

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: Canadian Pacific Express & Transport Ltd.  
Etobicoke, Ontario  
Represented by: Nancy Kleer, Counsel

Respondent: Transportation and Communication Union  
Represented by: Don O'Brien  
Employee Co-chairperson

Mis en Cause: Robert (Bob) Tomlin  
Safety officer  
Human Resources Development Canada

Before: Serge Cadieux  
Regional Safety Officer  
Human Resources Development Canada

An oral hearing was held on October 5, 1994 in Toronto, Ontario.

Background

On November 17, 1993, safety officer Bob Tomlin carried out a programmed inspection at Canadian Pacific Express & Transport Ltd. (hereafter "CPET") Etobicoke terminal. At this terminal goods that are transported by various trailers or other vehicles are unloaded for the purpose of being re-loaded in different trailers for delivery to their final destination. It is acknowledged that the goods, which are in transit at the terminal in question, are subject to the provisions of the Transportation of Dangerous Goods Act (the "TDG Act").

The safety officer reported that one employee of CPET, a dock worker who had the responsibility to organize the storage on the dock, was also responsible to clean up minor spills of hazardous substances. The safety officer was informed by the dock worker that although he had received training under the TDG Act, he had not received WHMIS<sup>1</sup> (Workplace Hazardous Materials Information System) training. In the summary report that he prepared for this inquiry the safety officer explained that

---

<sup>1</sup> A reference to WHMIS training in the text is a reference to the provisions found at section 10.17 of the Regulations under the heading Employee Education.

"Containers of various hazardous substances are continually coming in and out of the terminal and there is always a number of containers in storage on the dock. He (the dock worker) is provided with Personal Protective Equipment should he require it in handling these containers. There is also absorbent material on hand in the event a spill occurs. The company will argue that it is their policy for employees not to deal with chemical spills but to immediately leave the area and call a contractor such as Canutec (sic) to clean up the spill. During my inspection I observed at least one barrel that was filled with absorbent material that was awaiting removal by a chemical waste firm. I believe that this confirmed to me that the TDG worker or other employee on site was in fact cleaning certain spills up as part of their work function.

The safety officer was of the view that the employee should be trained under Part X (Hazardous Substances) of the Canada Occupational Safety and Health Regulations (the "COSH Regulations"). To ensure that the employer would comply with the regulatory requirements for employee education, the safety officer received from the employer an assurance of voluntary compliance<sup>2</sup> to that effect. During a follow-up inspection which had been initiated following correspondence with the employer who indicated that WHMIS training was not required, the safety officer formally directed the employer under subsection 145(1) of the Canada Labour Code, Part II (the "Code") to stop contravening the following provisions of the Code and the COSH Regulations:

125.(q) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure the safety and health at work of that employee;

Refer: Occupational Safety and Health Regulations subsection 10.17(1)

Every employer shall, in consultation with the safety and health committee or the safety and health representative, if any, develop and implement an employee education program with respect to hazard prevention and control at the work place.

Violation: Employees have not received WHMIS training.

It should also be noted that the summary report of the safety officer made reference to other employees of CPET either handling hazardous substances on a regular basis in the maintenance shop or being exposed to them in their regular work. However, at the hearing, the safety officer acknowledged that the direction was intended to apply strictly to employees working on the dock who were handling containers of dangerous goods.

### Submission of the Employer

The essential submission of the employer is that section 10.1 of the COSH Regulations excludes the handling and transportation of dangerous goods from the application of all the requirements of Part X of the COSH Regulations. Ms. Kleer interprets this exclusion as meaning that while

---

<sup>2</sup> Assurance of voluntary compliance means a formal written assurance by the person in charge of a workplace that a contravention of the Code or Regulations will be corrected.

dangerous goods are being handled and transported in a workplace such as the Etobicoke terminal, it is the provisions of the TDG Act which apply exclusively.

Under that legislation, the employee is trained to handle dangerous goods in a safe manner. The training is tailored to the requirements of the job. A certificate is issued to each employee after the employer is satisfied that the employee successfully completed the training. The training includes emergency measures to be taken in the event of a dangerous occurrence, such as a spill, as specified by paragraph 9.7(g) of the Transportation of Dangerous Goods Regulations (the "TDG Regulations").

In the alternative, should the Regional Safety Officer disagree with that argument, the employer submitted that there is no proof to show that the dock workers handle or are exposed to or likely to handle or be exposed to hazardous substances to the extent that the need to be trained under section 10.17 of the COSH Regulations.

