CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Raymond Wilson
Applicant

and

Canadian National Railway
employer

Decision No. 03-004
February 19, 2003

This case was heard by Michèle Beauchamp, appeals officer, in Winnipeg, Manitoba, on March 8, 2002

Appearances

For the employee
Raymond Wilson, Locomotive Engineer, Canadian National Railway (CN)
Darren Grywacheski, Legislative Health and Safety Representative, Brotherhood of Locomotive Engineers (BLE)
George Hucker, Vice President and National Legislative Representative, BLE
Jeff Johnston, Locomotive Engineer and Health and Safety Representative, BLE

For the employer
Donald Kruk, Solicitor, CN
Brian Sitar, Transportation Supervisor, CN
Ed Falardeau, Director, Risk Management, CN
Ron Smith, General Supervisor Transportation, CN

Health and Safety Officer
Lance Smith, Operations and Equipment, Transport Canada (TC)

[1] This case concerns an appeal made on October 26, 2001 under subsection 129(7) of the *Canada Labour Code*, Part II, by Darren Grywacheski, Legislative Health and Safety Representative, Brotherhood of Locomotive Engineers (BLE), on behalf of Raymond Wilson, locomotive engineer, following a decision of no-danger by health and safety officer Lance Smith, issued verbally on October 14, 2001 and in writing on October 15, 2001.

[2] Raymond Wilson, locomotive engineer, and Paul Joyal, conductor and locomotive operator, both employees of Canadian National, in Winnipeg, Manitoba, refused to work on October 14, 2001, for the following same reasons, as reproduced here from the Transport Canada Refusal to Work Registration form filled by both employees:

> I believe long nose operation of a locomotive is a danger, account of reduced sightlines, all signs and signals controlling train movement are opposite side of locomotive engineer's position.
> Conductor emergency valve not accessible.

[3] The following events led to Messrs. Wilson' and Joyal's refusal to work:

- The employees were ordered for train 201/31 on October 13th out of Sioux Lookout and destined to Winnipeg.

- The train was 8184 feet long, with a tonnage of 10,888. It consisted of locomotives CN 5647 (lead unit facing west), CN 5682 (facing east) and CN 5661 (facing east) and had 126 cars (102 with loads and 24 empty). Thirteen of these cars were carrying dangerous commodity and one was in bad order status because of defective door or end gate.

- East of Reddit, Ontario, lead unit CN 5647 developed mechanical problems (it appeared to be a seized pinion bearing).

- The employees were instructed to set it off at Reddit and to continue to Winnipeg using locomotive CN 5682 (facing east) as lead, therefore operating this locomotive long nose leading.

[4] Messrs. Wilson and Joyal informed the Rail Traffic Control Officer by radio that they were refusing to work for the reasons mentioned in paragraph 2. They agreed to pull the train westward to double track at Wade, some 13 miles away, to allow a westbound passenger train to pass, and to wait there for the health and safety officer who would investigate their refusal.

[5] Health and safety officer Lance Smith investigated the refusal with health and safety officer Neil Ames on the same day. He conducted a mechanical inspection of locomotive CN 5682 and interviewed the employees and the employer representative.

[6] The main facts established by health and safety officer Smith are reproduced as follows from his written report and his testimony at the hearing:

- Train 201/31 originated and operated normally until the mechanical failure of the lead locomotive CN 5647.

- Although not a normal practice, the train had to be operated long nose leading because of the mechanical failure of locomotive CN 5647 and Winnipeg was the nearest location where the locomotives could have been turned to face a westward direction.

- A General Motors SD-75 class locomotive, locomotive CN 5682 was last inspected on August 12, 2001.

- The locomotive is equipped with a front and rear pilot, and with front and rear ditch lights.

- It has an extra speedometer located on the electrical cabinet wall, specifically used for viewing when the locomotive is operated in reverse.

- Seats are fully adjustable and can easily be turned to face the rear of the locomotive.

- When seats are turned, there is adequate room to operate the locomotive air brake and reverser controls with relative ease.

- The locomotive window and door seals, the front and rear window wipers, the lights, the electrical cabinet doors and panels were all in good order.

- The toilet was inoperative at the time, but the toilet on trailing unit CN 5661 was functional.

- Locomotive CN 5682 was found to be in compliance with all applicable rules and regulations, except for its defective toilet.

- The SD-75 class locomotive is better suited than many other classes of locomotives for reverse operations.

[7] Health and safety officer Smith also determined that:

- Both employees were up to date with their rules and medicals.

- They were fit for duty when they reported to work that day.

- They knew what rules were in place to operate train 201/31 in the requested manner, *i.e.* long nose leading.

- They were familiar with the territory and signal locations.

