

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: Air Canada
Lester B. Person International Airport
Toronto, Ontario
Represented by:
Mr. Guy Delisle, Solicitor

Interested Party: Canadian Union of Public Employees (CUPE)
Division Health and Safety
Airline Division
Represented by:
Ms. Beverly J. Burns, Solicitor

Mis en cause: Mr. Chris Mattson
Safety Officer
Labour Canada

Before: Mr. Serge Cadieux
Regional Safety Officer

Oral hearings were held, in the instant case, on January 23 and 25, 1992 in Toronto.

Background

The issue of payment of wages for flight attendants involved in safety and health committee matters is not new for the parties before me. This issue has been at the centre of unsuccessful discussions during the negotiations for their collective agreement. The mood was not one of cooperation and, I believe, remains dominated by a sentiment of adversity. No doubt that the frustration of employees and their representatives has culminated in complaints to Labour Canada probably in an attempt to forcefully resolve the matter. As a result, this issue has come to a head on April 12, 1991 when safety officer Chris Mattson responded to a complaint made by the Canadian Union of Public Employees (CUPE), on behalf of several employees who contended they were being penalized financially and otherwise, for being members of safety and health committees.

In support of his decision in this matter, the safety officer prepared a summary which was submitted for the hearing. The safety officer identifies two areas of concern. The first concern relates to "Air Canada, in some cases, schedules meetings when Flight Attendants come in off a ten (10) hour flight and are not really in shape to attend a meeting. Or, Air Canada sometimes schedules meetings on the Flight Attendant members' day off work." The second concern relates to the payment of wages of committee members involved in committee matters. The statement is made in the summary that "In some locations, Air Canada is paying the Flight Attendant at the flight rate to attend O.S. & H. committee meetings; in other locations, the Flight Attendants are paid at the ground duty rate (the ground duty rate is about one-half of the flight duty rate)."

A direction was given, in writing, on October 17, 1991 to Air Canada respecting the scheduling of safety and health committee meetings and the payment of wages to flight attendants members on these committees. The direction was given under section 145(1) of the Canada Labour Code, Part II and specifies four violations, each of which will be addressed separately in my decision.

Testimonies

Expert witnesses from both sides explained, at the hearing, the flight attendant work scheduling process. I must admit that, I would not do justice to these experts in attempting to summarize this complicated and sophisticated process. However, because the direction covers a large population i.e. all flight attendants who are members of safety and health committees as opposed to specific individuals, I will focus my analysis of this case primarily on the principles involved. Once the principles are laid down, it should be "relatively" easy for the parties to agree on how to proceed in the future.

Flight attendants testified that they encountered serious difficulties in carrying out their role as safety and health committee members. For example, much emphasis was placed on the scheduling of meetings by the employer during days off, on the carrying out of functions as committee members such as periodic work place (aircrafts) inspections during days off as well as during working days, on the amount of work and time required to prepare for meetings, to attend them and to carry out the legislated committee functions under subsection 135(6) of the Code such as handling complaints.

It became evident from the various testimonies given that committee activities were carried out without terms of references or procedures which would assist the committee in fulfilling its mandate.

I was also informed of the employer's policy respecting payment of wages of safety and health committee members. Air Canada, I am led to believe, would unilaterally pay committee members ground duty rate to the dismay of employees, and their representatives, requesting flight time rate. This allegation was disputed by the employer's representative, Mr. Delisle, who stated that "somebody that is displaced is paid the greater of the block hour or of the actual time. Somebody that is on reserve, as Mr. Angle was, gets his guarantee monthly pay. Otherwise, for both situations, the ground rule applies which is consistent entirely with the collective agreement."

In one instance, the manager on a committee at one airport recommended that committee members be paid ground duty pay on an "honour basis". This meant that committee members i.e flight attendants, would only be required to submit a claim for X number of hours worked as a safety and health committee member and this claim would automatically be processed through the system "no questions asked" for payment at ground duty rate. This situation has now escalated to the point where, in another instance, a committee member expects to be paid the maximum flight time rate on the ground that he "could" have been awarded a ¹cycle or other flying time had he not participated in the meeting.

Evidently, the prevailing situation at Air Canada is, to say the least, very tense and confusing. In my opinion, the parties to this review have misunderstood their roles and responsibilities under the Code.

Analysis

In light of the above information and of the direction given by the safety officer, there are three basic issues to be decided in this case. They are:

- I. THE SCHEDULING OF MEETINGS.
- II. THE PAYMENT OF WAGES OF SAFETY AND HEALTH COMMITTEE MEMBERS
 - A) for attending safety and health committee meetings, and
 - B) for carrying out any of his/her functions as a member of the committee.
- III. THE POWER OF THE SAFETY OFFICER TO ORDER PAYMENT OF WAGES RETROACTIVELY.

