Decision No.: 94-008

Applicant: Canada Post Corporation/Winnipeg

Respondent: William M. Tamre and CUPW

Mr. Tamre had refused to unload closed top freight containers which are used by Air Canada to transport various types of mail receptacles. Safety officer Lewis Weber investigated into the refusal and upheld it. However, the safety officer did not decide the issue of danger and proceeded to give a direction under subsection 145(1) of the Code. The basis for the direction is that the closed top container is considered a confined space and it would be unsafe to handle the materials in it.

Upon review, the Regional Safety Officer found that in a refusal to work situation, the safety officer is required to, firstly, decide the issue of danger and secondly, to inform the employer and the employee of the decision. In the Report that he submitted subsequently, the safety officer stated that he felt that a danger existed to the employee. The Regional Safety Officer consequently rescinded the direction because the safety officer was bound to give a direction under subsection 145(2) of the Code. The Regional Safety Officer also looked at the facts of the case and concluded that no danger existed on the day of the refusal to work to the employee.

Decision No. 94-008

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 Winnipeg, Manitoba Represented by: Phillip M. Dempsey, Counsel
Respondent:	William E. Tamre Mail Dispatcher Represented by: Jeff Benny Canadian Union of Postal Workers (CUPW) National
Mis en Cause:	Lewis Weber Safety Officer Human Resources Development Canada
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada

An oral hearing was held on June 21, 1994 in Winnipeg, Manitoba. Although the respondent's representative had been duly informed of the hearing, neither he nor Mr. Tamre attended the hearing.

Background

On November 17, 1993, safety officer Lewis Weber responded to a refusal to work at Canada Post Corporation, Winnipeg Mail Processing Plant. Mr. Tamre had refused to unload a closed top[1] LD3-45 Air Canada freight container. The refusal to work constituted a continued refusal as Mr. Tamre had refused to unload identical containers of various types of mail receptacles on the same day and on the previous day. Mr. Tamre alleged that it was unsafe for him to unload the containers "due to the limited configuration and loading of contents."

The safety officer attended the work site at 2325 hours that day and carried out his investigation in the absence of the refusing employee. The employee had left work, his shift being completed. The safety officer took pictures of various containers, inspected the containers and interviewed

[1] A reference, in the instant case, to a closed top container is a reference to a closed top container with a hard top as opposed to a closed top container with a soft top.

employer and employee representatives at the site. On the basis of the information gathered during his investigation, the safety officer concluded that the closed top container was a confined space subject to the requirements of the Canada Occupational Safety and Health Regulations (the "Regulations"). A direction (see APPENDIX A) was given under subsection 145(1) of the Canada Labour Code, Part II as a result of the refusal to work. All three items of the direction are appealed by the employer.

Submission of the Employer

Several issues were raised and discussed at length by the employer respecting the investigation of the safety officer and the conclusions reached. The issues were reported in the following order:

> Issue #1 - Whether the Corporation was in contravention of Section 125 (p)(q) of the Code and Sections 14.46 14.47(b) and 14.49(2)(f) of the COSH regulations?
>
> Issue #2 - Whether the closed top container LD3-45 is a confined space pursuant to Section 11.1 of the COSH regulations?
>
> Issue #3 - Whether the Corporation was in compliance with the Code prior to and on the date of the Directions of November 18 and December 8, 1993?
>
> Issue #4 - EXISTENCE OF DANGER
>
> Issue #5 - Whether the Safety Officer Direction pursuant to section 145(1) was properly issued?

Suffice it to say that the Corporation went to great lengths to show that it had not at any time contravened the law. It made the point that the said container is not a confined space as envisaged by the Regulations, that there existed no immediate danger to Mr. Tamre on the day of the refusal or at any other time for that matter, that the direction of the safety officer was not issued under the proper provision of the Code, and finally, that in terms of procedures and training, Mr. Tamre was aware of the existence of the procedures for unloading the containers and that he had been given training in those procedures. In summary, the direction of the safety officer should not stand as it has no basis in law and it is not supported by the facts.

Decision

I have heard the testimony of the safety officer in this matter and, after considering the argument of the Corporation, I have come to the conclusion that the Corporation is right on most counts.

The investigation of the safety officer was flawed from the very beginning. For example, the safety officer was called in to investigate a refusal to work but failed to decide the issue of danger as required by the Canada Labour Code, Part II (the Code). The procedure to be followed in a refusal to work situation is found at section 129 of the Code. It provides as follows:

129. (1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.

(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not

> (a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or
> (b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),

and he shall forthwith notify the employer and the employee of his decision.

(3) Prior to the investigation and decision of a safety officer under this section, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternate work and shall not assign any other employee to use or operate the machine or thing or to work in that place unless that other employee has been advised of the refusal of the employee concerned.

