimony that the locomotive in question can operate both ways. This was not contested by the respondent.

[121] I am further persuaded by Mr. Jessom's testimony wherein he stated that though he finds it uncomfortable to drive long hood, he is capable of operating the locomotive safely in the long hood lead position. He also asserted that he did not have to look at the controls to operate them. These points also inform my decision.

[122] Finally, I am also persuaded by the TCRC's expert's answer to my question about limits or impediments to the safe operations of the locomotive's controls, wherein she noted that she did not find any such restrictions.

[123] Based on the above testimonies and evidence presented to me, I cannot conclude that the arrangement and design of the controls in the cab of Locomotive 4760 hinder or prevent the operator from safely operating the rolling stock.

[124] As such, my conclusion is that the design meets the intent of the regulation, and as indicated above, meets the requirements of the "prescribed standard", namely, section 10.5 of the OBTOSHR.

Is CN in contravention of section 10.6 of the OBTOSHR?

[125] Section 10.6 of the *On Board Train Occupational Safety and Health Regulations* reads as follows:

> Control Systems
> 10.6 All self-propelled rolling stock shall be fitted with braking and other control systems that
> (a) are capable of safely controlling and stopping the movement of the rolling stock or any accessory equipment that is on or part of the rolling stock; and
> (b) respond reliably and quickly to moderate effort on the part of the operator.

[120] In order for me conclude that CN is in contravention of this section, I must find that Locomotive 4760 is not fitted with braking or other controls systems that, a) are capable of safely controlling and stopping the movement of the rolling stock or any accessory equipment that is on or part of the rolling stock, and; b) respond reliably and quickly to moderate effort on the part of the operator. I find no such lack in the braking or other control systems of Locomotive 4760 for the reasons that follow.

[126] During the site visit as well as during his testimony, Mr. Gagnon explained the various controls of the locomotive, such as the automatic brake handle, bail off on independent brake handle, and the throttle, and other controls. It is clear that the locomotive has all the required control systems to properly operate the rolling stock. Regarding the reliability and the effort required to operate those controls, the site visit and Mr. Gagnon's testimony have also convinced me that the operation of the controls is relatively easy for a trained person.

[127] The emergency brake handle that is situated on the conductor's side is perhaps the control that requires the most effort. However, evidence from Mr. Glass showed that it was reliably applicable in a two to four second delay within the range of the force associated with the occupation of a train conductor.

[128] Contrarily, the employees testified that the emergency brake valve situated on the conductor's side was somewhat awkward to operate while driving the locomotive long hood lead. However, the employees did not say that it took too much effort, or that it was too difficult to operate, or that the amount of time required to turn around to use it would make it hazardous.

[129] Therefore, I conclude that Locomotive 4760 is properly equipped with control systems as required by section 10.6 of the OBTOSHR. As such, I find that there is no contravention of this regulation.

Is CN in contravention of section 10.13 of the OBTOSHR?

[130] Section 10.13 of the *On Board Train Occupational Safety and Health Regulations* reads as follows:

> Operation
> 10.13 No employer shall require an employee to operate self-propelled rolling stock unless the employee is capable of operating the rolling stock safely.

[131] The last issue for me to resolve in this appeal, then, is the question of whether the employees are capable of operating the rolling stock safely. I find that they are capable of doing so for the reasons that follow.

[132] I note that the OBTOSHR contains no definition of word "safe" or "safely". I also recognize the utility of other regulations that feature added specificity to the railway locomotives. In light of this, I have decided to use the *Railway Employee Qualification Standards Regulations* (REQSR) to help inform my position on whether the employees were able to operate the rolling stock safely, pursuant to section 10.13 of the OBTOSHR.

