



CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Canadian National Railway Company
applicant

and

Mr. Ross Tetley, Locomotive Engineer

and

Jim Alexander
health and safety officer
Transport Canada

Decision No. 01-020
August 21, 2001

This case was heard by Doug Malanka, appeals officer, in Thunder Bay, Ontario on May 24, 2001.

Appearances

Mr. Donald Kruk, Counsel
Mr. Earl Taylor, Operations Supervisor, Canadian National Railway (CN)
Mr. James Connor, Engine Service Officer, CN
Mr. George K. Lau, Senior Reliability Specialist, Mechanical, CN
Mr. William English, Director, Risk Management, CN

Mr. Terrence Markewich, Local Chairman, Brotherhood of Locomotive Engineers
Mr. Ross Tetley, Locomotive Engineer, CN
Mr. John Winslow, Health and Safety Committee Representative

- [1] This decision concerns an appeal of a direction by the Canadian National Railway (CN) Company pursuant to subsection 146.(1) of the *Canada Labour Code*, Part II (hereto referred to as the Code or Part II). Following his investigation of a refusal to work by Mr. Ross Tetley, a locomotive engineer with CN, health and safety officer Alexander decided that a danger existed and issued a direction to CN under subsection 145.(2)(a) of the Code. The direction ordered CN to protect any person from danger immediately.
- [2] On October 18, 2000, Mr. Ross Tetley, CN locomotive engineer boarded locomotive CN 5928 on train 861 to transport 150 empty cars from Thunder Bay north to Fort Francis. When he sat down in the operators seat he noticed that the footrest on the ergonomic chair was defective and could not be adjusted down to a level suitable for him. The footrest is attached to the seat post in a fixed position but normally can be raised up or down. He immediately notified the Neebing Yardmaster of the problem and requested to turn the consist on the Wye at Thunder Bay North so that the unit CN 5726 would lead. Instead, Mr. Tetley was ordered to proceed to Neebing. When he arrived at Neebing, he requested that shop staff at Neebing repair the footrest.
- [3] Mr. Earl Taylor, Operations Supervisor, CN, subsequently met Mr. Tetley, at Neebing and investigated his complaint. Mr. Taylor concluded that the faulty footrest was a comfort issue and instructed Mr. Tetley to continue his trip. At this point, Mr. Tetley refused to work under the Code.
- [4] Mr. Taylor advised the joint health and safety committee at Thunder Bay that Mr. Tetley refused to work and asked them to participate in the investigation of his refusal to work. Following the joint investigation, Mr. Taylor decided that a danger did not exist for Mr. Tetley and ordered him to proceed with his trip. Mr. Tetley disagreed and continued his refusal to work. Mr. McConigal later wrote that day that employee committee members D. Adams, D. McConigal and G. Kolodinski agreed that the footrest on locomotive CN 5928 was not operating as designed and concluded that the engineer's seating arrangement on locomotive CN 5928 would place stress on Mr. Tetley's back.
- [5] Mr. Taylor notified health and safety officer Alexander that Mr. Ross Tetley, locomotive engineer, had refused to work. Health and safety officer Alexander investigated the refusal to work the next day in the company of health and safety officers Terry Young of Transport Canada and Jim Fidler of Human Resources Development Canada.
- [6] Health and safety officer Alexander submitted a copy of his report prior to the hearing and later testified. I retain the following from his report and testimony.

- [7] On October 19, 2000, health and safety officer Alexander met with Mr. Tetley, Mr. Taylor, Mr. John Winslow, health and safety representative, and Mr. Dan McConigal, co-chair, occupational health and safety committee. Mr. Tetley complained to health and safety officer Alexander that the defective footrest caused pressure on his lower back and blocked his operation of the throttle and brake controls. He recorded the following in his refusal to work registration form.

“CN unit 5298 eng’s station seat and footrest was causing pressure on my lower back. The position that I was forced to assume blocked the operation of throttle and engine brake controls.”

- [8] Following a short meeting, all proceeded to locomotive CN 5928 to review Mr. Tetley’s concerns. During this time, Mssrs. Tetley and Taylor sat in the operators seat and indicated their point of view to officer Alexander. According to health and safety officer Alexander’s report:

“Mr. Tetley showed how his legs were held up above the seat by the defective footrest and how the locomotive controls were blocked. Mr. Taylor then showed how the seat could be adjusted and the different locations that you could place your feet and stated that “this is just a comfort issue.” Once I was sitting in the seat I attempted to adjust the footrest that was approximately 6 inches from the floor, without any success, because it was out of adjustment. I then tried to move the seat to the farthest limit of its adjustment, but could not find any location where I could sit in the seat and operate the locomotive controls, without interfering and obstructing the operation.”

