

SOURCE: <https://www.canada.ca/en/occupational-health-and-safety-tribunal-canada/programs/decisions/2016/ohstc-16-020.html?wbdisable=true>

2016 OHSTC 20

Date: 2016-11-30

Case No.: 2014-38

Between: Canadian National Railway Company, Appellant and Teamsters Canada Rail Conference, Respondent

Indexed as: Canadian National Railway Company v. Teamsters Canada Rail Conference

Matter: Appeal under subsection 146(1) of the Canada Labour Code of a direction issued by a Health and Safety Officer.

Decision: The direction is varied.

Decision rendered by: Mr. Olivier Bellavigna-Ladoux, Appeals Officer

Language of decision: English

For the appellant: Ms. Lindsay A. Mullen, Partner, Norton Rose Fulbright Canada LLP

For the respondent: Mr. Ken Stuebing, Counsel, CaleyWray

Citation: 2016 OHSTC 20

Reasons

[1] This matter concerns an appeal brought under subsection 146(1) of the Canada Labour Code (the Code) against a direction issued on July 30, 2014, by Mr. TC (Tyronne) Kowalski, a Health and Safety Officer (HSO) with Transport Canada, to the Canadian National Railway Company (“CN” or “the appellant”), an employer subject to the Code. The appeal was filed by CN on August 25, 2014. It is opposed by the trade union representing CN’s employees, Teamsters Canada Rail Conference (“TCRC” or “the respondent”).

Background

[2] On November 18, 2013, CN trainee conductor Jason Cluney was fatally injured during a switching operation at a location known as “Murphys” near Tisdale, Saskatchewan. A train was arriving two hours after sunset to deliver cars. Mr. Cluney was assigned the task of operating the rail switch to ensure the oncoming cars were delivered along the correct rail line. During the course of the switching, the conductor supervised Mr. Cluney via radio. The trainee was instructed to perform the switching operation and then send a signal via radio to the oncoming

train. Mr. Cluney made the switch and entered an adjacent track to continue with his work. However, because he did not correctly align the rail switches, he was working in the track of the oncoming cars. He was struck and run over, and the injuries resulted in his death.

[3] Subsection 141(4) of the Code, as it read at the time, provided that a health and safety officer shall investigate every death of an employee that occurred while the employee was working or that was the result of an injury that occurred while the employee was working. HSO Kowalski, assisted by a secondary investigation officer, Mr. Scott Lintock, conducted the mandatory investigation between November 2013 and July 2014.

[4] As a result, it was determined that the CN's trainee conductors were not adequately trained in handling switches, and that training and instructions for trainees' supervisors were also insufficient. In addition, CN's on-the-job supervision of its trainee conductors and its record keeping with respect to trainees' written examinations were found to be inadequate.

[5] More specifically, following his investigation, HSO Kowalski identified four contraventions to the provisions of the Code and issued the following direction pursuant to subsection 145(1) of the Code:

In the matter of the Canada Labour Code Part II - Occupational health and safety

Direction to the employer under subsection 145(1)

The undersigned health and safety officer investigated the death of an employee that occurred on November 18, 2013, in the work place that was operated by Canadian National Railway Company, being an employer subject to the Canada Labour Code, Part II, in the province of Saskatchewan on the Tisdale Subdivision, the closest milepost being 61, the said work place being sometimes known as Murphys.

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

1. Paragraph 125(1)(g) of the Canada Labour Code, Part II (Part II) and subsection 10.12(2), Part X, of the On Board Trains Occupational Safety and Health Regulations

CN failed to keep and maintain rules examinations completed by operating employees at initial training. The operating rule examination of the employee trainee fatally injured could not be provided. Canadian National Railway Company's (CN Rail) standard practice is to destroy the operating rule examinations written by operating employees soon after the examination is completed, and even while the operating employee is still employed by CN Rail.

2. Section 124 of the Canada Labour Code, Part II

The employer failed to ensure that the health and safety of trainee conductors was protected, by failing to emphasize in training material the importance of visually confirming that the switch points were examined and target observed to ensure a switch was properly lined for the intended direction of travel. Railway Safety Act, Canadian Rail Operating Rules (CROR), rule 104 (b) requires performance of these checks each time an employee turns a switch. These operating rule checks function as a control measure, enabling identification and correction of the error, thereby eliminating the hazard produced when the wrong switch is lined. Considering the severity of consequences that switch handling errors pose, the amount of instruction provided during

classroom training on rule 104 (b) was inadequate. Trainee conductors were examined on the CROR rules but the examination question on rule 104 (b) omitted a critical part included in the up to date rule: “to ensure that the switch is properly lined for the route to be used.”

3. Section 124 of the Canada Labour Code, Part II

The employer failed to adequately provide on-the-job supervision of trainee conductors by allowing the supervising conductor assigned as trainer to utilize the trainee to perform safety critical tasks without direct observation, thereby failing to observe the trainee’s performance of critical safe work practices that led to the accident. By failing to ensure adequate supervision was provided, the employer failed to ensure that the health and safety of trainee conductors was protected. The employer did not ensure the conductor trainee handled switches in the manner prescribed by the CROR rule 104 (b). The employer’s system of operating employee proficiency testing did not include any field testing in the rule on the trainee conductor necessary in order to determine if performance was reliable and compliant. The effectiveness and reliability of the trainee to perform the safety critical task of handling switches in accordance with CROR rule 104 (b) was not otherwise recorded and not known to those supervising the trainee conductor. Intervention by those supervising that was necessary to prevent exposure to the hazard of operating over the wrong switch into the wrong track was not provided. During operation of the last switch the trainee lined in error, no other employee directly observed him in order to be able to correct such an error. Given the level of training then, the level of supervision was also inadequate to prevent the trainee from essentially steering the self-propelled rolling stock inadvertently into the wrong track. Not then expecting the movement of the rolling stock in the track the trainee entered, the trainee unknowingly placed himself in harm’s way, once again without a level of supervision necessary to detect and remove the danger.

4. Paragraph 125.(1)(z) of the Canada Labour Code, Part II

The employer failed to provide adequate training, instructions, educational materials and policies on how on the job trainers (OJTs) and supervising conductors are to perform their duties as it pertains to trainee conductors. The employer failed to provide guidance to the supervising conductors and the OJT describing how they were expected to supervise the trainee. The OJT was not informed of how to access the supervising conductors’ reports on the trainees’ performance.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the Canada Labour Code, Part II, to terminate the contravention(s) no later than September 30, 2014.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the Canada Labour Code, Part II, to take steps no later than September 30, 2014, to ensure that the contraventions do not continue or reoccur.

Issued at Saskatoon this 30th day of July, 2014.

