

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: Mr. Mike Milcik
Canadian Airlines International Ltd.
Represented by: Mr. Harold C. Lehrer

Interested party: The Attorney General of Canada
Department of Justice Canada
Represented by: Mr. Raymond Piché and
Ms. Nadine Perron

Mis-en-cause: Denis Caron
Safety Officer
Human Resources Development Canada

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

A hearing was held on June 27 and 28, 1995 and September 16, 1995 in Montreal, Quebec.

Intervention of the Attorney General of Canada

The Attorney General of Canada sought leave to intervene in the hearing in this case. The Attorney General of Canada argued that since it was possible that no party would intervene in support of the said directions, he had all the necessary interest in arguing that the impugned directions were consistent with Part II of the Canada Labour Code (hereinafter the Code). The Attorney General of Canada was therefore authorized to intervene.

Background

The facts

On January 21, 1995, a work accident that caused the death of three employees of an employer covered by the Code, namely, the airline Canadian Airlines International Ltd. (hereinafter Canadian), occurred at Mirabel International Airport.

This accident occurred while three employees of Canadian and their fellow workers were deicing¹ a Boeing 747-400 aircraft belonging to the national airline Royal Air Maroc (hereinafter called RAM). The accident happened when the RAM aircraft began to move while deicing was still in progress. As result, the aircraft's rear stabilizers struck the hydraulic booms that were supporting the buckets, thus overturning the two trucks performing the deicing. The three employees of Canadian in the buckets were thus thrown to the ground and died as a result of their fall.

The inquiry

On January 21, 1995, Mr. Denis Caron, a safety officer, visited Mirabel International Airport to conduct an inquiry pursuant to the Code. The safety officer reported that "on the evening of the accident, Mr. Mike Milcik was acting as Deicing coordinator "ICEMAN" (Deicing Coordinator), in which capacity he was the alter ego² of the employer, Canadian.

In the course of his inquiry, the safety officer took the following initiatives:

- he analysed the brief description of Mr. Milcik's job;
- he visited the deicing centre three times;
- he questioned Mr. Milcik in the presence of a number of people;
- he gathered various documents, including:
 - the deicing procedure of Canadian;
 - the transcript of the questioning of Pierre Smarlak by Canadian;
 - the transcript of the questioning of Alain Giroux by Canadian; and
 - various statements which he recorded and which were signed by Messrs. Giroux, Smarlak and Milcik.

Relying on Canadian's deicing procedures (paragraphs 3-7-13), the safety officer noted that "the only two types of aircraft that could be de-iced while the engines were running were the Boeing 737-200s and Airbus A320-200s of Canadian".

Based on the preceding, the safety officer expressed the following opinions:

- Mr. Milcik, the "Iceman", was responsible for deicing operations on the evening of the accident;

¹ For information purposes, deicing is a procedure used to melt frost, ice or snow that accumulates on an aircraft or to prevent one or another of the aforementioned from forming or accumulating.

² "Alter ego" is an expression derived from Latin, the literal meaning of which is "another of oneself". An alter ego is a reliable person whom one can ask to do anything in one's place.

- Mr. Milcik was responsible for determining whether deicing was to be performed with the engines running, which responsibility he did not discharge;
- Mr. Milcik was aware that Mr. Smarlak had told the pilot to leave the engines of the Boeing 747-400 running;
- Mr. Milcik did not know whether anyone was really qualified to de-ice the Boeing 747-440 while its engines were running and yet he still let Mr. Smarlak de-ice the aircraft while the engines were running; and
- Mr. Milcik was aware that the background noise created when the engines of a Boeing 747-400 were running could interfere with communication between the truck driver and the bucket.

The direction

In conclusion, the safety officer was of the opinion that Canadian had contravened section 124 of the Code and issued a direction (APPENDIX-A) to Mr. Milcik, whom he considered the alter ego of the employer, Canadian.. The direction was issued by the safety officer on March 15, 1995, pursuant to subsection 145(1) of the Code, for a contravention of section 124 of the Code.

Mr. Milcik requested, through Mr. Lehrer, a review of this direction because he felt aggrieved by the said direction since he was not the employer's representative, let alone its alter ego.

Submission on behalf of the employee

Mr. Lehrer's detailed arguments were entered in the record. He made numerous observations during the hearing in this case. His principal observations concerned the fact that Mr. Milcik was not the employer's representative in this case and his name therefore should never have appeared in the direction.

Mr. Lehrer's first observation concerned Mr. Milcik's job description.

