Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2020-03-24
Case Nos.: 2018-39

Between:

Canadian Pacific Railway Company, Appellant

Indexed as: *Canadian Pacific Railway Company*

Matter:	Appeal filed under subsection 146(1) of the *Canada Labour Code* of a direction issued by an official delegated by the Minister of Labour
Decision:	The direction is rescinded.
Decision rendered by:	Mr. Olivier Bellavigna-Ladoux, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Matthew J. Macdonald, Legal Counsel, Canadian Pacific Railway Company
Citation:	2020 OHSTC 3

REASONS FOR DECISION

[1] The present reasons concern the appeal of a direction that was issued on October 30, 2018, by Mr. Jean Nodorakis, in his capacity as official delegated by the Minister of Labour (ministerial delegate).

Background

[2] On November 17, 2017, the ministerial delegate began conducting an investigation into an accident that occurred on November 8, 2017, at the Canadian Pacific (CP) marshalling yard in Côte Saint-Luc, Quebec. The accident resulted in the fatality of one of the appellant's employee who was part of a three-man crew responsible for the marshalling and switching of rolling stock. Given that the accident occurred in the early morning, the ministerial delegate determined that it was necessary to perform an assessment of the levels of lighting in the area of the yard where the employee was working.

[3] On December 6, 2017, a series of preliminary technical readings were taken by the ministerial delegate and showed that lighting levels were below the minimum prescribed in the *On Board Trains Occupational Health and Safety Regulations* (the *Regulations*). Based on these readings, the ministerial delegate determined that a technical survey of the levels of lighting in the yard was necessary.

[4] On May 8, 2018, the ministerial delegate carried out the technical survey accompanied by Ms. France de Repentigny, an industrial hygiene technologist at Employment and Social Development Canada. The appellant's work place committee employee co-chair, and a work place committee employee member attended the technical survey. No employer representative was present. All the technical readings were taken exclusively in the area known as the North Departure, or Diamond, of the St. Luc yard, where the accident occurred, and where the majority of railway switches that yard employees are required to use are found. According to the industrial hygiene technologist, the technical survey readings demonstrated that the appellant's lighting system did not provide the minimum levels of lighting prescribed by the *Regulations*.

[5] On October 30, 2018, following his investigation, the ministerial delegate issued a direction under subsection 145(1) of the *Canada Labour Code* (the *Code)* identifying contraventions of paragraph 125(1)(n) of the *Code* and subsection 3.1(1) and section 3.4 of the *Regulations*. The direction reads as follows:

> **IN THE MATTER OF THE *CANADA LABOUR CODE***
> **PART II - OCCUPATIONAL HEALTH AND SAFETY**
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)
>
> On May 8, 2018, the undersigned official delegated by the Minister of Labour was present while an Industrial Hygiene Technologist conducted a test into the levels of lighting, as part of an investigation into the work place fatality of an employee employed by CANADIAN PACIFIC RAILWAY COMPANY, being an employer subject to the *Canada Labour Code*, Part II, at the employer's work place located at 5901 Westminster Avenue, Montreal, Quebec, H4W 219, the said work place being sometimes known as St-Luc Yard.

The said official delegated by the Minister of Labour is of the opinion that the following provisions of the *Canada Labour Code*, Part II have been contravened:

No. 1

Paragraph 125 (1)(n) of the *Canada Labour Code* Part II, subsection 3.1(1) - On Board Trains Occupational Health and Safety Regulations.

The employer did not ensure that the levels of lighting at St-Luc Yard were in accordance with prescribed standards. The lighting system installed by the employer does not provide the prescribed levels of lighting required for areas where employees are engaged in the flagging, switching and marshalling of rolling stock.

No.2

Paragraph 125 (1)(n) of the *Canada Labour Code* Part II, subsection 3.4- On Board Trains Occupational Health and Safety Regulations.

The average level of lighting observed at St-Luc yard is below the value of 50 lux, as is required for areas where employees are engaged in the flagging, switching and marshalling of rolling stock. Fifty-two (52) readings were taken in the area known as north of the departure yard, where employees are routinely engaged in switching activities and the average level of lighting was 7.7 lux.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(l)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than May 1st 2019.

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

Issued at **Dorval**, this **30th** day of **October, 2018**.

Jean Nodorakis
Official Delegated by the Minister of Labour

[6] The appellant filed an appeal of the direction with the Occupational Health and Safety Tribunal (the Tribunal) on November 28, 2018. The appellant also applied for a stay of the direction on April 17, 2019, which I granted on April 18, 2019, pending the resolution of the appeal. The written reasons were issued on May 28, 2019 (see *Canadian Pacific Railway Company*, 2019 OHSTC 12).

