Federal Court of Appeal | Cour d'appel fédérale

Date: 20250827

Docket: A-252-24

Citation: 2025 FCA 152

CORAM: **RENNIE J.A.**
LASKIN J.A.
GOYETTE J.A.

BETWEEN:

PACIFIC COAST TERMINALS CO. AND BRITISH COLUMBIA MARITIME EMPLOYERS ASSOCIATION

Applicants

and

NENAD HABUS AND THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 500

Respondents

Heard at Vancouver, British Columbia, on April 8, 2025.

Judgment delivered at Ottawa, Ontario, on August 27.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: RENNIE J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Overview

[1] Pacific Coast Terminals Co. (PCT) and the British Columbia Maritime Employers Association (BCMEA) seek judicial review of a decision of the Canada Industrial Relations

Board (the CIRB or the Board). In that decision, the CIRB found that PCT disciplined the respondent, Nenad Habus, contrary to section 147 of the *Canada Labour Code*, R.S.C. 1985, c. L-2. Section 147 prohibits employer reprisals against employees for exercising their rights under Part II of the Code in relation to unsafe work.

[2] At the relevant time, Mr. Habus was employed by PCT and was a member of the respondent International Longshore and Warehouse Union, Local 500 (the Union).

[3] On a workday in December 2022, Mr. Habus refused to perform a task assigned to him by his superiors. As part of the Code process, PCT undertook an investigation to assess the refusal. Mr. Habus refused to sign a form put to him by PCT and failed to attend a meeting with BCMEA, the employers association that represents PCT. Ultimately, BCMEA disciplined Mr. Habus, issuing a three-day suspension from work and restricting him from dispatch to PCT for one year.

[4] Mr. Habus and the Union complained to the CIRB that this discipline was a reprisal for refusing unsafe work in violation of section 147 of the Code. Section 147 is found in Part II of the Code, which deals with occupational health and safety. It states, in relevant part, that no employer shall discipline an employee for acting in accordance with Part II.

[5] The Board issued a decision granting the complaint. It found that Mr. Habus had been disciplined for his participation in the unsafe work refusal process under the Code. PCT and BCMEA now apply for judicial review of the Board's decision.

[6] For the reasons that follow, I would dismiss the application.

II. Factual background

[7] Before his termination from PCT's regular workforce in December 2022, Mr. Habus was a longshoreman and a regular workforce employee holding the position of first aid attendant. As a first aid attendant, Mr. Habus was required by regulation to work close to the first aid station or room and was not to be assigned duties that would interfere with his ability to promptly render first aid: *Canada Occupational Health and Safety Regulations*, SOR/86-304, s. 16.3.

[8] On December 6, 2022, Mr. Habus raised a safety concern about the location of two pallets of lubricants. He was ordered by PCT to move the lubricants using a forklift. Mr. Habus refused the work, providing the reason to both the foreman on-site and his manager that operating the forklift would take him too far away from the first aid room and impair his ability to promptly render first aid should it be required.

[9] The next day, after Mr. Habus reported for work, he was asked by PCT management to fill out a document—a Refusal to Work Registration form from Employment and Social Development Canada. Mr. Habus briefly reviewed the form, some of which had already been completed, and refused to fill it out further or sign it. Later that day, PCT advised Mr. Habus that he was no longer permitted to work at PCT and that if he wanted to work, he would need to report to the union hall for dispatch to another job.

[10] On December 9, 2022, the Union received a letter from BCMEA advising that Mr. Habus had been suspended from dispatch until the conclusion of the investigation into his unsafe work refusal. The letter also proposed that BCMEA meet with Mr. Habus and provided dates for the meeting: Respondents' Record, Exhibit C, Applicants' Response to the Complaint Filed with CIRB on Feb. 13, 2023 at 173. In subsequent correspondence, BCMEA continued to seek a meeting with Mr. Habus. The Union grieved the original suspension and sought particulars from BCMEA. Neither the Union nor Mr. Habus agreed to BCMEA's requests for a meeting.

[11] On December 22, 2022, BCMEA sent a letter to the Union advising that Mr. Habus had been suspended from all work for three days and that his suspension from dispatch to PCT had been extended to one year.

[12] On January 9, 2023, Mr. Habus filed a complaint with the Board under subsection 133(1) of the Code alleging that he had suffered a reprisal for his unsafe work refusal contrary to section 147 of the Code.

