

Canada Labour Code
Part II
Occupational Health and Safety

Nav Canada
(London FIC)
applicant

Decision No. 05-019
April 25, 2005.

This case was decided by Appeals Officer Michael McDermott on the basis of written documents submitted by Nav Canada, the employer. The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW) the union representing employees at the London Flight Information Centre, did not submit any written documents.

For the employer

David K. Law, legal counsel.

- [1] This case concerns an appeal pursuant to section 146(1) of the *Canada Labour Code*, Part II (the *Code*) made by the employer, Nav Canada, on October 15, 2003, against a direction issued on October 8, 2003, by health and safety officer (HSO) Lindsay S. Harrower, pursuant to paragraphs 145(1)(a) and (b) of the *Code*.
- [2] The direction required the employer to terminate and prevent further occurrence of, contravention of paragraph 125(1)(p) and paragraph 17.5(1)(b) of Part XVII of the *Canada Occupational Health and Safety Regulations* (COHSR) titled Safe Occupancy of the Workplace, at its Flight Information Centre (FIC) in London, Ontario. More specifically, the nature of the contravention identified was that the employer had:
- failed to prepare or develop an emergency procedure as prescribed, to address the hazardous substances that the employees may have been exposed to during the application of Duochem 5335A1, 94001B1, RSLB1, RSLA2 epoxy coatings and hardeners to the hanger (sic) floor located directly below the Flight Information Centre which resulted in nine refusals to work.
- [3] When filing its appeal asking that the direction be rescinded, the employer sought a stay of the direction. Appeals Officer Douglas Malanka heard the request for a stay during a joint teleconference with the parties held on October 31, 2003, and granted a temporary stay. The stay request was further examined during a subsequent joint teleconference, held on November 10, 2003, at the end of which Appeals Officer Malanka issued an oral decision granting a longer stay. He confirmed his decision to the parties in writing on January 5, 2004, noting that, “the stay shall remain in force until such date as the appeal is heard by an Appeals Officer and a decision is rendered.”

- [4] An oral hearing of the appeal was initially set to be held in London, Ontario, on November 25, 2004. This hearing was postponed and on December 13, 2004, I informed the parties' representatives that I had been assigned the case and that I would be proceeding to hear the appeal by way of written submissions. The applicant employer's submission was sent on January 31, 2005, and received at the Appeals Office on February 1, 2005. The union was copied and alerted by the Appeals Office to its right to respond. On February 22, during a telephone call, the union informed the Office that it would not be submitting a response. No written confirmation was received by the Appeals Office but the union's decision was confirmed in a further telephone call made to it from the Office on March 14, 2005.
- [5] Before proceeding to an analysis of the employer's position, it is useful to review the events leading to the issuing of the direction under appeal. The statement and contemporary notes of Mr. Mike Woods, the Manager of Nav Canada's Flight Information Centre (FIC) at London, Ontario, provide unchallenged information in this respect. Copies of both documents are included as attachments to the applicant's submission. The London FIC is located in accommodation leased from Diamond Aircraft Industries, the owner, which also occupies space in the same building. On Wednesday, September 24, 2003, the Manager of Diamond Aircraft informed Mr. Woods that the floor of the company's hangar would be painted during the ensuing weekend. The hangar is immediately below the Nav Canada workplace. Mr. Woods was told that a non-toxic water based paint would be used and that the hangar doors would be kept open while the work was being performed to facilitate ventilation.
- [6] Nav Canada's Flight Information Centres operate on a 24 hour/seven day week basis, providing safety and other flight information services to commercial and private aircraft. On Sunday, September 28, at approximately 8:45 pm, Mr. Woods was contacted by Mr. Dale Maher, a Flight Services Specialist on duty at the London FIC. Mr. Maher informed Mr. Woods of the presence of paint fumes in the FIC workplace. The odours had become noticeable after the painting work began on Saturday morning but were very strong by Sunday evening with some staff complaining of headaches and burning sensations in their eyes. Mr. Woods went to the workplace where he noted that, contrary to information supplied to him on September 24, the hangar doors were closed. The hangar doors were opened at his request and employees who had been on duty all day and who were reporting discomfort were permitted to leave.
- [7] When he returned to work on Monday, September 29, Mr. Woods noted that the paint fumes had still not dissipated and he took steps to increase ventilation. He observed that some employees did not complain of discomfort and continued working while others exercised their right to refuse pursuant to section 128 of the *Code*. At this point, Mr. Woods said that he activated a partial contingency or emergency evacuation plan which step, from his contemporary notes, would appear to have been mainly concerned with the continuation of flight safety and information services in the absence of a full staff complement. However, there is no indication that any efforts were made to discourage employees who wished to exercise their right to refuse from doing so.

