Canada Appeals Office on Occupational Health and Safety
Bureau d'appel canadien en santé et sécurité au travail

275 rue Slater Street, Ottawa, Ontario, K1P 5H9 – Fax : (613) 953-3326

Canada Labour Code
Part II
Occupational Health and Safety

Bernadette Hogue-Burzynski
Suzanne Brisson
Margaret R. Hegier
Jennifer Roy
applicants

and

VIA Rail Canada
respondent

Decision No.: 06-015
May 1st, 2006

This case was heard by Appeals Officer Richard Lafrance, in Winnipeg, Manitoba, on three subsequent occasions: November 2 and 3, 2004, July 4 to 7, 2005 and November 24 and 25, 2005. Final arguments were received in writing by February 13, 2006.

Appearances

For the applicants

Stan Pogorzelec, employees' spokesperson
Dave Kissack, employees' spokesperson
Suzan Brisson, assistant service attendant
Margaret Hegier, senior service attendant
Jennifer Roy, assistant service attendant
Sarah Coss, assistant service attendant
Craig Bailey, maintenance employee
Margaret Temple, senior service attendant
Carmen Lanahan, senior service attendant
Bryan Donaldson, senior service attendant
Ron Susmelj, assistant service coordinator
Robert Tremblay, health and safety committee (HSC) member
Brad Roy, health and safety committee member
Chris Nadeau, health and safety committee member
Dan Michaluk, president, Local 4002, Canadian Auto Workers Union (CAW)
Fabien Bisson, CAW representative

For the Respondent
Brian Kenny, legal counsel
Dawson Wolk, director, Customer Services, West
Keith Dagg, manager, Operations, Vancouver
Kelly Thomas, manager, Customer Services, Vancouver
Dave Hunt, foreman, Equipment Maintenance, Winnipeg
Gary Dy, senior manager, Customer Services
Kevin Williams, assistant service coordinator
Maurice Desaulniers, on board service manager
Gordon Peck, manager, Customer Services, Winnipeg
Dr. John Embil, Director Infection Prevention and Control Unit, Health Science Centre, Winnipeg

Health and Safety Officer (HSO)
Lance Smith, Transport Canada, Surface, Winnipeg
Jim Connor, Transport Canada, Surface, Winnipeg

[1] This case concerns an appeal formed by Bernadette Hogue-Burzynski, Suzanne Brisson, Margaret R. Hegier and Jennifer Roy, on board service attendants for VIA Rail Canada, as a result of a decision of absence of danger made following the employees' work refusal.

[2] These employees were part of the crew coming in to replace the crew arriving from Vancouver. Their work refusal occurred on January 7, 2003, after the Canadian VIA-2 (VIA-2) train arrived in Winnipeg from Vancouver enroute to Toronto.

[3] The employees alleged that the cars had not been properly cleaned in Vancouver after 28 passengers had been ill with symptoms consistent with a gastrointestinal virus during the previous trip from Winnipeg to Vancouver. They believed that working on board the train would cause them to come into contact with a substance or virus, possibly the Norwalk-like virus, causing them to become ill.

[4] On January 7th, 2003, health and safety officer (HSO) Lance Smith, upon completing his investigation of the work refusal, rendered a decision of absence of danger. The refusing employees appealed the decision on January 20, 2003, pursuant to subsection 129(7) of the *Canada Labour Code*, Part II (the *Code*).

[5] I retain the following from the testimony of the witnesses and the documents submitted for the hearing.

[6] On January 3, 2003, the Canadian VIA-1 (VIA-1) train arrived in Winnipeg from Toronto and took on a new crew and service managers. The train left for Vancouver with 211 passengers. Enroute, 28 passengers were reported feeling unwell, with symptoms consistent with gastrointestinal infection. Some of the passengers were isolated to prevent transmission of the disease. Unfortunately, because of the large number of ill passengers, it was not possible to isolate all of them.

[7] During the trip, the crew had to deal with dozens of violently ill passengers and had to clean vomits from the aisles, seats and back of chairs. As well, washrooms were splattered with vomits and fecal matter. Crew members implemented VIA's enroute sanitization procedure.

[8] In Vancouver, only one employee, M. Desaulniers, the on board service manager, reported not feeling well and that he had vomited in his roomette before arriving in Vancouver. However, after a night's rest, he felt better and went back to his post for the return trip to Winnipeg. He attributed his illness to fatigue caused by the events of the previous trip and perhaps a cold that his family was fighting on his departure for work in Winnipeg.

