

**Canada Labour Code**  
**Part II**  
**Occupational Health and Safety**

Christopher Cathcart  
*applicant*

and

Canadian National Railway  
*employer*

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Decision No. 03-005  
March 3, 2003

This case was heard by Michèle Beauchamp, appeals officer, in Winnipeg, Manitoba, on March 6, 2002

**Appearances**

For the employee

Darrell Grywacheski, Legislative Health and Safety Representative, Brotherhood of Locomotive Engineers (BLE)

Jeff Johnston, Locomotive Engineer and Health and Safety Representative, BLE

For the employer

Donald Kruk, Counsel, CN

Craig Bohne, Transportation Supervisor, Symington Yard, CN

Ron Smith, General Supervisor Transportation, CN

Health and Safety Officer

Lance Smith, Transport Canada (TC)

- [1] This case concerns an appeal made on January 15, 2001 under subsection 129(7) of the *Canada Labour Code*, Part II, by Christopher Cathcart, locomotive engineer for Canadian National Railway in Winnipeg, Manitoba, following a decision of no-danger issued orally by health and safety officer Lance Smith on January 9, 2001 and in writing on January 18, 2001.

- [2] Christopher Cathcart refused to work on January 9, 2001 for the following reason, reproduced here from the Transport Canada Refusal to Work Registration form<sup>1</sup>:

My safety concern is with unit 2504 not equipped with ditch lights on the trailing end for a reverse movement. I am concerned for my safety, that of Conductor Lee Rawsthorne and the members of the public. In that at the approx. 14 plus public crossings at grade, 3 or more being major crossings, going in reverse with no ditch lights that the public would not see train 486 or that having only a single small headlight; that they would not recognize that we were not moving nor would they recognize that we were moving in their direction. And that they would then mistakenly cross in front of our train causing an accident which would place myself, Cond. Rawsthorne and the public in danger. Particularly if we contacted but not limited to a tanker, gravel truck, grader, bus, etc.

- [3] Health and safety officer Neil Ames, who investigated the refusal to work, was unable to appear at the hearing to explain the circumstances that led him to make a decision of no danger. Both parties agreed that it would be preferable if they were able to question him on his decision. Nevertheless, they decided to present their submissions at the hearing and put questions to health and safety officer Lance Smith, as he had accompanied health and safety officer Ames when he investigated the refusal to work, it being understood that the parties' questions would be limited to Lance Smith's role as accompanying officer.

- [4] In health and safety officer Ames' investigation report, the employee's statement of the refusal to work reads as follows:

Operating locomotive CN 2504 not equipped with ditch lights on the tail end for reverse movement was a danger. The public would not be able to see the train or identify if train was moving or what direction it was traveling hence road vehicles would mistakenly cross in front of the train causing an accident.

- [5] The following events led the employee to refuse to work::

- Locomotive engineer Christopher Cathcart and conductor Lee Rawsthorne were to operate CN continuous welded rail train 048641-08 from Transcona Yard, in Winnipeg, Manitoba, to Sioux Lookout, in Ontario.
- The train was 2265 tons and 1719 feet long. It consisted of 27 cars of continuous welded rail, two boxcars, and a single 4400 horse power six axle locomotive, CN 2504.

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<sup>1</sup> Transcription of the hand written statement made by Christopher Cathcart on that day.

- Shortly after departure, locomotive engineer Cathcart received a radio communication from an impact detector<sup>2</sup> that there were high impact readings on the rail, indicating that there were possibly flat spots on the wheel treads on two of the rail cars within their train.
- Following CN Rail's policy that railcars with high impact readings be brought to a location where repairs can be made, Mr. Cathcart stopped the train in the nearest siding. He secured it and informed the rail traffic controller (RTC) of the situation, who in turn advised Craig Bohne, transportation officer at Symington.
- Mr. Bohne told the train crew to turn around and couple the tail end car and to prepare to pull the train into Transcona, some 14 miles away. The train crew proceeded as told and waited for Mr. Bohne, who would be coming to investigate.
- Messrs. Cathcart and Bohne discussed moving the train to Transcona, where the defective wheels would be changed. Mr. Cathcart refused to operate the train to Transcona because there were no ditch lights facing the travelling direction, as the rear end of the train was now travelling backwards in the lead position. He also claimed that he had fulfilled his duty by spotting the train in the siding and thought that the wheels could be changed there.
- Discussions continued to no avail and a Transport Canada health and safety officer was called to investigate and render a decision on the alleged danger.