#### Submission for the Employees

Mr. O'Brien submits that while the clean up procedure for spills may call for a specialized chemical waste firm to clean up a spill, what happens in reality is totally different. If there is a spill, the employee having the responsibility for the dangerous goods will look after the spill. If that employee is busy elsewhere or if he is absent on that particular day, then any dock worker can be directed to clean up the spill.

As an example, Mr. O'Brien explained that on one occasion there was a cyanide spill. There were two or three dock workers helping with the cleaning up of the substance. They contacted Canutec who informed the employees to put ash on the substance, which they did without any special precaution and any knowledge of what they were handling. By the time they obtain proper documentation on the product, the spill is usually cleaned up.

Mr. O'Brien also said that employees who normally load freight may be required to handle dangerous goods because they are being bumped out of their regular job. This change of jobs creates a serious problem because those employees must clean up spills and they have not received proper training.

#### Decision

The issue to be decided in the instant case is whether, as specified in the direction, an employee education program is required at Canadian Pacific Express and Transport Ltd.? To answer that question, I must look at the application section of Part X of the COSH Regulations and determine whether that Part is excluded in whole or in part when employees are handling or transporting dangerous goods. Furthermore, in light of the submission of the employer, I must also determine whether the TDG Act, referred to in section 10.1 of the COSH Regulations, applies in lieu of Part X of the COSH Regulations.

Section 10.1 of the COSH Regulations provides as follows:

10.1 This Part does not apply to the transportation or handling of dangerous goods as defined in the Transportation of Dangerous Goods Act.

There is no question in anyone's mind, in the instant case, that the goods which are in transit at the Etobicoke terminal are dangerous goods as defined under the TDG Act. A dangerous good transiting through a workplace is considered, for all practical purposes, to be in transportation until it reaches its final destination. Therefore, all activities carried out during transportation, such as handling or temporary storage of the goods, are directly subject to the TDG Act.

The primary purpose of the TDG Act is to protect the public from the transportation of dangerous goods by various modes such as air, rail, marine and road transport. To that end, the TDG Act provides an internationally recognized identification system that will ensure that the goods reach their final destination well protected and clearly identified during transportation, or while they are being handled for transportation purposes. As intended by Parliament, while the goods are in transportation, they are solely governed by the provisions of the TDG Act.

To achieve its purpose, the TDG Act establishes minimum requirements to be strictly adhered to, such as classification, packaging, labelling, related documentation, inspection, training etc.. Those requirements will ensure the goods do not pose unnecessary risks to the public and also to the environment and to persons involved in the handling or transportation of the goods i.e. in the instant case, employees of CPET.

On the other hand, Part X of the COSH Regulations provides for another type of information system. That system is part and parcel of the right of each employee to know about all the hazards present in the workplace. In fact, Part X of the COSH Regulations incorporates the three key elements of the system of information delivery known as WHMIS i.e. labels, material safety data sheets (MSDS) and the employee education program. Section 10.17 of the COSH Regulations, which provides for the employee education program, establishes the legal framework for programs which provide instruction on hazards and training in work procedures. When employees handle, store or use hazardous substances in the workplace, the employee education program will provide those employees with the means and the necessary information to protect themselves.

The focus of section 10.17 of the COSH Regulations is on the protection of the employee whereas the focus of the TDG Act is on the protection of the public.

The dangerous goods transiting through the workplace, for the purpose of being transported elsewhere, are not intended to be stored, handled or used in that workplace by employees. It follows that an employee does not handle or is not likely to handle, or is not exposed to or is not likely to be exposed to the hazardous substance itself. The employee education program envisaged by section 10.17 of the COSH Regulations emphasizes hazard prevention and control at the workplace with respect to hazardous substances which are to be stored, handled or used in that workplace. **Consequently, Part X of the Regulations does not apply to the handling or transportation of those goods, in transit at the Etobicoke terminal, since the dangerous goods are already subject to the TDG Act and the TDG Regulations.**

However, all other provisions of the Code and the COSH Regulations, which are not specifically excluded, apply. This is so because the Code applies "Notwithstanding any other Act of Parliament or any regulations thereunder (ss.123 (1))". Hence, the two legislations are complementary.

While the two legislations are manifestly complementary, they are also mutually exclusive. It would be most confusing to have two separate legislative schemes apply concurrently to the same situation. In my opinion, Parliament never intended for those two legislations to be competing against each other. Likewise, since the two legislations have different purposes, they should not impede to any extent the application of each other in their own specific area of concern. Thus the exclusion found at section 10.1 of the COSH Regulations is necessary since it clearly delineates the area of responsibility of both legislations.

