Decision No: 97-015

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:	Saint Lawrence and Hudson Railway CP Rail System-Agincourt Yard Represented by: Chris Bartley Agincourt, Ontario
Respondent:	Canadian Auto Workers Union Oshawa, Ontario Represented by: Ron Laughlin Regional Vice President
Mis en cause:	Robert Maklan Safety Officer Human Resources Development Canada
Before:	Doug Malanka Regional Safety Officer

On January 6th, 1997, safety officer Robert Maklan conducted an inquiry into operations at the CP Rail System Diesel Shop located at the Agincourt Yard, Ontario. Following his inquiry, he issued a direction pursuant subsection 145.(1) of the Canada Labour Code (Code), Part II. Item 3 of his direction cited the employer for having contravened subparagraph 147.(a)(iii) of the Code in that an employee had been disciplined for exercising his right to refuse dangerous work. Safety officer Maklan directed the employer to terminate the contravention no later than February 7th, 1997. The direction was sent to the attention of Mr. Chris Bartley, Human Resources Specialist at CP Rail. A copy of the direction is attached as Annex A.

Mr. P. J. Gagne, Manager, Mechanical Operations, CP Rail, Toronto, wrote to safety officer Maklan on February 6th, 1997, to request a review of item 3 of the direction, pursuant to section 146 of the Code. As a result, a hearing was held on June 17, 1997, at Toronto, Ontario to review this part of the direction.

Background:

Safety officer Maklan's report forms part of the file and will not be repeated here. In his testimony at the hearing, he reported that on August 29, 1996, Mr. A. H. Mashregi, a diesel shop electrician, was assigned to service an alternator on a diesel locomotive. In the course of the work, he used

and was exposed to 5 cans of a chemical aerosol product called Contax-N. F. Mr. Mashregi was overcome by the chemical and felt dizzy and sick. His symptoms were consistent with the information on the product's Material Safety Data Sheet which indicated that excess inhalation of vapours could cause respiratory irritation, dizziness, giddiness and nausea. The label on the can also indicated that excess exposure could be harmful or fatal. The safety officer noted that the chemical was used in an area of the locomotive that had limited ventilation.

After being exposed to the Contax N-F, Mr. Mashregi went outside to get some air as directed on the label of the can. At that moment, Mr. Fenech, Assistant Operations Coordinator, saw him and instructed him to apply an inverter to engine 5555. According to safety officer Maklan's testimony, Mr. Mashregi told Mr. Fenech that he was feeling ill and was unable to carry out the work. He subsequently agreed to do the work, but could not complete the job because the smell of urine present in that part of the locomotive exacerbated his illness. Mr. Mashregi then met with Mr. Crosse, Assistant Operations Coordinator, and filed an accident report.

Safety officer Maklan acknowledged that Mr. Mashregi had not actually advised the employer that he was exercising his right to refuse under the Code. However, he felt it would have been dangerous for Mr. Mashregi and other workers if he had continued to work. So despite the fact that Mr. Mashregi was ambiguous in his refusal, safety officer Maklan stated that the employee acted correctly in the situation. He also said that this is consistent with the Canada Labour Relations Board (CLRB) decision no. 757, Malboeuf vs CN (1989).

On September 10, 1996, Mr. Gagne wrote to Mr. Mashregi to inform him that 20 demerit points for insubordination had been placed on his personnel record. The reason given in the letter was that he had failed to carry out the instructions of a supervisor on August 29, 1996, and perform repairs on units 5622 and 5555. On November 15, 1996, Mr. Laughlin wrote to Human Resources Development Canada and complained that CP Rail had disciplined Mr. Mashregi for having exercised his right to refuse. Safety officer Maklan was assigned to the file and met with the parties on January 6, 1997. He issued his direction on January 23, 1997.

Employer Position:

Prior to the hearing, the employer submitted documents explaining the reasons for requesting a review of item 3 of the direction. The documents form part of the file and will not be repeated here.

During the hearing, the employer presented 2 witnesses. They included Mr. J. Fenech and Mr. J. D. (Jim) Eaton, Locomotive Service Specialist.

