

**CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY**

Canadian Pacific Railway
applicant

and

Brotherhood of Locomotive Engineers
employee representative

and

Paul Danton
health & safety officer

Decision No.: 03-011

April 28, 2003

This inquiry involved an appeal brought under section 146 of the Canada Labour Code (hereto referred to as the Code or Part II) of a direction issued by a health and safety officer pursuant to section 145.(1) of the Code. A hearing was held in Smiths Falls, Ontario, on March 12, 2003.

Appearances:

Mr. J. Patrick Riley, Manager, Regulatory Affairs, Safety and Regulatory Affairs,
Canadian Pacific Railway (CP Rail)

Mr. Gregory Manahan, Regional Road Manager, Safety Process, CP Rail

Mr. Dan Lemay, Brotherhood Locomotive Engineers, Local Chairman, Local 658,
Smiths Falls, Ontario

Mr. Jim Alexander, health and safety officer, Transport Canada.

- [1] On February 22, 2002, health and safety Alexander investigated the collision of CP Rail west bound train 121-22 and CP Rail eastbound train 158-21 which occurred at mile 143.9, Belleville Division, Port Hope, Ontario. According to the evidence, the Conductor¹ of train 121-22 was at the controls of the locomotive moments before impact despite the fact that he was neither qualified nor authorized to operate the locomotive. The evidence further established that the Locomotive Engineer², duly qualified and authorized by CP Rail to operate train 121-22, had permitted his Conductor friend to operate the locomotive as part of a self-authorized on-the-job training session. The collision occurred when the Conductor disobeyed a stop signal and, thereby, exceeded the limits of authority for the train. It was additionally determined that the Locomotive Engineer assigned to train 121-22 was not supervising his Conductor friend when the rule violation occurred. Both the Conductor and the Locomotive Engineer of train 121-22 suffered multiple injuries when they jumped from the locomotive moments before the impact.
- [2] Following his investigation, health and safety officer Alexander issued a direction to CP Rail on May 6, 2002, pursuant to subsection 145.(1) of the *Canada Labour Code*, Part II, (hereto referred to as Part II or the *Code*). At the hearing, health and safety officer Alexander testified that he issued his direction to CP Rail because CP Rail had been advised of this unauthorized practice prior to the accident via a threatened refusal to work, and failed to ensure that the practice was discontinued. That being the case, he held that CP Rail had a duty to ensure that the Conductor had received proper training and certification to enable him to operate the train in a safe manner, and to ensure that the Conductor was properly supervised while operating the locomotive to ensure his compliance with CP Rail's safety rules and policies.
- [3] The direction, which is appended, cited CP Rail for the following two contraventions and ordered CP Rail to terminate the contraventions immediately. The cited contraventions were as follows:

The employer failed to provide adequate supervision of an employee at the controls of train 121-22 to ensure compliance with the company's safety rules, policies and procedures governing the operation of a train.

The employer failed to ensure the employee at the controls of train 121-22 had received the required training and certification to enable him to operate train 121-22 in a safe manner.

¹ The name of the Conductor is not relevant to the issue and will not be included in this decision. Instead, he will be referred to as the "Conductor".

² The name of the Locomotive Engineer is not relevant to the issue and will not be included in this decision. Instead, he will be referred to as the "Locomotive Conductor".

- [4] Mr. Riley, Manager, Safety and Regulatory Affairs, representing CP Rail confirmed that he agreed with health and safety officer Alexander's finding that the accident occurred as a result of:
- an unqualified operator controlling train 121-22 exceeding the limits of authority by not obeying signal indications; and,
 - complacency and failure on the part of the locomotive engineer in charge of train 121-22 to supervise the unqualified conductor at the controls of train 121-22.
- [5] However, he disagreed with health and safety officer Alexander's conclusion that, because its employees had violated safety policies, guidelines and operating procedures, CP Rail was in contravention of the *Code* and the *On Board Trains, Occupational Safety and Health Regulations* for having permitted an unqualified employee to operate the train, and for having failed to provide the unqualified employee with instruction and training to operate the train.
- [6] Mr. Riley referred me to transcripts of the disciplinary hearings that CP Rail conducted after the accident for the Conductor and Locomotive Engineer of CP Rail Train 121-22. According to the transcripts, the Locomotive Engineer said he permitted his Conductor friend to operate the locomotive because he interpreted the Iron-Horse provision³ in their collective agreement to permit this type of on-the-job training. Additionally, he personally felt qualified to provide the training since he had been a locomotive instructor in the past.
- [7] The transcript further confirmed that on January 30, 2002, some three (3) weeks prior to the accident, Mr. Rick McLellan, Manager, Operations, CP Rail summoned the Locomotive Engineer to his office and ordered him to discontinue the unauthorized practice. According to the evidence, another locomotive engineer had observed this unauthorized activity on occasions when he was deadheading on their train and complained about the practice to Mr. Carman Veitch, CP Rail Road Manager at Smiths Falls. The locomotive engineer who had complained indicated to Mr. Veitch that he would refuse to work if the practice occurred again when he was deadheading.
- [8] The Locomotive Engineer assured Mr. McLellan that he would cease the unauthorized practice unless advised that the Iron-Horse provision in the collective agreement permitted the practice. However, the transcripts suggested that, despite the aforementioned warning and agreement to discontinue the practice, the Locomotive Engineer continued to permit his Conductor friend to operate a locomotive. The evidence further suggested that, to avoid detection, the Locomotive Engineer and Conductor refrained from the practice in the presence of government and CP Rail inspectors, and did not discuss the matter in front of any company official.