An employee may handle, on a daily basis, dangerous goods. If the goods are accidentally released from their packaging or their containers, the employee is trained under the TDG Act to deal with those situations. Emergency measures are necessarily incidental to handling and transportation of dangerous goods. The question that comes to mind is whether the TDG Act and the TDG Regulations adequately protect the employee carrying out those activities?

When dangerous goods are transported, or are loaded for that purpose, then the TDG Act apply. However, when the goods enter the workplace, the Canada Labour Code, Part II, being a "Notwithstanding" legislation, applies. While a specific Part of the COSH Regulations, such as Part X, may be excluded for a special purpose, other Parts, which have not been specifically excluded, apply to ensure the protection of the employees at work. For example, Part XII (Safety Materials, Equipment, Devices and Clothing) and Part XV (Hazardous Occurrence Investigation, Recording and Reporting) of the COSH Regulations are not specifically excluded and therefore apply to protect employees at work.

As a case in point, during the cyanide spill that occurred at CPET, Mr. O'Brien reported "There were two or three dock workers helping with the cleaning up of the substance. They contacted Canutec who informed the employees to put ash on the substance, which they did without any special precaution and any knowledge of what they were handling. By the time they obtain proper documentation on the product, the spill is usually cleaned up." At the hearing, the employer indicated that the policy of CPET during a spillage clean up is for unauthorized personnel to be kept at a safe distance. However, the reality, as alleged by Mr. O'Brien, is that dock workers and maintenance employees working as dock workers assist in cleaning up spills without the proper training and equipment, a most unacceptable situation.

Furthermore, the employer indicated that breathing apparatus was available if it was required. However, in reading the Second Edition, EMERGENCY, Response for Dangerous Goods, HAZCHEM Code for fire or spillage control, produced by Transport Canada to deal with dangerous occurrences such as spills, irrespective of their sizes, I note that maximum protection is always indicated during clean ups. For example, as a minimum protection "breathing equipment and protective gloves" are required in all spillage situations. The reference to breathing equipment is defined in that document as a reference to Self Contained Breathing Apparatus (SCBA). Utilization of SCBA is subject to individualized and expert training. The protective

measures prescribed under the TDG Regulations are, in my view, sufficient to protect employees involved in cleaning up spills. If training is lacking or inadequate, it can be addressed by Part XII of the COSH Regulations.

In the absence of evidence to the contrary, I can only conclude that spills were dealt with by qualified employees using, in the prescribed manner, the prescribed protective equipment. Should this not be the case, the safety officer has all the necessary powers under subsection 145(2) of the Code to deal effectively with all situations where the safety and health of employees is put at risk.

For all the above reasons, I HEREBY RESCIND the direction given on February 28, 1994 by safety officer Robert (Bob) Tomlin to Canadian Pacific Express and Transport Ltd.

In obiter, I would add the following comment. I have not dealt specifically with maintenance employees carrying out their regular duties because the investigation of the safety officer was directed primarily at dock workers handling or transporting dangerous goods as defined under the Transportation of Dangerous Goods Act. The safety officer would certainly be justified in investigating further the application of Part X of the Regulations to those employees.

Decision rendered on November 18, 1994

Serge Cadieux  
Regional Safety Officer

SUMMARY OF RSO DECISION

Applicant: Canadian Pacific Express and Transport Ltd (CPET)

Respondent: Transportation and Communication Union (TCU)

Upon inspecting the Etobicoke terminal of CPET where dock workers load and unload dangerous goods as defined under the Transportation of Dangerous Goods Act (TDG Act), a safety officer was informed by a dock worker who had the responsibility to organize the goods on the dock that, although he had received TDG training, he had not received WHMIS training. The safety officer directed CPET under subsection 145(1) of the Code to provide an employee education program as prescribed under section 10.17 of the Canada Occupational Safety and Health Regulations (COSH Regulations).

Upon review, the Regional Safety Officer concluded that dangerous goods in transportation are solely governed by the TDG Act. Dangerous goods that are in transit at a workplace remain under the coverage of the TDG Act as they are considered to be in transportation until they reach their final destination. The RSO found that the exclusion found at section 10.1 of the COSH Regulations applied to the whole Part X. Therefore an employee education program was not required for dock workers handling dangerous goods because these employees are trained under the TDG Act to handle the goods and to respond to emergency situations. The RSO rescinded the direction.