[9] In Vancouver, VIA-1 was renamed VIA-2 for its return trip east to Toronto. Four of the contaminated passenger cars were replaced for the return trip. However, because of a lack of spare passenger cars, two cars (8118 and 8126) were "heavy cleaned" and returned to the train consist. Heavy cleaning consists of disinfecting all hard surfaces and steam cleaning soft surfaces such as carpets and seats.

[10] Before boarding VIA-2 the next day for the return trip, K. Thomas, manager of Customer Services in Vancouver, briefed the crew about the conditions aboard VIA-1 the previous day. She gave the employees a copy of the on board standards for hand washing and enroute sanitization procedures to follow on the return trip to Winnipeg.

[11] K. Thomas assigned an additional employee to the crew to clean and sanitize the cars on a continuous basis with a view to prevent potential spread of a virus aboard the train. She gave this employee specific instructions about her duties as a sanitizer and supplied her with personal protective equipment as well as spray bottles of cleaning solutions.

[12] K. Thomas provided the crew with flyers to be handed out to the passengers, to inform them about the potential presence of a virus aboard the train and precautions to take to protect themselves.

[13] K. Thomas also informed the crew about the two returning cars (8118 and 8126). Further to the concerns raised by some employees about the cleanliness of the two cars, she assured them that Health Canada's health and safety procedures were adhered to with regard to the heavy cleaning of the two cars.

[14] In addition to the flyers handed out by the crew, VIA posted a notice in washrooms and other public areas of the station and train to inform the public about the potential contamination by gastrointestinal virus. The notice advised the public of the precautions to take to prevent the spread of this communicable disease and protect themselves.

[15] While the train was in the station, all the washrooms on the train were locked to prevent anyone from using them. This was done because at that time the cars did not have holding tanks.

[16] When the train left the station, an employee unlocked the washrooms. He noticed in one washroom of car 8118 a splatter of unknown matter at the base of the wall beside the toilet bowl. He informed K. Williams, assistant service coordinator, about this. K. Williams and M. Desaulniers, the on board service manager, found splatters of what might have been vomits or feces on the lower part of the wall. They immediately locked the washroom to make sure that no one could use it until it was cleaned. In Jasper, a cleaner was allowed in to clean it and K. Williams further sanitized it afterwards.

[17] Approximately two hours before arriving in Winnipeg, a passenger complained that she was not feeling well. She was isolated in a roomette and detrained in Winnipeg without being interviewed by the work place health and safety committee or the health and safety officer. The roomette was emptied of its content upon arrival in Winnipeg and locked for the remainder of the trip to Toronto.

[18] On a few occasions during the trip to Winnipeg, M. Temple, senior service attendant on board VIA-2, informed the members of the HSC about the potential virus problem aboard the train.

[19] The day before the arrival of the train in Winnipeg, the HSC employee members met with G. Dy, senior manager, Customer Services, and employer co-chair of the off train HSC, to discuss the situation aboard VIA-2. Together they decided to do a joint on board inspection as soon as train pulled into the station.

[20] Before doing the inspection, the HSC employee members informed the replacement crew about the situation on the train and of their intention to inspect the train.

[21] Based on the information provided by the HSC members, four of the replacement employees decided to refuse to board and work on the incoming train. They held that the cars had not been properly cleaned in Vancouver and that working on the train would cause them to come into contact with a virus or substance, possibly the Norwalk-like virus, causing them to become ill.

[22] When the train arrived, the HSC employee members went aboard to do the inspection. G. Peck, manager, Customer Services, and alternate employer co-chair of the on board HSC, was supposed to accompany them to do a joint inspection, but he was delayed with operational issues and the others went ahead on their own to inspect the train.

[23] At the same time, Dave Hunt, foreman, Equipment Maintenance, having been informed about the soiled washroom by K. Thomas from the Vancouver office, had called in an additional cleaner to clean the washroom in question. At the request of the Customer Services manager, he had the washrooms in two coaches and the Skyline cleaned and sanitized as well. He provided the cleaner with a copy of the cleaning procedure and the personal protective equipment and cleaning products required in accord with the procedure.

[24] The HSC employee members noted in their statements and during their testimony that they did not find bottles of cleaning solutions, masks or other equipment on the train. One employee member reported having found a dirty mop that he thought was the same one that had been used on the previous trip to clean fecal matter and vomits from the floors of the cars.

[25] Another employee member noted in his statement that he went in the roomette where the reported ill passenger had been isolated to "see if there were traces of vomits or feces present to confirm her sickness. Unfortunately none was found", he noted in his statement.