Mr. Lehrer noted that the safety officer relied on a computerized version of the description of the "Iceman" job dated January 22, 1995, one day after the accident. However, in his report of inquiry, the safety officer submitted in evidence a version dated October 1994. Mr. Milcik stated that he had never seen this computerized version, which led Mr. Lehrer to express doubt concerning it because if Mr. Milcik was the employer's representative, then why would he not have seen a copy of the update of this job description?

Mr. Lehrer found it strange that everyone, i.e., personnel both inside and outside Canadian, including the safety officer, considered Mr. Ritchie, Mr. Lopes, Mr. Dirienzo, Mr. Powell and other members of management as representatives of the employer, but not when the direction of March 15, 1995 was issued to Mr. Milcik in his capacity as a representative of the employer. Mr. Lehrer noted that Mr. Milcik never received a copy of any of the correspondence exchanged in this case for the simple reason that Canadian did not consider him a member of management, let alone a representative of the employer. It was the above-mentioned members of the management of Canadian who exchanged correspondence and made the decisions.

Mr. Lehrer also observed that when the safety officer issued directions to the employer or exchanged correspondence with it, he knew very well to whom to send the documents, i.e., to Mr. Lopes or Mr. Ritchie. Moreover, the safety officer rescinded the directions issued to Canadian after reaching an agreement with this company concerning deicing procedures while the engines were running. Mr. Milcik never received a copy of this correspondence exchanged between the representatives of Canadian and the safety officer. In fact, the very logic of this direction escaped Mr. Lehrer: the safety officer issued a direction to Canadian on February 4, 1995, rescinded it on February 23, 1995, and issued another direction to the employer on March 15, 1995 through Mr. Milcik.

Mr. Lehrer submitted that Mr. Milcik's position title was Senior Lead and not "Iceman", as the safety officer claimed. By analogy, a Senior Lead was like a team leader. A team leader could distribute work to employees but was not a member of management and did not represent management. According to Mr. Lehrer, "the dividing line is who sets policy and who implements it". Although Mr. Milcik could, in certain cases, distribute work, he never set policy at Canadian and never had to decide what to do, when to do it or who should do it. According to Mr. Lehrer, it was impossible for a member of the union like Mr. Milcik to also be a member of management. Moreover, during the Coroner's investigation, Mr. Dirienzo, in answer to a question put to him by Mr. Lehrer, identified the managers responsible for deicing operations at Mirabel as being himself, Mr. Lopes and M. Mario Rosa and stated that no one in the union was a member of management.

Moreover, Mr. Lehrer pointed out, there was in fact someone who decided who would be the "Iceman" for a particular evening or even for a particular operation, that is, for the deicing of a particular aircraft. However, it was management, not Mr. Milcik, who decided who would be assigned this work. When the "Iceman" was designated for an operation, or possibly for a given period, he had to follow his employer's instructions by assigning the work as "Iceman" and this policy of assigning work had already been set by management.

Moreover, Mr. Lehrer argued that the safety officer knew that Mr. Ian Lopes, the Duty Manager at Mirabel Airport, was physically present on the evening of the accident and that he was the one who was in charge of the premises, and finally, that Mr. Milcik reported to him. If he wanted to issue a direction to the employer, Canadian, why not address it to Mr. Lopes as he had done on February 4, 1995 or to Mr. Ritchie or Mr. Dirienzo with whom he had held discussions concerning the deicing of aircraft while their engines were running. If he wanted to issue the direction to the employee, he could have done so by issuing a direction to Mr. Milcik, as he had done in the case of Mr. Smarлак.³ There was no doubt, on reading the text of section 124 of the Code, that the safety officer issued the direction to the employer in this case. However, he identified the employee as a representative of the employer and this, argued Mr. Lehrer, made the direction very vague and very ambiguous.

³ A direction was in fact issued to Mr. Smarлак as an employee. This direction was the subject of a request before the regional safety officer and is to be heard at a later date.

Submission of the Attorney General of Canada

The detailed submission of the Attorney General of Canada was entered in the record. Mr. Piché recognized that the direction was in fact addressed to the employer, Canadian. Mr. Piché also recognized that Canadian's official policy was not to de-ice Boeing 747s while their engines were running. However, officials of Canadian at Mirabel began testing the deicing of these aircraft with their engines running and began training personnel to perform this operation even though certain members of Canadian's management considered this dangerous. It appeared, then, that Canadian's official policy, which existed at the same time as the tests were being conducted, created what was, to say the least, an ambiguous situation because, in Mr. Piché's words, "there were no directives or instructions; the manuals were not amended to specify in what circumstances deicing should be done with the engines running".