[6] Darrell Grywacheski, the BLE representative, added at the hearing that Mr. Cathcart has more than 23 years of service, including 17 years as a locomotive engineer. Given CN's past practice and the type of locomotive involved, Mr. Cathcart believed that it was his duty under the *Canada Labour Code* to invoke his right to refuse. He was being more than reasonable in taking action so as not to endanger the safety of his co-worker or himself, declared Mr. Grywacheski.

[7] Mr. Grywacheski also said that transportation supervisor Bohne had given the train a roll-by inspection before it departed and told the crew that it was okay. However, Mr. Grywacheski speculated, maybe the wheels were already damaged before the train left the yard because Mr. Cathcart had not used the brakes after leaving Transcona.

[8] Nonetheless, the train was safely moved into the Anola siding, where there would be no disruption of service to trains in either direction. The crew was advised to run around their train and return it to Transcona. No inspection was to be done by qualified car department inspectors prior to the return trip and there were no ditch lights on the trail end (long nose), as required by *Rail Regulations* 16.1 and 16.2, said Mr. Grywacheski.

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<sup>2</sup> An impact detector is a device attached to the rails that can measure how hard a wheel hits on the rail surface due to defects such as flat spots, shelled out spots which is when pieces break out of the wheel tread surface and also when wheels are out of round.

- [9] The union believed that alternatives could have been used to correct the situation but CN decided that the locomotive would operate backwards, contrary to the regulations. The locomotive is designed with a desk top type control stand, so that the engineer sits at the desk in a high back seat with all controls in front of him. The unit is designed to operate facing forward not backwards for any distance or length of time, declared Mr. Grywacheski.
- [10] The union also believed that the operation of this unit backwards, i.e. long nose lead, is in violation of sections 10.5, 10.6 and 10.13 of the *On-Board Regulations*, which read:
- 10.5- The arrangement and design of dial displays and the controls and the 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.
- 10.6- All self-propelled rolling stock shall be fitted with braking and other control systems that (a) are capable of safely controlling and stopping the movement of the rolling stock or any accessory equipment that is on or part of the rolling stock; and (b) respond reliably and quickly to moderate effort on the part of the operator.
- 10.13- No employer shall require an employee to operate self-propelled rolling stock unless the employee is capable of operating the rolling stock.
- [11] The union also questioned why the employer claimed this it would have been unpractical to change the wheels on site and decided to move the damaged equipment without having it properly inspected before by qualified employees, thus risking broken rails, further damage, or a possible derailment.
- [12] The employer's representative agreed in part with the employee's description of the events. However, he believed that the train crew could have safely moved the train to Transcona without ditch lights if the train was moving at a reduced speed and each road crossing was manually protected by the conductor until the crossing was occupied.
- [13] CN management admitted that there were specific rules for operating with head light failure, but not with ditch light failure. Since the head light was working normally and offered adequate illumination to light the way ahead – in fact, the head light illumination is more than what ditch lights offers–, CN believed that there was no danger to operate the train.
- [14] Further, CN management maintained that it was up to them to decide where the nearest repair point will be when rail cars require repair. In the present case, CN claimed that changing wheels on this type of car while loaded was extremely difficult and could be done much more safely in a shop environment.
- [15] The health and safety officer established the following facts, reproduced from his investigation report:

- At the time of the refusal to work, the crew had just secured the train in a siding at AnoIa. The locomotive had been run around to the opposite end and coupled to the rear end of the train. The crew had been asked to pull the train approximately 14 miles back to Transcona, where the wheels would be changed on one of the cars.
- Mr. Cathcart has approximately 21 years of service as a locomotive engineer and has been consistently qualified under the operating rules.
- He has operated continuous welded rail trains in the past and can understand the special braking characteristics of this equipment.
- Because the crew was advised that they could proceed at reduced speed, Mr. Cathcart was concerned that road traffic would try to race the train to the crossings. If that happened, he could be forced to bring the train to a sudden stop.
- Mr. Cathcart knew the characteristics of the brakes well and would not have been caught off guard by the dynamics of the train had he been required to stop suddenly.
- To further enhance his ability to make quick stops at crossings, CN advised Mr. Cathcart that he could run the locomotive by itself backwards 10 miles to turn it. He would then be able to run backward again to the train so that when he would pull the rail train to Transcona, the locomotive would be facing forward and he would be able to run the appropriate speed with ditch lights displayed.
- A locomotive running by itself at reduced speed can stop in a relatively short distance compared to one pulling a train.
- Mr. Cathcart still insisted at this point that he had performed his duty by spotting the train for repairs and believed that there was no practical reason to bring the train to Transcona. He added that manual protection of crossings would take a long time and was not a practical solution, and that the rules required lead locomotives to be equipped with ditch lights.
- Mr. Cathcart requested that temporary ditch lights be installed at this location before proceeding. However, the locomotive was not equipped with brackets to allow the installation of temporary ditch lights, contrary to other models of locomotives.
- Mr. Cathcart had experienced headlight failure during his career and had managed to move his train safely by applying CROR rule 17.1, which deals with defective headlights. He relied on this type of protection many times and used the conductor for this protection. He is also conversant with the necessary rules and the practice of manual crossing protection.

- [16] According to health and safety officer Ames' report, Mr. Cathcart was concerned with the absence of ditch lights mainly because the public, who is familiar with the triangular formation of lights on a train, would not recognize his movement as a train and mistakenly cross in front of his train.
- [17] Health and safety officer Ames witnessed the rear headlight on high position and observed that the crossing, which was several hundred yards away, was well illuminated. Also, the head light was clearly visible from the crossing.
- [18] Health and safety officer Ames determined that train crews could comply with the rules for defective headlight and proceed by applying the restrictions of rule 17.1, which states:
- (a) If the headlight on a train fails and repairs cannot be made, the RTC must be notified as quickly as possible. Ditch lights or oscillating headlight in the stationary position, will, when the engine is so equipped, be used in lieu of the headlight and the train may proceed.
  - (b) If the engine is not equipped with ditch lights or oscillating headlight, such lights as are available must be displayed and the train may proceed to the first point where repairs can be made. It must not exceed twenty-five miles per hour entering each public crossing at grade not protected by a watchman, gates or automatic warning devices until the crossing is fully occupied by the train.
- [19] According to the health and safety officer, ditch lights can, under the rules, be extinguished in certain situations, such as when travelling adjacent to a highway, which indicates that these lights are not necessary to be on continuously for safe operation. Also, the ditch lights are not a factor for public safety once the railway crossing is occupied because they are not visible as a triangle once passed by.
- [20] The health and safety officer found that since the failure of a headlight is a significantly more severe situation than when there is ditch light failure, the train could be moved safely if the rules were followed and the more restrictive alternative method for movement of the train was applied.
- [21] The health and safety officer decided that there was no danger, based on the facts established during his investigation and the definition of danger given in the *Canada Labour Code*, Part II, because the locomotive engineer and his conductor had the knowledge and the practical experience necessary to move the train as directed by CN under the provisions of the operating rules; there was sufficient light to show the way clearly for the train crew; and if the train moved at reduced speed, the public would see it coming.

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[22] Subsections 146(1) and 146(2) of Part II of the *Code* define the appeal officer's role when an appeal is brought against a decision of no danger issued under subsection 129(7). They read:

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
- (b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

(2) The appeals officer shall provide a written decision, with reasons, and a copy of any direction to the employer, employee or trade union concerned, and the employer shall, without delay, give a copy of it to the work place committee or health and safety representative.

[23] The issue to be decided here is whether the employee, Christopher Cathcart, was facing a danger within the meaning of the *Canada Labour Code*, Part II, when he refused to work. The Part II provisions dealing with the definition of danger and refusal to work situations read as follows:

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.

- [24] Mr. Cathcart believed that operating the locomotive when it was not equipped with ditch lights was dangerous because at public crossings, the public would either not see it moving or not recognise that the train was moving in their direction.
- [25] Mr. Cathcart's concern for refusing to work, as evidenced by his hand written statement and the testimonies heard at the hearing, was that the absence of ditch lights would jeopardise his safety and that of conductor Rawstorne and the public.
- [26] The Canada Industrial Relations Board declared in a very similar case<sup>3</sup> where an employee refused to operate a locomotive in reverse, that employees could not refuse to work because they perceived danger for the public. The Board said:

Part II of the *Code* does not allow employees to invoke the work refusal provisions of the *Code* on the basis of a perceived danger to the public. Public safety is the designated responsibility of Parliament and provincial legislatures. These bodies enact statutes and regulations, and establish organizations to monitor and enforce the rules.