[26] A Transport Canada health and safety officer was then called to investigate the continued work refusals.

[27] HSO Smith conducted his investigation and established the following facts:

- There were 28 ill passengers on VIA-1 enroute to Vancouver.
- The crew members did their best to contain the illness by isolating the ill passengers and initiating enroute sanitization procedures.
- Four passenger cars were replaced in Vancouver and two (8118 and 8126) were heavily cleaned and returned to service because of equipment shortage.
- Employees disagreed with interpretation of VIA procedure; they believed that all the cars should all have been removed.
- According to the employees, the cars may not have been properly sanitized.
- On the return trip to Winnipeg, a toilet in car 8118 was found to not have been thoroughly cleaned.
- The toilet was sanitized in Jasper (maybe not per VIA instructions).
- A dirty mop was found on the train that could possibly have been infected by the virus on the previous trip.
- Health Canada participated in the development of the enroute sanitization procedures.
- VIA Rail developed, in consultation with the HSC, a process for employees to use Virox disinfectant wipes.
- The on board service manager reported he did not feel well upon arrival in Vancouver, but was feeling better the next day and his condition improved during the return trip.
- At the time of the investigation, the Norwalk-like virus had not been confirmed.
- After arrival in Winnipeg, additional sanitization was done on the two coaches' toilets and the Skyline.

[28] The HSO asserted in his report that on board train personnel are in contact with the public on a daily basis during the performance of their duties. There is some inherent risk of exposure to virus when coming into contact with so many people. He rendered a decision of absence of danger based on the facts gathered during his investigation.

[29] Following the respondent's request, I recognized Dr. John Embil, whose services were retained by VIA Rail, as an expert in the field of infectious diseases. It is to be noted that VIA offered the appellants to meet with Dr. Embil to present their views and discuss the report that he had prepared for the hearing. The appellants refused the offer, preferring rather to cross-examine him during the hearing.

[30] Dr. Embil submitted a report and testified at the hearing. He reviewed documents provided by VIA which contained their submission as well as the applicants' submission. I retain the following from his report and testimony.

[31] Based on his review of the VIA enroute cleaning and sanitizing procedure, in comparison with sanitizing procedures established in other work places such as hospitals, Dr. Embil was of the opinion that the VIA procedure was satisfactory, including the concentration of bleach used to sanitize.

[32] Dr. Embil clarified in his report the difference between sanitization and sterilization:

- Sanitization measures are meant to limit the number of viruses in a given area to an acceptable level.
- Sterilization is meant to eradicate all viruses and can only be reached in a strictly controlled environment. It cannot be hoped to be achieved in an area such as a train.

[33] Therefore, if properly applied, the sanitization protocol implemented aboard trains is meant to maintain the level of viruses at an acceptable level for the protection of the employees or any other persons.

[34] Dr. Embil further explained that the Norwalk-like type virus may live up to 12 days in a wet environment and such soft surfaces in trains like carpets and seat cushions that are not cleaned and sanitized. On hard surfaces, such as handle bars, the virus would dry up and normally die within 12 hours.

[35] Dr. Embil clarified as well in his report the term "airborne transmission" as follows:

> It refers to the dispersion of particles/droplets of feces or vomitus into the air, such as the virus may be contained there in. These are large particles and fall to the ground quickly, traveling less than 1 meter. Ultimately, it is contact and ingestion of the particles/droplets of feces or vomitus, which leads to the gastrointestinal infection since the respiratory tract does not have the necessary captors for this virus.

[36] Dr. Embil emphasized that the first line of defence for anyone is hand washing as described in VIA's procedure. In addition, he cautioned that people should never touch their mouth or nose without washing their hands first.

Applicants' Final Arguments

[37] In his final arguments, S. Pogorzelec argued that a danger existed for the refusing employees because:

- VIA allowed the on board train manager who had similar symptoms as the ill passengers to return to work on board VIA-2;
- VIA did not follow its policy and replace all the cars where passengers had been sick; and
- VIA did not follow its procedure to clean the cars and a washroom was not properly cleaned and sanitized.