³ A contingency provision in the Collective Agreement in force at the time affecting Locomotive Engineers that was never activated by the CP Rail and the union because the adverse circumstance it was to address never transpired. The provision was also referred to as the Expressway provision.

- [9] Mr. Riley proffered a memorandum by Mr. McLellan that referred to the threatened refusal to work January 30, 2002 and his instruction to the Locomotive Engineer involved in the accident to cease the unauthorized practice of permitting his conductor friend to operate locomotives. He asked health and safety officer Alexander if this was the threatened refusal to work to which he had referred in his testimony. Health and safety officer confirmed that it was, and further indicated that he was previously unaware that the threaten refusal to work/warning and the accident were so close in time.
- [10] Mr. Manahan, Regional Road Manager, testified regarding the selection criteria and training of locomotive engineer at CP Rail and explained the Iron Horse collective agreement provision. He also testified regarding CP Rail's on-going compliance procedures for ensuring employee rule compliance, and described the Brown discipline system used by CP Rail for dealing with non-compliance. I retained the following from his testimony.
- [11] Mr. Manahan explained that when there is an opening for a locomotive engineer at CP Rail, interested employees must bid for the training. Selection into the training program is based on seniority and a comprehensive interview process to determine the candidate's suitability to the program. For example, the interview process looks into the employee's employment record, infractions and medical condition. If selected for training, the candidate goes to the training facility in Calgary, Alberta and is subjected to:
- extensive rules instruction and examination;
 - extensive simulation exercises
 - on-the-job training as a locomotive engineer
 - further training and rules examination at the training facility;
 - a final observation by a qualified locomotive trainer.
- [12] He added that a trainee is removed from the program if the person fails to score at least 90 percent on any test and, given the comprehensiveness of the selection process and the training, no employee could be confused as to whether or not they were in the CP Rail locomotive training program.
- [13] With regard to the Iron Horse Agreement referred to by the Locomotive Engineer, Mr. Manahan explained that this was a never implemented special contingency provision in the collective agreement to deal with the possibility that the schedule between Toronto and Montreal could not be maintained if there was a crew change in Smiths Falls. The provision provided that, if crews could not effect a crew change in Smiths Falls and still maintain the schedule between Toronto an Montreal, then the Iron Horse provision would be activated. Under the provision, conductors could be trained as locomotive engineers to operate the locomotives for short periods of time, perhaps under restricted conditions, to relieve the locomotive engineer. However, the provision was never needed or instituted because crews were able to effect the required crew changes at Smiths Falls and maintain the schedule between Toronto and Montreal.

[14] On the subject of CP Rail procedures to ensure employee compliance with operating rules and procedures, Mr. Manahan testified that CP Rail achieves this via their:

- proficiency testing program;
- safety education program which includes a safety poster program, regular safety meetings, one on one discussion and question and answer sessions;
- “RQ”⁴ testing, which is conducted by locomotive trainers to confirm understanding and compliance with what is being instructed; and,
- safety framework program, which involves its health and safety committees across the network.

He added that Transport Canada inspectors also inspect for non-compliance on a regular basis.