- [8] Mr. Woods' contemporary notes also indicate that on September 29, prior to the refusals to work having been invoked, he sought advice from Nav Canada's Health and Safety Department in Ottawa, and subsequently requested and obtained from Diamond Aircraft, the Material Safety Data Sheets (MSDS) for the materials being used for the hangar painting. He also took steps to find whom he should contact at HRDC in order to arrange for air quality testing. He recalls that the person he contacted at HRDC arranged for a visit to the London FIC by local health and safety officers. The HSOs did arrive at the FIC but it was in the context of refusals to work which had been instituted by a number of employees experiencing discomfort and adverse symptoms at the FIC premises. The HRDC health and safety officers conducted an investigation leading to a decision that a danger did not exist, the paint fumes by this time having dissipated. However, a direction, which is the subject of this appeal, was subsequently issued.
- [9] The hangar floor painting and coating work performed at Diamond Aircraft was not satisfactory and a repainting was scheduled for November 25, 2003. A detailed set of measures was drawn up aimed at mitigating any adverse effects on employees that might arise during the course of repainting. Pursuant to these measures, Diamond Aircraft undertook to seal off the work area in order to minimize the prospect of odours seeping into the FIC space. It also agreed to arrange for the presence of a manufacturer's representative to ensure that paint materials were appropriate and properly applied. Nav Canada undertook to provide for maximum ventilation of its accommodation, including the availability of stand-by exhaust fans, and to brief its employees fully on the work to be done and the materials to be used. The respondent union representatives were consulted on these measures which they found to be satisfactory and a copy was provided to the Appeals Office. Copies of the list of these measures were attached to the letters which Appeals Officer Malanka sent to the parties on January 5, 2004, confirming the stay of the direction.
- [10] In its submission Nav Canada cites two grounds for appeal of the direction. First it claims that the evidence does not support the conclusion that a hazard existed at the London FIC as maintained in the text of the direction. Second, whether a hazard existed or not, Nav Canada submits that the evidence demonstrates that it had satisfied the requirements of paragraph 125(1)(p) of the *Code* and of COHSR p.17.5(1)(b) long before September, 2003.
- [11] With respect to its claim that no hazard existed, Nav Canada does not dispute that certain of its employees at the London FIC felt unwell or uncomfortable as a result of the odours or vapours emanating from the hangar during painting of the floor. It contests, however, that the odours or vapours met the definition of a hazardous substance in section 122 of the *Code*, which reads as follows:

“hazardous substance” includes a controlled product and a chemical, biological or physical agent that, by reason of a property that the agent possesses, is hazardous to the safety or health of a person exposed to it.

In support of its position, Nav Canada cites information from the manufacturer of the products concerned, the relevant Material Safety Data Sheets (MSDS) and the appropriate Reference Listing for Accepted Construction Materials, Packaging Materials and Non-Food Chemical Products of the Canadian Food Inspection Agency. In sum, these references indicate that, although there are substances in the products concerned which could have adverse effects on employees and cause discomfort, the products can be used safely. In particular, exception is taken to the prospect that the products applied in the hangar could have constituted a hazard to employees at work upstairs in the FIC offices.

* * *

[12] In my view there is no evidence on file which could lead conclusively to a determination that a hazard existed in the FIC offices on the relevant dates. Although it would appear that the painting work began in the hangar on the morning of Saturday, September 27, 2003, it was not until the following evening that complaints were made. Corrective action appeared to be limited to ventilation of the premises, initially by opening doors. At no time were objective tests such as air quality analyses made. By the time an investigation was undertaken on the afternoon of September 29, in response to refusals to work, odours had dissipated and a no danger decision was issued.