[133] In the REQSR I find that no railway company can permit an employee to work as a locomotive engineer, transfer hostler, conductor, or yard foreman unless the employee has qualified for that occupational category; and in the case of a locomotive engineer or transfer hostler, has received a passing mark for on-job training in that occupational category. I have found as well that a railway company shall provide to its locomotive engineer candidates and transfer hostler candidates sufficient on-the-job training in respect of the required subjects. This is to enable them to demonstrate to instructors and examiners that they are competent to perform their required duties.

[134] I have also noted in the REQSR that employees who work in the relevant positions of the railway industry are trained on the following: the *Uniform Code of Operating Rules*; the *Railway Radio Regulations*; *Dangerous Commodities*; *Air Brake Systems and Tests*; *Locomotive Operation*; *Train Handling*; and, *Freight Car and Train Inspection.*

[135] It is with this this information from the REQSR in mind that I allowed the TCRC to conduct an ergonomic assessment of the position of the locomotive engineer in Locomotive 4760. I thought that despite what I perceive to be CN's adherence to the REQSR, an ergonomic assessment might reveal the possible existence of an inconspicuous hazard that could jeopardise the safe operation of the rolling stock, pursuant to section 10.13 of the OBTOSHR.

[136] Concerning the existence of possible ergonomic issues, I retain from the report and testimony of TCRC's expert witness, Ms. Daley, that:

> [...] she observed that the engineer had a viewing area estimated at approximately 150° [degrees] to look at all controls and in front of the locomotive going long hood lead. She believed as well that this required excessive and repetitive neck rotation posture to view the work area required to effectively perform their duties.
>
> She further stated that in combination with excessive neck rotation postures, the job task also required repetitive weight shifting and trunk rotation posture. She finally concluded that the repetition and frequencies of these non-ergonomic movements indicate that risk exists for the possibility of neck and back musculoskeletal injuries.

[137] Be that as it may, I retain and find more compelling the evidence and testimony of CN's expert witnesses, Mr. Rose and Ms. Tharoo who found that:

> [...] based on the results of the analysis completed in accordance with the Ontario guideline, for the Stain Index, Rapid Upper Extremity and Rapid Entire Body Assessment is that the level of risk of developing MSDs is at a negligible level.

[138] Of the two sets of expert testimony, I find CN's experts' evidence more convincing. This is because I am of the impression that the evidence of TCRC's expert witness, Ms. Daley, was based on a draft methodology that was never recognised by the American National Standards Institute (ANSI), which I accept as a persuasive and reliable authority in these matters. Further, and more determinative in my assessment, I find that the draft methodology used by Ms. Daley does not provide as thorough an ergonomic safety assessment as the methodology used by CN's experts.

[139] Ms. Daley's assessment was done in the train yard as well as through interviews with the concerned employees. This assessment, however, fails to give me specific information such as the actual amount of time spent working long hood lead, number of times during that period that the engineers has to excessively turn his head 150 degrees, amount of time in the same period that the employees posture is in a neutral rest position, etc. It seems that the conclusion is based solely on the mere belief that the engineers were repetitively and exceedingly twisting their neck and back, rather than on recorded observations *in situ*. The employees' testimony was to the effect that they felt fatigue and some back or neck pain while driving long hood. While employee's testimonies have to be given considerable weight as they are the ones living that situation and know the in and out of the working condition, no tangible evidence of any kind was brought forward to support their ailments. Therefore I do not give much weight to this assessment conducted by Ms. Daley.

[140] In contrast to Ms. Daley's chosen methodology, the conclusion drawn by CN's expert was based on a known method used in various industrial situations in Ontario, and which I feel provides a more comprehensive ergonomic assessment.

[141] As there are no official federal guidelines, Mr. Rose and Ms. Tharoo elected to follow the Ontario Ministry of Labour Guidelines for assessing the risk of workplace musculoskeletal disorders, which were published through the Occupational Health and Safety Council of Ontario. They selected three questionnaires from this tool on the basis of their ability to assess the upper limbs specifically and the whole body. Consequently, it seems more reasonable to give more weight to the results of that assessment than that which was done by Ms. Daley.