[7] A hearing into the merits of this appeal was held on June 18 and 19, 2019. There is no respondent in this case.

Issue

[8] The issue before me is whether the direction issued under subsection 145(1) of the *Code* by the ministerial delegate is well-founded.

Submissions of the Appellant

[9] The first witness for the appellant was Mr. Christopher Clark, CP yard superintendent. He explained the operations conducted at the St-Luc yard, and more specifically in the diamond area where the accident occurred. He also explained the manipulations involved with the use of the light-emitting diode (LED) type lanterns by the employees working at the St-Luc yard. He indicated that he has never heard any complaints from employees regarding the use of lanterns in the yard.

[10] The second witness for the appellant was Mr. Robert Tully, Director, Safety Management Systems at CP. Mr. Clark testified that it was not reasonably practicable to install lighting systems because it would create new safety issues. He explained that the use of lantern is a tried and proven method of work in the railway industry.

[11] The third witness for the appellant was Mr. David Ayriss of Golder Associates Ltd. (Golder), a certified industrial hygienist. Mr. Ayriss was accepted by the Tribunal as a qualified expert in his field. He has more than five years of experience conducting workplace lighting level assessments. He explained the lighting assessments that he performed at the request of CP in the "Diamond" area of the St. Luc yard.

[12] The appellant argues that the direction should be rescinded because it is not reasonably practicable to achieve the prescribed levels of lighting solely by installing more lighting systems, and that compliance with the direction would create safety hazards. Complying with the direction would be disproportionate to the benefits.

[13] The appellant alleges that section 3.1 of the *Regulations* affords some flexibility to employers to use portable lanterns if it is not reasonably practicable to use only installed lighting systems. The appellant claims that the direction nullifies the intended flexibility of section 3.1.

[14] The appellant submits that compliance with the direction would create a new hazard as installing more lighting systems would create visual and physical obstructions for those on board moving trains and those nearby the tracks. Meeting the prescribed levels of lighting requires placing posts at such frequencies that would create a significant clearance hazard and increase the risk of severe injury or death. No reasonable amount of additional installed lighting systems would meet the requirements of the *Regulations*.

[15] It is not reasonably practicable to install more lighting systems to meet the prescribed levels of the direction. Doing so would create further safety hazards and would materially not contribute to meet the prescribed level of lighting in areas where employees need it most. Thus, the cost of compliance with the direction is disproportionate to any benefit. Portable lanterns are necessary alternatives to meet the prescribed levels of lighting at the yard and their usage is an established industry standard.

[16] The appellant submits that the ministerial delegate's report failed to demonstrate any analysis relating to reasonable practicability and failed to apply and follow the interpretations,

policies and guidelines prior to issuing the direction. These errors further demonstrate that the direction should be rescinded.

[17] The appellant submits that by adopting and relying on the officer's report which is based on an erroneous legal standard and inappropriate testing method, the direction issued is not well founded. The ministerial delegate relied and adopted the report of an unqualified officer, Ms. de Repentigny. The evidence shows that Ms. de Repentigny lacked the proper qualifications. She did not have the necessary knowledge or training and did not hold certification as a Registered Occupational Hygiene Technologist at the time of the report was prepared.

[18] The appellant alleges that the evidence showed that Ms. de Repentigny did not receive training specific to testing lighting levels at railway yards nor did she receive training for testing lighting levels from task lighting such as lanterns. Her lack of necessary knowledge was demonstrated when she incorrectly stated during her testimony that it was unnecessary to know whether the portable lanterns used LED or incandescent lighting.

[19] Further, it is submitted that Ms. de Repentigny had no relevant work experience testing lighting levels at railway yards prior to preparing the report. Her experience testing lighting levels at a waste treatment facility and an administrative office is insufficient as these worksites only deal with fixed structures whereas in a railway yard lighting is constantly shifting because of moving structures. The ministerial delegate should not have relied on Ms de Repentigny's report to issue the direction given her lack qualifications.

[20] The appellant submits that the appeals officer should prefer the Golder reports that were prepared by Mr. Ayriss and Ms. Zeina Nahas, who are both qualified under the *Regulations*. The Golder report used appropriate testing method to closely simulate the conditions and light source positioning during evening and night conditions. In particular, the Golder reports showed that the lighting was tested with an extended arm in static position and slightly angled forward. Unlike Ms. de Repentigny, the experts adjusted its testing methods to stimulate real working conditions and use of lanterns at the yard.