[15] With regard to CP Rail’s proficiency testing program, he outlined that:

- every CP Rail manager and supervisor must conduct a minimum number of proficiency tests in a year such that every employee under their direction is tested on a rule at least once every year. Proficiency tests assess knowledge and compliance with safety policies, guidelines and operating procedures. Proficiency testing is achieved through observation, surveillance and discussion.
- supervisors must also ride a minimum number of trains to observe and test crew proficiency relative to rules compliance;
- supervisors must analyse printouts from computerized event recorders which are located within the rail infrastructure and record numerous aspects of rail operation. The data reveals both compliance and non-compliance with operating rules.

[16] In this regard, Mr. Lemay confirmed that Mr. McLellan had informed him of the January 30, 2002, threatened refusal to work relative to this matter and of his warning to the engineer in question. Mr. Manahan added, despite all of the compliance efforts of CP Rail, no one reported seeing the prohibited activity during the period after the engineer was ordered to cease the activity until the train collision.

[17] In his summation, Mr. Riley argued that the direction that health and safety officer Alexander issued to CP Rail is in error because it is based on a finding of absolute liability rather than the concept of strict liability which is the proper legal test to be applied in connection with section 124 of the *Code* and paragraph 10.12(1)(a) of the *On Board Trains Occupational Safety and Health Regulations*. In this regard, he referred me to case law which he summarized as follows:

- Where an employer is charged in respect of an act committed by an employee, the question will be whether the act took place without the employer’s direction or approval and whether the employer has been duly diligent and has taken reasonable care. - *R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299*,

⁴ Acronym not defined during testimony.

- Where the prescribed actions are shown to have been committed by an employee acting entirely contrary to careful and appropriate instructions, then this can limit a finding of lack of due diligence. - *R. v. Fletcher Challenger Canada Ltd., Elk falls Forest Industries Ltd., Charles Mander, (1997) B.C.P.C. #62329-01 Burnaby Register.*
- Reasonable care and due diligence does not mean superhuman efforts; rather “a high standard of awareness and decisive prompt and continuing action - *R. v. Commander Business Furniture Inc. (1992) 9 C.E.L.R. (NS) 185.*

[18] Mr. Riley held that the operation of train 121-22 by the conductor was without the employer’s direction or approval. Despite the clear and timely instructions from their employer, the employees chose to act entirely contrary to the instructions issued. Moreover, the evidence taken during CP Rail’s investigation of the accident revealed that the Conductor had never operated the locomotive in the presence of a company officer and never inquired as to whether the activity was acceptable. The evidence further suggested that the two were hiding the practice of permitting the Conductor to operate the train. Mr. Riley asked that the direction that health and safety officer Alexander issued to CP Rail on May 6, 2002 pursuant to section 145.(1) of the *Code*, be rescinded.

[19] According to his testimony, health and safety officer Alexander held that CP Rail was in contravention of section 124 of the *Code* in that it failed to ensure that the prohibited activity was not recurring following their warning to the Locomotive Engineer. He wrote in his report that the employer is ultimately responsible for supervising and enforcing compliance with its safety policies, guidelines and operating procedures.

[20] Having concluded that CP Rail failed to ensure that the prohibited activity was not recurring, health and safety officer Alexander cited CP Rail in his direction for having failed to ensure that the conductor operating the train received the required training and certification as a locomotive engineer, and for having failed to ensure that the conductor was adequately supervised while at the control of a locomotive to ensure his compliance with safety rules, policies and procedures governing the operation of a train.

[21] In my opinion, health and safety officer Alexander was correct to have considered whether CP Rail shared any culpability relative to the failure of its employees to comply with CP Rail’s safety rules, policies and procedures governing the operation of a train. However, the difficulty I have with his finding is that the evidence that he gathered and relied upon for his direction does not establish that CP Rail’s measures to ensure compliance by its employees with safety rules, policies and procedures governing the operation of a train were wanting. The other difficulty I have with his finding is the standard of care that he applied relative to assessing the efficacy of the measures CP Rail was taking to ensure such compliance.

[22] With regard to the evidence in the case, I was persuaded by Mr. Manahan's testimony that CP Rail had a comprehensive program in place that effectively monitored employee compliance with the Company's safety rules, policies and procedures and dealt with non compliance. In the case at hand, the supervisor summoned the engineer as soon as he learned of the prohibited activity, confirmed for the employee that the activity was prohibited, clarified proper procedures and ordered that the activity cease. I believe that the activity remained undetected because the two employees in question concealed their activities. In the final analysis, the evidence did not establish that CP Rail's compliance measures were wanting, or that the Company failed to address the non-compliance of the two employees.