[38] S. Pogorzelec argued that contrary to VIA's position that exposure to a biological agent is a normal condition of work, the employees consider that when the employer does not adhere to its safety policy, this changes the condition of work to an abnormal condition of work, as it raises the level of risk in such a way that it becomes a danger to the employees. To support his position, he cited Federal Court Justice Gauthier, who declared in paragraph 55 of *Verville v. Canada (Correctional Services)*[1]*:*

> [55] The customary meaning of the words in paragraph 128(2)(*b*) supports the views expressed in those decisions of the Board because "normal" refers to something regular, to a typical state or level of affairs, something that is not out of the ordinary. It would therefore be logical to exclude a level of risk that is not an essential characteristic but which depends on the method used to perform a job or an activity. In that sense and for example, would one say that it is a normal condition of employment for a security guard to transport money from a banking institution if changes were made so that this had to be done without a firearm, without a partner and in an unarmoured car?

[39] S. Pogorzelec argued that I should rescind the decision of the HSO because:

- he refused to board the train, to inspect the work place and to verify if the proper procedures had been used to clean the cars;
- he did not interview the person who actually did the work;
- he refused to board the train, to inspect the work place and to verify if the proper procedures had been used to clean the cars;
- he did not interview the incoming ill passenger to determine how sick she was, where she had been sick and the extent of her exposure to the other passengers and crew;
- he did not interview the cleaner that did the cleaning of the washrooms in Winnipeg, therefore he had no way of accurately assessing what remedial cleaning occurred enroute and at the station to determine if further sanitization was required.

---

[1] *Verville v. Canada (Correctional Services)*, 2004 FC 767, May 26, 2004.

The investigation was therefore flawed from the beginning, the decision was patently unreasonable and it should be rescinded.

[40] Furthermore S. Pogorzelec stressed what Madam Justice Gauthier declared in paragraph 51 of that same decision[2] to argue that the fact that the HSO did not give enough weight to the findings of the HSC members was sufficient to quash his decision. Justice Gauthier stated the following in that regard:

> [51] Finally, the Court notes that there is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. A **reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion**. It could even be established through an inference arising logically or reasonably from known facts.
>
> (my underline)

[41] Based on the testimony of Brad Roy, S. Pogorzelec claimed that the mop that was found on the train was the same mop that was used by the crew on the previous trip to clean vomits and fecal matter. That mop was therefore contaminated with the virus and exposed the employees to the Norwalk-like virus.

[42] S. Pogorzelec further maintained that the HSC members did not find any face shields aboard the train to protect the employees from airborne transmission of the viral material. Again exposing the employees to the virus.

[43] S. Pogorzelec argued that the employees were exposed to the virus because the bleach solution that VIA utilized at the time of the refusal to sanitize the cars was not concentrated enough to contain the spread of the virus and eradicate it and to effectively sanitize any of the surfaces in the cars. The evidence presented was in a memo that was sent a few days after the work refusal by the director of Customer Services, D. Wolk, to VIA managers. This memo indicated that Health Canada had reviewed and updated the recommended concentration of bleach from 0.05% to 0.1%.

[44] Citing Justice Gauthier in paragraph 35 of *Verville v. Canada (Correctional Services)*[3], S. Pogorzelec indicated that the definition of danger does not require that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. It indicates that it must be capable of causing injury at any time, but not necessarily every time. Justice Gauthier stated on that matter:

---

[2] *Verville v. Canada (Correctional Services), supra.*

[3] *Verville v. Canada (Correctional Services), supra.*

> [35] Also, I do not believe that the definition requires that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. The French version « susceptible de causer » indicates that it must be capable of causing injury at any time but not necessarily every time.

[45] S. Pogorzelec maintained as well that I should take into consideration the fact that three more passengers were reported ill with gastrointestinal disease on that very same train on the continuation voyage to Toronto. This indicates that the sanitization procedure was not adhered to, that the virus had not been eradicated and that the employees were still at risk aboard that train.

Respondent's Final Arguments

[46] B. Kenny, counsel for VIA Rail, maintained that an appeal formed pursuant to section 129(7) of the Code **is not** a proceeding *de novo* and, accordingly, that I should review the facts as they were at the time of the HSO's investigation. To support this assertion, he cited the decision made by Appeals Officer Serge Cadieux in *Welbourne and Canadian Pacific Railway Co.*[4], who declared in paragraph 13:

> [13] The role of the appeals officer in hearing an appeal of a decision of no danger issued by a health and safety officer following a refusal to work is not to carry out a new investigation into the matter under appeal. The inquiry of the appeals officer begins with and builds on the health and safety officer's initial investigation and report. **The appeals officer looks at the same circumstances investigated by the health and safety officer, appreciates the facts that were considered or available to the officer, determines and interprets the legislation applicable to the relevant facts, and makes a ruling**. In the end, the appeals officer decides, like the health and safety officer before him or her, if the refusing employee was in a situation of danger as contemplated by the Code and, if so, issues the appropriate directions under subsection 145(2) or (2.1).