Mr. Fenech testified that on August 29, 1996, Mr. Mashregi refused three (3) times to perform work he assigned him. He insisted that Mr. Mashregi did not mention to him that he was feeling ill because of the Contax N-F, or that he was refusing, for safety, to do the work. He contended that there was insufficient time for Mr. Mashregi to have completed the work claimed that morning, and therefore doubted that Mr. Mashregi had done the work or had been exposed to the Contax N-F.

Mr. Eaton testified that, following the incident, Mr. Mashregi complained to him that he was being picked on by Mr. Fenech, and indicated that he wanted to go to see his doctor. According to Mr. Eaton, Mr. Mashregi did not mention to him that he had been exposed to Contax N-F, and did not appear to be sick.

Employee Position:

Mr. Mashregi testified on his own behalf and insisted that he had performed the work on the alternator and that he had used 5 cans of Contax N-F in connection with that work. He admitted that he was aware that Contax N-F was hazardous, but clarified he was not aware of the specific hazards related to the chemical until he read the label on the can. He confirmed that he had not received any WHMIS training regarding Contax N-F or training on respiratory personal protection. He said that he was not aware that charcoal respirators were available in the diesel shop.

Following his exposure to the 5 cans of Contax N-F, he felt dizzy, weak and sick. He indicated being particularly stressed when he read on the label that the product could cause death. When he stepped out of the locomotive to get some fresh air, Mr. Fenech instructed him to remove the inverter on the locomotive. Mr. Mashregi testified that he told Mr. Fenech to get someone else to do the work because he was sick.

Mr. Mashregi explained that he did not call a safety officer because he was feeling sick. He further explained that he revised the accident report on September 9, 1996, because it was not completed on August 29, 1996, due to his illness. He asserted that the stress he reported in the initial accident occurrence report related to his feeling and Mr. Fenech repeatedly insisting that he change the inverter. He stated that, he had never refused an assignment in his 27 years of service with the company.

Mr. W. Hardy, a Engineman Helper and assistant co-chair of the health and safety committee, Toronto Yard, testified that WHMIS training in the diesel shop was last provided in the mid-1980s. He said that he was not involved in Mr. Mashregi's refusal, but, given the circumstances, felt that Mr. Mashregi had done the best he could do.

Employer Submission:

In his submission, Mr. Bartley reiterated that neither Mr. Fenech, Mr. Crosse, Mr. Eaton or himself detected anything in Mr. Mashregi's demeanour or actions that suggested that he was ill. He underscored that Mr. Mashregi had not advised anyone that he had just been exposed to Contax N-F or that he was feeling ill. He said that the refusal to do the work was insubordination and not related to safety.

Mr. Bartley argued that in the cases of Paquin v. CAFAS Inc.[1], Lapointe v. Canada Post Corporation[2], Green v. Air Niagara Express Inc.[3], and Laprise v. Robin Hood Multifioods Inc[4] the CLRB ruled that the employee must clarify to the employer that he or she is refusing to work for

1 Paquin v. CAFAS Inc.(1991) - CLRB Decision No. 896.
2 Lapointe v. Canada Post Corporation (1992) - CLRB Decision No.920.
3 Green v. Air Niagara Express Inc (1992) - CLRB Decision No.983.
4 Laprise v. Robin Hood Multifioods Inc. (1990) - CLRB Decision No. 793.

safety reasons, and must identify the safety concern related to the refusal. He further argued that in the Bliss v. Treasury Board[5] case, the Public Service Staff Relations Board established that danger does not include stress or conflicts arising out of human relationships. He added that in the Almeida v. Via Rail Canada[6] case the CLRB ruled that stress arising from interactions with fellow employees may be found normal to the job.

Employee Submission:

Mr Laughlin pointed out that there was no evidence to show that Mr. Mashregi did not service the alternator on August 29, 1996. He reiterated that the harassment Mr. Mashregi reported to Mr. Eaton, and reported in the initial accident occurrence report, related to the fact that Mr. Mashregi was feeling ill. He noted that no-one from the health and safety committee was present during the completion of the accident report by Mr. Crosse. He contended that Mr. Mashregi did not call in a safety officer because he was ill and confused. He said that the employer should have called for a safety officer.