Each issue will be discussed separately. A decision will be given for each item of the direction further in the document.

I. THE SCHEDULING OF MEETINGS.

The issue of scheduling of meetings is of paramount importance in the instant case. It is the scheduling that will decide the wage that should be paid to flight attendants, members of safety and health committees, based on the work they are assigned to at that moment and the wages they receive to do that work.

Respecting the meetings or the scheduling of meetings of safety and health committees, there are two provisions in the Code which address these points. The first provision is subsection 135(8) of the Code which stipulates, in part:

¹ A pairing or cycle is an active work period in which an employee undertakes two or more flights. The pairings are of one to five days duration.

"(8) A safety and health committee shall meet during regular working hours at least once each month..."

and, the second provision is subsection 135(13) which stipulates:

"(13) Subject to any regulations made pursuant to subsection (11), a safety and health committee may establish its own rules of procedure in respect of the terms of office not exceeding two years of its members, the time, place and frequency of regular meetings of the committee, and such procedures for its operation as it considers advisable." (my underlining)

Subsection 135(8) devolves upon the committee the responsibility to meet once a month during regular working hours. To facilitate this, the Code sets general parameters for committee meetings i.e. during regular working hours and once a month. The use of the word "shall" creates a mandatory requirement on the committee to meet as specified. Any outside interference with this requirement would be illegal and reprehensible. I am of the opinion that this provision does not entitle the employer nor does it make it his/her responsibility to schedule meetings.

The responsibility to schedule meetings falls on the committee as an entity, not on the employer or for that matter, on the committee's individual members. Subsection 135(13) of the Code gives the committee the prerogative, by the use of the word may, to "establish its own rules of procedure in respect of...the time, place and frequency of regular meetings of the committee". Consequently, it is up to the committee to schedule these meetings on a consensual basis. Clearly then, the safety officer erred in ordering the employer to schedule meetings. At best, the safety officer could order the employer to stop interfering, assuming this can be demonstrated, with the committee's responsibility to meet as required.

II. **THE PAYMENT OF WAGES OF SAFETY AND HEALTH COMMITTEE MEMBERS**

A) **For attending safety and health committee meetings**

The underlining principle to resolve this case can be found in a decision issued by the Federal Court of Appeal in Doug.C. Lund and Her Majesty the Queen as Represented by the Treasury Board (A-50-89). The Court interpreted a provision of a collective agreement in which the wording is almost identical to subsection 135(9) of the Code. Chief Justice Frank Iacobucci gave the following reason for his judgement in this case. He said:

"Although we do not entirely agree with the reasoning of the Adjudicator in this matter, we are in agreement with his conclusion that paragraph 24 of the Committees and Representatives Standards TB STD 3-20, which forms part of the Collective Agreement 402/85, is intended to establish an income protection provision for employees who serve on Safety and Health Committees. The first part of paragraph 24 should be read in conjunction with the second part so that the reference to "...any time spent by the member..." in the second part of paragraph 24 must be qualified by the first part dealing

with the entitlement of the employee to be away from work. (my underlining)
Paragraph 24, reads as follows: Members of a safety and health committee are entitled to such time from their work as is necessary to attend meetings or to carry out any other functions as members of the committee, including reasonable meeting preparation time, and any time spent by the member while carrying out any of his or her functions as a member of the committee shall, for the purposes of calculating wages owing to him or her, be deemed to have been spent at work."

The key words here are "income protection" which, I believe, mean that a member of a safety and health committee should not suffer financially for attending safety and health committee matters. Therefore, no loss of pay should be suffered by a committee member for being pulled off, for example a cycle, to attend a meeting. At the end of the cycle, that member should receive at least the same amount of money that member would have received had he/she not attended the meeting. Knowing that a cycle may last from two to five days in some instances, that committee member should receive an amount of money equal to or greater than he/she would normally have at the end of that cycle. I say greater because, in my view, there is nothing under the Code which prevents the employer from reassigning that employee to another cycle or other work in the event it is impossible to return that employee to his/her regular duties within the cycle. Thus, wage protection does not mean that one cannot earn more wages. Obviously, a major impediment to reassignment would be the collective agreement.

If a meeting is held while flight attendants are carrying out ground duty work, then ground duty rate should be paid. However, I understand that ground duty work is not a major part of the normal activities of flight attendants. It is an exception rather than the rule. This, I believe, should be reflected in the scheduling of meetings.