[47] B. Kenny further alleged that the applicants' concerns were, at best, based on speculation and hypothesis.

[48] With reference to the testimony of K. Dagg, manager of Operations in Vancouver, B. Kenny argued that the two cars which were reused for the trip back to Winnipeg had been cleaned and sanitized by VIA maintenance people and were safe to be used. The testimony of K. Dagg and the submitted work report firmly established that the two cars in question were cleaned and sanitized as per VIA's sanitization procedure. He further pointed out that that procedure had been developed in consultation with Health Canada and VIA's policy health and safety committee.

---

[4] *Welbourne and Canadian Pacific Railway Co.*, Appeals Officer Serge Cadieux, Decision No. 01-008, March 22, 2001.

[49] B. Kenny maintained that K. Thomas briefed the employees about the conditions aboard the train and that she gave them copies of the enroute sanitization procedure before the train left Vancouver. As well, K. Thomas confirmed that she discussed the issue of reusing the two cars and made clear to the employees that those cars had been cleaned and sanitized in accordance with VIA's approved procedure. She also told the employees that Health Canada health and safety protocols were followed to sanitize the two cars. Therefore, the cars were safe and the risk of exposure to the Norwalk-like virus was not there anymore.

[50] B. Kenny claimed as well that VIA did its utmost to control the spread of the virus by assigning E. Noel as an additional crew member, specifically to sanitize the cars on a continuous basis during the trip. K. Thomas testified that she informed E. Noel about her duties as a sanitizer on the train. She testified as well that she gave her a copy of the on board sanitizing procedure, personal protective equipment and bottles of cleaning solution. Consequently, by adding a sanitizer to the train, VIA made sure again that the potential spread of the virus was contained.

[51] B. Kenny admitted that M. Desaulniers arrived in Vancouver feeling unwell. As testified by K. Thomas, M. Desaulniers informed her about his prevailing condition on the way to Vancouver, but after a night's rest, he thought he was well enough to carry on with his duties on the trip back to Winnipeg. Because of the lightness of his symptoms and the fact that he was feeling well the next day, K. Thomas saw no reason for not letting him get back to work.

[52] B. Kenny also agreed that a washroom was found in car 8118 to be still soiled. However, as the train manager testified, this washroom was immediately locked and made unavailable to passengers and crew until it was cleaned and sanitized in Jasper. Furthermore, as a precaution, this washroom as well as the other washrooms in the two coaches were cleaned and sanitized again upon arrival in Winnipeg. Therefore the incoming replacement crew would not have been exposed to anything hazardous.

[53] B. Kenny recognized as well that a passenger was reported ill a few hours before arriving in Winnipeg. However, that passenger was isolated as soon as she indicated not feeling well. She detrained in Winnipeg, and the roomette where she had been isolated was emptied of its content and kept locked until Toronto.

[54] B. Kenny maintained that, as testified by Dr. Embil, the enroute sanitizing procedure that was developed in cooperation with Health Canada and VIA's policy and work place health and safety committees is the proper procedure to sanitize the cars while enroute.

[55] With regard to the issue of the bleach concentration, B. Kenny argued that nobody submitted any evidence to the effect that a 0.05% solution was ineffective to sanitize the cars. He added that the concentration was doubled to 0.1% following a recommendation by Health Canada further to their review of the procedure.

[56] B. Kenny submitted that the mop that was placed aboard the train could not have exposed the employees to the Norwalk-like virus because, according to the testimony of K. Williams, it was a different mop. That mop may have been oily and dirty, but K. Williams was positive that it was not the one that was used on the previous trip to clean vomits and fecal matter.

[57] B. Kenny agreed that it could be argued that the circumstances on VIA-1 on the way to Vancouver did not represent a normal condition of work because of the high number of ill passengers. However, with regard to the work refusals, the circumstances aboard VIA-2 were the ones that must be considered, and those circumstances were within the crew's normal conditions of work.

[58] In conclusion, B. Kenny argued that the employees were safe and submitted that the appeal be dismissed.

****

Analysis and Decision

[59] Before proceeding to the analysis of the case, I have to deal with B. Kenny's arguments that the inquiry conducted by this tribunal is not a *de novo* procedure and that the Appeals Officer should only review the circumstances prevailing at the time and place of the work refusal.

