Decision: 93-011

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146 of the Canada Labour Code, Part II
of a direction issued by a safety officer

Applicant:	Canada Post Corporation Halifax Postal Plant Halifax, Nova Scotia Represented by: Mr. Harold L. Doherty Legal Counsel
Interested Party:	Ms. Wendy Vandersteen Employee Represented by: Mr. Fred Furlong Canadian Union of Postal Workers (CUPW)
Mis-en-cause:	Mr. Robert Muzzerall Safety Officer Labour Canada
Before:	Mr. Serge Cadieux Regional Safety Officer Labour Canada

An oral hearing was held on July 6, 1993 in Halifax, Nova Scotia, into the refusal to work exercised by Ms. Vandersteen. Ms. Vandersteen did not attend the hearing although she had been duly notified that it would take place on the above noted date. Her absence was motivated by Mr. Furlong who requested, on her behalf, that the hearing proceed without any further delay.

Background

On April 30, 1993, Ms. Wendy Vandersteen exercised her right to refuse to work under the Canada Labour Code, Part II. Ms. Vandersteen refused to move a large metal rack designed to transport oversized parcels, known as a baker rack, because she was not wearing protective footwear. She considered this situation to constitute a danger.

Mr. Muzzerall investigated the refusal to work. The safety officer testified that he reviewed, throughout his investigation, the site, the equipment and the procedures. In the end, the safety officer concluded that Ms. Vandersteen was effectively in danger and directed Canada Post

Corporation, under paragraph 145(2)(a) of the Code, to cease contravening unspecified provisions of the Code. The direction reads, in part, as follows:

> "...having conducted an investigation into a refusal to work from Ms. Wendy Vandersteen who refused to move a Baker Rack without the wearing of safety footwear, it is the opinion of the Canada Safety Officer that the following provisions of the Canada Labour Code, Part II are being contravened:
>
> > Suitable foot protection in not in place to reduce or eliminate foot injuries in the event that a wheel from a Baker Rack, C-3 Binnie, C-8 Cart, E-2 Tray Rack or C-40 comes in contact with an employee's foot.
>
> **HEREBY DIRECTS** the said employer pursuant to paragraph 145(2)(a) of the Canada Labour Code, Part II, to terminate the contravention immediately as verbally directed on April 30, 1993 for guarding the source of danger.
>
> Issued at Halifax this 7th day of May 1993."

The safety officer noted, in the synopsis that he prepared for the hearing, that "A possible cause of the refusal is that the new contract has been signed and Canada Post is saying that the Bruce Outhouse Arbitration[1] of five years ago no longer is valid. The union appears to want to pursue this activity to ensure that the people are protected or at least to have foot injuries reduced."

> Note: Mr. Doherty strongly objected to any reference to the Bruce Outhouse Arbitration. Mr. Doherty argued that when investigating a refusal to work, the safety officer should not concern himself with the provisions of a collective agreement. The safety officer can only decide at that moment the issue of danger.

Submissions of the Employer

The thrust of the employer's argument is that Ms. Vandersteen was never in danger of being injured on the day she refused to work. Ms. Vandersteen was asked to move a baker rack, not any other type of racks as mentioned in the direction. The baker rack was located against a wall, in an aisle and most importantly, alleges the employer, the rack was empty. According to Mr. Doherty, the numerous decisions of the Canada Labour Relations Board entered into evidence, and which constitute the current jurisprudence, establishes that an employee must be in a situation of immediate danger to justify a refusal. Canada Post contends that Ms. Vandersteen was never in a situation in which she was likely to be injured and furthermore, she was not in danger "right there and then" when the safety officer investigated.

Mr. Doherty further submitted that the safety officer did not investigate Ms. Vandersteen's refusal to work on a factual basis as he should have in a refusal situation but relied primarily on his experience and knowledge of the activities carried out at Canada Post to decide the matter. The

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[1] The "Outhouse award", as it is commonly referred to by the parties, is an arbitration decision arising out of the collective agreement between Canada Post and its employees in which the arbitrator decided that the employer had to provide postal clerks working in the Almon Street postal plant with safety shoes.

safety officer never visited the actual work site, did not request a demonstration of the use of the equipment and did not see the rack which is the subject of the refusal. For this reason, Mr Doherty suggests, the safety officer did not know that the rack was empty and that it did not constitute a danger to Ms. Vandersteen. Consequently, the direction should not stand since there was no situation in which Ms. Vandersteen faced an immediate danger.

In addition, submits Mr. Doherty, the right to refuse to work was not intended to be the primary vehicle to attain objectives of the Code. The safety officer candidly admitted in his testimony that his direction was not only intended to protect Ms. Vandersteen but all other employees at the postal plant. That was not the issue to be resolved on the day of the refusal. The only issue to be resolved was whether Ms. Vandersteen was in a situation of immediate danger.

Mr. Doherty explained that the procedures for moving non-motorized materials handling equipment provide that employees may require the assistance of another employee in the event that a rack must travel a hazardous route. As a rule, employees must not pull a rack and place themselves in a position where injury is likely to occur. The procedure calls for an employee to push a rack to its destination, therefore reducing the risk of injury to the minimum. It is Canada Post's contention that if the procedures are adhered to as they should, then the task that was requested from Ms. Vandersteen does not require safety shoes. However, employees who prefer to wear safety shoes at work are encouraged to do so at their own expenses.