[signed]

TC (Tyronne) Kowalski
Health and Safety Officer

7187

To: Canadian National Railway Company

935 de La Gauchetière Street West
Montreal Quebec H3B 2M9

[6] CN applied for a stay of the direction in regards to all four of the contraventions on September 12, 2014. On October 1, 2014, I rendered my decision not to grant the stay and the Occupational Health and Safety Tribunal Canada (the Tribunal) so informed the parties on the same day. The reasons for this decision were issued on December 12, 2014, and are set out in *Canadian National Railway Company v. Teamsters Canada Rail Conference*, 2014 OHSTC 23.

[7] The appeal was heard in Winnipeg, Manitoba from May 5 to 8, 2015, and in Montreal, Quebec on August 19 and 20, 2015. HSO Kowalski was invited by the undersigned to appear as a witness and gave evidence concerning his September 12, 2014, final investigation report.

[8] The appellant called the following members of its training personnel as witnesses: (1) Mr. David Radford, Director, Training Operations; (2) Mr. Bruce Hoyt, Rules Instructor; and (3) Mr. Denis Hoziel, Senior Manager, Transportation and Training. Mr. Roland Hackl, Vice President, TCRC, was the sole witness called by the respondent.

[9] The appellant's position is that it is not in contravention with any of the provisions of the Code or its prescribed regulations and that, given that it is already in compliance with the relevant legal requirements, HSO Kowalski exceeded his jurisdiction and had no authority to issue the direction. Therefore, CN requests that I rescind the direction in its entirety in accordance with paragraph 146.1(1)(a) of the Code.

[10] The respondent's position is that the direction is well-reasoned and supported by HSO Kowalski's thorough review of the circumstances of the accident that are detailed in his investigation report. In the respondent's view, the deficiencies in the training and supervision of conductor trainees described in the direction amount to contraventions to the Code. Accordingly, the respondent requests that I confirm the direction.

Issue and scope of appeal

[11] At issue in this appeal is whether, as determined by HSO Kowalski, CN contravened its general duty to protect the health and safety of employees under section 124 the Code and its specific duties under section 125 of the Code and the On Board Trains Occupational Safety and Health Regulations that are identified in the direction.

[12] Pursuant to subsection 146.1(1) of the Code, my role as an appeals officer is to inquire into the circumstances of the direction and the reasons for it and to come up with the correct decision from a health and safety perspective (*Canadian Freightways Ltd. v. Canada (Attorney General)*, 2003 FCT 391 (F.C.T.D.)). While I may only "vary, rescind or confirm" the original direction (*Transport Canada Marine Safety v. Public Service Alliance of Canada*, 2014 OHSTC 13), the power to vary a direction is broad enough to allow the substitution of a different contravention than the one cited originally provided that the new contravention is based on the same facts as those considered by the HSO (*Rudavsky v. Public Works and Government Services Canada*, 2016 OHSTC 1).

[13] This was made clear by Mr. Justice Rouleau in *Vancouver Wharves Ltd. v. Canada (Attorney General)*, (1998) F.C.J. No. 943 (F.C.T.D.). In that decision, it is stated that the word “vary” is sufficiently flexible to permit expressing the problem identified by the HSO “in a different manner as long as its nature is not altered” (at para. 12). Thus, I may vary a direction by substituting a contravention of one section of the Code for another in certain circumstances. However, the power to vary a direction is not without limits, as the scope of my inquiry is constrained by the facts and issues considered by the HSO.

[14] It is settled law that these proceedings are in the nature of a *de novo* hearing. I can consider in my inquiry any relevant evidence submitted by the parties, regardless of whether this evidence was or could have been available to the HSO when he conducted his investigation. This evidence must, however, pertain to the circumstances existing at the time of the issuance of the direction, not to circumstances as they exist at the time of my inquiry - in this case, more than two years later.

[15] To the extent that I conclude, based on the evidence before me, that no provision of the Code was contravened, I will rescind the direction. Indeed, as submitted by CN, in the absence of a contravention to the provisions of the Code, there is no legal basis for an HSO to issue a direction under subsection 145(1) of the Code. I will vary the direction if I conclude that only certain of the contraventions identified by HSO Kowalski occurred or if, based on the same facts and issues that he considered, I come to the conclusion that other applicable provisions have been breached. Alternatively, I will confirm the direction should I conclude that all of HSO Kowalski’s findings are valid.

Undisputed facts

[16] Before examining whether CN contravened its obligations under the Code, it is useful to review the circumstances surrounding the tragic event that led to HSO Kowalski’s investigation. They are described in an agreed statement of facts that was jointly submitted by the parties and can be summarized as follows:

- On November 18, 2013, Mr. Cluney (hereinafter the conductor trainee), who had been employed by CN since May 27, 2013, was participating in his 58th on-the-job training trip as a conductor trainee when the accident took place.
- On that day, CN freight train L5864118 was traveling from Humboldt, Saskatchewan to switch cars at a location known as “Murphys”, east of Tisdale, Saskatchewan.
- A crew of four individuals was on board, namely, (1) the locomotive engineer who was new to the territory; (2) the pilot locomotive engineer who was familiar with the territory; (3) the conductor who was also familiar with the territory and provided on-the-job training to the conductor trainee; and (4) the conductor trainee.
- The crew was performing switching manoeuvres when the conductor trainee was instructed by the conductor via radio to line switch TS 22 in the normal position in order for the train to reverse (back up) on the main track and pick up the conductor.

- Instead of lining switch TS 22 to the normal position, the conductor trainee inadvertently reversed a different switch, switch TS 23, which lined the track for the train's entry into a diverging interchange track. Unaware of his error, the conductor trainee reported via radio that the mainline switch, switch TS 22, had been lined and locked in the normal position, as instructed, and directed the train to back up. At that point, the crew was unaware that the train was being routed into the wrong track.
- As a result, the train entered the interchange track rather than the main track. The conductor trainee was positioned between the rails of the interchange track with his back to the train and was struck by the train.
- The conductor trainee sustained serious injuries. He succumbed to his injuries during transport by ambulance to the hospital.

[17] The parties also agree with HSO Kowalski's finding that, in the above circumstances, it is clear that the conductor trainee breached rule 104(b) of the Canadian Rail Operating Rules (CROR)^{Footnote 1}. This rule, which is central to the issues raised in this appeal, reads as follows: Except while being turned, each switch must be secured with an approved device. When a switch has been turned, the points must be examined and the target, reflector or light, if any, observed to ensure that the switch is properly lined for the route to be used.

[18] To comply with rule 104(b), the conductor trainee should have identified the right switch and then checked to ensure that a green reflector was observed in the switch target, and should have checked to ensure that the points were lined for the main track. Based on the undisputed evidence, it is apparent that the required examination of the switch points and observation of its target to ensure that the tracks were lined for the intended route were not performed by the conductor trainee. Mr. Hoyt and Mr. Hoziel, witnesses for CN, both testified that the fatal injury would most likely not have occurred had the conductor trainee adhered to Rule 104(b). It was also noted by both Mr. Radford and Mr. Hoziel that another critical rule of the CROR, namely General Rule C(ii) (commonly referred as C2), stating "expect a movement, track unit or equipment to move at any time, on any track, in either direction", was not followed by the trainee at the time of the incident, resulting in his death.