III. The CIRB's decision

[13] Section 16.1 of the Code authorizes the CIRB to decide any matter before it without holding an oral hearing. The Board considered the written submissions and documentary evidence put forward by the parties and was satisfied, despite the requests of both the Union and the applicants for an oral hearing, that the documentation was sufficient for it to render a decision without one.

[14] The Board concluded that Mr. Habus had suffered a reprisal contrary to section 147. It found that Mr. Habus had refused unsafe work and reported the circumstances of his refusal without delay: CIRB Letter Decision, 2024 CIRB LD 5393 at 10 (Decision). It then applied the test for determining whether there has been a reprisal set out in *Paquet et al. v. Air Canada*, 2013 CIRB 691 at paras. 53-60. Under the *Paquet* test, there is a reprisal where (1) discipline has been threatened or imposed, (2) the employee has validly exercised their rights under Part II of the Code, and (3) there is a nexus between the discipline and the employee's participation in the Part II process. If the employee has validly exercised the right to refuse unsafe work, then the burden shifts to the employer to show that any discipline was not a reprisal.

[15] The parties did not dispute that the first factor of the *Paquet* test was satisfied: Mr. Habus had been disciplined by PCT.

[16] As to the second factor, the Board found that Mr. Habus had validly exercised his rights under section 128 by providing the reason for his work refusal orally on December 6, 2022, even though he refused to attend the meeting proposed by BCMEA or complete the form the day following his initial refusal: Decision at 13-14. In the Board's view, PCT and BCMEA did not take issue with Mr. Habus's initial refusal but with his alleged frustration of the work refusal process. Given Mr. Habus's valid work refusal, the burden shifted to the applicants to demonstrate that there was no nexus between the refusal and the discipline imposed.

[17] Central to the Board's decision on this factor were its findings that Mr. Habus had participated in the section 128 process even though he refused to attend the meeting proposed by

BCMEA or complete the form the day following his initial refusal: Decision at 13-14. The Board held that section 128 contains the complete process for work refusals and does not require of an employee anything more than the prompt communication of the circumstances of the refusal; this, it found, Mr. Habus had provided orally on December 6, 2022. As a result, the Board determined, the decision to discipline Mr. Habus for refusing to attend the meeting with BCMEA or complete the form constituted a reprisal for Mr. Habus's exercise of his rights under section 128, including the right to see his unsafe work refusal investigated without being required to participate in any meetings or complete any forms.

[18] Accordingly, the Board rescinded the three-day suspension, ordered PCT to compensate Mr. Habus for lost wages and benefits arising from that suspension, and reserved jurisdiction to consider any claim Mr. Habus might bring for compensation for the extended suspension from dispatch to PCT.

IV. Issues and standard of review

[19] The parties agree that the standard of review of the substance of the Board's decision is reasonableness: *Stewart v. Canada (Attorney General)*, 2025 FCA 89 at para. 2; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 25.

[20] The applicants raise several issues regarding the reasonableness of the Board's decision, including its interpretation of sections 128 and 147.1 of the Code and its application of relevant jurisprudence.

[21] In addition, the applicants say that they were denied procedural fairness when the Board refused to hold an oral hearing despite the requests of all parties. On judicial review for procedural fairness, this Court is to determine for itself whether the Board's process satisfied the level of fairness required in all the circumstances, in effect applying a standard of correctness: *Jagadeesh v. Canadian Imperial Bank of Commerce*, 2024 FCA 172 at para. 53; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras. 44-56.

V. Analysis

A. *Was the Board's decision unreasonable?*

[22] As mentioned above, the applicants attack the reasonableness of the Board's decision, primarily on the ground that its interpretation of certain provisions of the Code, sections 128 and 147.1, was unreasonable.

[23] Reading the Board's decision holistically and contextually in light of the evidentiary record, the submissions of the parties, and the relevant statutory provisions and caselaw, I conclude the Board's decision was not unreasonable: *Matos v. Canada (Attorney General)*, 2025 FCA 109 at para. 45; *Vavilov* at para. 97. The Board considered and applied the relevant statutory provisions—sections 128, 133, 147 and 147.1 of the Code—to the facts before it and did so relying on authorities from this Court and past decisions of the Board.