(4) Where a safety officer decides that the use or operation of a machine or thing constitutes a danger to an employee or that a condition exists in a place that constitutes a danger to an employee, the officer shall give such direction under subsection 145(2) as the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing or to work in that place until the direction is complied with or until it is varied or rescinded under this Part.

(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board.

Clearly then, the first priority of the safety officer when completing his investigation is, in accordance with subsection (2) above, to decide whether danger exists and notify the employer and employee of his decision. The decision of the safety officer can be either that danger exists or that danger does not exist. In each case, different responsibilities flow from the decision.

Where the safety officer decides that danger exists, he is required to give a direction under subsection 145(2) above to protect the employee from the danger. In the event that the safety officer finds that danger does not exist, he must notify the employee of his decision in order to ascertain that the employee's right to appeal that decision to the Canada Labour Relations Board is protected.

In the instant case, the safety officer gave a direction under subsection 145(1) of the Code. The only way that the safety officer would be authorized to do this is, firstly, by deciding that no danger exists and, secondly, by notifying the employee of his decision who may require the safety officer to refer his decision of no danger to the Board. Having satisfied those statutory requirements, the safety officer could then proceed further with his investigation to determine whether the employer was in breach of other provisions of the Code and the pursuant Regulations. There is no evidence on record showing that the safety officer satisfied those requirements.

However, approximately one month later, the safety officer prepared an **Investigation Report and Decision** for my investigation. In that Report, under the heading Decision of the Safety Officer, the safety officer stated the following:

> "Pursuant to ss. 129(2), the decision of the Safety Officer is that a condition exists that constitute a danger to the employee. This is based upon the facts of the case and the definition of danger in the Code."

In the covering letter to the above noted Report, the safety officer wrote the following:

> "A continued refusal to work at the Canada Post Corporation, Mail processing Plant, occurred on November 17/18, 1993.
>
> This resulted in the Safety Officer, Lewis Weber, Winnipeg West Districk Office, upholding the continued refusal to work and the issue of a Direction to the employer, Canada Post Corporation."

It would appear clear from the above reported statements that the safety officer found that danger existed to the refusing employee and gave the employer a direction to protect the employee from the danger. However, there are glaring contradictions in the evidence submitted by the safety officer respecting this issue. For example, in the same letter, the safety officer states the following:

> "It should be noted that the final paragraph of the Direction makes reference to subsection 145(1) and not 145(2). The Safety Officer examined the work situation. It was considered that the confined space itself did not in itself present a hazard. It was found that it was the procedure for material handling within the restricted limits of the container which presented the hazard...."

I prefer not to attempt to explain the safety officer's rationale above. Rather, it is important to determine whether the direction given is founded in law and on the facts.

The safety officer acknowledged that he never saw the actual closed top container which was the subject of the refusal nor its contents. I understand that the closed top container that was the subject of the refusal to work had been emptied by other employees. The closed top containers inspected by the safety officer were not containers subject to a refusal to work. I can only assume, in the absence of evidence to the contrary, that Mr. Tamre was refusing to unload any closed top container.

The safety officer asserted that the LD3-45 closed top container was a confined space as defined in the law. The direction of the safety officer is founded on that premiss. For example, in terms of the closed top container being a confined space, the safety officer stated in his summary report the following:

> **Closed Top Container** - Due to its configuration, dimension and entry access is considered to be a confined space by the complainant. Following examination and review of the definition of the COSH Regulation, Part XI, SS. 11.1, Interpretation, I am of the opinion that the closed top container is a "confined space".

According to the definition of confined space as specified above,

> "confined space" means an enclosed or partially enclosed space that
>
> (a) is not designed for human occupancy except for the purpose of performing work,
> (b) has restricted means of access and egress, and
> (c) may become hazardous to an employee entering it due to
>
> (i) its design, construction, location or atmosphere,
> (ii) the materials or substances in it, or
> (iii) any other condition relating to it;

In my opinion, the closed top container LD3-45 is not a confined space as envisaged by the Regulations. With a large front opening of 55 inches wide and 35 inches high, it cannot be argued that it has a restricted means of access or egress. Furthermore, the employee emptying the container never has to fully enter the container, as one foot remains on the ground at all times. Contrary to what the safety officer reported in his Report, I am told that Mr. Tamre was never required to enter the container. In the absence of the interested parties in the instant case, that statement remains uncontradicted and, in my view, is very reasonable and credible.

The consequences of classifying the LD3-45 as a confined space are far reaching as all other provisions of Part XI (Confined Spaces) of the Regulations would apply. For example, a permit system would have to be established, air sampling would have to conducted at specific intervals, emergency procedures would have to be developed, personal protective equipment would have to be worn, and the list goes on. Evidently, classifying the closed top container LD3-45 as a confined space was a mistake fraught with consequences.