- They believed that a locomotive from another train should have been dropped off to be used as a lead unit.

- Mr. Wilson had previously operated trains long nose leading on distances of 20-30 miles, but not on the 125 miles distance requested by the employer on that day.

[8] Health and safety officer Smith expressed the opinion that although throttle control when returning to idle position was possibly the only control not easy to operate, it was certainly not difficult to do so. He also stated that when the seat was facing the rear of the locomotive, the conductor's emergency brake valve could be reached very easily by leaning to the left, and, contrary to the employees' belief, it was not necessary to leave the seat and turn to activate this emergency valve.

[9] Health and safety officer Smith could not recall if Mr. Wilson had been advised at what speed to operate the train. He recognized that sightlines would probably decrease for the locomotive engineer when operating long nose lead, but that on the other hand, the conductor's sightlines would possibly increase and the conductor does provide information on what can be seen outside.

[10] The Brotherhood of Locomotive Engineers' main points of dispute were expressed in its written submission to the Canada Appeals Office and in its presentation at the hearing. They are as follows:

- It was Mr. Wilson who suggested to take the train over to double track at Wade, so as to prevent the delay of other trains.

- Contrary to Mr. Sitar's statement, Mr. Joyal could not relieve Mr. Wilson if Mr. Wilson became fatigued. In fact, the object of the Conductor Locomotive Operators (CLO) program, under which Mr. Joyal has become a conductor, is to assist the engineer and to run under his supervision, and they have not been trained in operating locomotives backwards, nor could they take proper direction from the engineer if he was fatigued. Also, if Mr. Wilson was to become fatigued, how would he properly perform his job on the opposite side of the cab and remain vigilant.

- Mr. Sitar and the Transport Canada Officers mentioned to both employees previous decisions of no danger made following refusals involving long nose lead locomotives. These decisions should not have been brought into the picture as they have no bearing on this case.
- Wade is not a siding but a station on double track on the Redditt Subdivision, and this implies a difference under the applicable rules.

- According to CN, train scheduling and tonnage requirements of other trains made dropping off another locomotive not practical. However, the refusal under section 128 and delay to train 201 could have been prevented by Mr. Wilson's suggestion to do a power swap with another train or to have a unit set off that was pointing the proper direction, such as train 106 which was in the vicinity. Power swaps in route and setting out and picking up of locomotives for other trains are part of common railway operations and happen often.

- As stated by Mr. Smith, sightlines are more restrictive operating long nose lead. The sightline distance from the locomotive engineer's seat facing backwards to the opposite side of the track is approximately 350 to 400 feet minimum on straight track.

[11] The BLE representative believed that neither CN nor Transport Canada Safety Officers were in compliance with the intent of the *Railway Safety Act - 1999* and the powers of Railway Safety Inspectors, who can forbid or restrict the use of unsafe equipment.

[12] The BLE representative also stated that CN is not training locomotive engineers or conductors on long nose blindside operations as required by s. 125(1) of the *Canada Labour Code*.

[13] Furthermore, he submitted that CN was violating sections 10.5, 10.6 and 10.13 of the *On-Board Regulations* by instructing locomotive engineers to operate long nose backwards for any period of time or distance, as locomotives' intended design for safety is short nose lead.

[14] According to Mr. Sitar, CN Transportation Supervisor, operating the train long nose lead was not dangerous because:

- the train is equipped with a rear pilot, rear ditch lights and headlights;

- there are rules in effect for cross cab communication for signals, crossings, speeds and signs; and

- employees know and have access to these rules and to time tables and track profiles.

[15] Mr. Sitar believed that it was not practical to drop off another locomotive because of train scheduling and tonnage requirements. He also told Mr. Wilson to operate the train long nose lead at the speed at which he would feel comfortable with.

[16] Mr. Sitar told the employees that Mr. Joyal was a qualified conductor locomotive operator and could relieve Mr. Wilson if he was fatigued. He informed them of previous refusals to work regarding long nose leading locomotives for which a no-

danger decision had been rendered and confirmed by the Canada Industrial Relations Board.

[17] Mr. Sitar also stated that training for long nose lead is done through daily activities, and that conductors operate progressively from Symington Yard to Sioux Lookout. He believed that a qualified locomotive engineer is also qualified to operate a train either forwards or backwards, and that this series of unit can be run both ways. He added that operating long nose leading is not the preferred way of operation but that it is used frequently in yards.

[18] He argued that Mr. Wilson was experienced and familiar with the route, that controls were accessible and that engineers are well trained and equipped to handle long nose operations.