[24] The principles relevant to reasonableness review were recently summarized by this Court in *GCT Canada Limited Partnership v. International Longshore and Warehouse Union Ship and Dock Foremen, Local 514*, 2025 FCA 100 at paragraph 26:

> (1) The "burden is on the party challenging the decision to show that it is unreasonable." "[A]ny shortcomings or flaws relied on by the party challenging the decision [must be] sufficiently central or significant to render the decision unreasonable." (*Vavilov* at para. 100);
>
> (2) A decision will be unreasonable if the reasoning process is not rational or logical. In particular, "a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis …" (*Vavilov* at para. 103);
>
> (3) A decision will also be unreasonable when the "decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it." (*Vavilov* at para. 101); and
>
> (4) With respect to factual determinations, generally the court must "refrain from 'reweighing and reassessing the evidence considered by the decision maker'." However, "[t]he decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. … The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it." (*Vavilov* at paras. 125, 126).

[25] These principles apply to review of an administrative decision-maker's statutory interpretation: *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21. These decision-makers need not in all cases engage in a formalistic exercise in statutory interpretation, but their reasons for decision must show that the decision-maker was alive to the essential elements of the text, context, and purpose of the statutory provision in question: *Mason* at para. 69.

(1) Interpretation of section 128

[26] The applicants argue that the Board interpreted section 128 of the Code unreasonably by relying on the language of subsection 128(12) and failing to advert to section 126 in concluding that an employee does not need to participate in the investigation process.

[27] Subsection 128(1) states that an employee may refuse work when the employee has reasonable grounds to believe that performing the prescribed task, including the operation of a machine, would constitute a danger to the employee or another employee. By subsection 128(6), an employee who refuses work "shall report the circumstances of the matter to the employer without delay."

[28] Subsection 128(12) states:

> The employer, the members of a work place committee or the health and safety representative may proceed with their investigation in the absence of the employee who reported the matter if that employee or a person designated under subsection (11) chooses not to be present.

[29] The applicants do not dispute that Mr. Habus fulfilled the requirement to report the circumstances of his refusal by stating his reasons orally on the date of the refusal. However, the applicants submit that the Board erroneously relied on subsection 128(12) to conclude that Mr. Habus was not required to attend a meeting with BCMEA or complete the form at PCT's request: Applicants' memorandum of fact and law at para. 60.

[30] The Board reasoned that while subsection 128(7.1) imposes a duty on the employer to investigate an unsafe work refusal, the Code also contemplates, in subsection 128(12), that an employee could decline to participate in an investigation by permitting the employer (or work place committee or health and safety representative) to continue the investigation even though the employee "chooses not to be present."

[31] The applicants contend that the Board's reasoning "reads-in an employee protection . . . that does not exist": Applicants' memorandum at para. 61. I disagree. In my view, the Board's interpretation is reasonable on the plain wording of subsection 128(12) and the context found in other parts of section 128. The Board's reasons show that it was alive to these considerations.

[32] As the Board observed, section 128 sets out the complete process for the handling of unsafe work refusals. When Parliament intended to impose an obligation or prohibition on an employee within the work refusal process, it did so explicitly:

> (1) subsection 128(2) prohibits an employee from refusing work when doing so would risk the life, health, or safety of another person;

(2) subsection 128(6) requires the employee to promptly notify the employer of the circumstances of a work refusal;

(3) subsection 128(7) requires the employee to inform the employer as to whether they intend to exercise any recourse under a collective agreement;

(4) subsection 128(9) requires an employee who wishes to continue a work refusal to report without delay the circumstances of the refusal to both the employer and the work place committee or health and safety representative.

[33] The applicants disagree that section 128 comprises the complete set of obligations on an employee participating in the work refusal process. They refer to *Sousa-Dias v. Treasury Board (Canada Border Services Agency)*, 2017 PSLREB 62 in support of the proposition that refusing to attend a meeting as part of a section 128 investigation is insubordination that warrants discipline. In that case, Mr. Sousa-Dias refused work under section 128. The next day, he was called to a meeting by his manager. Mr. Sousa-Dias insisted that a union representative be present at the meeting with him, and when the employer refused, Mr. Sousa-Dias behaved in an intimidating and aggressive manner. He was subsequently disciplined for this conduct.

[34] The applicants liken this case to *Sousa-Dias* and submit that the Code must not be used as a shield against "inappropriate or reprehensible workplace behaviour": Applicants' memorandum at para. 64. However, as this Court made clear on judicial review of the *Sousa-Dias* decision, the discipline upheld in that case was not for Mr. Sousa-Dias's refusal to attend the meeting without his union representative but for his "disrespectful conduct and

insubordination" at the meeting "regardless of how he came to attend" it: *Dias v. Canada (Attorney General)*, 2018 FCA 126 at para. 9. While this Court ultimately upheld the Board's decision in *Sousa-Dias*, it declined to endorse the Board's view that the applicant was required to attend the meeting: *ibid*. *Sousa-Dias* does not assist the applicants.

