

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146 of the Canada Labour Code,
Part II, of a direction given by a safety officer

Applicant: Air Canada
Montreal International Airport
Dorval, Quebec
Represented by: Louise-Hélène Sénécal

Respondent: International Association of Machinists and
Aerospace Workers (IAM)
Represented by: Denis Audet

Mis-en-cause: Yves Jégou
Safety Officer
Human Resources Development Canada

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

This case was heard on June 17 and November 17, 1998 in Montreal. Mr. Jégou was present at the first hearing into this case. Safety officer Denis Lupien represented the Department's interests at the hearing of November 17, 1998.

Objection concerning the receivability of the request for review of the direction

Mr. Jégou, Mr. Audet, Ms. Sénécal and I held a teleconference on May 6, 1998 to discuss certain points, including the scope of the direction (ANNEX) under appeal. During the conversation, Mr. Jégou raised the issue of the timing of Air Canada's request for review of the direction given to it orally on January 23, 1998. Since Air Canada requested a review on February 23, 1998, the fourteen-day time period provided for by subsection 146(1) of the Canada Labour Code, Part II (hereafter the Code) had expired and, according to Mr. Jégou and Mr. Audet, the request was not receivable.

It was agreed that the regional safety officer would first examine his authority to receive the request for review. I advised the parties of the decision by the Federal Court of Canada, Trial Division, in *Brinks Canada Limited v. Serge Cadieux et al*, file T-959-93. In this decision, the Court ruled that a direction given orally by a safety officer and subsequently confirmed in writing constitutes the same direction. Consequently, the fourteen-day time period applies from the moment

when the direction is issued orally. A hearing was held on June 17, 1998 to deal solely with the regional safety officer's authority to receive the request for review.

The direction and the chronology of events

It is important to note that the safety officer's intervention in this case in the work place of Air Canada at Dorval International Airport followed an initial inspection of baggage tractors used in the work place. After the inspection, a written direction was given to Air Canada. The direction issued at that time is dated March 19, 1997 and states that Air Canada contravened paragraph 125(i) of the Code and subsection 14.9(1) of Part XIV (Materials Handling) of the Canadian Occupational Safety and Health Regulations (hereafter the Regulations). On review, I confirmed this direction.

The safety officer explained that, on January 23, 1998, he had gone to Air Canada's baggage service at Dorval Airport, domestic arrivals, and asked to see Claude de la Sablonnière, operations manager. He spoke with Mr. de la Sablonnière by telephone. The safety officer explained to him that he was there to conduct an inspection and an inquiry regarding the baggage tractors, as a follow-up to the direction he had issued on March 19, 1997 and the regional safety officer's subsequent decision to confirm that direction.

The safety officer explained that he had chosen January 23 for his intervention because there was a snow storm at the airport. He felt it was an appropriate time to verify whether the baggage tractors complied with the Regulations and with the direction issued a few months earlier, especially in view of the weather conditions, which he felt justified the directions.

Mr. de la Sablonnière informed the safety officer that he could not make himself available because of the storm and the many operations resulting from it. Mr. de la Sablonnière then asked Michel Duchesneau, acting manager, to look after the safety officer so that he could conduct his inspection. The safety officer explained to Mr. Duchesneau that he wanted to go around the tarmac¹ to observe the operations and check as many areas as possible where Air Canada employees were providing service. He also asked that a member of the occupational health and safety committee be present. Mr. Audet was eventually designated to accompany the safety officer and Mr. Duchesneau to the baggage sorting area in Air Canada's section of the airport.

A four-wheel drive vehicle was used for travelling around the tarmac. As they went along, the safety officer tried to explain to Mr. Duchesneau that a direction had already been issued regarding the baggage tractors, but the latter quickly answered that he was not familiar with the matter and that, in any event, it was not his responsibility. In response, the safety officer informed Mr. Duchesneau of the reasons for the inspection, i.e. to determine whether the baggage tractors were in compliance with the Regulations and with the regional safety officer's decision on this matter.