****

[19] The issue to be decided here is whether employees Wilson and Joyal were facing a danger within the meaning of the *Canada Labour Code* when they refused to work. The Part II provisions dealing with the definition of danger and refusal to work situations read:

> 122(1) "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.
>
> 128(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
>
> (a) the use or operation of the machine constitutes a danger to the employee or to another employee;
> (b) a condition exists in the place that constitutes a danger to the employee;
> (c) the performance of the activity constitutes a danger to the employee or another employee.
>
> 129(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

[20] Msssrs. Wilson and Joyal believed that operating the locomotive long nose was dangerous because their sightlines would be reduced, the signals controlling train movement would be on opposite sides of the engineer's position and the conductor's emergency brake valve would not be accessible.

[21] Before deciding if there was a danger in operating this way, health and safety officer Smith ascertained the condition of the locomotive by conducting a mechanical inspection. He concluded that the locomotive was fully functional and that the fact that it was equipped, on both ends, with headlights, ditch lights and pilots was clearly indicative that the locomotive was intended to be used forward or backward.

[22] Health and safety officer Smith also determined that apart from the throttle, which governs speed and is not used in an emergency situation, no controls were difficult to access, and that both employees were familiar on how to communicate signals while operating long nose.

[23] Appeals officers Cadieux has determined in Decision 02-009[1] what standard should be applied in deciding whether a danger exist at the time of a health and safety officer's investigation. He stated:

> In order to declare that danger existed at the time of his investigation, the health and safety officer must form the opinion, on the basis of the facts gathered during his investigation, that:
>
> - the future activity in question will take place[2] ;
> - an employee will be exposed to the activity when it occurs; and
> - there is a reasonable expectation that:
>   - the activity will cause injury or illness to the employee exposed thereto; and,
>   - the injury or illness will occur immediately upon exposure to the activity.

[24] I fully agree with this standard. How does it apply in the present case? The future activity would have taken place had the employees not refused to work. Therefore, they would obviously have been exposed to it since they were the ones operating the train.

[25] However, would there have been a reasonable expectation of immediate injury to the employees had they been exposed to the activity? Based on the facts gathered by the health and safety officer and the testimonies presented at the hearing, I don't believe so.

[26] It has been established that the locomotive was equipped to be safely operated forward or backward. Also, although the employees had not operated long nose on such a distance, both of them were familiar with the rules, with the signal locations and with the territory. On the basis of the evidence submitted, I am satisfied, like the health and safety officer before me, that neither Mr. Wilson nor Mr. Joyal were in a situation likely to cause them injury.

---

[1] *Parks Canada Agency v. Doug Martin and the Public Service Alliance of Canada*, Canada Appeals Office, Decision No. 02-009, May 23, 2002

[2] This first condition is redundant in cases where the health and safety officer has established that the activity is taking place at the time of his investigation.

[27] For these reasons, I therefore confirm the decision of no danger made by health and safety officer Smith.

[28] Before concluding, permit me to comment on the union's statement that the employer's failure to use section 127.1 of the *Canada Labour Code*, Part II, Internal Complaint Resolution Process, was a major component of the refusal to work. This belief seems to be generalized among employers and unions alike. I do think however that there are misconceptions about the use of section 127 that need to be clarified.

[29] To my view, this provision is and can be an extremely profitable tool to have the work place parties resolve health and safety issues between themselves, before an outside party --like a health and safety officer -- intervenes. However, it is a recourse to be used only in situations where "there has been a contravention or there is likely to be an accident or injury arising out of, linked with or occurring in the course of the employment…" The exception created, in s. 127.1, by the words " *excepts the rights conferred by sections 128, 129 and* 132 " clearly implies that that section is definitely not to be used in lieu of sections 128, 129 and 132. Refusals to work are governed only by sections 128 and 129, which directly specify to the parties involve when, why and how to refuse to work.

Michèle Beauchamp
Appeals Officer

SUMMARY OF APPEALS OFFICER DECISION

Decision No. 03-004

Applicant: Raymond Wilson

Employer: Canadian national Railway

Key words: Refusal to work, danger

Provisions:

Code: 122(1); 128

COSHR: n/a

SUMMARY

A locomotive engineer and a conductor-locomotive operator working for Canadian National, in Winnipeg, Manitoba, refused to work because they believed that operating a locomotive long nose leading was dangerous: there would be reduced sightlines, signs and signals controlling the train movement would be opposite of the locomotive engineer's position and the conductor emergency valve would not be accessible.

After conducting a mechanical inspection and investigating the refusal to work, the health and safety officer decided that this operation represented no danger for the employees.

The appeals officer confirmed the health and safety officer's decision because the locomotive was equipped to be safely operated forward or backward and, although the employees had not operated a locomotive long nose leading on such a distance, both of them were familiar with the rules in place, with the signal locations and with the territory.