[21] With respect to the testing methods adopted by Ms. de Repentigny, the appellant argued that she failed to consider the particular circumstances as required by the *Regulations*. Ms. de Repentigny committed an error by failing to adjust the testing methods to capture light at task point. The most accurate means to assess the lighting in this case was to capture light at the task point which entailed orienting the sensor towards the actual lighting source. The lighting measurements taken by Ms. de Repentigny were inaccurate because the yard's typical lighting and working conditions were not captured appropriately.

[22] The appellant also submits that the direction should be rescinded for the reasons that it fails to meet the appropriate levels of specificity. First, the direction fails to specify how to remedy the alleged contravention of the *Code* which states that the Minister of Labour may direct an employer to terminate a contravention and take steps to ensure the contravention does not repeat itself. It requires specificity about the compliance which was not provided.

[23] Second, the direction failed to reference reasonable practicability. It mentions the levels of lighting were not in accordance with prescribed standards but that it is not the legal threshold for determining a breach of the *Regulations*. By failing to reference reasonable practicability in

the direction, it is unclear how the employer allegedly breached the *Regulations* or what steps should be taken to remedy the alleged breach.

[24] The appellant also argues that the ministerial delegate breached procedural fairness by failing to address the issue of reasonable practicability in a satisfactory manner before issuing the direction. The appellant alleges that it was not provided the opportunity to make representations on the issue and that if the ministerial delegate had properly investigated the matter, this issue could have been resolved prior to the issuance of the direction.

[25] The appellant submits that failing to provide specifics and not addressing reasonable practicability in a meaningful way resulted in a breach of procedural fairness, which should lead the appeals officer to rescind the direction.

Analysis

[26] Subsection 146.1(1) of the *Code* sets out the authority of an appeals officer when a direction is appealed. An appeals officer may vary, rescind or confirm the direction:

> **146.1(1)** If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
>
> **(a)** vary, rescind or confirm the decision or direction; [...]

[27] In the present case, the direction issued by the ministerial delegate identifies contraventions of paragraph 125(1)(n) of the *Code* and subsection 3.1(1) and section 3(4) of the *Regulations*. Paragraph 125(1)(n) of the *Code* provides as follows:

> **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,
>
> **(n)** ensure that the levels of ventilation, lighting, temperature, humidity, sound and vibration are in accordance with prescribed standards;

[28] The prescribed standards governing workplace lighting levels are set out in Part III of the *Regulations*. At the time of the hearing, the relevant sections of Part III of the *Regulations,* which have since been amended, read as follows:

> **3.1(1)** The levels of lighting prescribed in this Part shall, where reasonably practicable, be provided by a lighting system installed by the employer.
>
> **(2)** Where it is not reasonably practicable to comply with subsection (1), the employer shall provide portable lanterns that give the prescribed levels of lighting.
>
> **3.2** For the purposes of this Part, the average level of lighting at a task position or in an area shall be determined

> **(a)** by making one measurement at four different places that are representative of the level of lighting at the task position or that, in an area, are representative of the level of lighting 1 m above the floor of the area; and
>
> **(b)** by dividing the aggregate of the results of those measurements by four.
>
> [...]
>
> **3.4** The level of lighting in an area referred to in Column I of an item of Schedule II to this Part shall be not less than the level set out in Column II.

[29] Part III of the *Regulations* adopted pursuant to paragraph 125(1)(n) is intended to regulate lighting levels in workplaces in the railway industry. Its purpose is to provide proper visibility to employees in the performance of their work. To that end, subsection 3.1(1) of the *Regulations* requires employers to provide prescribed levels of lighting, where reasonably practicable, by the installation of a lighting system. However, in cases where the installation of a lighting system is not reasonably practicable, subsection 3.1(2) permits the use of portable lanterns to achieve the same prescribed levels of lighting.

[30] The *Regulations* set the minimum lighting levels in accordance with the type of work that must be performed. Pursuant to section 3.4, Schedule II of the *Regulations*, the level of lighting that must be provided by the installation of a lighting system or by the use of portable lanterns, in areas where employees are engaged in the flagging, switching and marshalling of rolling stock, is 50 lux.

[31] The evidence has revealed that the lighting system in the St-Luc yard consists of three high-mast lighting towers and a series of post lights. Following his investigation into the matter, the ministerial delegate concluded that the employer contravened subsection 3.1(1) of the *Regulations* based on Ms. de Repentigny's report, which according to him clearly demonstrates that the lighting system at the St-Luc yard does not provide the prescribed levels of lighting required by the *Regulations* in certain areas where employees are engaged in the flagging, switching and marshalling of rolling stock.