Analysis

[19] As an initial element of analysis, from the file documentation and the testimonies rendered during the hearing I have found that the behaviour of the conductor trainee on the day of the incident was very hard to understand. He committed three different critical mistakes, namely not manoeuvring the proper railway switch, aligning that improper switch in the incorrect direction and finally working inside of and in close proximity to the tracks during any movement on the rails. From my observations of the CN standard practices and training, this type of behaviour is clearly in marked contradiction with basic expected conduct of railway personnel. With that being said, my role here is not to determine the contributory factors to the accident per se, but to determine whether CN was in compliance with its obligations under the Code at the time of the accident.

[20] While HSO Kowalski issued a single direction, he identified four contraventions. In order to determine if the direction is well-founded in law and in fact, I will address each contravention in turn.

[21] For each contravention (that is, each item in the direction), my analysis will be structured as follows:

- Circumstances leading to the issuance of the direction and reasons for it;
- Submissions of the parties; and
- Assessment by the undersigned.

Contravention No. 1 - Failure to keep and maintain rules examination completed by operating employees at initial training

[22] HSO Kowalski determined that CN contravened paragraph 125(1)(g) of the Code and subsection 10.12(2) of the On Board Trains Occupational Safety and Health Regulations by failing to keep and maintain the actual CROR examinations completed by conductor trainees during their initial training.

Circumstances of the direction and reasons for it

[23] HSO Kowalski noted that a specific duty of employers under subsection 125(1) of the Code is to keep and maintain in prescribed form and manner prescribed health and safety records. He added that pursuant to the On Board Trains Occupational Safety and Health Regulations, employers are required to keep a record of any instruction and training provided to operators regarding the safe and proper use of rolling stock for as long as they are employed.

[24] In the course of his investigation, HSO Kowalski noted that the operating rules examinations (i.e., the CROR examinations) written by the conductor trainee during his training could not be provided by CN. He was informed that, while CN keeps a record of the marks obtained by trainees participating in its training program, their actual completed CROR examinations are destroyed. In his opinion, this contravenes the above noted provisions since it makes it impossible to know with absolute certainty the response of the conductor trainee to the operating rule question concerning switch handling (that is, rule 104(b)) on which he was examined.

[25] HSO Kowalski concluded that proper operating rules examinations entails ensuring that mistakes are corrected, such that it can be guaranteed that the examined trainee attain the correct understanding of the operating rules. In his opinion, the retention of examinations is necessary to enable an adequate review and oversight of trainees' performance and evaluation.

Submissions of the parties

[26] CN submits that the requirement under paragraph 125(1)(g) of the Code is for an employer to keep and maintain prescribed health and safety records in the prescribed form. According to

CN, the term “prescribed” can only mean something prescribed by regulations of the Governor in Council. Therefore, as paragraph 125(1)(g) refers to prescribed health and safety records, for it to apply, there must be a regulation setting out the prescribed health and safety records that an employer must retain.

[27] In this regard, CN notes that HSO Kowalski relied on subsection 10.12(2) of the On Board Trains Occupational Safety and Health Regulations as the regulation prescribing the relevant record keeping requirement. However, CN submits that the requirement cited by HSO Kowalski references an obligation to keep and maintain an instruction and training record regarding the safe and proper use of rolling stock, not a health and safety record. According to CN, subsection 10.12(2) of the On Board Trains Occupational Safety and Health Regulations has no connection to paragraph 125(1)(g) of the Code since the latter provision does not use the words “keep and maintain in prescribed form and manner prescribed instruction and training records.” Rather, paragraph 125(1)(g) refers to a different type of records, that is, prescribed health and safety records. It follows that paragraph 125(1)(g) of the Code and subsection 10.12(2) of the regulations cited by HSO Kowalski do not apply to completed CROR examinations because such documents cannot be considered to constitute prescribed health and safety records.

[28] CN further submits that subsection 10.12(2) of the On Board Trains Occupational Safety and Health Regulations relates to the retention of a record of any instruction and training provided to an “operator of self-propelled rolling stock” which, in CN’s view, means locomotive engineers, not conductors. On that basis, CN argues that, even if CROR examinations were considered to be health and safety records, subsection 10.12(2) would not apply in respect of the conductor trainee, since he was not trained on the safe and proper use (and the fueling) of locomotives. On that basis, CN submits that subsection 10.12(2) could only encompass a record of examinations of locomotive engineers in respect of the use and fueling of locomotives, not the CROR examinations of conductor trainees.

[29] In the alternative, even if CROR examinations were considered to be health and safety records, and even if subsection 10.12(2) of the On Board Trains Occupational Safety and Health Regulations applied in respect of the conductor trainee and covered examinations other than those in respect of the use and fueling of locomotives, CN submits that its practice with respect to record keeping regarding its conductor training examinations is in compliance with subsection 10.12(2). CN remarks that this provision refers to “a record” rather than “the record”, which indicates that Parliament did not intend to require an employer to keep a specific examination (i.e., a completed version of a CROR examination).

[30] On this issue, CN submits that the evidence clearly establishes that it does in fact keep and maintain a record of conductor trainees’ instruction and training, including that of the conductor trainee. In particular, CN keeps a record of all questions and examination scores for each conductor trainee and ensures that any errors are reviewed, corrected and discussed.

[31] For its part, TCRC submits that it was confirmed in the evidence in this proceeding that CN does not retain the actual operating rules examinations written by employees and that changing this practice would facilitate proactivity and the ability to respond and anticipate gaps in the knowledge of trainees. It pointed out that a witness for the CN, Mr. Hoziel, indicated that it was CN’s intention to keep trainees’ examinations on file as soon as they become electronic in the imminent future. According to TCRC, this retention would be for good purpose as it will provide

a relevant signal as to what an employee may or may not have ascertained in the course of critical rules training in the classroom.

[32] TCRC added that, in the circumstances of this case, there is no record of CN's instruction to the conductor trainee following his first two CROR examinations and that this made it impossible to know what he failed to grasp and what deficiencies in his rules knowledge had to be flagged and reinforced by those tasked with training him. According to TCRC, this creates a gap in corrective prospective coaching that could be provided by the on-the-job trainer and supervising conductor since they have no way of knowing which questions the conductor trainee did not answer correctly.

[33] Finally, TCRC submits that under the CROR, a conductor is defined as an "employee in charge of the operation of a movement." As such, contrary to CN's argument, subsection 10.12(2) of the On Board Trains Occupational Safety and Health Regulations applies to the conductor, given that he is plainly in charge of the movement of the rolling stock.

Assessment

[34] HSO Kowalski's conclusion implies that, in his opinion, "prescribed health and safety records", within the meaning of paragraph 125(1)(g) of the Code, and "a record of any instruction and training" regarding the safe and proper use of rolling stock, referred to in subsection 10.12(2) of the On Board Trains Occupational Safety and Health Regulations, include CROR examinations completed by conductor trainees. Indeed, his conclusion rests on the premise that CROR examinations constitute prescribed health and safety records that must be kept by employers.