[60] With regard to the *de novo* issue, Federal Court Justice Rothstein clearly stated, in paragraph 28 of *Martin v. Canada (Attorney General)*[5], that

> [a]n appeal before an appeals officer is de novo.

[61] As well, Madam Justice Gauthier explained in paragraph 32 of *Verville v. Canada (Correctional Services)*[6] decision, that

> [w]ith the addition of words such as "potential" or "éventuel" and future activity, the *Code* is no longer limited to specific factual situations existing at the time the employee refuses to work.

[62] Therefore, based on the above decisions, an appeal before the Appeals Officer under subsection 129(7) is a *de novo* proceeding. Thus, this allows me to review the matter anew and to receive, in addition to the evidence gathered by the HSO, any evidence that the parties may submit, whether or not this evidence was or could have been available to the HSO conducting the investigation.

---

[5] *Martin v. Canada (Attorney General)*, 2005 FCA 156, May 2, 2005.

[6] *Verville v. Canada (Correctional Services), supra.*

[63] Furthermore, as declared by Justice Gauthier, I am not limited to the specific factual situation. I may receive evidence that takes into consideration the potential hazards or conditions as well as any current or future activities in relation to the circumstances surrounding the work refusal.

[64] Finally, S. Pogorzelec argued as well that I should rescind the HSO's decision because he believed that the HSO's investigation was incomplete. I am of the opinion that while I have to take into consideration the findings of the health and safety officer, because of the *de novo* nature of my inquiry, as explained above, I can render my decision based on the circumstances and all the evidence that was submitted at the hearing.

[65] The issue to be decided in the present case is whether or not the employees who refused to work were in a situation of danger as defined in Part II of the *Canada Labour Code*.

[66] In order to render a decision on this issue, I must take into consideration the definition of "danger" stipulated in the *Code*, the relevant jurisprudence as well as all the facts and circumstances of the case at hand.

[67] In the *Canada Labour Code*, Part II, subsection 122(1) defines "danger" as follows:

> "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;

[68] As well, the *Code* states in section 122.2 by what means prevention should be achieved:

> 122.2 Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

[69] In the relevant jurisprudence, there are two leading Federal Court decisions regarding the interpretation of the notion of danger, *i.e.*:

- *Douglas Martin and Public Service Alliance of Canada and the Attorney General of Canada*[7], made by Justice Tremblay-Lamer in October 2003, and
- *Verville v. Canada (Correctional Services)*[8], made by Justice Gautier in May 2004.

---

[7] *Douglas Martin and Public Service Alliance of Canada and the Attorney General of Canada*, 2003 FC 1158, October 6, 2003.

[8] *Verville v. Canada (Correctional Services), supra.*

[70] In the first decision[9], Justice Tremblay-Lamer clarified that the *Code* does not specify that the injury or illness must occur immediately upon exposure for a finding of danger, but that it still requires that there be an impending element, since the injury or illness must occur before the hazard or condition can be corrected or the future activity altered. She wrote:

> [58] However, the new definition also clearly states that a hazard, condition or activity could constitute a danger "**whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity**". As such, contrary to what was indicated by the appeals officer, I am of the view that it is not necessary that there be a reasonable expectation that the injury or illness will occur **immediately** upon exposure to the activity in order to constitute danger within the meaning in the *Code*.
>
> [59] Nevertheless, in my opinion, the new definition still requires an **impending element** because the injury or illness has to occur "before the hazard or condition can be corrected or before the activity is altered.

[71] As to the second decision[10], Appeals Officer Douglas Malanka appropriately summarized in *Cole and Air Canada*[11] Justice Gauthier's determination about the danger. I completely agree with him when he writes:

> [69] Justice Gauthier's decision followed and considered the decision of Justice Tremblay-Lamer. Justice Gauthier wrote in paragraph 36 of her decision that:
>
> > [36] ...Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.
>
> [70] Taking the above noted *Code* provisions and the findings of Justices Tremblay-Lamer and Gauthier, it is my opinion that a danger exists where the employer has failed, to the extent reasonably practicable, to:
>
> - eliminate a hazard, condition, or activity;
> - control a hazard, condition or activity within safe limits; or
> - ensure employees are personally protected from the hazard, condition or activity;
>
> and one determines that:

---

[9] *Douglas Martin and Public Service Alliance of Canada and the Attorney General of Canada, supra.*

[10] *Verville v. Canada (Correctional Services), supra.*

[11] *Cole and Air Canada,* Appeals Officer Douglas Malanka, Decision No. 06-004, February 28, 2006.