[35] The applicants also contend that the Board erred by relying on *Bérubé v. Canadian National*, 1991 CarswellNat 1079 in finding that Mr. Habus was not required to complete the Refusal to Work Registration form PCT placed before him. In *Bérubé*, the employer argued that the employee had not legitimately refused work under Part II of the Code because he had not asked for or completed the form required by the employer to do so. The Board held that "there is no requirement in the Code that an employee who refuses work complete a form": *Bérubé* at para. 26.

[36] Here the Board, after quoting paragraph 26 of *Bérubé*, stated that "in order to initiate a work refusal, it is not necessary to fill out any form, even an ESDC registration form." Rather, "the employee may communicate the substance of the complaint orally, as the complainant did in this case": Decision at 13. The Board's reference in this context to *Bérubé* was not an error, and its reasons in finding that Mr. Habus was not required to complete the form or attend a meeting with the employer were based on its reasonable interpretation of section 128.

[37] The Board's reasons show that it was alive to the text, context, and purpose of the section 128 work refusal process. The reasons exhibit the requisite degree of justification, transparency, and intelligibility: *Vavilov* at para. 100.

[38] It is also worth noting that the form placed before Mr. Habus—the Refusal to Work Registration form—is not required under section 128 but is meant for submission under subsection 129(1) of the Code to the Head of Compliance and Enforcement, who exercises the Minister of Labour's powers of administration and enforcement under Parts II and IV of the Code. Section 129 is triggered by a continued refusal of work under subsection 128(15). A day after Mr. Habus initially refused work, the parties had not yet reached this step in the process, which under section 128 follows the conclusion of both the employer's investigation and that of the work place health and safety representative. The applicants do not explain why the completion of this form would have been required at the early stage of the investigation in this case.

[39] Finally on this branch of their submissions on section 128, the applicants point to section 126 of the Code, which sets out what is expected of employees "while at work" in relation to health and safety matters, as context for interpreting section 128. The applicants submit that the Board erroneously ignored section 126 in interpreting section 128. The result, they say, is that the Board interpreted section 128 in a manner that contradicts the general requirements in section 126 that an employee "follow prescribed procedures," "comply with all instructions from the employer," and "cooperate with any person carrying out a duty" in relation to health and safety. I would reject this submission.

[40] As the respondents note at paragraph 46 of their memorandum, the applicants did not put section 126 to the Board in their submissions. Parties are ordinarily prohibited from raising arguments on judicial review that they did not raise before the first instance decision-maker: see

Ouimet v. Canada (Attorney General), 2021 FCA 200 at para. 22; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 22-28. This prohibition extends to arguments that address context that may be relevant to the interpretation and application of a statutory provision: *Canada (Attorney General) v. Ibrahim*, 2023 FCA 204 at para. 53. It therefore applies to the applicants' argument concerning section 126. In my view, it is dispositive of any section 126 issue.

(2) Interpretation and application of section 147.1

[41] In the alternative to their submissions based on section 126, the applicants submit that the Board unreasonably relied on section 147.1 of the Code. Section 147.1 allows for discipline where an employee has "wilfully abused" the rights conferred by sections 128 and 129 of the Code: *Saumier v. Canada (Attorney General)*, 2009 FCA 51 at para. 43. However, it permits imposition of discipline on this basis only once the employee has exhausted all investigations and appeals.

[42] The applicants point first to the Board's observations, at page 14 of its reasons, that the Code did not require Mr. Habus to give reasons for his refusal to sign forms or meet with BCMEA. They say that the Board then moved "inexplicably" to section 147.1 "to suggest that the [a]pplicants were required, but failed, to wait until all investigations and appeals into a refusal of unsafe work are exhausted before implementing discipline": Applicants' memorandum at para. 90.

[43] The applicants then offer two possible interpretations of section 147.1, one of which they say the Board must have adopted to support this conclusion. The first is that Mr. Habus's refusal to participate was its own unsafe work refusal. The second is that the Code prohibits discipline for any conduct arising out of the section 128 process until the process has concluded. They argue that both of these interpretations are unreasonable. In my view, however, we need not contend with the two possible interpretations discussed by the applicants, because their argument rests on a misapprehension of the Board's reasoning.