[13] Although I agree with Nav Canada's submission that the evidence does not support the conclusion that a hazard existed at the London FIC, I note that the direction was expressed in conditional terms with respect to "the hazardous substances **that the employees may have been exposed to...**" (emphasis added).

Indeed, the intent of both paragraph 125(1)(p) of the *Code* and COHSR p.17.5(1)(b) is anticipatory in nature aimed at having procedures in place in the event that something might happen rather than waiting for dangers or hazards to arise. The applicant apparently agrees with this view when stating, in its submission, its contention that, "whether a hazard existed or not, the evidence plainly demonstrates that Nav Canada had satisfied the requirements of paragraph 125(1)(p) of the *Code* and COHSR p.17.5(1)(b) long prior to September 2003." The validity or otherwise of the applicant's contention is at the heart of the issue to be decided in this appeal.

[14] Nav Canada submits that the Emergency Evacuation Plan for the London FIC and the manner in which it was applied in this case, met the requirements of paragraph 125(1)(p) of the *Code* and COHSR p.17.5(1)(b). It strongly disputes that the emergency procedures envisaged by the regulation should be such as to address specific circumstances or substances. Rather it maintains that the generic nature of the Emergency Evacuation Plan at the London FIC provides for sufficient response to an emergency which it characterizes in general terms as, "an unexpected, uncontrollable and unspecific set of circumstances warranting action, including the possibility of the exit of personnel from a building." In assessing the validity of this submission it is relevant to consider the nature of the statutory and regulatory obligations concerned, as well as the scope and content of the Emergency

Evacuation Plan for the London FIC. Both the statutory and regulatory obligations fall within the general heading of safe occupancy of the workplace, including safe access and exit to and from the workplace. The regulation places particular emphasis on emergency plans and procedures and COHSR s.17.5(2) specifies that the emergency procedures referred to in s.17.5(1) shall, among other things, contain an emergency evacuation plan.

- [15] The Emergency Evacuation Manual for the London FIC addresses fire prevention and emergency evacuation procedures. It was developed in March, 2003, and its completion is mentioned in the London Workplace Health and Safety Committee minutes for March 21, 2003, which are included as an attachment in the applicant's submission. Given the nature of Nav Canada's mandate in the field of aviation safety, the Manual also covers the continuation of services in the event of an evacuation, either in designated temporary accommodation or through passing on responsibility to other Nav Canada locations. The Manual, however, stresses that employee safety is paramount and should not be jeopardized in the process of implementing temporary or replacement service. Nav Canada maintains that the Emergency Evacuation Manual is generic in nature and suited to respond to the requirements of COHSR s.17.5(1) including p.17.5(1)(b).
- [16] In brief then, the facts available reflect a situation in which odours and vapours emanating from painting the floor in premises below those occupied by the appellant, had the unanticipated effect of causing discomfort and adverse symptoms to some but not all employees present in the applicant's workplace. There was some delay before this situation was brought to management's attention and the initial response was restricted to opening doors to ventilate the premises and the release from work of those feeling ill effects. Subsequently, as adverse symptoms continued to be experienced and the odours remained present, increased ventilation was arranged and steps were taken to ascertain the nature of the products causing the odours and inquiries were made with a view to having the air quality assessed. These steps were overtaken when refusals to work were instituted by nine of the employees at which point a partial contingency or emergency evacuation plan was activated by management. HRDC health and safety officers conducted an investigation arising from the refusals which led to a decision that no danger existed. However, a direction which is the subject of this appeal was subsequently issued.
- [17] Nav Canada submits that the London FIC Emergency Evacuation Manual is sufficiently generic to respond to emergency procedures envisaged by COHSR p.17.5(1)(b) which reads as follows:

Every employer shall, after consultation with the workplace committee or the health and safety representative and with the employers of any persons working in the building to whom the Act does not apply, prepare emergency procedures

- (b) if there is the possibility of an accumulation, spill or leak of a hazardous substance in a workplace controlled by the employer, to be implemented in the event of such an accumulation, spill or leak.