- the circumstances in which the remaining hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed thereto **before the hazard, condition or activity can be corrected or altered**; and
- the circumstances will occur in the future as a reasonable possibility as opposed to a mere possibility or a high probability.

[My underline.]

[71] As pointed out by Justice Tremblay-Lamer, the new definition of danger still requires an impending element because the injury or illness has to occur before the hazard or condition can be corrected or future activity altered.

[72] In this case, it would have been unreasonable to expect Air Canada to eliminate the risks related to contracting SARS as SARS was not under Air Canada's control.

[72] When taking into consideration Appeals Officer Malanka's approach and applying it to the elimination of the virus hazard in the present case, I find that it would be unreasonable to expect VIA Rail to eliminate the hazard of his employees coming into contact with the Norwalk-like virus because that hazard is out of VIA's control. Any passenger boarding the train can be a carrier without even being aware of it.

[73] With regard to controlling the hazard, condition or activity within safe limits, I am satisfied that the employer, in cooperation with Health Canada and VIA's policy and work place health and safety committees, developed and implemented general cleaning as well as enroute cleaning procedures.

[74] S. Pogorzelec did not in fact contest the validity of the procedures. What he did argue about is that in the employees' view, the procedures were not adhered to.

[75] While I am aware that some of the employees who testified alleged that the maintenance employees cleaning the cars did not always do a good job, I received no evidence to demonstrate that this was the case in this instance. I am satisfied by the testimony of K. Dagg, who was in charge of the cleaners in Vancouver, that the cleaners followed VIA's cleaning procedure GT 200/400[12].

[76] Notwithstanding this, however, the facts show that after the cleaning was done, a washroom was still found to be soiled by what appeared to be dried fecal matter and/or traces of vomits. Nonetheless, this soiled washroom was discovered as the train was leaving Vancouver and, before anyone had a chance to use it, it was made inaccessible to the crew and passengers and it remained so until the train arrived in Jasper, where a cleaner cleaned and sanitized it.

---

[12] Via Rail, GT 200/400, *General Procedure for Disinfection and Cleaning of All Cars and Locomotives*, 6 pages, issued on 12-2000.

[77] In addition, as noted in the testimony of the HS committee members, the train carpeting and cushions were damp, indicating that some kind of cleaning had occurred.

[78] Even so, S. Pogorzelec argued that to protect the employees from the exposure to the virus, all the cars where passengers had been sick should have been removed from service, in accordance with the following memo sent by Via Rail to the employees:

> We are working closely with Health Canada to implement several remedial measures [to eliminate gastrointestinal viruses]. These include:
>
> - immediate reporting of any incident and isolation of the individual (passenger or crew);
> - **removal from service** and **thorough cleaning** of equipment where the illness occurred, and
> - implementation of an aggressive equipment sanitation program aimed at eliminating the virus onboard.

[79] In my opinion, the goal of the memo was achieved. The ill passengers were isolated to the extent possible given the circumstances. It is true that two cars were not removed from service, but they were thoroughly cleaned, as indicated by K. Dagg. Finally, an additional crew member was put aboard the train to sanitize on an ongoing basis throughout the train, and the crew was asked to implement as well the enroute sanitization procedure.

[80] Given all this, I am convinced that the employer met the *Code* requirement of controlling the hazard within safe limits.

[81] With regard to making sure that the employees were personally protected from the hazard, condition or activity, I find that the employer met this requirement by ensuring that the employees were informed of the existing or potential danger on the train, by advising them of the procedure necessary to protect themselves and by providing them with the protective and sanitizing equipment in accord with VIA's procedure.

[82] It is to be noted that, contrary to what S. Pogorzelec stressed, the HS committee did not find any face mask on the train to protect the employee from airborne transmission of the virus. Given the facts of the case, a face mask was not a required piece of personal protective equipment, as confirmed by Dr. Embil's testimony as well as indicated in VIA's procedure.

[83] As to the circumstances in which the existing or potential hazard, condition or activity could reasonably have been expected to become a danger, *i.e.* to cause injury or illness to any person exposed to it before the hazard, condition or activity could have been corrected or altered, I am of the opinion that the employer met that test because:

- the cars were heavy cleaned and sanitized in Vancouver;

- the soiled washroom was made inaccessible to the employees and passengers as soon as it was found;
- that washroom was cleaned and sanitized in Jasper;
- the washrooms in the coaches were cleaned and sanitized in Winnipeg;
- the allegedly contaminated mop was removed from the train;
- the ill passenger disembarked in Winnipeg;
- the roomette where the ill passenger was isolated was emptied and locked for the remainder of the trip to Toronto;
- the train service manager who had been ill enroute to Vancouver also disembarked in Winnipeg;
- an additional employee also came on board to do the sanitization for the rest of the trip towards Toronto; and
- the crew was to apply the on board enroute sanitization procedure.