Section 128 of the *Code* is clear in its wording. The refusing employee must believe an **employee** faces an immediate risk of illness or injury before the hazard or condition can be corrected. This is not to say that employees cannot play an important role in public safety by communicating their concerns for the public to their trade union or to an employer representative. Communication with the organization responsible for enforcing particular rules of public safety may be appropriate. If legislation does not address the situation, contact with an elected government representative may prove of assistance.

- [27] Although this was stated before the coming into force of the modifications of Part II of the *Canada Labour Code* in September 2000, the wording of subsection 128(1) leaves no doubt that it remains absolutely true today.
- [28] In the same decision, the Canada Industrial Relations Board declared:

A rear headlamp functioning as the front headlight can be operated at full capacity. This reduces the possibility that others might not see the train as easily during the daytime. Further, the failure to comply with General Order No. O-14 does not necessarily mean that a danger exists. If Mr. Johnston was not satisfied with the headlamp's operation at full capacity, the CRORs provide for a course of action in the event of headlight failure.

Nor does the absence of ditch lights create a danger. Firstly, at the time of his investigation, the engine unit at the Pine Falls Yard was at a standstill. When at a standstill, the railway operating rules do not require ditch lights to be illuminated. Secondly, even if the absence of ditch lights created a risk of injury, it was to the public not to crew members in the cab.

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<sup>3</sup> *Jeff Johnston v. Canadian National Railway Company*, Board File 18750-C, December 3, 1999.



Following the investigation by telephone, Mr. Dambly learned of the amendment to section 16(2) of the *Railway Locomotive Inspection and Safety Rules*. Ditch lights are required on engine units regularly operated in reverse over a portion of the run, or a suitable alternative filed with the Department.

- [29] To decide if there was a danger for employee Cathcart, I will apply the standard determined by Appeals officers Cadieux in Decision 02-009<sup>4</sup>, and examine if
- the future activity in question will take place;
  - 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.
- [30] Would there have been a reasonable expectation of immediate injury to either Messrs. Cathcart or Rawsthorne if Mr. Cathcart had operated the locomotive in reverse without ditch lights on the tail end? None of the facts and testimonies presented at the hearing lead me to conclude so.
- [31] I believe that suitable alternatives had been offered to the conductor, *i.e.* moving the train at a reduced speed and manually protect each road crossing until the crossing was occupied. Furthermore, the head light was working normally and offered adequate illumination to light the way ahead. As the Board declared, "the absence of ditch lights [does not] create a danger."
- [32] I am satisfied that, even though he could not attend the hearing to present his case, health and safety officer Ames made a thorough investigation of the refusal to work. For his part, health and safety officer Smith gave explicit and careful explanations of the situation at the hearing.
- [33] Therefore, after carefully hearing all the evidence and considering all the testimonies received, I am of the view that the decision of the health and safety officer was correct. For this reason, I confirm health and safety officer's Ames decision of no danger.

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Michèle Beauchamp  
Appeals Officer

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<sup>4</sup> *Parks Canada Agency v. Doug Martin and the Public Service Alliance of Canada*, Canada Appeals Office, Decision No. 02-009, May 23, 2002.

## Summary of Appeals Officer Decision

**Decision No.:** 03-005

**Applicant:** Christopher Cathcart

**Employer:** Canadian National Railway

**Key Words:** Refusal to work, danger, absence of ditch lights

**Provisions:** *Code* 122(1); 128  
COSHR: n/a

### **Summary:**

A locomotive engineer working for Canadian National Railway, in Winnipeg, Manitoba, refused to work because he believed that the locomotive he was operating was not equipped with ditch lights on the trailing end for a reverse movement was dangerous to the public, to himself and to the train conductor.

After 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 and declared that "the absence of ditch lights [does not] create a danger." Suitable alternatives had been offered to the conductor, *i.e.* moving the train at a reduced speed and manually protect each road crossing until the crossing was occupied. Also, the head light was working normally and offered adequate illumination to light the way ahead.