

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: Canada Post Corporation
Represented by: W. Lynd,
Occupational Health Safety & Environment

Respondent: CUPW
Represented by: Mr. D. Knight
2nd Vice President, Vancouver Local

Mis-en-cause: Mr. Todd Campbell
Safety Officer
Human Resources Development Canada

Before: Douglas Malanka
Regional Safety Officer
Human Resources Development Canada

Background:

On July 5th, 2000, safety officer Todd Campbell investigated into the refusal to work of Mr. Ray Hustad, a letter carrier employed by Canada Post Corporation (CPC). According to Mr. Hustad, he refused to work in the 3900 Block of Frances Street in Burnaby, British Columbia, because a resident on Frances Street refused to curtail his hostile dogs and intentionally released them at random times into the neighborhood. He said that the dogs had attacked him on different occasions during the past 2 years. Following his investigation, safety officer Campbell decided that a danger of dog attack existed for Mr. Hustad and ordered CPC to protect any person from the danger immediately. A copy of the direction is attached. On July 24th, 2000, CPC requested, pursuant to section 146 of the Canada Labour Code, Part II, (hereto referred to as the Code or Part II) that the direction be reviewed by a Regional Safety Officer and a hearing was held on August 23, 2000.

Safety Officer:

Safety officer Campbell's written report concerning his investigation was distributed to parties and will not be repeated here. However, I retain the following from his Report and testimony at the hearing.

Safety officer Campbell wrote the following on page 13 of his Report:

“Division III, Decision of the Safety Officer - On 5 July 2000, a condition existed in Mr. Hustad’s workplace consisting of a resident, who despite numerous complaints, continued to allow his aggressive dogs to run loose over the block, at random unpredictable times. Based on the history of this issue, it could reasonably be expected that if Mr. Hustad was required to deliver mail in this block, he would inevitably and possibly without warning, be attacked again by the unrestrained dogs. The fact that he has escaped five such attacks without injury so far is attributable as much to luck as to his presence of mind. However Mr. Hustad should not be required to rely upon these two factors to protect his safety and health in the face of a significant workplace hazard. Therefore I find that Mr. Hustad was exposed to a situation of Danger on 5 July, 2000, when he was asked to deliver mail to the 3900 block of Frances Street.”

During his testimony, safety officer Campbell reiterated that he decided that a condition of danger existed for Mr. Hustad at the time of his investigation because the owner of the dogs intentionally and randomly set the dogs free to roam the neighborhood without supervision or restraint. He held that the fence that had been constructed in the dog owner’s front yard to restrain the dogs did not mitigate against the danger because the dog owner intentionally and randomly released the dogs, and because the dogs could climb over pieces of wood near the back yard fence. He felt that it was only a matter of time before the dogs attacked Mr. Hustad or another letter carrier.

Applicant:

Mr. Lynd submitted two documents. The first document consisted of 8 responses to a questionnaire that CPC had sent to residents of the 3900 Block of Frances Street following the direction. Three of the occupants responded that the dogs in question were often loose in the neighborhood and that the dogs were intimidating. Five replied that there was no danger with the dogs and that they either did not recall seeing the dogs loose, or not recently.

The second document was a copy of CPC’s hazard policy. The document outlines employee and supervisor responsibilities relative to hazards, including hostile dogs, and specifies, among other things, that the delivery of mail must not be permitted until the hazard has been corrected. Mr. Lynd stated that CPC is concerned regarding the safety of its employees and makes every effort to prevent injury. He said that CPC trains its letter carriers on hazard recognition, provides them with tools to defend themselves against dog attacks, and instructs them through the hazard policy to discontinue delivery until the hazard has been corrected.

Mrs. Marian Carson, Manager, Occupational Health and Safety and Environment, CPC, testified that dogs are an inherent danger for letter carriers. She reported that injuries due to dog bites are the second most frequent cause of injury to letter carriers next to slips and falls. She stated that the ability of CPC to deliver mail would be seriously curtailed if mail was suspended every time there was a dog threat.

Respondent:

Mr. Knight agreed with safety officer Campbell's report and decision. He did not submit further any documents or present witnesses.

Summations:

Mr. Lynd held that there was no danger to Mr. Hustad at the time of the safety officers investigation and that the direction should be rescinded. He argued that the investigation conducted by safety officer Campbell was insufficient for deciding that a danger existed for Mr. Hustad. He said the investigation was insufficient because safety officer Campbell did not interview the owner of the dogs, or other residents in the 3900 block of Frances street, to confirm the basis for his decision of danger which was that the dogs were randomly and intentionally released into the neighborhood.