With regard to Mr. Milcik's position and his designation by the safety officer as a member of management or a representative of the employer, Mr. Piché said the following:

"We have seen from Mr. Milcik's testimony that the position that he occupies is unionized. He is not a member of management. He has no decision-making authority as regards the formulation of policy or the implementation of these policies. Mr. Milcik's role is to carry out decisions. He is the company's spokesperson in dealing with the employees. He is the one who tells the employees what the employer's policies are. His role is limited to ensuring that the employer's directives are carried out by the employees and he has no decision-making power, and in that regard, I fully agree with my colleague, Mr. Lehrer, when he tells you that Mr. Milcik has no management functions, and this seems perfectly clear."

Mr. Piché also confirmed that it is the management of Canadian that designates the "Iceman" and explained that Mr. Milcik is not the employer. The employer, in Mr. Piché's words, "is really Mr. Milcik's employer; moreover, it clearly says so in the direction". In fact, the direction specifically stated that " Mr. Milcik works for Canadian as senior lead". However, Mr. Piché pointed out that the reason why Mr. Milcik's name appeared in the direction was because he was present on the evening of the accident and because he had to oversee the application of the employer's policies. The company's policy was not to de-ice Boeing 747s while their engines were running, and it did not enforce this policy.

Decision

The question I have to answer in this case is the following: was Mr. Milcik acting on behalf of the employer on the evening of the accident and did he therefore have to be identified as such in the direction? The request for a review is based on Mr. Milcik's statement that he is an employee who is not a member of management and that he was not therefore representing the employer on the evening of the accident.

Subsection 122 (1) of the Code defines "employer" as follows:

"employer" means a person who employs one or more employees and includes an employers' organization and any person who acts on behalf of an employer."(emphasis added)

In this case, I cannot review the direction issued to the employer for the simple reason that Canadian formally notified me, through Mr. Dumont, its regular counsel, in a letter of June 14, 1995, that Canadian did not intend to request a review of the directions issued to the employer. Mr. Dumont argued that the direction issued to Mr. Milcik was addressed to him personally and that it was only in this capacity that Mr. Milcik could request a review of the said direction. However, the safety officer stated that he issued the direction to Mr. Milcik in his capacity as employer representative and not in his capacity as an employee.

Consequently, if I conclude that Mr. Milcik is not the employer's representative, I will then have to decide whether to simply strike his name from the direction or identify another person who is a member of management at Canadian and who was present on the evening of the accident. Either way, the direction to the employer will remain.

Moreover, I will not have to determine whether Mr. Milcik was negligent in the performance of his duties as "Iceman" on the evening of the accident. In order to find him negligent, I would also have to be able to issue a new direction to Mr. Milcik, and this power I do not have under section 146 of the Code. The regional safety officer can only confirm, rescind or vary a direction (subsection 146(3)). He cannot issue a new direction in discharging his function.

In the instant case, everyone agrees that Mr. Milcik is not a member of management at Canadian. Mr. Lehrer is insistent on this point. Mr. Piché also accepts this position and recognizes without hesitation that Mr. Milcik is not a member of management and that he has none of the powers that are associated with this function. Mr. Milcik himself says he is an employee and not a member of management. However, Mr. Piché alleges that on the evening of the accident, the safety officer identified Mr. Milcik as the employer's representative because he was the one who was present at the scene of the accident and who was overseeing the application of the policies of Canadian, the employer.

I too believe that Mr. Milcik is not a member of management. Mr. Piché stated that Mr. Milcik was the one who was overseeing the application of Canadian's policies on the evening of the accident. Canadian's official policy was not to de-ice Boeing 747s while their engines were running. The reality, as we saw, was very different because members of management at Canadian allowed deicing tests to be conducted while the engines were running. Moreover, on the evening of the accident, the duty manager was Mr. Lopes who was physically present at the time. The tests that took place at Mirabel were known to and permitted and even authorized by the members of management named earlier. I do not believe that Mr. Milcik had any say whatsoever in these tests. He had to carry out orders.

As to whether Mr. Milcik was acting on behalf of the employer, it is not clear that he was acting in this capacity because even if Mr. Milcik volunteered for the assignment of "Iceman", he was not the one who decided who would be given this assignment. It was management who designated the "Iceman" for a specified period. This means that at certain times, Mr. Milcik could be assigned additional duties and responsibilities, whereas at other times, he resumed his normal duties as Senior Lead. When Mr. Milcik serves as "Iceman", a job which he himself describes as information coordinator for aircraft deicing, he has none of management's usual powers. Mr. Milcik cannot hire, fire, discipline, give orders to or assign specific duties to an employee. In

short, Mr. Milcik does not act on behalf of the employer; he is merely performing the duties assigned to him, just like any other employee. Consequently, Mr. Milcik clearly is not Canadian's alter ego. Moreover, in my view, no employee of Canadian can assume and doff the function of manager at will.

