

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: Via Rail Canada Inc.
Winnipeg Maintenance Centre
Winnipeg, Manitoba
Represented by: Ms. Anne Cartier
Assistant General Counsel

Interested Parties: International Brotherhood of Electrical Workers
Local Union 409
Winnipeg, Manitoba
Represented by: Mr. George Woods
Assisted by: Mr. John Merritt, CAW
Rail Division, Local 100

Mis en cause: Mr. W.H. (Bill) Humisky
Safety Officer
Labour Canada

Before: Mr. Serge Cadieux
Regional Safety Officer

An oral hearing was held on March 24, 1992 in Winnipeg, Manitoba.

Background

The events that lead to a refusal to work, on August 29, 1991 by Mr. Harry Finley, a Via Rail Canada Inc. electrician with nearly 20 years experience, have been described in great detail by the parties to the review. In the summary report the safety officer prepared for the hearing, the work that Mr. Finley refused to perform is described as follows:

"As per Appendix G, Mr. Finley was assigned a variety of repairs to various cars. These repairs would require him to get under the cars for certain lengths of time which would put him in a dangerous position. In order to protect himself in this position he wanted the rails aligned away from the main track and a lock placed on the switch to ensure it stayed in that position. As the lock was not in place he refused to do the work under the cars."

The Labour Canada Registration form signed by Mr. Finley regarding his concern for his safety on that day states:

"SWITCH OFF MAIN LINE IS TO BE ALLIGNED AWAY FROM TRACK AND LOCKED BY AGREEMENT 4 ARTICLE 1 THIS WAS NOT CASE AS TOLD TO ME BY FOREMAN." (sic)

Mr. Bill Humisky was the safety officer assigned to investigate the matter. He went to the work site, interviewed witnesses and considered information from the Memo Defect Sheet¹. The safety officer also considered the various procedures used at the Winnipeg Maintenance Centre. These are complex procedures for controlling traffic on the individual tracks. I would certainly not do justice to the expert witnesses that appeared before me in attempting to describe or analyze these procedures. Suffice it to say that the Blue Flag rule² at issue in this case is part and parcel of the Canadian Rail Operating Rules. These Rules are approved by the Minister of Transport under the authority of the Railway Safety Act of 1988. The Rules have been adopted after consulting with the industry and employee representatives.

On the basis of the information gathered during his investigation, the safety officer concluded that Mr. Finley was effectively in danger when working under a car. The direction issued by the safety officer under subsection 145(2) of the Code describes the danger in the following terms:

"Employees are placed in a dangerous position (i.e. effecting repairs under trains) while repairing or maintaining equipment. Employees are not adequately protected by the Blue Flag rule since this does not afford positive protection while the employees are under the trains."

In his summary report, the safety officer noted "Writer (safety officer) questioned Mr. Finley if he was refusing under the Collective Agreement. Complainant respondent he was refusing under the Canada Labour Code but used his Collective Agreement to assure himself that the condition was dangerous. He was questioned if he was refusing as only a Blue Flag was in use. The complainant again responded no he was refusing because the switch was not locked and he was not disputing the Blue Flag (my underlining)." This assertion was also repeated several times by Mr. Finley at the hearing.

The safety officer further noted in his summary that "Management explained how CTC put the train into the station and thus knew the track was occupied. Also Blue Flags were placed at each end of the train for further protection. No derails were along track #6 and this was confirmed by management."

¹ A Memo Defect Sheet is a Via Rail document used only on trains for reporting enroute defects to intermediate repair points.

² Essentially the Blue Flag rule is a rule that requires that a blue flag by day, and in addition a blue light by night or when day signals cannot be plainly seen, be displayed at one end or both end of equipment to indicate that workmen are in the vicinity of such equipment.

The safety officer explained in closing his report that "It was the writers (sic) opinion at this time that a possible dangerous situation existed for the work the complainant was doing."

Preliminary objections

Three objections were formulated at the hearing which must be addressed before proceeding.

The first preliminary objection originates from Mr. Merritt, System Health and Safety, Legislative Coordinator for the Canadian Auto Workers Union (CAW). Mr. Merritt was denied intervenor status by the Regional Safety Officer on the basis that the case before the Regional Safety Officer was a refusal to work exercised by one individual. Thus the Regional Safety Officer had to address the circumstances as they occurred on the day of the refusal and resolve the matter as it applied to Mr. Finley, the refusing employee on that day. Mr. Merritt was concerned with a more general matter i.e. the Blue Flag rule which would affect employees represented by the CAW which are also protected by the rule.

While Mr. Merritt was informed by letter that the interest of the CAW were orbital of those of Mr. Finley, he nevertheless opted to pursue the matter by volunteering written comments to the decision of the Regional Safety Officer to deny him intervenor status. Mr. Merritt was informed that the Regional Safety Officer's decision was final in the instant case and required no further response of him. Nevertheless Mr. Merritt was informed that he could advise Mr. Woods, the official representative of Mr. Finley in this case, which he agreed to do.

The second preliminary objection was raised by Ms. Cartier, counsel for Via Rail Canada Inc.. The objection "is to the effect that the safety officer had no jurisdiction to entertain the request made by Mr. Finley because the complaint did not constitute a refusal to work but an alleged violation of a collective agreement." This information appears on the Labour Canada Refusal to Work Registration form.