- [9] Health and safety officer Alexander then tried the seat and decided that a danger under the Code existed. He informed parties of his decision and issued a direction to CN the next day. The direction ordered CN to protect any person from the danger immediately. He wrote the following in his direction which is included as an appendix:

The engineer’s seat footrest on locomotive 5298 was found to be too high, without any further downward adjustment. This prevented Ross Tetley the locomotive operator from having unrestricted access to the locomotive controls; throttle, independent and automatic brakes; this is critical to the safe operation of the train.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145.(2)(a) of the *Canada Labour Code*, Part II, to protect any person from the danger immediately.

- [10] Mr. Taylor, Operations Supervisor, CN, Thunder Bay, testified at the hearing and provided his version of events related to the refusal to work by Mr. Tetley. He stated that Mr. Tetley’s first complaint on October 18 was that the defective footrest caused him back discomfort. He said that Mr. Tetley did not complain that the footrest blocked his access to the

throttle and brake control until the next day when health and safety officer Alexander investigated the refusal to work. Mr. Taylor testified that the speed limit for train 861 was 35 miles per hour.

- [11] During the hearing Mr. Connor, Engine Service Officer, testified on behalf of CN. He explained the different controls on the locomotive and the difference between the independent brake, the emergency brake and the dynamic brake. He indicated that CN currently instructs its operators to use the emergency brake in an emergency because this it is the fastest method for stopping a train. However, on cross examination, he conceded to Mr. Markewich that the position of his hand at the time of the emergency could influence which brake he used when operating a light train (train transporting empty cars). [This matter was raised because Mr. Tetley held that the positioning of his leg resulting from the faulty footrest particularly restricted his use of the independent brake.]
- [12] Mr. George Lau, Senior Mechanical Reliability Specialist, CN testified. He explained the design, construction and use of the operator seat in locomotive CN 5298. He agreed that the defective footrest defeated the ergonomic function of the seat, but held that the defective footwork would not have impeded Mr. Tetley's access to the locomotive controls. At this point, Mr. Kruk led photos and a video to show the proximity of the various locomotive controls to the seat.
- [13] Mr. Tetley testified regarding his version of events. He insisted that he had told Mr. Taylor on October 18 that there was a control issue related to the defective footrest when Mr. Taylor investigated his refusal to work. He reiterated that the defective chair caused his left leg to block the throttle and his left hip to block the independent brake handle. Mr. Markewich submitted photos of Mr. Tetley in the seat to show how his access to the locomotive controls was restricted. On cross examination, Mr. Tetley agreed that the emergency brake is the first method of braking. He also conceded to Mr. Kruk that he could have turned over the control of the train to his conductor if he needed a break.

- [14] The role of an appeals officer following an appeal of a direction of a health and safety officer is stated in subsection 146.1(1) of the Code. Subsection 146.1(1) reads:

146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may

(a) vary, rescind or confirm the decision or direction; and...

[My underline.]

[15] In this case, health and safety officer Alexander decided that the defective footrest in locomotive CN 5928 constituted a danger and directed CN to protect any person from the danger immediately. If I agree that a danger existed, I must confirm or vary the direction that he issued to CN on October 19, 2000. If I decide that a danger did not exist, then I must rescind the direction.

[16] “Danger” is defined at subsection 122.(1) of the Code as follows:

“danger” means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system. [My underline.]

[17] To decide that a danger existed in this case, I must conclude from the evidence that the defective footrest constituted a hazard that could reasonably be expected to cause injury before it could be corrected at the end of the trip. In this regard, I make the following observations.

[18] First, paragraph 125.(1)(t) of the Code requires employers to:

ensure that the machinery, equipment and tools used by the employees in the course of their employment meet prescribed health, safety and ergonomic standards and are safe under all conditions of their intended use;

[19] In the case of on board rail employees, a prescribed ergonomic standard is found in section 10.5 of the *On Board Trains Occupational Safety and Health (OHS) Regulations*. Section 10.5 of the Regulations reads:

10.5 The arrangement and design of dial displays and the controls and general layout and design of the operator’s compartment or position on all self-propelled rolling stock shall not hinder or prevent the operator from operating the rolling stock. [My underline.]

I am therefore satisfied that the defective foot rest constituted a contravention to Part II and the On Board Trains OHS Regulations.

[20] Moreover, there is no question in my mind that the defective footrest diminished the ergonomic fit between Mr. Tetley and the controls of the locomotive and thereby diminished Mr. Tetley’s optimal operating efficiency. This, in my opinion, should have been of paramount concern to Mr. Taylor when he investigated Mr. Taylor’s refusal to work. Instead, Mr. Taylor

focused his attention of how Mr. Tetley could position his feet and body and still control the locomotive. However, this does not establish that the defective footrest constituted a danger.