In my opinion, Mr. Milcik is not the person who should be identified in the direction issued to the employer; instead, it should be another member of management. It is not up to me at this stage to determine who in management was responsible, on the evening of the accident, for overseeing the application of Canadian's policy on the deicing of an aircraft whose engines are running. In any case, I do not have to identify a particular person in order for the direction to remain legally valid. Although Canadian is not a natural person, it is an artificial person and as such, is responsible for the actions of its official representatives. Moreover, subsection 35(1) of the Interpretation Act defines the term "person", which is found in the above-cited definition of "employer", as follows:

"person", or any word or expression descriptive of a person, includes a corporation; (emphasis added)

I will send a copy of this decision to Mr. Louis Dumont, counsel for Canadian, so that he is aware of it and can take the measures that he deems appropriate in the circumstances.

For all the above-mentioned reasons, I HEREBY VARY THE PRESENT direction issued by safety officer Denis Caron on March 15, 1995 under subsection 145(1) of the Code, to the employer, Canadian Airlines International Ltd., by deleting from the said direction all references to Mr. Mike Milcik, namely, the following references:

– Reference to Mr. Milcik in the first paragraph of the direction which reads as follows:

"and for whom Mr. Mike Milcik works as Senior Lead of the station attendants"

– Reference to Mr. Milcik in the last paragraph of the direction, first line:

"Mr. Mike Milcik"

It is important to note here that my decision to delete Mr. Milcik's name from the direction because he is not the employer's representative does not relieve him of any liability in the instant case. I am merely recognizing, based on the evidence presented to me, that the safety officer erred in identifying Mr. Milcik as being the employer's representative on the evening of the accident. Mr. Milcik is an employee and his name should not have appeared in the direction issued against the employer.

Decision rendered on December 6, 1995.

Serge Cadieux
Regional Safety Officer

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On February 2, 1995, the undersigned safety officer conducted an inquiry in the workplace operated by Canadian Airlines International Ltd., an employer subject to Part II of the Canada Labour Code and for whom Mr. Mike Milcik works as Senior Lead of the station attendants, this employer being located at 12600, Airport A-1, local 2134, Montreal International Airport, Mirabel, Quebec, JN7 1C9, the said location being sometimes called the Deicing Centre.

The said safety officer is of the opinion that the following provision of Part II of the Canada Labour Code has been contravened:

Section 124. of Part II of the Canada Labour Code (Part II).

The employer, by letting the employees de-ice a B747-400 while its engines were running, did not enforce its own written directives by neglecting to provide the supervision necessary to protect the safety and health of these same employees, with the result that accidents occurred.

CONSEQUENTLY, you are **HEREBY ORDERED**, pursuant to subsection 145(1) of Part II of the Canada Labour Code, to cease all contraventions forthwith.

Issued at LaSalle, this 15th day of March 1995.

Denis Caron
Safety Officer
#1521

TO: Mr. Mike Milcik
Canadian Airlines International Ltd.
12600, Airport A-1, local 2134
Montreal International Airport
Mirabel, Quebec
J7N 1C9

SUMMARY OF THE DECISION OF THE REGIONAL SAFETY OFFICER

Applicant: Mr. Mike Milcik
Interested party: The Attorney General of Canada

KEY WORDS

Management, employee, ICEMAN, deicing while engines running.

PROVISION

Code: 124, 145(1)

SUMMARY

Following an accident that took the life of three employees of Canadian Airlines International Ltd. who were deicing an aircraft belonging to Royal Air Maroc, a safety officer concluded that Canadian had contravened section 124 of the Code. The safety officer issued a direction to the employer through Mr. Mike Milcik who, on the evening of the accident, was the ICEMAN (deicing coordinator). The safety officer identified Mr. Milcik by name in the direction because on the evening of the accident, he was present at the scene of the accident and because he was overseeing the application of Canadian's policies.

Upon review, the regional safety officer (RSO) determined that Mr. Milcik was not a representative of the employer and that his name should not therefore have appeared in the direction to the employer, Canadian. The RSO VARIED the direction by deleting from it all references to Mr. Milcik, but also recognized that this action did not relieve Mr. Milcik of any liability in this case.