

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: Canadian National Railway (Prairie Division)
Represented by: Mr. T.L. Bourgonje
Superintendent

Respondent: Dale Anderson, and
Brotherhood of Locomotive Engineers
Represented by: Scott W. Chamberlain, Counsel

Mis-en-cause: Susanne Manaire
Safety Officer
Transport Canada

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

Background:

On May 25, 2000, Mr. Dale Anderson, a locomotive engineer with Canadian National Railway (CN Rail) refused to operate a locomotive in reverse from Vibank to Kipling, Saskatchewan, on the grounds that it was dangerous to do so. Mr. Anderson's concern was his inability to control the safe movement of the train while having to be seated sideways and/or away from the "desk-top" operating controls to operate the train in reverse. Safety officer Susanne Manaire investigated the refusal to work on May 26, 2000 and ruled that it was possible to operate the train safely in reverse and that Mr. Anderson was not in a situation which constituted a danger under the *Canada Labour Code*, Part II (the Code).

The safety officer however found that CN Rail was in contravention of paragraph 125(t) of the Code and sections 10.5, 10.6 and 10.13 of the *On-Board Trains Occupational Safety and Health Regulations* (the Regulations), those provisions being associated with the problems encountered in operating the train in reverse. The safety officer issued a direction (APPENDIX) under subsection 145(1) of the Code to CN Rail requiring that the company terminate the contraventions immediately. CN Rail requested a review of the direction.

Jurisdictional Issue:

Upon receiving the request to have the direction reviewed and as the Regional Safety Officer seized of the request, I informed the parties, via a teleconference, that I did not have jurisdiction to review the direction issued to CN Rail. The reason for this was that the refusing employee had requested that safety officer Manaire refer her decision of absence of danger to the Canada Industrial Relations Board (the Board), an action that triggered the application of subsection 146(5) of the Code. I confirmed this in a letter dated July 7, 2000, in which I wrote:

The purpose of the teleconference was to bring to the attention of the parties a jurisdictional problem for the Regional Safety Officer (RSO) with regards to the request for review of the direction noted in the subject matter. Subsection 146(5) of the Canada Labour Code, Part II (the Code) appears to prevent subsection 146(1) from applying under the circumstances of this case. These provisions read as follow:

146(1) Any employer, employee or trade union that considers himself or itself aggrieved by any direction issued by any safety officer under this Part may, within fourteen days of the date of the direction, request that the direction be reviewed by a regional safety officer for the region in which the place, machine or thing in respect of which the direction was issued is situated.

146 (5) Subsection (1) does not apply in respect of a direction of a safety officer that is based on a decision of the officer that has been referred to the Board pursuant to subsection 129(5).

I was informed via the safety officer's written INVESTIGATION REPORT AND DECISION (copy attached) that the employee involved in the Right to Refuse Investigation that led to the direction has asked that she refer her decision of "no danger" to the Board. In view of subsection 146(5), I believe that the Regional Safety Officer cannot assume jurisdiction over this matter unless the referral of the safety officer's decision to the Board is withdrawn by the refusing employee.

...

I will remain seized of this matter until the Board hears the case in the eventuality that the employee withdraws his referral. Should this happen, I would ask you to inform me of the withdrawal so that I can proceed with reviewing the direction.

In reply to the above letter, both Mr. Bourgonje and Mr. Chamberlain agreed with my interpretation. The language of subsection 146(5) prohibits the Regional Safety Officer from reviewing the direction issued by the safety officer to CN Rail. As I indicated in the letter, in order to protect the right of appeal of CN Rail, I would remain seized of the matter and reserve my decision until such time that the Board heard and decided the case.

The matter has been heard and a decision issued by the Board on February 5, 2001 under the signature of Mr. J. Paul Lordon, Chairperson. This file must now be closed.

Decision:

Consequently, I am dismissing the request for review of the direction issued under subsection 145(1) of the Code on May 26, 2000 by safety officer Susanne Manaire to CN Rail on the grounds that I have no jurisdiction to review the direction.

Decision issued on March 2, 2001

Serge Cadieux
Regional Safety Officer

APPENDIX

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(1)

On May 26, 2000 the undersigned safety officer conducted an investigation in the work place operated by Canadian National Railway, being an employer subject to the Canada Labour Code, Part II, at Vibank, Saskatchewan.

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

Paragraph 125(t) of Part II and sections 10.5, 10.6, 10.13 of the On Board Trains Occupational Safety and Health Regulations.

The operation of Locomotive 2502 in the reverse prevents the engineer from being able to operate the locomotive safely because the employee is unable to readily access the controls, thereby effecting the employee's ability to control and stop the movement quickly and safely, and absence of ditch lights in the direction of the movement.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1) of the Canada Labour Code, Part II to terminate the contravention immediately.

Issued at Calgary, this 26th day of May, 2000.

Susanne M. Manaire
Safety Officer
3303

To: CANADIAN NATIONAL RAILWAY
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SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: CN Rail, Prairie Division

Respondent: Brotherhood of Locomotive Engineers

KEY WORDS

Locomotive engineer, operation in reverse, lack of jurisdiction to hear case, referral of decision of no danger, direction arising out of decision of no danger.

PROVISIONS

Code: 145(1), 146(1), 146(5)

On-Board Trains OSH Regulations: 10.5, 10.6, 10.13

SUMMARY

A safety officer investigated a refusal to work made by an locomotive engineer working for CN Rail. The employee refused to operate a train in reverse claiming it was dangerous to do so. The safety officer investigated the refusal and concluded it was possible to operate the train in reverse safely. The safety officer therefore found that the refusing employee was not in danger. However the safety officer found that CN rail was in contravention of provisions of the On-Board Trains OSH Regulations in relation to the operation of the train in reverse. On appeal of the direction, the Regional Safety Officer (RSO) concluded that he did not have jurisdiction to review the direction because section 146(5) of the Code prohibited him from doing so since the refusing employee had requested that the safety officer refer her decision to the Canada Industrial Relations Board (Board). The matter was eventually heard and decided by the Board. The RSO then dismissed the case and closed the file.