- [21] Second, I believe in this case that Mr. Tetley initially refused to work because the defective footrest caused pressure on his lower back. While he may have coincidentally argued that the defective footrest affected his access to the controls of the locomotive when he complained to Mr. Taylor, I am not convinced that he specified this as a reason for his refusal to work. If he had, then Mr. McConigal's note of October 18, 2000, regarding the finding of the health and safety committee who investigated Mr. Tetley's refusal to work with Mr. Taylor would have referred to this. Instead, the first official reference to the issue of access to the locomotive controls appeared in the refusal to work registration form that Mr. Tetley completed for health and safety officer Alexander on October 19, 2000.
- [22] Third, during health and safety officer Alexander's investigation of the refusal to work, Mr. Taylor insisted that Mr. Tetley could have shuffled his feet and body around in the seat and achieved an acceptable compromise throughout the trip between his comfort and his effective access to the controls of the locomotive. That is, Mr. Tetley could have disregarded the defective footrest and just repositioned his body and feet as necessary to access the controls. On the other hand, Mr. Tetley rested his feet on the defective footrest and argued that his access to the controls of the locomotive was restricted. It appears from his testimony that health and safety officer Alexander determined that a danger existed on the basis that Mr. Tetley's feet should remain on the footrest.
- [23] No one disputed that the footrest was an integral part of an ergonomic seat and that the ergonomic fit between Mr. Tetley and his position relative to the controls of the locomotive was diminished by the defective footrest. So, Mr. Taylor was incorrect when he characterized it as a comfort issue. However, this does not establish that the footrest constituted a danger.
- [24] Based on the evidence in this case including the photos from both parties and the video tape led by Mr. Kruk, I conclude that Mr. Tetley could have ignored the footrest and repositioned himself in the seat during the trip to achieve adequate access to the controls of the locomotive until the train reached its destination and was repaired. While this would have compromised his ergonomic operation of the locomotive, I do not agree that the defective footrest constituted a hazard that could reasonably be expected to cause injury before it could be corrected at the end of the trip. On that basis, I rescind the direction that health and safety officer Alexander issued to CN on October 20, 2001.

[25] The defective footrest was in contravention of paragraph 125.(1)(*t*) of the Code and section 10.5 of the On Board OHS Regulations and constituted a hazard that a prudent employer/supervisor would have eliminated or reduced immediately or as soon as possible. However, I am not authorized under paragraph 146.1(1)(*b*) of the Code to issue a direction for a contravention and, therefore cannot address the contravention.

Doug Malanka
Appeals Officer

APPENDIX**IN THE MATTER OF THE CANADA LABOUR CODE
PART II - OCCUPATIONAL HEALTH AND SAFETY****DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)**

On October 19th, 2000, the undersigned health and safety officer conducted an investigation following the refusal to work made by Ross Tetley in the work place operated by CN Rail, being an employer subject to the Canada Labour Code, Part II, at Neebing Yard, the said work place being sometimes known as CN Thunder Bay.

The said health and safety officer considers that the use or operation of a machine or thing constitutes a danger to an employee while at work.

The engineer's seat-footrest on locomotive CN 5298 was found to be too high, without any further downward adjustment. This prevented Ross Tetley the locomotive operator from having unrestricted access to the locomotive controls; throttle, independent and automatic brakes; this is critical to the safe operation of the train.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to protect any person from danger immediately.

Issued at Thunder Bay, this 20th day of October 2000.

Jim Alexander
Health and Safety Officer
No. 3300

SUMMARY OF APPEALS OFFICER DECISION

Decision No.: 01-020

Applicant: Canadian National Railway

Employee: Mr. Ross Tetley

KEY WORDS: danger, locomotive seat, ergonomics, locomotive controls, emergency brake, dynamic brake, independent brake, unrestricted access, *On Board Trains Occupational Safety and Health Regulations*.

PROVISIONS:

Code: 122(1), 125.1(f), 128(1), 145(2), 146.(1)
Regulations 10.5

SUMMARY:

A locomotive engineer with Canadian National Railway refused to work and complete a trip because the footrest on his seat was defective. He held that constituted a danger because the defective footrest caused his left leg to block access to the throttle and his left hip to block access to the independent brake handle. The health and safety officer who investigated the refusal to work agreed that the defective footrest created a danger and ordered Canadian National Railway Company to protect any person from the danger immediately.

Following his review, the appeals officer rescinded the direction. He concluded that the defective footrest was in contravention of the Code and the On Board Trains OHS Regulations and constituted a hazard for the locomotive engineer, but was not a danger.