[142] Evidence from Mr. Rose and Ms. Tharoo's assessment demonstrated that the data collected came from a combination of job site evaluation, video and picture collection of the position, controls, etc. The assessment also drew from interviews with various employees of CN Rail, communications with various departments of CN Rail and a review of accepted risk analysis tools and research literature reviews. The data collected from the CN's experts indicated that although the employees work an eight hour shift, switching activities was determined to be done on an average of 3.75 hours. Further, the average time spent traveling the main line was 1.75 hour, where the rest of the time the locomotive was normally stationary. Finally, submitted time-logs indicate that the locomotive travels long nose lead an average of 67 minutes in an 8 hour shift.

[143] Upon completion, the assessment conducted by Mr. Rose and Ms. Tharoo produces a final score which is used as an objective measure of the risk that employees face of developing work-related MSD to upper body extremities. The assessment conducted for the purposes of the present appeal resulted in a score that puts the risk of MSD in the safe category.

[144] The results from the tool that assesses biomechanical and posturing loading on the whole body with particular attention to neck, trunk and upper limbs concluded that while a low risk seems to be present, the said position should be further reinvestigated.

[145] The final tool utilised to conduct the assessment looked at assessing posture for risk of MSD. This indicated that the specific job task of operating the locomotive in long hood lead falls in the low risk level.

[146] Consequently, I find that the ergonomic assessment from CN demonstrates that the engineers working in the long hood lead position may feel some discomfort over the short period of time traveling long hood, however, I find no evidence that ultimately convinces me that it exposes them to a hazard that may jeopardize their health or safety. As such, I find that the employees can operate the self-propelled rolling stock safely, in accordance with section 10.13 of the OBTOSHR. In other words, I find that there is no contravention of this section.

[147] Moreover, I acknowledge that employees complained that they could not operate the locomotive safely because they had not received specific training on long hood lead operation. In response to this point, however, I would like to inform the parties that I am satisfied and convinced by the testimony of Mr. Glass, who stated that operating controls, rules of operations, etc., were the same in either long or short hood lead.

[148] Furthermore, I also acknowledge that the employees had issues with both, blind spots in some curves of the track, and the visibility of signage when operating in the long hood lead position. In fact, the employees' testimony concentrated mostly on the potential danger they are exposed to due to the blind spots along the track caused by the long hood of the locomotive. Although I have come to a conclusion on the issues to be resolved in this appeal, I would like to now treat these concerns of the employees before concluding my analysis.

[149] I would first like to point out that the inspection conducted by HSO Rodgers concentrated on the arrangement and design of dial displays during long hood travels. In other words, the direction at issue is concerned with operational challenges posed by the layout of the locomotive in LHL configuration. Additionally, there was no investigation by the HSO into the issue of blind spots or visibility of the signage on both sides of the track.

[150] The appeal before me does not concern a work refusal, nor am I faced in this appeal with a decision of "danger" on the issue of blind spot and the visibility of signage. Consequently, I believe that my duty when seized of an appeal of a Direction, pursuant to section 146.1(1) of the Code, is to look into the circumstances and reasons that led to the issuance of the Direction, and as such, I may not extend my inquiry to new issues other than those that forms part of the circumstances and reasons that led to the issuance of the Direction under appeal.

[151] In conclusion, based on all of the above, I believe that CN did not contravene paragraph 125(1)(k) of the Code and section 10.13 of the *On Board Train Occupational Safety and Health Regulations*, as specified in the Direction issued by HSO Rodgers.

Decision

[152] For these reasons, I rescind the Direction issued to CN by Health and Safety Officer Rodgers on December 6, 2010, as I find that CN is not in violation of paragraph 125(1)(k) of the *Canada Labour Code* and in particular, is not in violation of sections 10.5, 10.6 and 10.13 of the *On Board Train Occupational Safety and Health Regulations*.

Richard Lafrance
Appeals Officer