He pointed out that CPC supported Mr. Hustad when he raised his concerns regarding the dogs and applied the maximum sanction possible which was the suspension of mail delivery to both the residence of the owner of the dogs and to the neighborhood. He testified that, once mail was resumed in the neighborhood, CPC permitted Mr. Hustad to do other duties while supervisors and other letter carriers delivered the mail in the 3900 block of Frances street. Mr. Lynd said that this arrangement went on for 10 months and during that time, there was not one documented complaint or incident related to dogs. Then sometime in June, 2000, CPC noticed that a fence had been constructed in the front property of the owner of the dogs which looked sufficient to hold the dogs. Based on the absence of dog attacks over the 10 months and the construction of the fence, Mr. Lynd said that CPC reassigned Mr. Hustad to resume mail delivery in the 3900 block of Frances Street, but not to the residence of the owner of the dogs. Mr. Lynd reiterated that CPC felt it was safe for Mr. Hustad to resume delivery to that location, and that Mr. Hustad could suspend delivery if there were any further incident with the dogs.

Finally, he argued that all letter carriers face similar problems with dogs at some time and that the possibility of dog attack on a route is inherent and normal to the work of a letter carrier. He said that letter carriers are trained how to deal with dog attacks and provided with tools to defend themselves. In addition, the hazard policy dictates that mail delivery is to be suspended until the hazard is corrected.

Mr. Sean Kennedy, Senior Counsel, Area West, CPC, referred me to two previous decisions of the now Canada Industrial Relations Board¹ (CIRB). He said that, in the decision of Montani v. Canadian National Railways (1994), 95 di, 157, the Board stated on page 7 of the decision that:

“The right to refuse is an emergency measure. It is used to deal with situations where employees perceive that they are faced with immediate danger and where injury is likely to occur right there and then. It cannot be a danger that is inherent in the work or that constitutes a normal condition of work. Nor is the possibility of injury or the potential for danger sufficient to invoke the work refusal provisions; there must in fact be danger.”

¹ Formerly the Canada Labour Relations Board.

Thus he said, that CPC contends that safety officer Campbell erred when he decided that a condition of danger existed for Mr. Hustad based on the probability of an attack and of injury.

He also cited the decision of the CIRB in the case of Paul du Bourg v. Canadian Pacific Limited, 1996, 103 di 16, in which the Board stated that “danger” must be immediate and real rather than merely the possibility of future injury.

Mr. Knight argued that this is not the usual dog hazard because the long standing nature of the problem and because the hazard is not only related to the dogs, but also to the attitude of the owner of the dogs. As such, the condition of danger is not one that is inherent to the job. He argued further that Mr. Hustad’s situation is unique because the problem has gone on for 2 years without resolution and that CPC has not involved the safety and health committee during that time. He agreed with safety officer Campbell’s rationale for finding of danger and that the danger was not inherent to the work. He asked that I confirm the direction.

He also dismissed the CIRB decisions cited by Mr. Kennedy because those decisions confirmed a safety officer’s decision of “no danger”. Instead, he referred me to points 4, 5 and 6 in the decision of Federal Court of Appeal in the case of Alberta Wheat Pool v. Grain Workers’ Union, Local 333 (F.C.A.) ([1994] F.C.J. No. 287, DRS 94 - 10180, Appeal No. A-998-91), and to the case of Ron Clavet and Via Rail, 100 di, 73, [1996] CLRB, D No. 7 Decision No. 1158, Board File: 950-320. Mr. Knight held that the cases establish a basis for a determination of danger where there is a randomness and unpredictability of a potential hazard in a work situation. He stated that Mr. Hustad encounters many dogs on his route for which residential delivery has not been suspended because the owners have behaved responsibly in controlling their dog. Since that is not the situation here, he argued that the possibility of a dog attack always exists and that the safety officer Campbell was correct in his determination that a condition of danger existed for Mr. Hustad.

Decision:

Issue(s):

The issue before me is whether a condition of danger under the Code existed at the time of the safety officer’s investigation of the refusal to work by Mr. Hustad. If I agree that a condition of danger existed, then I must decide whether to vary or confirm the direction.

Applicable Legislation:

For deciding these questions, it is necessary to review the applicable provisions in Part II. These include respectively:

The definition of “danger” in Section 122. (1) of the Code. The definition reads:

*“Section 122. (1) In this Part,
“danger” means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected;” [My underline.]*

Subsection 129. (2) of the Code which reads:

“129.(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide whether or not
(a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or
(b) a condition exists in the place in respect of which the investigation was made that constitutes a danger to the employee referred to in subsection (1),
and he shall forthwith notify the employer and the employee of his decision.” [My underline.]

Rationale:

To decide the first issue, which is whether a condition of danger existed for Mr. Hustad at the time of the safety officer’s investigation, it is necessary to consider the definition of danger under the Code in conjunction with the facts in the case.

With regard to the Code, the definition of danger therein establishes that, for a danger to exist, there must be a reasonable expectation that the hazard or condition will cause injury or illness to the person exposed thereto before the hazard or condition can be corrected. Mr. Kennedy referred me to two CIRB decisions. The aforementioned decisions conclude that the right to refuse is an emergency measure where the danger perceived is immediate, as opposed to future or anticipated, and I agree² with their findings. Mr. Knight argued that these cases do not apply to this review because the decisions cited by Mr. Kennedy referred to safety officer decisions of no danger under the Code. Mr. Knight held that the facts in this case establish that a danger existed for Mr. Hustad.