[44] Contrary to the applicants' submissions, the Board did not rely on section 147.1 to say that the applicants were required to wait until all investigations and appeals were exhausted to discipline Mr. Habus no matter what the reason for the discipline. Nor is the Board's discussion of section 147.1 inexplicable. Rather, following its conclusion that there was a "clear and direct nexus between the work refusal and the [applicants'] discipline of [Mr. Habus]"—one that would ordinarily give rise to a reprisal under section 147—the Board then addressed whether the discipline could nonetheless be justified under section 147.1.

[45] The Board found that because Mr. Habus was disciplined for his refusal to participate in the investigation while the section 128 process was still ongoing, the applicants could not have availed themselves of section 147.1. This conclusion flows from the plain wording of section 147.1, which includes the condition that all investigations and appeals have concluded before discipline can be imposed.

[46] The applicants raise the additional concern that the Board's reasoning would "create a statutory right to engage in misconduct until investigations into a work refusal and all appeals are completed": Applicants' memorandum at para. 103.

[47] I would reject this submission.

[48] An employer in the applicants' position is empowered by section 147.1 to discipline employees who wilfully abuse the work refusal process. So, an employee who refuses work in bad faith, deliberately obstructs the work refusal process, or otherwise misuses their rights under sections 128 and 129 cannot do so free of potential consequence.

[49] However, Parliament has mandated that the imposition of discipline on this basis can take place only once the process has concluded. This makes sense when understood in light of subsection 128(12), which allows the investigation process to proceed with or without the employee's participation, and paragraph 129(1)(c), which permits the Head to refuse to further investigate a refusal made in bad faith. The protection provided to employees refusing unsafe work does not come at the expense of the employer's ability to see the process through and determine after the fact whether the refusal constituted an abuse of rights warranting discipline.

[50] In the Board's view, the applicants failed to demonstrate that there was no nexus between the discipline and the section 128 process. Nor could they tenably argue that Mr. Habus had abused his rights under sections 128 and 129 when he was disciplined before all investigations

and appeals had concluded. These findings were reasonable based on the evidence before the Board and rest on a reasonable interpretation of section 147.1.

B. *Was the Board's process procedurally unfair?*

[51] The applicants also take issue with the Board's decision not to hold an oral hearing. Section 16.1, as noted above, provides that "the Board may decide any matter before it without holding an oral hearing."

[52] The applicants argue that the Board deprived them of the opportunity to "test [Mr.] Habus' basis for refusing to participate in the investigation process" and thereby ignored "countless alleged credibility issues" that ought to have played a role in the Board's decision-making: Applicants' memorandum at para. 111.

[53] As the plain language of section 16.1 states, the Board is not required to hold an oral hearing, even where a party has requested one: *Madrigga v. Teamsters Canada Rail Conference*, 2016 FCA 151 at para. 27.

[54] Moreover, this Court has repeatedly affirmed that the presence of credibility issues or even contradictory evidence does not on its own override the "very wide" discretion afforded to the Board by section 16.1: see *Grain Services Union (ILWU-Canada) v. Frisen*, 2010 FCA 339 at paras. 24-26. There must be other compelling reasons to warrant an oral hearing: *ibid*. In short, unless a party can demonstrate that the decision not to hold an oral hearing precluded it from fully asserting its rights or knowing the case it had to meet, this Court will not intervene:

Ducharme v. Air Transat A.T. Inc., 2021 FCA 34 at para. 19. The applicants have failed to make that demonstration here.

[55] Further, I agree with the respondents that the Board came to its conclusions irrespective of any credibility determinations about Mr. Habus's reasons for refusing to participate in the investigation process. The Board found that Mr. Habus was not required to participate in the applicants' investigation beyond "informing the employer of the workplace issue": Decision at 14. Nor was Mr. Habus "obliged to give reasons to the employer for his lack of participation": *ibid*. Accordingly, while the applicants may have lost the opportunity to challenge the credibility of Mr. Habus's reasons for not participating in the investigation, that lost opportunity had no value—it could not have affected the outcome of the decision. No unfairness resulted from the Board's decision to proceed without an oral hearing.

VI. Proposed disposition

[56] For the reasons I have set out, I would dismiss the application with costs.

"J.B. Laskin"

J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Nathalie Goyette J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-252-24
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CONCURRED IN BY:	RENNIE J.A. GOYETTE J.A.
DATED:	AUGUST 27, 2025

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