The group proceeded with the inspection. The safety officer described the conditions outside as very difficult, as there was a snow storm, with very strong winds and almost zero visibility. The

¹ "Tarmac" refers to the defined area on a aerodrome intended for parking, loading, unloading and/or servicing of aircraft.

going was very difficult even with the four-wheel drive vehicle. The safety officer noticed that baggage tractors were moving about the tarmac without the protection for the employees required by Part XIV of the Regulations. He stated that he had noted the identification number of each non-compliant tractor that had been mentioned in the previously issued direction. He also noticed that other materials handling vehicles that had not been identified in any direction were not in compliance with the Regulations. The direction (ANNEX) issued at that time refers to those six vehicles.

The safety officer acknowledged that there was a great deal of activity inside the truck because Mr. Duchesneau was in constant communication by radio with the employees working in the sorting area and had many problems to solve. When the inspection was completed, the safety officer informed Mr. Duchesneau that he had to issue a direction under subsection 145(1) of the Code. The direction was issued orally for the materials handling vehicles identified in the direction. In response to Ms. Sénécal's question as to which direction he had issued to Mr. Duchesneau, the safety officer replied:

[TRANSLATION] "A direction under 145(1), and I told Mr. Duchesneau that the lift trucks [sic] were not in compliance with the Regulations, as indicated in the direction."

It was not clear at this stage whether the safety officer had told Mr. Duchesneau exactly which equipment the direction pertained to. On cross-examination, the safety officer admitted that he did not remember specifying which equipment would be mentioned in the direction to Mr. Duchesneau.

The safety officer advised Mr. Duchesneau that even though he was not aware of the matter of the baggage tractors and was not familiar with the Regulations, the safety officer was going to issue a written direction to Ms. McCoy, vice-president of operations, with a personal copy to Mr. Duchesneau. The written direction was first translated into English, which caused a significant delay, and then sent by registered mail to Air Canada more than two weeks later. When the direction was received, the fourteen-day time period prescribed by section 146 of the Code had expired. In fact, the official receipt from Canada Post which the safety officer submitted in evidence at the hearing is stamped February 10, 1998, eighteen days after the date of the written direction.

Testimony of Mr. de la Sablonnière and Mr. Duchesneau

I received the testimony of Mr. de la Sablonnière and Mr. Duchesneau, who gave a somewhat different version of the events reported by the safety officer. This testimony is on file and will not be repeated here. However, what stands out from the testimony is Mr. Duchesneau's statement that:

1. the safety officer never advised him of the numbers of the tractors that were covered by the direction; and
2. there was never any question of sending a direction to Ms. McCoy, vice-president.

Decision on the receivability of the request for review of the direction

Ms. Sénécal argued that:

1. Mr. Duchesneau was not acting as the employer's representative when he was assigned to accompany the safety officer, but was only his escort; and
2. the written direction received on February 11, 1998 at Ms. McCoy's offices is different from the oral direction issued on January 23, 1998 and is therefore receivable.

I reject Ms. Sénécal's first argument and accept her second argument for the following reasons.

In my opinion, Mr. Duchesneau was acting on behalf of the employer when he was assigned to accompany the safety officer on his inquiry in the work place of Air Canada. He was identified as an acting manager—clearly a management position—to Air Canada's customers. It was established that Mr. Duchesneau was constantly making decisions affecting Air Canada operations while accompanying the safety officer in the four-wheel drive vehicle. He had to answer questions from employees performing the various operations in various locations and he made decisions as a representative of the employer. As Mr. Audet said, as a representative of the company, Mr. Duchesneau had all the authority associated with his management position. In addition, I do not accept the argument that he did not understand the essence of the oral direction given to him by the safety officer on January 23, 1998, for obvious reasons. Consequently, I reject Ms. Sénécal's first argument.

In *Brinks Canada Limited v. Serge Cadieux et al*, the lawyer representing Brinks argued that the oral direction given by the safety officer to the employer's representative and the written confirmation of that direction, which was sent to the company three months later, were identical. Consequently, I had to deal with the same direction and it was clear that the fourteen-day time period had been exceeded. In the instant case, Ms. Sénécal is alleging the opposite, namely that the written direction received on February 11, 1998 at Ms. McCoy's offices is different from the oral direction issued on January 23, 1998. I accept this argument because the safety officer admitted that he did not remember whether he had specified which tractors would be identified in the direction. In fact, Mr. Jégou practically acknowledged that he had not been specific when he gave the verbal direction to Mr. Duchesneau, which means that Mr. Duchesneau could not know the content of the direction. I feel that it is important, even essential, to clearly state the content of a direction so that the recipient can determine whether he or it is aggrieved by the direction, a condition which must exist for the recipient to exercise the right to request a review under subsection 146(1) of the Code. Even if no other argument were submitted, I would accept the request for review solely on this point because, in my opinion, the written direction differs from the oral direction.