[32] With respect, in my opinion, the ministerial delegate did not correctly apply the *Regulations* in this case. As submitted by the appellant, there is no reference to the standard of reasonable practicability in the direction. It is thus unclear, from reading the direction, that the ministerial delegate turned his mind to the question of whether or not, in the circumstances of this case, compliance with subsection 3.1(1) of the *Regulations* is reasonably practicable.

[33] The appellant's position in this appeal is essentially that it cannot be found to have contravened the *Regulations* in view of the fact that it is not reasonably practicable to achieve the prescribed lighting levels solely with installed lighting systems. The appellant provides portable lanterns to its employees, who work in the evening, to illuminate the task points, which give more than the prescribed minimum levels of lighting at all relevant times.

[34] As previously stated, subsection 3.1(2) of the *Regulations* allows for the use of portable lanterns to provide the prescribed levels of lighting, where it is shown that it is not reasonably practicable to do so with the installation of a lighting system. It follows that the first question to

be determined to resolve this appeal is whether the appellant has demonstrated that it is not reasonably practicable to install more lighting systems at the yard to achieve the prescribed lighting levels.

[35] In support of its argument that it is not reasonably practicable to install additional lighting systems, the appellant referred to the Employment and Social Development Canada- Labour Program's Interpretation and, Policies and Guidelines (IPG) titled "IPG-055 Criteria for reasonably practicable, and reasonably possible" which states the following :

> 4.2 The criteria a HSO must consider when determining compliance with a specific COHSR is "reasonably practicable" include both the technical and economical aspects of compliance:
>
> a. The technical aspect - is it physically possible to comply, and would compliance introduce other hazards or areas of non-compliance, such as nullifying any require Canadian Standards Association (CSA), Underwriters` Laboratories of Canada (ULC) or similar agency approval?
>
> b. The economical aspect- would the cost to comply significantly outweigh the benefits. This criterion in turn requires an assessment of the benefits of compliance. To assess the benefits, the following additional factors must be considered:
>
> i. how severe is the hazard, and what is the likelihood(risk) of an employee being exposed to the hazard. The greater the hazard and the risk, the more effort must be put into complying with the specified requirements;
>
> ii. would compliance reduce the hazard or risk enough to make a noticeable improvement (i.e., would use of a permanent, rather than temporary structure provide significantly greater protection to the employee);
>
> iii. how long would the improvements remain in effect, i.e is the equipment or building scheduled to be replaced soon, or is the work place a temporary location).

[36] While IPGs are internal directives that are not binding on the appeals officer, they provide useful guidance on the interpretation and application of the *Code* and its *Regulations* (*Attorney General of Canada* v. *Public Service Alliance of Canada*, 2015 FCA 273).

[37] After reviewing the evidence submitted in this case, I agree with the appellant's contention that it would not be reasonably practicable to install additional lighting systems at the yard in order to meet the prescribed lighting levels for the reasons that follow.

[38] I am convinced that the addition of lighting structures would create visual and physical obstructions for the employees on board moving trains and near the tracks which could increase the risk of accidents. The evidence has also revealed that it would take a numerous amount of additional lighting systems to meet the prescribed levels of lighting for the reasons that there are moving shadows from operating trains cars which constantly affects lighting levels. I agree with the appellant's assertion that the cost of these numerous structures would be quite high and would not outweigh the benefits since the installation of more lighting structures would introduce additional hazards into the workplace. Finally, I also find very compelling the fact that the use of portable lanterns is the standard practice in the railway industry in Canada.

[39] Having come to the conclusion that it would not be reasonably practicable for the employer to comply with subsection 3.1(1) of the *Regulations* by installing additional lighting systems, I now have to decide whether the prescribed level of 50 lux is being met by the provision of portable lanterns in the areas of the yard where employees are engaged in the flagging, switching and marshalling of rolling stock in accordance with subsection 3.1(2) of the *Regulations*.