[35] However, HSO Kowalski did not discuss the legal basis upon which the record keeping requirements set out in paragraph 125(1)(g) of the Code and subsection 10.12(2) of the On Board Trains Occupational Safety and Health Regulations apply in the circumstances of this case. Before concluding that the failure to retain rules examinations at initial training contravenes these provisions, it must first be determined that they can be interpreted to create a legal obligation requiring CN to keep and maintain the actual CROR examinations completed by conductor trainees.

[36] Paragraph 125(1)(g) of the Code is very specific and clearly only requires the retention of a certain type of records. It provides that an employer shall "keep and maintain in prescribed form and manner prescribed health and safety records." In this regard, CN correctly notes that "prescribed" means prescribed by or under regulations made by the Governor in Council (see definition in subsection 122(1) of the Code and 171817 Canada Inc. - Artic Sunwest Charter, Decision No. OHSTC-09-005) (171817 Canada Inc.).

[37] Accordingly, for CN to be legally required to keep and maintain actual completed CROR examinations under paragraph 125(1)(g) of the Code, there must be a specific requirement to that effect set out in an applicable regulation. In this regard, HSO Kowalski found that subsection 10.12(2) of the On Board Trains Occupational Safety and Health Regulations required the retention of actual completed CROR examinations.

[38] For the following reasons, I disagree. At the time of the issuance of the direction, section 10.12 of these regulations read as follows:

Operator Instruction and Training

10.12 (1) Every operator of self-propelled rolling stock shall be instructed and trained by the employer in the procedures to be followed for

- (a) the safe and proper use of the rolling stock; and
- (b) the fuelling of the rolling stock, where applicable.

(2) Every employer shall keep a record of any instruction and training referred to in subsection (1) for as long as the operator remains in his employ.

[Emphasis added.]

[39] On my reading, subsection 10.12(2) of the On Board Trains Occupational Safety and Health Regulations merely requires an employer to keep “a record” of any instruction and training given to operators of rolling stock regarding the safe and proper use (and fueling of) rolling stock. Even assuming that this instruction and training record also constitutes a “health and safety record” within the meaning of paragraph 125(1)(g) of the Code,^{Footnote2} subsection 10.12(2) does not prescribe in which form and manner it is to be kept and maintained by an employer.

[40] Therefore, a requirement to keep and maintain a specific type of record of this instruction and training, such as the actual CROR examinations written by trainees, cannot be read into this provision. Had the regulator intended to require employers to keep and maintain an instruction and training record in this particular form and manner, it would have prescribed it in the regulations.

[41] In this regard, it bears repeating that paragraph 125(1)(g) of the Code does not only refer to prescribed (i.e., set by regulations) health and safety records. It also directs their retention in a prescribed (i.e., set by regulations) “form and manner.” As such, if a specific type of record, information or document is required to be kept and maintained under paragraph 125(1)(g) of the Code, this requirement must be set out (i.e., prescribed) in regulations.

[42] For example, subsection 8.12(1) of the On Board Trains Occupational Safety and Health Regulations provides that a record of all protection equipment provided by the employer shall be kept by him for a period of two years after the equipment ceases to be used. Subsection 8.12(2) precisely details the “form and manner” in which this record must be kept:

(2) The record referred to in subsection (1) shall contain

- (a) a description of the equipment and the date of its acquisition by the employer;
- (b) the date and result of each inspection and test of the equipment;
- (c) the date and nature of any maintenance work performed on the equipment since its acquisition by the employer; and
- (d) the name of the person who performed the inspection, test or maintenance of the equipment.

[43] In contrast, subsection 10.12(2) does not indicate what the record that it refers to shall contain, nor does it prescribe that this record be kept in any particular format. This means that employers have some flexibility to determine how to keep a documentary account of the instruction and training regarding the safe and proper use of rolling stock provided to employees.

[44] This is a reasonable conclusion where, such as in this case, there is no express requirement for an employer to keep and maintain completed CROR examinations or other specific documents concerning the instruction and training that it provided to operators of rolling stock. Otherwise, the Governor in Council would have prescribed in the regulations that the requisite record shall take a particular form. However, there is no prescribed “form and manner” in which this record is required to be in and, thus, no requirement to retain specific examinations written by employees. Simply put, completed CROR examinations are not prescribed health and safety records that must be kept by employers under the On Board Trains Occupational Safety and Health Regulations.

[45] In order to comply with subsection 10.12(2), an employer simply has to keep “a record” of any instruction and training given to operators of rolling stock regarding the safe and proper use (and fueling of) rolling stock. In this regard, assuming that conductor trainees are operators of rolling stock within the meaning of subsection 10.12(2) (i.e., this provision covers instruction and training given to conductor trainees), I find that CN complied with this record keeping requirement. ^{Footnote 3}

[46] The evidence indicates that CN in fact kept and maintained an extensive record of conductor trainees’ instruction and training, including that of the conductor trainee. This record includes the marks of all rules examinations of each conductor trainee, copies of the model examinations that are administered to conductor trainees and a class log which includes daily comments on the conductor trainees’ progress and any issues regarding particular trainees.

[47] At the hearing, I also heard evidence indicating that following the completion and marking of each CROR examinations, the instructors note each question answered incorrectly and review the examination with all conductor trainees in class and emphasize the correct answers (testimony of Bruce Hoyt). In sum, CN has a record of all questions and examinations scores for each conductor trainee as well as a policy that ensures that errors are reviewed, corrected and discussed.

[48] Moreover, in the case of the conductor trainee, the evidence shows that he obtained all requisite marks in order to progress through the conductor training program. There is also ample evidence of the contents of the CROR initial training that he received and of the various tests that, like all conductor trainees, he had to pass to ensure that he understood the materials presented throughout CN’s training program.

[49] On the basis of the foregoing, I conclude that the fact that CN did not retain the actual CROR examinations completed by conductor trainees at initial training did not breach the requirements set out in paragraph 125(1)(g) of the Code and subsection 10.12(2) of the On Board Trains Occupational Safety and Health Regulations. Given that CN did not contravene these provisions and that neither the Code nor the pertinent regulations contain any other provisions that would require the retention of actual CROR examinations by an employer, Item 1 of the direction must be rescinded.

Contravention No. 2 - Failure to emphasize the importance and contents of rule 104(b) in the training materials

[50] HSO Kowalski determined that CN breached section 124 of the Code by failing to emphasize in training materials the importance of visually confirming that the switch points were examined and target observed to ensure that the switch was properly lined for the intended direction of travel in accordance with rule 104(b) of the CROR. In HSO's Kowalski's opinion, considering the severity of consequences that switch handling errors pose, the amount of instructions provided on rule 104(b) during CN's classroom training was inadequate.