Decision:

Subparagraph 147(a)(iii)[7] of the Code prohibits an employer from taking disciplinary action against an employee who has acted in accordance with this Part. Given Mr. Gagne's letter to Mr. Mashregi on September 10, 1996, informing him of 20 demerits points, the question of whether the employer disciplined the employee is not in dispute.

Therefore the issue that I must decide relative to item 3 of safety officer Maklan's direction is whether Mr. Mashregi had acted in accordance with Part II of the Code, and, specifically, whether Mr. Mashregi had exercised his right to refuse under the Code.

While there was some commonality in the testimony I heard from the parties in relation to the timing and sequence of events that occurred on August 29, 1996, there was considerable difference between their testimony as to what had actually transpired. As a result, I can only resolve the case by determining the most probable rationalization of the evidence heard.

Taking the events in their order, I am satisfied that Mr. Mashregi was in fact exposed to the 5 cans of Contax N-F. No compelling evidence was presented to me to refute his claim that he had done the work and that he had been exposed to 5 cans of Contax N-F. Mr. Fenech argued that it was impossible to overhaul the alternator in the time that Mr. Mashregi worked on it, but he did not offer any proof as to what Mr. Mashregi did or did not do, or how much Contax N-F was used that morning.

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5 Bliss v. Treasury Board (1987) - PSSRB Decision No. 166-2-18.

6 Almeida v. Via Rail Canada (1990) - CLRB Decision No. 819.

7 Subparagraph 147.(a)(iii) reads:

> **"**147**.** No employer shall
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> (*a*) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part, have worked or take any disciplinary action against or threaten to take any such action against an employee because that employee…
>
> (iii) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part; or…"

I am also satisfied that the exposure to the Contax N-F made Mr. Mashregi ill and stressful. The Material Safety Data Sheet for the Contax N-F, and the testimony of the safety officer, corroborates that exposure to the Contax N-F in a poorly ventilated area would make Mr. Mashregi ill. While the employer's witnesses testified that Mr. Mashregi did not outwardly appear ill, they were not medically trained to confirm their observation and did not see to any testing.

Having considered the evidence, I am satisfied that Mr. Mashregi was unable to do the work because he was ill as a result of the exposure to the Contax N-F. The safety officer reported that, given the nature of work in a diesel shop and Mr. Mashregi's condition, it would have been dangerous for him and other workers if he had continued to work. I am not persuaded that Mr. Mashregi's action was motivated by personal conflict between himself and Mr. Fenech.

With regard to the initial accident occurrence report that does not mention the exposure to Contax N-F or to the refusal, Mr. Mashregi testified that the report was incomplete because he was sick. Mr. Crosse did not testify at the hearing to refute Mr. Mashregi's claim and there is nothing in the documents provided to me to refute the employee's claim. Therefore, I must accept Mr. Mashregi explanation for the absence of such information on the accident investigation form and for wanting later to revise the report. For the same reason I accept Mr. Mashregi's explanation that the harassment and stress referenced in the accident occurrence report related to his illness and Mr. Fenech insistence that he do the work just assigned.

Safety officer Maklan acknowledged in his report that Mr. Mashregi never said that he was refusing to work under the Code because of danger. However, he explained that he believed this was Mr. Mashregi implicit intention when he said that he felt sick and planned to leave early to see his doctor. He said that, given the circumstances, Mr. Mashregi acted properly when he refused.

Mr. Bartley argued that Mr. Mashregi had not in fact exercised his right to refuse because he had not made his intention clear to the employer, or identified the safety concern. He reiterated that the Boards have established this requirement and the fact that stress or harassment cannot constitute a danger under the Code.

While I can appreciate safety officer Maklan's rational for deducing that Mr. Mashregi had implicitly exercised his right to refuse under the Code, I would agree with Mr. Bartley that the employee must make it clear to the employer that he or she is refusing under the Code and indicate the safety concern. In the Lapointe v. Canada Post Corporation case cited by Mr. Bartley, Ms G. Gollelin, CLRB member, wrote in her decision that:

> "The relevant provisions of the Code reveal that it is the report that the employee makes to his employer and to a member of the health and safety committee that triggers the whole process that must lead to the resolution of the problem and that will guarantee him the protection of the Code if warranted. This report is more than a mere administrative detail: it is the concrete expression of the refusal to work because it gives substance to an employee's decision not to work under certain conditions because he believes that a danger exists. This is why section 133(3) provides that making a report is a prerequisite for filing a complaint. The

> Board has repeatedly said that in order for this report to comply with both the spirit and the letter of the Code, it need not be formal and detailed, provided it is clear that the employee is refusing to work for safety reasons."