[40] As previously stated, the ministerial delegate formed his opinion and issued a direction primarily on the basis of the lighting assessment report of Ms. de Repentigny. During the hearing, Ms. de Repentigny was the first witness to testify at my request. She explained the methodology she used for the technical survey she performed in the area known as the "Diamond" of the St-Luc yard, which is where most of the switching and marshalling of rolling stock is performed and where the accident occurred. While some lighting levels reading were taken with the use of portable lanterns, she took the majority of the readings without the use of portable lanterns. She presented the results in a report titled "Assessment of lighting levels in Canada Pacific Rail's St-Luc Yard". The report, which was originally written in French was translated in English, concludes as follows:

> i. The average illuminance level of 7.7 lux obtained around the switches in areas where employees do not use a portable lantern was less than the regulatory value of 50 lux. These areas where employees carry out signalling and rolling stock switching and shunting operations, and the lighting levels in these areas are contrary to Appendix II of section 3.4 of Part III – Lighting of the On Board Trains Occupational Safety and Health Regulations.
>
> ii. The highest lighting levels were obtained where there was direct lighting coming from the high-mast lighting tower located on the East side, North Switch, 2nd East Loop/East Loop Crossover of the marshalling yard. The arithmetic mean value of the four spot readings was 49.6 lux, which makes it possible to maintain a lighting level for this work area that complies with the Regulations.
>
> iii. The average illuminance level obtained in areas where employees use a portable lantern (North Crossover-West Side and North Crossover-East Side) was 21.5 lux. Despite the use of a portable lantern, it seems that this lighting device does not help to significantly improve lighting levels in the work area where employees carry out switching and rolling stock shunting operations, so as to comply with the 50 lux standard.
>
> iv. The lighting levels obtained during a reading of the inventory list with the help of a portable lantern varied between 70 lux and 400 lux. The use of a portable lantern greatly facilitates this reading task for which greater accuracy is required.
>
> v. Where possible, the lighting in areas where employees carry out signaling and rolling stock switching and shunting operations must be provided by a lighting system that meets the minimum standard of 50 lux. A complete reassessment of the St. Lucs Yard lighting system, including its configuration, must be carried out to ensure that regulatory requirements are met.

[41] The appellant sought to challenge the accuracy of the lighting levels readings taken by Ms. de Repentigny by producing the expert testimony of Mr. David Ayriss, a board certified industrial hygienist. Mr. Ayriss and his colleague, Ms Zeina Nahas, who is also a certified industrial hygienist, conducted two hand-held lantern lighting assessments and issued two reports.

[42] The first report dated January 8, 2019, concluded that the minimum lighting level of 50 lux was achieved at distances of up to approximately four meters from the LED light source (hand-held Star LED lantern) at the measured locations. The second report dated June 6, 2019, was produced following a second lighting assessment conducted in response to photographs provided by the ministerial delegate to demonstrate how Ms. de Repentigny collected the lantern light measurements. Both reports described in great details the methodology used for the lighting measurements. The testing methods were adjusted to stimulate working conditions and the use of portable lanterns by employees involved in the flagging, switching and marshalling of rolling stock.

[43] On the contrary, the lighting reading results provided by Ms. de Repentigny, in her report, were taken based on what appeared to me to be a flawed methodology. During her testimony at the hearing, she explained that she used her own developed testing method to perform various readings since it was her first time performing testing lighting levels at a railway yard. She has not received any training in relation to testing lighting levels at railways and railway yards. When she was measuring the lighting levels in the areas where portable lanterns are used, she had another person holding the lantern while she was taking the readings, orienting the light sensor towards the object being illuminated. According to a photograph provided to the appellant by the ministerial delegate, Ms. de Repentigny positioned the light sensor one meter above the ground.

[44] Mr. Ayriss testified that the orientation of the light sensor to the actual light source was critical in obtaining lighting levels. He explained and demonstrated during his testimony how the manner Ms. de Repentigny positioned the light sensor would not accurately capture the lighting levels at task points. He confirmed that the second lighting assessment that was conducted to replicate Ms. de Repentigny's methodology, demonstrated that when the light sensor was correctly positioned, the regulatory minimum of standard of 50 lux was achieved with the use of portable lanterns. I therefore agree with the respondent's assertion that the measurement methodology employed by Ms. de Repentigny would not accurately capture the levels of luminescence at task points, and as a result, I find her readings of the lighting levels at the yard to be unreliable.

[45] I am therefore persuaded, based on the totality of the evidence adduced in this case, that the prescribed lighting level of 50 lux is met in areas of the yard where employees are engaged in the flagging, switching and marshalling of rolling stock. Consequently, I find that the direction issued by the ministerial delegate is not well-founded in fact and law.

Decision

[46] For the above reasons, the direction issued by the ministerial delegate on October 30, 2018, is rescinded.

Olivier Bellavigna-Ladoux
Appeals Officer