Circumstances of the direction and reasons for it

[51] HSO Kowalski noted that, for reasons other than lighting, the examination of the switch points and observation of the target required by rule 104(b) of the CROR was not effectively performed by the conductor trainee. In his opinion, finding a deficiency in human performance does not preclude finding lapses of responsibility on the part of the employer, some of which may also be contraventions where prescriptions in law exist to ensure diligence.

[52] HSO Kowalski stated that controls for such human performance issues included training and proceeded to examine aspects of CN's training program. He found that the question in the CROR examination on switching operations left out the part of rule 104(b) which explains its purpose, namely, ensuring that the switch is lined for the route to be used. HSO Kowalski opined that this part was critically important to carrying out the prescribed checks as it informed the trainees of what "properly lined" means.

[53] HSO Kowalski further found that there were only two program training slides in five weeks of classroom training with respect to rule 104(b). He also noted that these slides and the other few slides that pertain to switching activities did not sufficiently emphasize the purpose of rule 104(b) and reinforce the safety critical importance of this rule. In his opinion, these slides represent only a very small percentage of training slides. Given that switch handling is integral to day-to-day railway operations and that it is subject to human errors that can produce harmful consequence, HSO Kowalski considered that this was not sufficient to ensure that trainees acquire the capability of properly handling switches.

[54] While he noted that trainee conductors were examined on the CROR rules, he considered inadequate the single examination question on rule 104(b) because it omitted a critical part of the rule, the part which emphasizes its purpose: "to ensure that the switch is properly lined for the route to be used."

[55] In summary, HSO Kowalski determined that CN failed to deliver effective substantial training on rule 104(b). Taking into account the severity of the consequences that switch handling errors pose, he concluded that the lack of emphasis on rule 104(b) in CN's training materials amounted to a contravention to CN's general duty, under section 124 of the Code, to ensure that the health and safety at work of every person employed is protected.

Submissions of the Parties

[56] CN submits that it is noteworthy that HSO Kowalski did not reference paragraph 125(1)(q) of the Code, which specifically deals with statutory requirements for employers in relation to the instruction and training of employees. According to CN, this provision which requires employers to provide, in the prescribed manner (i.e., prescribed by regulations), employees with instruction,

training and supervision necessary to ensure their health and safety at work, was omitted from the direction because there is simply no prescribed instruction and training obligation in the regulations.

[57] CN argues that since there is no prescribed manner of information, instruction and training for conductor trainees, there was no basis for the issuance of a direction on the inadequacy of CN's training materials. CN submitted that where the manner or contents of training materials is not prescribed by legislation, Parliament intended to provide flexibility to employers to determine appropriate measures for their own workplaces given the expertise, the knowledge and the control that an employer exercises over its workplace. There was therefore no basis for the issuance of a direction on specific contents to be used in training materials, in particular, on the wording of an examination question.

[58] CN added that HSO Kowalski incorrectly relied upon section 124 of the Code as a basis to justify a legal requirement for CN to include the phrase "to ensure that the switch is properly lined for the route to be used" to an examination question since no such obligation exists at law. According to CN, the standard under section 124 of the Code is one of reasonableness and in order for a contravention to exist, an HSO must identify a step that a reasonable employer would have taken in the circumstances but which the employer in question failed to take. Applying this test, CN submits that taking into account the comprehensive and detailed nature of its conductor training program, there is simply no evidence to support HSO Kowalski's view that the addition of a specific phrase regarding rule 104(b) to CN's CROR examinations is a step that a reasonable employer would have taken in the circumstances to ensure employee health and safety, but which CN failed to take.

[59] CN further submits that HSO Kowalski failed to take into account the realities of the conductor trainee's classroom experience, the hands-on experience that they acquire during field intensive training, the repetitive nature of the instructions and all of the additional resources that are available to them in the course of CN's conductor training program. CN argues that CN's training materials are more than reasonable (they are cutting edge) and HSO Kowalski frivolously employed his powers by unduly scrutinizing the wording of a single presentation slide and a single examination question, without regard to the entirety of CN's training program.

[60] Regarding HSO Kowalski's finding that CN failed to ensure that the health and safety of conductor trainees was protected by failing to emphasize in training materials the importance of visually confirming that the switch points were examined and target observed to ensure a switch was properly lined for the intended direction of travel, CN submits that this conclusion has no basis in fact. It argues that HSO Kowalski failed to take into account the objective reality of CN's conductor training program as evidenced by his admission that he only reviewed a single day of course slides and that he did not speak with any member of the training staff before issuing the direction.

[61] In CN's view, HSO Kowalski's investigation was narrow, incomplete and did not provide a fair and accurate basis upon which to conclude that CN's training program failed to emphasize proper switching techniques, including the need to ensure that the switch is properly lined for the route to be used. In fact, the evidence indicates that the rules regarding switches and switching activities are dealt with comprehensively during the course of the program, both in the classroom portion and during the field intensive portion when trainees acquire hands-on experience in a

controlled setting using real equipment and practice tasks, including switching activities. As such, the specific concept described in rule 104(b) is discussed and explained throughout the program.

[62] CN also argues that an objective examination of the information, instruction and training provided during its training program illustrates that it has taken all reasonable steps to ensure the health and safety of conductor trainees and is therefore in compliance with section 124 of the Code. There is simply no evidence that amendments to the materials used during the course of the program are necessary to reasonably ensure the health and safety of conductor trainees in the circumstances.

[63] Finally, CN submits that the very specific requirement outlined in Item 2 of the direction constitutes interference by an overly prescriptive HSO which is simply unreasonable. This item should not stand given that its impact would mean that an HSO can prescribe the contents for training materials, including examinations, for a conductor training program, something which Parliament has specifically not done, nor empowered an HSO to do in its stead.

[64] TCRC submits that the second contravention identified in the direction is well supported by the totality of the evidence and that HSO Kowalski correctly found that there is very little information with respect to handling switches in CN's training materials. It argues that no matter how many training modules CN presented through its witnesses, the employer did not present evidence of any written training materials that instruct trainees on the fundamental purpose of rule 104(b). In stark contrast to older training materials that was jointly prepared by the union and the employer, the present training materials do not emphasize or reinforce the importance of complying with the specific requirements of rule 104(b).

[65] TCRC added that the second item in HSO Kowalski's direction speaks to a significant deficiency in the classroom portion of CN's conductor training program which only contains two slides out of numerous slide presented to trainees over a short period of time. According to TCRC, HSO Kowalski reasonably concluded that more could and should be done to reinforce the importance of adhering to rule 104(b) given that it is one of five most important - and most violated - rules for CN's employees. In particular, no slide reinforces the safety critical importance of this rule, as found by HSO Kowalski.

Error 2029 reinforces the safety critical importance of this rule, as found by HSO Kowalski.