In response, I would reply that the Labour Canada Refusal to Work Registration form signed by Mr. Finley is a written acknowledgement by the refusing employee that a refusal to work has been duly exercised under the Canada Labour Code, Part II. The description provided therein is a subjective description of the employee's concern. It need not be an objective analysis of the situation. Such an analysis is the responsibility of the safety officer. Therefore, the fact that Mr. Finley has chosen to describe the danger feared in the instant case by referring to a provision in his collective agreement is quite acceptable and, in my view, does not constitute a refusal to work under or because of a violation of a provision of a collective agreement. Therefore the first preliminary objection of Ms. Cartier is dismissed.

The third preliminary objection raised also by Ms. Cartier on behalf of Via Rail is to the effect that the Minister of Transport has sole and exclusive jurisdiction to determine whether the Blue Flag rule is adequate. Ms. Cartier states that "The authority responsible to determine whether the Blue Flag rule is adequate at the Winnipeg station is the Minister of Transport. The Minister has in fact confirmed the adequacy of rule 26 by issuing revised C.R.O.R. rules on January 26, 1990. The Safety Officer had no jurisdiction to determine that the Blue Flag rule was inadequate. Consequently, our second preliminary objection should be granted and the directive annulled."

I would also respond to this objection by referring Ms. Cartier to subsection 123(1) of the Code which stipulates the following:

"123. (1) Notwithstanding any other Act of Parliament or any regulations thereunder, this Part applies to and in respect of employment

(a) on or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in the Yukon Territory or Northwest Territories; and"

In relation to the above, paragraph 2(b) of the Code states:

"2. In this Act

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province," (my underlining)

Clearly then, the Minister of Labour has exclusive jurisdiction over safety and health matters affecting employees under federal jurisdiction, including railway employees, unless it is specifically provided in the Railway Safety Act that this Act would supersede any other Acts of Parliament, including the Canada Labour Code, Part II. No evidence to this effect has been submitted before me at the hearing.

I am nevertheless of the view that the procedure outlined in the Railway Safety Act i.e the Blue Flag rule, may apply equally to those situations not covered by the Canada Labour Code and the pursuant Regulations as long as the procedure does not contradict the provisions of the Code. This, I believe, is consistent with and further enhances the purpose of the Code which is to prevent accidents and injuries at work. From this perspective, both legislations can coexist and complement each other.

Furthermore, the right to refuse has been entrenched in the Code as an emergency measure and can be exercised by all employees under federal jurisdiction. The case before me concerns the right of an employee to refuse to work in a situation of perceived danger. The safety officer is empowered under the Code to intervene as necessary. Whenever a safety officer is notified of a refusal, he/she must investigate the matter forthwith. If danger is detected, there is mandatory requirement on the safety officer to issue directions to rectify the situation. Also, because danger is under consideration, the safety officer has the necessary authority to address and correct if necessary, under subsection 129(4) of the Code, any situation covered by the Blue Flag rule that may affect the safety and health of an employee at work.

Therefore, the Code supersedes the Railway Safety Act for safety and health matters. Consequently, the second preliminary objection of Via Rail is dismissed.

Decision

The issue to be decided in this case is whether there existed on August 29, 1991 a danger to Mr. Finley, as defined under the Code, that would justify the issuance of a direction to Via Rail Canada Inc. to protect Mr. Finley from the danger. In my view, there was no such danger and consequently, the direction should be rescinded for the following reasons.

Mr. Finley is an electrician with several years of experience with Via Rail Canada Inc. Mr. Finley has performed the same tasks he was to do on the day of his refusal over and over without ever experiencing any serious incident. While it is evident that Mr. Finley is concerned that an accident could occur while he is under a car performing specific tasks, there was nothing different on August 29, 1991 than on any other day. The speculative possibility that a runaway or misrouted train could come into contact with the car he is working on does not constitute a danger as defined under the Code. For danger, as defined under the Code to exist, a hazard or condition that is likely to cause injury without warning must exist at the time the employee refuses and also at the time the safety officer investigates the refusal. Hence the risk of injury must be so acute that unless measures are taken right away to protect the refusing employee, it is likely he/she will be injured.

Those conditions did not exist on August 29, 1991. Furthermore, the safety officer's conclusion following his investigation that a "possible dangerous situation existed" is insufficient to justify a finding of danger as defined under the Code. The danger must be real and present at the time of the safety officer's investigation. Thus the safety officer's investigation must be objective and consider the reality of the situation.

Obviously, this does not mean that danger in the broader sense does not exist. There are risks in working under a train. Mr. Finley and the union representatives present at the hearing expressed concerns that are not being addressed at their satisfaction. Notwithstanding that management is aware that a car is being worked on and that the Rail Traffic controller is routing other cars accordingly, notwithstanding that a blue flag by day and a blue light by night are positioned to advise that work is being done in the vicinity, there does exist a possibility, albeit remote, that a serious accident could occur. Given the ease with which the track, where work is being carried out, could be secured, I am surprised and somewhat concerned of Via Rail's insensitivity towards the request of the railway employees. A positive gesture would go a long way in reassuring employees that their work place is safe. This would certainly foster a positive attitude in the rail industry.

For all the above reasons, I hereby rescind the direction given on the 30th day of August 1991 by safety officer W.H.(Bill) Humisky to Via Rail Canada Inc.

Decision issued in Ottawa this 1st day of May 1992.

Serge Cadieux
Regional Safety Officer