Since Mr. Mashregi did not explicitly advise his employer that he was exercising his right to refuse under the Code and identify the safety concern, I accept the employer's proposition that Mr. Mashregi's actions, despite his being ill, do not qualify as a refusal under the Code. Therefore, I am satisfied that section 128 of the Code does not apply in this case.

That stated, I must return to the original premise of safety officer Maklan that Mr. Mashregi had acted in accordance with Part II of the Code and should not have been disciplined. In this respect, I note that, according to paragraph 126.1(h)[8], of the Code, Mr. Mashregi is required to report the accident or occurrence that caused him injury to his employer. Section 15.3[9] of the Canada Occupational Safety and Heath Regulations (COSHRs) further specifies that his report to the employer can be made orally or in writing. In my view this was done when Mr. Mashregi informed Mr. Fenech that he was feeling ill and wished to see his doctor. The information was repeated when Mr. Mashregi filed the accident report with Mr. Crosse that identifies the time of the "injury" to be 11:00 hours, and when, on September 10, 1996, Mr. Bartley took a statement from Mr. Mashregi in the presence of Mr. W. Hardy. During this meeting, the employer's report shows clearly that Mr. Mashregi testified that the Contax N-F had make him sick.

Having been informed by an employee of an accident or occurrence, paragraph 125. (c)[10] of the Code requires the employer to investigate, record and report in the manner prescribed, all accidents or occurrences known to them. The prescription found in subsection 15.4(1)[11] of the COSHRs requires the employer, without delay, to appoint a qualified person to investigate the occurrence, to notify the safety and health committee of the occurrence and the name of the person appointed to investigate the occurrence, and to take necessary measures to prevent recurrence.

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8 Paragraph 126.1(h) reads:

"While at work, every employee shall…

(*h*) report in the manner prescribed every accident or other occurrence arising in the course of or in connection with the employee's work that has caused injury to the employee or to any other person; and…"

9 Section 15.3 reads:
"15.3 Where an employee becomes aware of an accident or other occurrence arising in the course of or in connection with the employee's work that has caused or is likely to cause injury to that employee or to any other person, the employee shall, without delay, report the accident or other occurrence to his employer, orally or in writing."

10 Paragraph 125(c) reads:
125**.** Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,…

(*c*) investigate, record and report in the manner and to the authorities as prescribed all accidents, occupational diseases and other hazardous occurrences known to the employer;…

11 Subsection 15.4(1) reads:

"15.4(1) Where an employer becomes aware of an accident, occupational disease or other hazardous occurrence affecting any of his employees in the course of employment, the employer shall, without delay,

(a) appoint a qualified person to carry out an investigation of the hazardous occurrence;
(b) notify the safety and health committee or the safety and health representative, if either exists, of the hazardous occurrence and of the name of the person appointed to investigate it; and
(c) take necessary measures to prevent a recurrence of the hazardous occurrence."

While it could be argued that Mr. Crosse's filing of the 1409 accident report satisfied the first requirement, that a qualified person be appointed to investigate the matter, there is no evidence that an accident investigation was conducted, beyond filling out the 1409 report form. Furthermore, there is no evidence that the safety and health committee was notified or that the employer took necessary measures to prevent a recurrence of the accident.

In addition to these requirements, paragraph 125.(f)[12] of the Code obliges the employer to provide first aid facilities and services as are prescribed. The prescription in subsection 16.2(1)[13] of the COSHRs requires the employer to establish written instructions that provide for the prompt rendering of first aid to an employee for an occupational injury or illness. If such instructions existed at the diesel shop, there was no evidence that they were applied.

