

Canada Labour Code
Part II
Occupational Health and Safety

Canadian Pacific Railway Company
Applicant

and

Canadian Auto Workers (CAW)
Respondent

Decision No.: 06-003 (S)
January 30, 2006

This request for a stay was heard by Appeals Officer Douglas Malanka on January 26, 2006. The decision was rendered on the same day.

For the applicant

Bob Tully, Mechanical Services Safety Specialist, Canadian Pacific Railway

For the respondent

Jim Wilson, National Health and Safety Coordinator, Canadian Auto Workers, (CAW) local 101
Mario Galli, Co-chairman employee representative of the work place health and safety committee

Health and safety officer

Todd Campbell
Human Resources and Skills Development Canada
Labour Program, Vancouver, British Columbia

- [1] This decision concerns the request for a stay in respect of the third item of the direction that health and safety officer (HSO) Todd Campbell issued to Canadian Pacific Railway (CPR) on November 28, 2005, under paragraph 145(1)(a) and (b) of the *Canada Labour Code*, Part II (the Code). HSO Campbell issued the direction following his investigation of an accident in the CP Rail rail yard in Port Coquitlam that resulted in the death of Dennis Sokoliuk, a Labourer/Switchman employed by CPR.

[2] Item 3 of the direction that HSO Campbell issued to CPR reads as follows:

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(1)

On 10 January, 2005, the undersigned health and safety officer conducted an investigation into the workplace fatality of Dennis Sokoliuk, a Labourer / Switchman employed by Canadian Pacific Railway Company, an employer subject to the *Canada Labour Code*, at the rail yard located at 1250 Lougheed Highway, Port Coquitlam B.C. a work place operated by the employer.

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code* Part II, have been contravened:

.....

3. Section 124 of the Canada Labour Code Part II, (directional terms)

The employer failed to ensure that the health and safety of employees performing Switchman duties, is protected, by training these employees to use imprecise terms such as “forward”, “backward”, “ahead”, and “back”, to indicate the direction of railcar movement requested from the Locomotive Operator. Given that the meaning of these terms depends on the orientation of the locomotive, which may change over time, and which may not be readily visible to the Switchman, the Switchman’s instruction may be misinterpreted as having the opposite meaning by the Locomotive Operator.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than January 31, 2006.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

[3] A telephone conference call to hear arguments for the stay was held on January 26, 2006, with both parties and the health and safety officer in attendance.

[4] Prior to the telephone conference call, B. Tully submitted to the Appeals Officer written reasons in support of his request for a stay of direction. In his submission, he referred indirectly to the *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, Date: 1987-03-05, Docket: 19609 and made the following arguments:

- based on the merits of the case, there is a serious question to be tried. What is at issue is the health and safety of all CPR employees who perform switching operations with railway equipment at our mechanical facilities;
- irreparable harm will flow to CPR if the stay is not granted. Following the direction will force CPR to operate in a manner that is inconsistent with the *Canadian Railway Operating Rules (CROR)* and will place all of our employees at undue risk. Rule 12.2 of the CROR requires that direction is to be given in relation to the front of the controlling locomotive when a radio is being used to control a switching movement. In addition, by changing directional terms, this would create confusion for employees to the detriment of CPR and CPR operations would be seriously curtailed in their efficiency, and, above all, the safety of its employees; and
- If CPR follows item 3 of HSO Campbell's direction, this would cause confusion for CPR employees to the detriment of their safety and CPR's efficiency of operations. CPR and its employees will suffer the greatest harm if the stay is not granted.

[5] During the telephone conference call, HSO Campbell indicated that he did not oppose a stay to item three of his direction as there was no clear evidence that the situation described in item three of his direction was a direct cause of the accident. In addition, he agreed with parties that compliance with item 3 of the direction could cause confusion for CPR employees if the direction was subsequently rescinded or varied by an Appeals Officer.

[6] In order to ensure that the health and safety of employees would be protected in the interim, should the stay be granted, Mr. Tulley agreed that CPR would be in compliance with items one and two of the direction by January 31, 2006, the compliance date specified in the direction. Items one and two of the direction read as follows:

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(1)

On 10 January, 2005, the undersigned health and safety officer conducted an investigation into the workplace fatality of Dennis Sokoliuk, a Labourer / Switchman employed by Canadian Pacific Railway Company, an employer subject to the *Canada Labour Code*, at the rail yard located at 1250 Lougheed Highway, Port Coquitlam B.C. a work place operated by the employer.

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code* Part II, have been contravened:

1. Section 124 of the *Canada Labour Code* Part II, (training / assessment)

The employer failed to ensure that the health and safety of employees performing Switchman duties, who have not performed these duties for a significant period of time, is protected, by failing to establish the acceptable period between formal

retraining of these employees, including an objective assessment of their ability to safely perform these duties.

2. Section 124 of the *Canada Labour Code* Part II, (physician's report)

The employer failed to ensure that the health and safety of employees returning to work following a medical leave, is protected, by not abiding by, or seeking clarification of, a physician's negative assessment of the employee's ability to return to work, as indicated on the employer provided **Medical Report to be Completed by the Treating Physician**.

....

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than January 31, 2006.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

[7] The issue in this case is whether or not to grant a stay of direction pursuant to subsection 146(2) which reads as follows:

146(2) Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

[8] For the following reasons, a conditional stay is granted until such time that an Appeals Officer hears and decides on CPR's appeal of item three of the direction:

1. the agreement of the parties and HSO Campbell that irreparable harm could come to CPR employees should item three of the direction be complied with before the item is finally reviewed and decided by an Appeals Officer;
2. HSO Campbell's advice that the issue of communication dealt with in item three of the direction was not a significant factor in the accident that resulted in the death of Mr. Sokoliuk; and
3. CPR's agreement that they will be in conformity with items one and two of the direction by January 31, 2006, the date specified in the direction for compliance.

[9] The stay is conditional on CPR's compliance with items one and two of the direction by January 31, 2006.

[10] In this regard, the Appeals Officer relies on HSO Campbell for monitoring CPR's compliance with the condition of stay and for taking any action he deems necessary and appropriate should circumstances change during the stay that adversely affects the health and safety of affected employees.

Douglas Malanka
Appeals Officer