[66] TCRC further submits that while trainees are presented a video entitled "Safe Switch Handling" during their classroom training, this video fails to demonstrate the performance of the necessary checks on which compliance with rule 104(b) depends. In fact, in this video, the model employees do not point the route to be used and are not seen to perform the checks that enable the identification and correction of an error in switch handling.

[67] Regarding the obligation in section 124 of the Code, TCRC submits that this provision requires due diligence of employers and that, contrary to CN's submissions, an employer's reasonableness is not sufficient to ensure compliance with the requirements of section 124. In TCRC's view, two slides in CN's training materials fail to meet its due diligence obligation of reinforcing the importance of rule 104(b) and the potential serious consequences of failing to perform the checks embedded in this rule.

[68] Finally, TCRC submits that this item of the direction merely indicates that further reinforcement of rule 104(b) is necessary in order to ensure the health and safety at work of every trainee and new employee in a manner consistent with the purpose of the Code. TCRC sees nothing extraordinary in this relatively discrete and manageable direction with respect to rule 104(b).

Assessment

[69] HSO Kowalski found that CN contravened its general duty to ensure that the health and safety at work of every employee is protected under section 124 of the Code by failing to sufficiently emphasize rule 104(b) of the CROR in its conductor training materials. The first question that must be addressed is whether section 124 can be relied upon as a basis to impose on employers obligations concerning the contents of their instruction and training materials for employees.

[70] CN correctly noted that there is no prescribed instruction and training obligations in the regulations and that, therefore, paragraph 125(1)(q) of the Code, which specifically deals with requirements in relation to the provision of instruction and training to ensure the health and safety of employees, does not apply. Does the fact that the Code and regulations do not prescribe the manner in which training and instruction shall be provided to train conductors mean that there is no legal basis for the issuance of a direction in this regard?

[71] In my opinion, this question must be answered in the negative. The reason is that even if paragraph 125(1)(q) of the Code does not apply, CN must still ensure that the health and safety of its employees is protected as is mandated by section 124. Indeed, the phrase “[w]ithout restricting the generality of section 124” at the beginning of subsection 125(1) makes it clear that the specific requirements listed in section 125 cannot have the effect of limiting the scope of an employer’s overarching obligation under section 124.

[72] As stated by the appeals officer in 171817 Canada Inc., at paragraph 72:

However, while paragraph 125(1)(q) of the Code may not apply, the employer general protection duty under section 124 of the Code does continue to apply. I will therefore consider the evidence put before me to determine if the employer fulfilled its general duty under section 124 of the Code.

[73] Following this guidance, I will determine, based on the evidence before me, whether CN’s training materials fulfill its general duty under section 124 of the Code. The general employer obligation under the Code is to ensure that employees at work have a safe working environment. As was stated by the appeals officer in 171817 Canada Inc., to achieve this, an employer has to put in place and apply health and safety procedures, which include training and supervision.

[74] Given the very general nature of the employer’s obligation set out at section 124, the issue is whether the employer has taken all reasonable steps to ensure the health and safety of its employees. In other words, section 124 subjects the employer to an obligation of due diligence as opposed to the necessity of specific compliance, which is the case where specific obligations are set out in the Code or its regulations.

[75] That the exercise of due care and diligence is the compliance standard under section 124 is clear from the case law. For example, in *Western Stevedoring Company Limited v. Lemonier*, Decision 97-011, regional safety officer Doug Malanka stated the following:

Section 124 obliges employers to ensure that the safety and health of every person employed by the employer is protected. That is, the employer must take whatever action to protect the safety and health of employees that a reasonable person having knowledge of the legislation and the workplace and workplace hazards would deem necessary to ensure that the safety and health of every person employed by the employer is protected. The word “ensure”, used therein, is defined in the *New Shorter Oxford Dictionary* (1993) to mean “warrant” or “guarantee”, words that establish that the obligation is serious.

[...]

That is not to say that the obligation on employers in section 124 is absolute with no means of defence, or that section 124 can be used frivolously by safety officers. Specifically, paragraph 148.(6)(e) of the Code states that it is a defence in respect of any alleged violation of section 124 for the person to prove that he or she exercised due care and diligence to ensure the safety and health at work of every person employed by the employer is protected. Therefore, in respect of section 124, the exercise of due care and diligence is the compliance standard that employers must meet as opposed to the specific prescriptions found in the [Canada Occupational Health and Safety Regulations] for violations under section 125.

[Emphasis added]

[76] The jurisprudence also clearly establishes that an employer will meet this standard of due care and diligence if it takes reasonable steps to ensure employee health and safety. This test was articulated in *Verville v. Correctional Service Canada*, Decision No.: 02-013:

[18] I do not think that it has been established that the employer did not ensure the protection of the health and safety of its employees. In order for a contravention [of section 124] to exist, the employer must not have taken all reasonable steps to ensure employee health and safety [...].

[19] In the instant case, the employer has, in my opinion, taken all reasonable steps to ensure the employees’ health and safety [...].

[77] The applicability and validity of this test was subsequently confirmed by Madam Justice Gauthier of the Federal Court on judicial review of appeals officer Serge Cadieux’s decision in that case (*Verville v. Canada (Service correctionnel)*, 2004 FC 767 (*Verville*)).

[68] As to the other statements made by the appeal officer [...], I construe them to mean that an employer must take reasonable steps to identify the health and safety risks in the workplace and once a risk has been identified, either through a risk analysis, a complaint by an employee or otherwise, he must take reasonable steps to eliminate or minimize it as much as reasonably possible.

[69] Thus, reviewing the decision as a whole even if some of his comments are questionable, I am not satisfied that the appeal officer applied the wrong standard or test.

[Emphasis added]

[78] Applying this standard, I must determine whether, through its training program materials, CN has taken all measures reasonable in the circumstances to protect the health and safety of conductor trainees. Again, the standard is one of reasonableness, not perfection. While it can be argued that an employer could always do more and provide more safeguards to protect its employees, in order for a contravention of section 124 to exist, a finding that an additional step was required or was not taken must be supported by the evidence (Verville, at para. 66).

[79] HSO Kowalski essentially concluded that there was a lack of emphasis on rule 104(b) of the CROR in CN's training materials, specifically on the purpose of this rule, and on that basis, found that CN failed to comply with section 124 of the Code. However, the evidence before me does not support his conclusion that the amount of instructions provided during classroom training on rule 104(b) was inadequate.

[80] To the contrary, CN provided extensive evidence regarding the comprehensive, rigorous and dynamic nature of its conductor training program. This documentary evidence demonstrates that PowerPoint slides on rule 104(b) which HSO Kowalski considered incomplete are only a subset of the various techniques through which the course curriculum is taught. The classroom portion of the training also includes other learning techniques such as animations, demonstrations, discussions, videos, hands-on activities, reviews, questions and answers and examinations.