[84] Therefore, the existing or potential hazard or condition that could reasonably have been expected to cause injury or illness to any person exposed thereto was corrected before the refusing employees had to board the train in Winnipeg.

[85] Finally, I have to ask myself if circumstances may occur in the future as a reasonable possibility, as opposed to a mere possibility or a high probability, that may cause injury or illness to a person exposed to them.

[86] Justice Gauthier affirmed in paragraph 36 of *Verville v. Canada (Correctional Services)*[13], that

> [**she does not believe either that**] it is necessary to establish precisely the time when the potential condition or hazard or future activity will occur… the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.
>
> [my underline]

[87] So there must be a reasonable possibility, as opposed to a mere possibility, that the circumstance will occur in the future. Black's Law Dictionary[14] defines "reasonable" as meaning "[F]air, proper, or moderate under the circumstances." I believe this to refer to a moderate degree of probability of the occurrence, as opposed to a mere or high probability.

[88] Therefore, the above mentioned decision establishes that the danger can be prospective to the extent that the hazard, condition or activity is capable of coming into being, not as a mere possibility but as a reasonable one, and that the action is reasonably expected to cause

---

[13] *Verville v. Canada (Correctional Services), supra.*

[14] *Black's Law Dictionary*, Seventh Edition, 1999.

injury or illness to a person exposed to it before the hazard or condition can be corrected or the activity altered.

[89] Based on this and given all the measures and procedures put in place by Via Rail, I find that as long as they are indeed implemented, the possibility for the employees of being exposed to a biological agent such as the Norwalk-like type or noroviruses, as they are called today, and of contracting the disease is minimal.

[90] Consequently; because the employer did everything to minimize the exposure of the employees, I view this minimal possibility of exposure to a Norwalk-like virus as a normal condition of work.

[91] Finally, as to the employer's duties towards every person granted access to the work place, in accord with the Code and the *On Board Trains Occupational Safety and Health Regulations*[15], I am satisfied that the employer did what was reasonably practicable to eliminate and control the hazard. VIA Rail reduced the presence of the virus to an acceptable safe level by implementing cleaning and sanitization procedures.

[92] VIA Rail informed as well the passengers about the specific potential hazard aboard the train and the measures taken to protect them. In addition, passengers were told about the measures they should take to protect themselves. Finally, VIA supplied Verox antimicrobial hand wipes to wash their hands.

[93] Therefore, based on all of the above, I confirm the decision of absence of danger rendered by health and safety officer Smith.

_____

Richard Lafrance
Appeals Officer

[15] *On Board Trains Occupational Safety and Health Regulations* made under Part II of the *Canada Labour Code*, SOR/95-105.

Summary of Appeals Officer's Decision

Decision No.: 06-015

Applicant: Bernadette Hogue-Burzynski
Suzanne Brisson
Margaret R. Hegier
Jennifer Roy

Respondent: VIA Rail Canada

Key Words: Decision, refusal to work, Norwalk, virus, ill, symptoms , train, gastrointestinal, infection, sanitization, sterilization, hazard, disease

Provisions: *Canada Labour Code*: 129(7), 122(1), 122.2

Summary:

Four employees of Via Rail refused to work because they alleged that the cars had not been properly cleaned after 28 passengers had been ill with symptoms consistent with a gastrointestinal virus during the previous trip. They believed that working onboard the train would cause them to come in contact with a substance or virus, possibly the Norwalk-like virus causing them to become ill.

A health and safety officer investigated their refusal to work and decided that a danger did not exist and asserted that on board train personnel are in contact with the public on a daily basis during the performance of their duties and that there is some inherent risk of exposure to virus when coming into contact with so many people.

Following his review, the Appeals Officer confirmed the decision of the health and safety officer that a danger did not exist. The Appeals Officer stated that because the employer did everything to minimize the exposure of the employees he viewed the minimal possibility of exposure to a Norwalk-like virus as a normal condition of work. As to the employer's duty towards every person granted access to the work place, the Appeals Officer stated that he was satisfied that the employer did what was reasonably practicable to eliminate and control the hazard.