Mr. Doherty also expressed the opinion that the law does not authorize the safety officer to issue a direction under subsection 145(2) of the Code and to subsequently submit it under subsection 145(1) of the Code in the event that the direction could be justified under that latter provision. Likewise, the Regional Safety Officer must limit himself to deciding the question of whether danger existed at the time of the safety officer's investigation.

Submissions of the Employee Representative

Mr. Furlong submitted that in the Outhouse decision, which he supports, the health and safety expert-consultant hired by the union, Ms. Chymyck, "testified that, having toured the Almon Street plant, her overall impression was that it was a warehouse-type facility with product being brought in, processed and then moved back out again. She said that in all warehouses she was familiar with the employees were required to wear safety shoes and she saw no reason why the same rule shouldn't apply in the plant."

Mr. Furlong is of the view that Mr. Muzzerall has acted appropriately in this case given his familiarity with the situation and the equipment involved. Mr. Furlong submitted that the role of the safety officer in a refusal to work situation is not to determine the quantum of a risk but only to establish that a risk or "danger" exists. Consequently, the safety officer made a reasonable decision at the time of the refusal to work and his directive is based on his concern for the protection and safety of employees. For all these reasons, the direction should stand.

Decision

The issue to be decided in the instant case is whether danger, as defined in the Code, existed at the time the safety officer investigated Ms. Vandersteen's refusal to work.

Danger is defined at subsection 122(1) of the Code as follows:

> "danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected;

It follows from this definition that a danger is not simply a risk, or to repeat the expression used in the Code, any hazard or condition; it is a hazard or condition which has been qualified by legislation. In light of that definition, the hazard or condition, or to use Mr. Furlong's terminology, the "risk" must be so acute that it is likely to result in injury unless measures are taken to protect the employee.

Furthermore, because Ms. Vandersteen used the right to refuse to work to settle this matter, the onus was on Ms. Vandersteen to demonstrate to the safety officer what hazard or condition constituted the danger at that point in time. The jurisprudence cited by the employer is clear on this matter. The Federal Court of Appeal in Bonfa v Minister of Employment and Immigration ruled that the danger feared by the employee must exists at the time that the safety officer investigates. Whether danger existed before his arrival is irrelevant to the decision he must make during his investigation. He must decide if danger exists during his investigation and in the affirmative, give the necessary directions to protect that employee or any other person exposed to the danger.

In the case before me, I must ask myself what hazard or condition has been detected by the safety officer that would justify his conclusion that danger existed, or in other words, that the danger was real and present at the time of his investigation? I find I cannot answer that question on a factual basis given the evidence adduced by the safety officer.

Ms. Vandersteen was absent from the hearing and therefore was not there to corroborate or deny the statement that the rack was empty or to tell us what hazard or condition she feared in moving the baker rack. There was reference to another rack in the proceedings, however no evidence was given respecting its condition and whether Ms. Vandersteen was required to move it as well. Regrettably, Ms. Vandersteen's absence disadvantages her as she could not testify as to whether she had been trained in the procedures to follow for moving non-motorized materials handling equipment and whether she knew she could request assistance in some situations.

The safety officer never saw the rack in question and therefore is unable to submit evidence to the physical condition of the rack or the route that Ms. Vandersteen had to travel with the rack. Mr. Doherty submitted, and uncontradicted evidence was given by Canada Post representatives, to the effect that the rack in question was empty and in good condition and that in any event, another employee can be required to assist where the situation warrants it. It was also shown that Ms. Vandersteen had been assigned to another task when the safety officer arrived and that the rack in question had been moved by another employee.

I am not authorized, when acting under section 146 of the Code, to deal with the whole situation of the Almon Street postal plant and the hazards it may present. Only the safety officer can do this under section 145(1) of the Code. Because the right to refuse to work is an individual right, I must inquire into the circumstances of the direction as it applies to the case of Ms. Vandersteen only. This is so because the right to refuse is to be used by an employee only in those instances where a situation has developed unexpectedly and which puts the life, health or safety of that employee in jeopardy. Hence, the situation affecting Ms. Vandersteen when she refused to work did not justify immediate attention to protect her life, safety or health at that moment.

In view of the evidence before me, I can only conclude that the safety officer did not limit his investigation to the refusal to work of Ms. Vandersteen but attempted to resolve the ongoing problem of safety footwear at the Halifax Postal Plant. This is further supported by the various racks and carts identified by the safety officer in his direction. Those racks and carts, which are used throughout the postal plant, were not involved in the actual refusal to work. In my opinion, the safety officer decided to identify them in the direction in order to resolve the issue of safety shoes in general. This is contrary to the numerous decisions of the Canada Labour Relations Board which I fully support and which have clearly established that the right to refuse to work cannot and should not be used to resolve ongoing differences and problems of this nature.

I do believe the safety officer when he says that he is quite familiar with the operations taking place at Canada Post and that many of those operations present hazards to employees. At the risk of repeating myself, I have said on numerous occasions in previous decisions that, as a Regional Safety Officer acting under section 146 of the Code, I cannot look at whether the safety officer could have acted under another provision of the Code to resolve safety and health problems. I can only look at the direction that was given following the investigation of the safety officer and vary, rescind or confirm that direction only.

For all the above reasons, I find that Ms. Vandersteen was not in a situation of danger when she exercised her right to refuse to work and neither was she when the safety officer investigated. It is my decision therefore to rescind the direction given on May 7, 1993 by safety officer Robert Muzzerall to Canada Post Corporation.

Decision issued this 30th day of August, 1993

Serge Cadieux
Regional Safety Officer