There is no specific reference in the London FIC Emergency Evacuation Manual to procedures covering accumulations, spills or leaks of hazardous substances and certainly nothing approaching the detail drawn up with respect to contingencies for the repainting of the Diamond Aircraft hangar in November, 2003. In effect, Nav Canada is arguing that the emergency evacuation procedures are sufficient to cover the obligation created by the regulation.

- [18] Hazardous substances or products which are potentially hazardous if improperly used, are present in virtually every workplace. Depending on the nature of the business, the level of presence of such substances or products will vary. In those cases when the use of hazardous substances or products is integral to the operation concerned, it makes sense that contingencies for misuse or accidents should be well developed and include corrective measures as well as evacuation plans. Indeed it is likely that staff employed in such businesses will possess a measure of expertise and be suitably equipped to handle such contingencies. Nav Canada is in the business of aviation safety and communication. No direct evidence is included in the file but it is reasonable to assume, from the descriptive information on FIC operations included in Nav Canada's submission, that the presence of hazardous substances or potentially hazardous products at the FIC premises would be incidental rather than integral to its main functions. As such, there is some validity to the argument that, in the event of incidents at such premises involving actual or suspected hazardous substances, evacuation of the area is a reasonable response which would allow for appropriate expert assistance to be brought in to diagnose and deal with the situation. Furthermore, as noted previously, the regulations governing safe occupancy of the workplace emphasize emergency evacuation procedures and COHSR p.17.5(2) requires that the emergency procedures referred to in p.17.5(1) contain an emergency evacuation plan.
- [19] In reaching a decision in this case, I am mindful that, although the opportunity to respond to the applicant's decision was available to the union representing the employees concerned, no such response was filed. The applicant's contentions as to the lack of evidence of the existence of a hazard and the adequacy of the Emergency Evacuation Plan at the London FIC, a workplace controlled by the employer, have not been challenged. I have also taken into account the nature of operations at the FIC and the emphasis in COHSR s.17.5 on emergency evacuation procedures. I have concluded that, while more prompt action and activation of the evacuation plan might have been advisable, the measures envisaged in the Emergency Evacuation Plan at the London FIC, meet the threshold of the requirements of paragraph 125(1)(p) of the *Code* and of COHSR p.17.5(1)(b) as they applied to the circumstances that existed at the London FIC during the period September 27 to 29, 2003. My decision, pursuant to paragraph 146.1(1)(a) of the *Code*, is to rescind the direction issued on October 8, 2003.

Michael McDermott
Appeals Officer

Summary of Appeals Officer's Decision

Decision No: 05-019

Applicant: Nav Canada (London FIC)

Key Words: Hazardous substances, emergency procedures

Provisions: *Code* 125(1)(p), 145(1)(a) and (b), 146(1) 146(1)(a)
COHSR 17.5(1)(b)

Summary:

Nav Canada, the employer, appealed a direction issued by a health and safety officer requiring it to cease contravention of paragraph 125(1)(p) of the *Code* and paragraph 17.5(1)(b) of the COHSRs at its Flight Information Centre (FIC) in London, Ontario. The nature of the contravention identified was that the applicant had failed to prepare or develop an emergency procedure to address hazardous substances to which employees may have been exposed during the painting of a hangar floor directly below the FIC workplace.

The appeal was heard on the basis of a written submission from the applicant which was copied to the union representing employees at the London FIC. Nav Canada cited two grounds for appeal: that the evidence did not support a conclusion that a hazard existed at the workplace and that, whether or not a hazard existed, the Emergency Evacuation Plan for the London FIC was already in place and sufficiently generic to satisfy the requirements of the *Code* and the COHSRs. The union was aware of its right to respond but chose not to do so.

In reaching a decision, the Appeals Officer noted that the applicant's submission had not been challenged and took into account the nature of Nav Canada's operations at the FIC as well as the emphasis in COHSR s.17.5 on emergency evacuation procedures. He concluded that the measures in the Emergency Evacuation Plan met the threshold of the paragraphs of the *Code* and the COHSRs cited above, as they applied to the circumstances that existed at the London FIC during the relevant period, and issued a decision to rescind the direction pursuant to paragraph 146.1(1)(a) of the *Code*.