Concerning the scheduling of meetings, which has already been addressed above, subsection 135(8) of the Code stipulates that "A safety and health committee shall meet during regular working hours...". The expression "regular working hours" is difficult to apply in industries of this nature with unconventional working hours. Nonetheless it would be contrary to the spirit of the Code to financially penalize employees working in such industries. I interpret the above expression to mean those hours where the company conducts its business. The business of Air Canada respecting this case is to fly planes. The business of flight attendants is also to fly planes. It therefore makes sense that meetings be scheduled during the flight attendants' monthly scheduled hours of work which, in my view, constitute regular hours of work for flight attendants.

However, managers attending the meetings are only available in a shorter "9 to 5" period, while Air Canada carries on its business beyond those hours. Since managers are also members of the safety and health committee, it would be contrary to the intent of subsection 135(9) of the Code to require these persons to attend meetings on their time off and possibly at their own expenses. In my view, to satisfy the requirement of the legislation, meetings should, as a suggestion, be held during this shorter "9 to 5" period, a period of the day where both sides are normally available. This means that committee meetings can take place during this period any time flight attendants are considered at work, or for that matter, that flight attendants receive wages to be

available for work. Where a meeting takes place during that period of time, the wages paid during this period would be the wages owed to the employee, not some speculative possibility that the member could have earned more wages had he/she flown during that period.

Obviously, there is no restriction on the committee to agreeing on a different schedule. This is particularly true for those circumstances where it is impossible to harmonize the working schedules of committee members.

Clearly then, the parties to this review should agree on a mechanism to decide meeting times and dates. One very good reason for this is that the Code imposes a meeting requirement but does not specify scheduling requirements, as noted above. Evidently, it will be impossible for committee members to agree on such a mechanism unless they establish rules of procedure for the operation of the committee as stipulated under subsection 135(13) of the Code. In fact, this provision goes further than limiting these procedures to "the time, place and frequency of regular meetings of the committee". It proposes to the committee the development of "such procedures for its operation as it considers advisable". I strongly encourage the parties to take advantage of this provision and I invite the safety officer to assist them in this endeavour.

B) For carrying out any of his/her functions as a member of the committee.

Air Canada must pay committee members wages for attending safety and health committee meetings. It must also pay those members the same wages according to subsection 135(9) of the Code "to carry out any of the other functions of a member of the committee" such as those functions stipulated under subsection 135(6) of the Code. Air Canada has been directed by the safety officer to pay committee members flight time rate for carrying out these "committee functions". The employer contends that paying employee members of the safety and health committee the flight time rate would amount to a "windfall bonus for attending these things". I agree with the employer that this is exactly what will happen unless there is a change in attitude on both sides.

First of all, the Code speaks of the committee, not of its individual members. Hence, every time a member of the committee carries out a task, it must do so as a representative of the committee. That means that the member of the committee should be formally authorized by the committee to carry out that activity. Rules of procedure for the operation of the committee would be essential in such instances. Furthermore, there is nothing in the legislation that limits that role of the committee to employee members only. On the contrary, as equal partners charged under the Code with the responsibility of identifying and resolving work place problems, employer members should be just as dedicated and active on the committee as the employee representatives. For example, if an Air Canada employee made a complaint to the committee regarding a safety or health issue, an employer member of the committee could be designated by the committee to act on its behalf, to investigate the complaint and to report back to the committee on the action taken or recommended. I am surprised and somewhat concerned to see how passive employer representatives are on the committee.

Secondly, the "laissez faire" of the employer respecting committee activities is, to say the least, stunning. For example, nowhere does the Code provide committee members with the

entitlement to periodically carry out work place inspections. The fact that employee representatives carry out those inspections is certainly to their credit however, the Code does not provide a mechanism whereby committee members could claim payment of wages for carrying out periodic work place inspections as a committee function, this activity being excluded from the powers of the committee. The same holds true for preparation time to attend a safety and health committee. This activity is not envisaged by the Code. A formal agreement with the employer, Air Canada, would be necessary to cover payment of wages for those activities. Nonetheless, an argument could be made, given the "honour system" in existence that, to this date, the employer members of the safety and health committees have authorized the employee representatives, on behalf of Air Canada, to carry out these activities. This issue is however not before me at this time.