However, I am also of the opinion that a direction given orally to a particular person should be confirmed in writing to that same person and not, as the safety officer did, to a third party, i.e. Ms. McCoy. Ms. McCoy was not personally involved in this matter but nonetheless received a direction for the first time. Consequently, with respect to the direction to Ms. McCoy, the time period for requesting a review of the direction began when she received the direction for the first time.

An oral direction should be confirmed as soon as possible, so as not to adversely affect the recipient's right to appeal the direction. In the instant case, the eighteen days it took to send the confirmation of the oral direction is excessive, in my opinion, and, in addition, the confirmation was sent to the wrong person. There are many problems with the practice of issuing oral directions. For this reason, a direction issued orally must be confirmed in writing as soon as possible, to eliminate the ambiguity inherent in an oral direction and to ensure that it is compliant. It is also essential that the written confirmation be sent to the same person.

For all these reasons, **I receive** the request for review of the written direction as, in light of the preceding facts, it was made at the appropriate time.

Withdrawal of the request for review

At the hearing of November 17, 1998, the parties reached an agreement on the interpretation and application of subsection 14.9(1) of Part XIV (Materials Handling) of the Regulations, with respect to the baggage tractors used by Air Canada. Following this agreement, Ms. Sénécal advised me that she was withdrawing her request for review.

As the regional safety officer in charge of this matter, I hereby confirm that, on November 17, 1998, Air Canada withdrew its request for review of the direction issued on January 30, 1998 under subsection 145(1) of the Code by safety officer Yves Jégou. Consequently, I am no longer seized of this matter. The case is closed.

Decision rendered on November 20, 1998.

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 January 23, 1998, the undersigned safety officer conducted an inquiry in the work place operated by AIR CANADA, being an employer subject to the Canada Labour Code, Part II, at MONTREAL INTERNATIONAL AIRPORT, DORVAL, QUEBEC, the said work place being sometimes known as Air Canada, aircraft service.

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

Paragraph 125(i) of the Canada Labour Code and section 14.9 of the Canada Occupational Safety and Health Regulations, Part XIV

The six (6) motorized materials handling vehicles regularly used outdoors LTD tractors No. 1, 2, 3, 5, 23 and 24 are not fitted with a roof or other structure that will protect the operator from exposure to any weather condition that is likely to be hazardous to the operator's safety or health.

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 20, 1998.

Issued at Montreal, this 30th day of January 1998.

YVES JÉGOU
Safety Officer #1907

TO: AIR CANADA
AIR CANADA, AIRCRAFT SERVICE
MONTREAL INTERNATIONAL AIRPORT
DORVAL, QUEBEC
H4Y 1C3

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Air Canada, Montreal International Airport

Respondent: International Association of Machinists and
Aerospace Workers (IAM)

KEYWORDS

Baggage tractors, materials handling equipment, receivability of the request for review, weather conditions, oral direction, confirmation, written direction, right to appeal.

PROVISIONS

Code: 125(i), 145(1)

Regulations: 14.9(1)

SUMMARY

A safety officer conducted an inspection at Dorval Airport to verify whether the baggage tractors used by Air Canada complied with the Regulations. The safety officer issued an oral direction to a representative of the employer but sent the written confirmation to another person in authority at Air Canada. On review, the employer argued that the written direction differed in content from the oral direction and that, in addition, it was addressed to someone who was not involved in this matter. The regional safety officer (RSO) agreed that the written direction differed from the oral direction and decided that he could receive the request for review in light of that argument. The RSO also noted that written confirmation of the oral direction should be sent to the person who received the oral direction. The RSO received the request for review.

However, at the second hearing into this matter, the parties reached an agreement and Air Canada withdrew its request for review. The RSO closed the case.