[81] Moreover, Mr. Hoyt testified that during the course of the program, the CROR, including rule 104(b), are discussed and explained at length. He indicated that each trainee receive their own copy of CN's operating manual, which includes the CROR in their entirety. Mr. Hoyt also stated that conductor trainees are provided detailed instructions throughout the course regarding the CROR, including rule 104(b). According to his evidence, switches and switching activities are dealt with comprehensively in the classroom setting as well as during the field intensive training portion of the program.

[82] In particular, he indicated that when slides are on the screen in class, conductor trainees are expected to follow along with the CROR in their copy of CN's operating manual. I agree with CN's submissions that, in this context, the reproduction of all the text of any particular CROR within a PowerPoint slide, including rule 104(b), would be redundant. Simply put, the slides provide an overview of the CROR and are not meant to highlight the importance of one rule versus another or put emphasis on their specific contents.

[83] Beyond the contents of the slides, what matters is that there is ample evidence that the rules concerning switching and switching activities, including the requirement to ensure that the switch is properly lined for the route to be used, are discussed and explained in detail throughout the entire conductor training program. The switching activities performed during the field intensive portion of the training include the reinforcement of safe work procedures and the practice of checking points, targets and route to be used.

[84] In my view, when considered as a whole, CN's training materials contain adequate information concerning rule 104(b) for trainees to appreciate the importance of this rule and understand it. Moreover, there is evidence that during the course of its training program, CN highlights other operating rules that act as additional safeguards to ensure employee health and safety. For example, rule C(ii) requires employees to "expect a movement, track unit or equipment to move at any time, on any track, in either direction".

[85] During my visit of the CN training facility, I also saw the switches used to provide hands-on training and teach the proper switching procedure to conductor trainees. I also received demonstrations regarding how to properly line a switch. I have no reason to believe that those demonstrations were different than the instructions and training given to conductor trainees. Such instructions include checking that the points are lined for the route to be used and the step of checking the target, the aspects that HSO Kowalski found that CN failed to emphasize. On balance, I am persuaded by the evidence before me that conductor trainees receive complete information regarding rule 104(b) in the classroom setting and see multiple demonstrations on how to properly line a switch both in person and from other training activities.

[86] Therefore, taking into account the entirety of CN's conductor training program, I find that HSO Kowalski's conclusion that CN failed to emphasize the importance and purpose of rule 104(b) in its training materials is incorrect. It was not reasonable to focus on the wording of PowerPoint slides, without considering the training program as a whole, to conclude to a contravention of section 124 of the Code. In themselves, the slides provide an insufficient basis to conclude that CN failed to take all reasonable steps to ensure employee health and safety.

[87] I reach the same conclusion regarding the other shortcoming in CN's classroom training materials identified by HSO Kowalski in Item 2 of the direction, namely, the omission of certain words in the written examination question concerning Rule 104(b). In this regard, like the appeals officer in *Black Sheep Aviation & Cattle Co. Ltd*, 2015 OHSTC 9, I am of the view that it would be a stretch for me to interpret the broad obligation set out in section 124 of the Code in a way that implies the very specific obligation for the employer that was found to exist by HSO Kowalski. Mandating that examination questions contain explicit reference to any part of Rule 104(b) is such a specific prescription that it would typically be found in a regulations if it existed.

[88] As discussed above, under section 124, the standard of compliance is due care and diligence and the totality of the evidence clearly indicates that the materials provided during CN's conductor training program largely meet this standard. Overall, taking into account the fact that the trainees must receive information on a very large volume of course contents, CN's training materials provide sufficient instructions, information and resources on rule 104(b) for trainees to learn how to properly line a switch and to put them in a position to carry out switching operations in a safe manner.

[89] What is more, in respect of rule 104(b), one has to look beyond the question in the written examination to determine if CN adequately evaluates a trainee's performance and ability with respect to switching activities. In this regard, there is evidence that during the student conductor intensive field training portion of training program, trainees are evaluated on their performance at lining switches as well as on their ability to stay alert at work and work safely, overall attitude, physical ability and ensuring understanding of the tasks.

[90] Based on all of the above, I find that CN's training materials complies with its general duty under section 124 of the Code. In other words, in terms of the classroom training provided and related activities, CN took all reasonable steps that a reasonable person having knowledge of the legislation and the workplace and workplace hazards would deem necessary to ensure that the safety and health of every trainee employed by it is protected.

[91] While TCRC correctly points out that CN could easily improve its training materials by further reinforcing the contents of rule 104(b) and, in this way, implement simple additional

measures to ensure the health and safety at work of every trainee, it bears repeating that section 124 does not require perfection. It is true that CN could certainly enhance its training materials in the manner suggested by TCRC, but I am not convinced that putting more emphasis on CROR rule 104(b) is a step that a reasonable employer would have taken in the circumstances and, thus, that was required to ensure employee health and safety in the instant case.

[92] In summary, I find that the shortcomings in CN's training materials identified by HSO Kowalski do not amount to a contravention of section 124 of the Code and, consequently, Item 2 of the direction must be rescinded.

Contravention No. 3 - Failure to provide adequate on-the-job supervision

[93] HSO Kowalski determined that CN breached section 124 of the Code by failing to adequately provide on-the-job supervision of trainee conductors by allowing the supervising conductor assigned as trainer to utilize the trainee to perform safety critical tasks without direct observation. HSO Kowalski also found that CN did not ensure that the health and safety of trainee conductors was protected by failing:

- to ensure the conductor trainee handled switches in the manner prescribed by CROR rule 104(b);
- to include field testing in the rule on the trainee conductor necessary in order to determine if his performance of switching operations was reliable and consistent; and
- to record the effectiveness and reliability of the conductor trainee to perform the task of handling switches in accordance with CROR rule 104(b) such that those supervising him did not know and could not determine whether his performance was reliable and compliant.

Circumstances of the direction and reasons for it

[94] HSO Kowalski stated in his report that, while the failure by the conductor trainee to notice that he had lined the wrong switch and the fact that he incorrectly applied CROR rule 104(b) were the main factors leading to the accident, there are preventive upstream measures or controls that CN had to take to prevent this situation. Such measures involve not only training, but also adequate supervision. In this case, HSO Kowalski found that special instructions to directly observe the trainee were not provided by CN to those in charge of his supervision. In his view, direct observation by the supervising conductor would have very likely prevented the accident.

[95] More specifically, HSO Kowalski reasoned that if the trainee performing a task inside the track had been under the direct observation of a qualified crewmember, he could and most likely would have been alerted by the qualified employee that rolling stock was approaching, perhaps in time to enable the trainee to step out of the track. Also, the qualified conductor could have signaled the movement to stop and the operation could have been restored to the normal path. However, without a clear instruction otherwise, qualified crewmembers are induced to engage in other productive tasks, a situation which makes them unable to directly observe the trainee during his performance of safety critical tasks.

[96] According to HSO Kowalski, the fact that the conductor trainee did not effectively perform the required checks when he handled a switch in the case at hand indicates that the habit of doing so was not sufficiently formed. The situation of an employee that has not formed the habit of applying rule 104(b) reliably being allowed to perform switching operations without direct observation was deemed particularly hazardous by HSO Kowalski. Until this habit is formed, the practical way to ensure the health and safety at work of conductor trainees is through direct observation. The HSO's report suggested direct supervision at least until consistency in performance is demonstrated.