When safety officer Maklan investigated the matter on January 6, 1996, some 4 months after Mr. Mashregi's exposure to the Contax N-F, he found that measures had not been taken to prevent recurrence of the accident. He consequently directed the employer, via items #1 and #2 of his direction, to cease the contraventions to the Code specified in his direction. As a result of this, it is clear in this case that employees at the diesel shop would have been better served if the focus of the employer's investigation had been safety and health rather than insubordination.

I further suggest that, had the employer been more diligent with respect to Mr. Mashregi's first aid or medical needs, and had the employer properly investigated the accident, it is unlikely that the question of whether Mr. Mashregi was exercising his right to refuse because he was made ill from the Contax N-F, or whether his actions constituted an implicit refusal would not have arisen.

Taking all of this into account, it is my view that Mr. Mashregi acted in accordance with the Code and was disciplined for having done so. As a result, **I HEREBY VARY** the third item of safety officer Maklan's direction as follows.

The said officer is of the opinion that the following provision of the Canada Labour Code, Part II are being contravened:…

> 3. 147(a)(iii)
> No employer shall
>
> (a) dismiss, suspend, lay off or demote an employee or impose any financial or other penalty on an employee or refuse to pay the employee remuneration in respect of any period of time that the employee would, but for the exercise of his rights under this Part,

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12 Paragraph 125.(f) reads:

125**.** Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,

(*f*) provide such first-aid facilities and health services as are prescribed;…

13 Subsection 16.2(1) reads:

"16.2(1) Every employer shall establish written instructions that provide for the prompt rendering of first aid to an employee for an injury, an occupational disease or an illness."

have worked or take any disciplinary action against or threaten to take such action against an employee because that employee

(iii) has acted in accordance with Part or has sought the enforcement of any of the provisions or this Part.

Mr. Mashregi was disciplined for having acted in accordance with paragraph 126(1)(h) of this Part.

Therefore you are **HEREBY DIRECTED** pursuant to subsection 145(1) of the Canada Labour Code, Part II to terminate the contraventions no later than February 7th, 1997.

Decision rendered October 16, 1997

Doug Malanka
Regional Safety Officer

Decision: 97-015

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Saint Lawrence and Hudson Railway
CP Rail System-Agincourt Yard
Agincourt, Ontario

Respondent: Canadian Auto Workers Union

KEY WORDS

Right to refuse, implicit refusal, first aid, hazardous occurrence investigation, discipline, harassment, WHIMIS, MSDS, training.

PROVISIONS

Code: 125.1(c), 125.1(f) 126.(h), 128, 133, 145.1, 147.(a)(iii)
COSHRS: 15.3, 15.4(1), 16.2(1)

SUMMARY

On January 6th, 1997, a safety officer conducted an inquiry into operations at the CP Rail System Diesel Shop located at the Agincourt Yard, Ontario. Following his inquiry, he issued a direction pursuant subsection 145.(1) of the Canada Labour Code (Code), Part II. Item 3 of his direction cited the employer for having contravened subparagraph 147.(a)(iii) of the Code in that an employee had been disciplined for exercising his right to refuse dangerous work. The safety officer directed the employer to terminate the contravention no later than February 7th, 1997.

The safety officer acknowledged in his report that the employee had not actually advised the employer that he was exercising his right to refuse under the Code. However, he felt it would have been dangerous for the employee and other workers if he had continued to work. So despite the fact that the employee was ambiguous in his refusal, the safety officer held that the employee acted correctly in the situation.

The Regional Safety Officer (RSO) decided that, while he could appreciate the safety officer's rationale for deducing that the employee had tacitly exercised his right to refuse under the Code, he confirmed that, for the right to refuse to apply, the employee must make it clear to the employer that he or she is refusing under the Code and indicate the safety concern.

Notwithstanding this, the RSO decided that the employee had acted properly when he reported to the employer that he been exposed to a chemical aerosol and informed him that he was unable to carry out the new assignment. As such, the employee should not have been disciplined for having acted in accordance with Part II. The RSO **CONFIRMED** that the employer had contravened subparagraph 147.(a)(iii), when he disciplined the employee, but **VARIED** the direction to delete the reference to right to refuse. Decision was rendered on October 8, 1997.