The Corporation has entered into evidence the SAFE-USE PROCEDURES, AIR CONTAINERS. While I agree that the procedures may be insufficiently detailed, they do not amount to a situation constituting a danger as envisaged by the Code. Mr. Tamre had been trained in unloading the containers. Also, this was not a new situation to Mr. Tamre as he has done this job many times before. I suspect that Mr. Tamre has brought to a head a situation which has been lying unresolved for a long time. The right to refuse was not meant to resolve long standing problems of this nature.

Mr. Dempsey has introduced several decisions of the Canada Labour Relations Board and of the Federal Court of Appeal which have clarified the concept of danger as envisaged by the Code. Essentially, the danger must be immediate and serious enough to justify the employee in refusing to work. Furthermore, the safety officer must establish the reality of the danger and its existence at the time of his investigation in a refusal to work situation. Therefore, the decision of the safety officer must be an objective one, which means that it must have been reached after having given regard to the actual facts of the case before him.

In my opinion, there was no danger to Mr.Tamre on the day of the refusal to work and neither when the safety officer investigated. That was the only conclusion that should have been reached by the safety officer following his investigation. Instead, the safety officer ignored his responsibility to decide the issue of danger in accordance with the provisions of the Code and proceeded to give a direction under subsection 145(1) of the Code. I have seen no documents which specifically informed Mr. Tamre of that decision. It would appear that Mr. Tamre may have been deprived of his right, as provided by subsection 129(5) of the Code, to require the safety officer to refer his decision of no danger to the Canada Labour Relations Board.

The Federal Court of Appeal has also clarified the role of the safety officer when investigating into a refusal to work. In Bonfa v. Minister of Employment and Immigration, Court file No. A-138-89, the Honourable Louis Pratte of the Federal Court of Appeal said, in respect of the investigation of the safety officer,

> The function of the safety officer is not to decide whether the employee was right in refusing to work in his workplace but whether, at the time the officer did his investigation, a condition existed in the workplace that constituted a danger to the employee. If the officer concludes that there was a danger, he must give the direction he considers appropriate under s. 145(2).

Assuming that the safety officer effectively concluded that danger existed to Mr. Tamre on the day of the refusal to work, which remains unclear to me at this time because of the glaring contradictions in the evidence submitted, the safety officer was bound under subsection 129(4) of the Code to "give such direction under subsection 145(2) as the officer considers appropriate...". In a refusal to work situation, the only direction that can be given, where the safety officer finds that danger exists, is a direction under subsection 145(2) of the Code.

The direction given by the safety officer is improperly given under the authority of subsection 145(1) of the Code. That latter provision is only used in those situations were a contravention of the Code and/or the Regulations is detected and which does not necessarily constitute a danger.

Subsection 129(4) of the Code places a mandatory statutory requirement on the safety officer to give a direction under subsection 145(2) of the Code when he finds that danger exists, which he obviously failed to do.

The direction given by the safety officer in the instant case has no basis in law and therefore, should not be allowed to stand because the safety officer is not authorized to give a direction under subsection 145(1) of the Code when investigating a refusal to work. After considering the facts of this case, I am also of the opinion that no danger existed to Mr. Tamre on the day of the refusal to work.

For all the above reasons, I HEREBY RESCIND the direction given on November 18, 1993 by safety officer Lewis Weber to Canada Post Corporation.

Decision rendered on August 23, 1994

Serge Cadieux
Regional Safety Officer

APPENDIX A

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On November 17, 1993, the undersigned safety officer conducted an inquiry in the work place operated by Canada Post Corporation, being an employer subject to the Canada Labour Code, Part II, at 266 Graham Avenue, Winnipeg, Manitoba, the said work place being sometimes known as Mail Transfer Section, Winnnipeg Mail Processing Plant.

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

1. (a) paragraph 124 or Part II,
   (b) the Canada Occupational Safety and Health Regulations, 11.2.

   Employees' safety and health in the workplace are not protected when unloading air containers, with closed-top type.

2. (a) Paragraph 125(p) of Part II,
   (b) the Canada Occupational Safety and Health Regulations 14.49(2)(f).

   Work procedures are unsafe when unloading closed-top type air containers, of bags, lettertainers, flats tubs and/or parcels.

3. (a) Paragraph 125(q) of Part II,
   (b) the Canada Occupational Safety and Health Regulations 14.46 and 14.47(b).

   Entry into and work within closed-top type air containers, is unsafe due to configurations for entry into work within the container.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contraventions no later than December 2, 1993.

Issued at Winnipeg, Manitoba, this 18th day of November, 1993.

Lewis Weber