Thirdly, the employer has, on a number of occasions, called meetings on flight attendants days off or at the end of their flight shift. This practice is clearly in contradiction with the intent of the Code which specifies under subsection 135(8) that "A safety and health committee shall meet during regular working hours...". Hence, there is a mandatory requirement for the committee to meet on working time and any interference with this requirement is, as stated above, illegal and reprehensible. Unfortunately, meetings held on days off, or for that matter, any committee activity carried out on a day off, have not been envisaged by the Code. This also means that the Code is an inappropriate vehicle to ensure payment of wages in such cases.

III. THE POWER OF THE SAFETY OFFICER TO ORDER PAYMENT OF WAGES RETROACTIVELY.

This issue will be addressed later directly in the decision.

DECISION

It is obvious from the foregoing that all parties to this review have erred in many instances in their interpretation of the Code in relation to the mandate of the safety and health committee. The pragmatics will consider this as a learning process and get on with their responsibilities under the Code. In order to remedy the situation, the following items of the direction are rectified by taking into consideration the above rationale.

1. The first item of the direction states:

"Air Canada shall pay every Flight Attendant who is a member of a safety and health committee at his/her flight time rate for time spent attending safety and health committee meetings or carrying out any of the other functions of a member of the committee.
(Section 135(9), Part II, C.L.C.)"

This item of the direction must be varied to reflect the wage protection principle outlined above. It should indicate that flight attendants should be paid the wages they would have earned absent taking part in safety and health committee meetings or carrying out other permitted functions as a committee member.

Therefore, I hereby vary the first item of the direction by replacing that paragraph with the following paragraph i.e.

"Air Canada shall pay every flight attendant who is a member of a safety and health committee those wages that the member would have normally earned, in a manner consistent with his/her duties at that time, for time spent attending safety and health committee meetings or carrying out any of the other functions of a member of the committee. (Subsection 135(9), Canada Labour Code, Part II)"

2. The second item of the direction states:

"Air Canada shall schedule and hold safety and health meetings during the scheduled hours of work of every Flight Attendant who is a member of a safety and health committee, with the exceptions of a meeting called regarding an emergency situation or other special circumstances. (Section 135(8), Part II C.L.C.)"

This item of the direction must be rescinded since it is not a responsibility of the employer, Air Canada, to schedule safety and health committee meetings. This responsibility falls upon the committee. Subsection 135(8) of the Code requires the committee to meet during regular working hours once a month. Any outside interference with this requirement would be unacceptable and can be rectified, if necessary, by the safety officer. The Code facilitates the requirement to meet by extending to the committee the prerogative, in accordance with subsection 135(13) of the Code to "establish its own rules of procedure in respect of ...the time, place and frequency of regular meetings of the committee...". Clearly then, one cannot order the employer to substitute himself/herself for the committee. It is for the committee, on a consensual basis, to schedule meetings during regular working hours.

Therefore, for the above reasons, I hereby rescind this second item of the direction.

3. The third item of the direction states:

"Air Canada shall pay every Flight Attendant who is a member of a safety and health committee and who is removed from a cycle to attend a safety and health committee meeting or to carry out any of the other functions of a member of the committee no less wages than what the Flight Attendant would have earned had he/she performed his/her regular duties during the cycle. (Section 135(9), Part II, C.L.C.)"

Taking into consideration what I have already explained earlier, this item of the direction needs no modification. This portion of the direction ensures that the salary of a committee member at the end of the cycle affected would be equal to or greater than it would normally have been. Of course, as far as the Code is concerned, reassignment of the employee is possible unless it results in a financial penalty. Furthermore, the collective agreement may have to be considered in the instant case.

For the above reasons, I hereby confirm this third item of the direction.

4. The fourth and last item of the direction states:

"Air Canada shall pay to every Flight Attendant who is or has been a member of a safety and health committee during the past three years at his/her flight time rate for time spent attending safety and health committee meetings during that period of time. (Section 135(9), Part II, C.L.C.)"

As stated, this item of the direction would give the safety officer the unlimited power to require that any contravention be corrected, in time, from the moment it began. It would give the safety officer retrospective powers. I cannot accept this. It would require far more explicit language in the legislation to justify such a provision. Language similar to that found under section 134 of the Code would be necessary to convince me that the safety officer has the powers inferred to in this portion of the direction.

I need not dwell any longer on this item of the direction because even if it could be argued that those powers existed, one would still have to provide specific details of individuals having been financially penalized for having attended safety and health committee meetings or having carried out other legislated functions of a member of the committee. This information is not available in the instant case.

For all the above reasons, I hereby rescind this fourth item of the direction.

Decision issued, in Ottawa, this 2nd day of April, 1992

Serge Cadieux
Regional Safety Officer