With regard to the facts in the case, safety officer Campbell testified that he relied on the fact that the dog owner was known to intentionally and randomly release the dog into the neighborhood, and in consideration of past attacks by the dogs. He held that it was only a matter of time before Mr. Hustad, or any other letter carrier would be attacked. He further held that, since the dogs were intentionally released, the fence built on the property to contain the dogs did not mitigate against the risk of attack.

However, even I if were to agree with Mr. Lynd that safety officer Campbell should have spoken to the owner of the dogs in question to verify the basis for his decision of danger, the plain fact in the matter is that there were no dogs in the 3900 block of Frances Street at the time of safety officer Campbell’s investigation. That being the case, the danger of dog attack at the time of his investigation was speculative, regardless of how well founded that speculation might have been, and safety officer Campbell could not conclude that the hazard or condition could reasonably be expected to cause injury before the hazard or condition could be corrected.

² Reference is made to the decision of my colleague, Regional Safety Officer Serge Cadieux in the case of *Terminus Maritimes Fédéraux and Sydicat des débardeurs et Association internationale des débardeurs*, April 29, 1999, Decision No. 99-010, and to my decision in the case of *Canadian Airlines International Limited and International Association of Machinists and Aerospace Workers*, October 26, 1999, Decision No. 99-024.

Moreover, Mr. Lynd testified that the matter was resolved in the past by permitting Mr. Hustad to do other duties while the 3900 block of Frances Street was serviced by other CPC employees. Mr. Lynd also testified that the owner of the dogs told him in an interview following safety officer Campbell's direction that he was concerned that mail was not being delivered to his neighbors, and that he wanted to cooperate to end the situation. For his part, Mr. Knight testified that the matter had not yet been raised at the workplace safety and health committee for resolution. In my view, this confirms that options to correct the hazard before Mr. Hustad was injured by the dogs were immediately available to CPC and to the safety and health committee. That being the case, the safety officer should have addressed his attention to ensuring that CPC undertook measures to immediately address the hazard.

Decision:

The evidence in the case established that there was a long standing hazard relative to the dogs referred to in this case, but it did not establish that a condition of danger existed for Mr. Hustad at the time of safety officer Campbell's investigation. Consequently, I HEREBY RESCIND the direction that safety officer Campbell issued to CPC pursuant to subsection 145.(2) on July 12, 2000.

Decision rendered on September 19, 2000.

D. Malanka
Regional Safety Officer

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On July 5th, 2000, the undersigned safety officer conducted an investigation following the refusal to work by Raymond Hustad in the work place operated by CANADA POST CORPORATION, being an employer subject to the Canada Labour Code, Part II, at NORTH BURNABY POSTAL STATION, 474 SOUTH MACDONALD AVENUE, BURNABY, B.C., the said work place being sometimes known as North Burnaby Depot.

The said safety officer considers that a condition exists in a portion of the mail delivery route assigned to Mr. Hustad, specifically the 3900 Block of Francis(sic) Street, Burnaby that constitutes a danger to an employee while at this location.

On 5 July 2000, a condition existed in the 3900 Block of Francis(sic) Street, consisting of a resident, who despite numerous complaints, continued to allow his aggressive dogs to run loose over the block, at random unpredictable times. Based on the history of this issue, it could reasonably be expected that if Mr. Hustad was required to deliver mail on this block, he would inevitably and possibly without warning, be attacked again by the unrestrained dogs. The fact that he has escaped five such attacks without injury so far is mostly a matter of luck.

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

Issued at Surrey, this 12th day of July 2000.

Todd Campbell
Safety Officer BC 3187

To: CANADA POST CORPORATION
NORTH BURNABY POSTAL STATION
474 SOUTH MACDONALD AVENUE
BURNABY, B.C.
V5C 4N0

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Canada Post Corporation

Respondent: CUPW

KEY WORDS

Letter carrier, dog attack, danger, hazard policy, suspended mail delivery

PROVISIONS

Code: 122, 129.(2),145(2), 146

SUMMARY

On July 5th, 2000, safety officer Todd Campbell investigated into the refusal to work of Mr. Ray Hustad, a letter carrier employed by Canada Post Corporation (CPC). Mr. Hustad refused to work in the 3900 Block of Frances Street in Burnaby, British Columbia, because a resident on Frances Street refused to curtail his hostile dogs and intentionally released them at random times into the neighborhood. Following his investigation, safety officer Campbell decided that a danger of dog attack existed and ordered CPC to protect any person from the danger immediately. The Regional Safety Officer conducted a hearing on August 23, 2000, and subsequently rescinded the direction. He reasoned that the evidence established that there had been a long standing hazard relative to the dogs referred to in this case, but it did not establish that a condition of danger under the Code existed for Mr. Hustad at the time of safety officer Campbell's investigation.