[23] With regard to my second concern, the standard of care that health and safety officer Alexander applied, there is no question that section 124 of the *Code* specifies that the employer is responsible for ensuring that the health and safety of his or her employees is protected. Section 124 of the *Code* reads:

124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

[24] However, the *Code* also specifies in section 126 that employees are required, among other things, to comply with all instruction from the employer concerning the health and safety of employees.

126. (1) While at work, every employee shall
(b) follow prescribed procedures with respect to the health and safety of employees;
(d) comply with all instructions from the employer concerning the health and safety of employees;
(g) report to the employer any thing or circumstance in a work place that is likely to be hazardous to the health or safety of the employee, or that of the other employees or other persons granted access to the work place by the employer;
(j) report to the employer any situation that the employee believes to be a contravention of this Part by the employer, another employee or any other person.

[25] It simply cannot be concluded that the employer is automatically culpable whenever there is non-compliance on the part of an employee. Where, as in this case, the employer has provided employees with instruction and training to carry out work safely, has comprehensive measures in place to detect non-compliance; has and applies a formal disciplinary procedure; and takes immediate steps to address non-compliance, it is difficult to comprehend what more an employer could do.

[26] While the question of due diligence is for the Courts to decide in a prosecution, health and safety officers must be guided by the evidence before them as to whether an action or lack of action on the part of an employer contributed to the contravention under review. I would agree that subsection 145(1) specifies that the health and safety officer must only be “*of the opinion*” that a contravention has occurred. However, given the broad investigative powers that health and safety officers have under the *Code*, it must be understood that their “*opinion*” must at least be an “*informed*” opinion. Subsection 145.(1) of the *Code* reads:

145.(1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to

- (a) terminate the contravention within the time that the officer may specify; and
- (b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or reoccur.

[My underline.]

[27] In this case, there is no evidence that the contraventions by the two employees resulted from, or were influence or encouraged by, any action or failure to act, on the part of CP Rail. For this reason, I hereby rescind the direction that health and safety officer Alexander issued to CP Rail on May 6, 2002, pursuant to section 145.(1) of the *Code*.

Douglas Malanka
Appeals Officer

ANNEX

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On February 22, 2002 the undersigned health and safety officer conducted an investigation into a hazardous occurrence at the work place operated by Canadian Pacific Railway, being an employer subject to the *Canada Labour Code*, Part II, at Port Hope, Ontario, the said work place being sometimes known as Port Hope siding.

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:

Section 124 of the *Canada Labour Code*, Part II:

The employer failed to provide adequate supervision of an employee at the controls of train 121-22 to ensure compliance with the company's safety rules, policies and procedures governing the operation of a train.

Paragraph 125(1)(q) of *the Canada Labour Code*, Part II, and paragraph 10. 12(l)(a) of the *On Board Trains Occupational Safety and Health Regulations*;

The employer failed to ensure the employee at the controls of train 121-22 had received the required training and certification to enable him to operate train 121- 22 in a safe manner.

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

Issued at Toronto, this 6 day of May, 2002.

Original signed by:

Jim Alexander
Health and Safety Officer
ID No. 3300

SUMMARY OF APPEALS OFFICER'S DECISION

Decision No.: 03-011

Appellant: Canadian Pacific Railway

Respondent: Brotherhood of Locomotive Engineers

Provisions:

Canada Labour Code: 124, 126, 145.(1), 146.1(1)
**On Board Trains Occupational
Safety and Health Regulations:** 10.12(1)(a)

Keywords: train collision, conductor, locomotive engineer, certification, instruction, training, due diligence, unauthorized operation of locomotive, supervision, operating rules.

Summary:

A collision involving two trains occurred when a locomotive engineer duly qualified and authorized by CP Rail to operate a train permitted his conductor to operate the train. While at the controls the conductor disobeyed a stop signal and, thereby, exceeded the limits of authority for the train. It was further determined that the Locomotive Engineer assigned to the train was not supervising his Conductor friend when the rule violation occurred. Following this investigation of the collision, the health and safety officer issued a direction to CP Rail for having failed to provide adequate supervision of an employee at the train to ensure compliance with the company's safety rules, policies and procedures governing the operation of a train, and for having failed to ensure the employee at the controls of train 121-22 had received the required training and certification to enable him to operate train 121- 22 in a safe manner.

The appeals officer rescinded the direction because there was no evidence that the contraventions by the two employees resulted from, or were influenced or encouraged by, any action or failure to act, on the part of CP Rail.