[97] HSO Kowalski added that, during his investigation, he inquired as to whether the conductor trainee had been consistently observed by trainers and supervisors in the field precisely for the purpose of verifying if the simple checks required by CROR Rule 104(b)- examining the target and the switch points to ensure that the switch is properly lined for the route to be used - were consistently performed. HSO Kowalski found no evidence of the verification of the competency of the trainee in handling switches and, therefore, concluded that specific observation of trainees on their reliable performance of these checks was not documented. Absent a determination that the trainee's performance in handling switches was reliable and consistent, it was a contravention of section 124 of the Code to let him perform such a safety critical task without direct observation by a qualified person able to intervene to correct errors, detect and remove the danger.

Submissions of the parties

[98] CN submits that, as was the case with Item 2 of the direction, it warrants noting that HSO Kowalski did not reference paragraph 125(1)(q) of the Code which specifically deals with statutory requirements in relation to an employer's supervision of employees. In CN's submissions, the fact that there is no prescribed supervision requirements in regulations enacted under the Code obviously means that paragraph 125(1)(q) does not apply and that there is therefore no basis for the issuance of a direction on supervision.

[99] Given the absence of a prescribed supervision requirement, HSO Kowalski incorrectly relied on section 124 of the Code as a basis to justify a legal requirement for CN to provide direct observation of conductor trainees when handling switches without regard to an individual's status within the conductor training program. CN submits that no direct supervision obligation exists at law. Rather, Parliament intended to provide flexibility to federal employers to determine appropriate measures for the supervision of employees in their workplaces. This is in keeping with the expertise, the knowledge and the control that CN exercises over its work places.

[100] With respect to the adequacy of supervision, CN stated that the standard under section 124 is reasonableness, not faultlessness and that adequate and reasonable supervision does not in all cases require that a supervisor be physically present on site. The nature of the supervision that the law requires is dependent on the particular situation and the training, experience and knowledge of the employees.

[101] CN argues that direct observation of the conductor trainee was not reasonably required in the circumstances. CN noted that it employs a graduated scale of supervision of its conductor trainees during the structured training trip portion of its training program. At first, they are restricted to purely observing the activities of the crew, but as they gradually become more

experienced, they gain more responsibility and require less supervision. The evidence is clear that the conductor trainee had training, experience and demonstrated knowledge such that direct supervision was not mandatory in this case:

- he received comprehensive training regarding switches and switching activities in the classroom setting as well as hands-on during field intensive training;
- he demonstrated good comprehension and abilities relating to switching operations; and
- he was on his 58th trip and had almost finished the program when the accident occurred.

[102] CN submits that one has to look beyond the ground level supervising conductor to determine whether the supervision of the conductor trainee was adequate. This is because once a trainee arrives at the structured trip portion of his training, CN's industry leading Training Evaluation Form System (TEF System) comes into play. This is an electronic evaluation system used to assess a trainee's performance during their training trips which addresses all of the tasks performed, including the use of switches and switching activities.

[103] Pursuant to CN's requirements, under the TEF System, each assigned supervising conductor is required to complete a daily evaluation of a conductor trainee. These evaluations are then input into the TEF System where they are accessible by the on-the-job trainers and CN's training management staff. The TEF System also generates automatic alerts regarding conductor trainees with unsatisfactory results. In such cases, CN takes steps to ensure that the problems signalled are addressed by the relevant on-the-job trainer.

[104] In the case of the conductor trainee, CN argues that based upon his performance reviews in the TEF System, it was clear that he was performing well and that there were no recent concerns that would have signalled a potential issue such that direct supervision would have been required. CN also notes that it is important to recall that, at all times on the day of the accident, there was communication with the trainee by way of radio.

[105] CN further submits that there are factual errors in Item 3 of the direction. For example, HSO Kowalski incorrectly stated that its system of operating employee proficiency testing "...did not include any field testing in the rule on the trainee conductor necessary in order to determine if performance was reliable and compliant." In this regard, CN filed evidence indicating that, on the contrary, the conductor trainee's crew was audited in the field more than once during the structured trip portion of his training. Indeed, the crew was observed successfully performing switching activities. This type of monitoring and evaluation is in addition to the daily evaluation under the TEF System whereby supervising conductors evaluate various switching activities as set out in CN's student conductor evaluation form.

[106] According to CN, Item 3 of the direction also mischaracterizes the act of switching as being a safety critical task which requires direct supervision. CN submits that switching activities are routinely and frequently performed and do not comprise a material portion of workplace injuries among CN employees.

[107] Finally, CN submits that, in the circumstances, reasonable and adequate supervision of the conductor trainee was provided. Direct supervision of all conductor trainees at all times, without regard to the stage they are at in the training process, is not reasonable and is not required. Such a requirement would not be consistent with the progressive nature of the training and would

mean that an HSO can prescribe the manner of supervision of conductor trainees, something which Parliament has specifically not done.

[108] In response, TCRC submits that HSO Kowalski correctly noted that CN does not provide instructions to any supervising conductor indicating that there are not to permit a trainee to perform safety critical tasks without direct observation. Indeed, no such instructions can be found in any materials presented by CN in this proceeding and CN's witnesses unanimously confirmed that there is no specific direction provided to employees regarding the proximity and degree of direct observation and supervision that needs to be provided to conductor trainees in the course of a training trip.

[109] In TCRC's view, the fact that there is no guidance or instruction in the materials provided to CN's supervising conductors, including the job aids, stating that they must never allow a trainee to perform safety critical tasks without direct supervision and explaining how supervising conductors are expected to supervise trainees in the course of an assignment is particularly hazardous. TCRC wonders how CN employees could comply with a requirement that is not known.

[110] Since there is no communication on expectations in the materials provided to supervising conductors regarding levels of direct observation required, TCRC argues that there is no deficiency in HSO Kowalski's rationale and conclusion in respect of the third item of his direction. According to TCRC, maintaining a level of direct observation necessary to permit immediate intervention with the trainee should be an explicit requirement conveyed to supervising conductors.

[111] TCRC further submits that this contravention is well-detailed in HSO Kowalski's report and is entirely consistent with the preventive purpose of Part II of the Code. It goes to ensuring that there is a safe environment for the performance of safety critical tasks by trainees.

[112] TCRC also relies on case law under section 124 of the Code to argue that CN failed to exercise due diligence or take all reasonable care to protect its employee in the instant case. In particular, it argues that the critical omissions are that CN failed to impose a rule requiring supervising conductors to directly observe trainees at all times and failed to ensure that they are trained to do so. Moreover, it submits that there are precedents indicating that section 124 can be applied in circumstances of insufficient supervision during the performance of dangerous work.

[113] According to TCRC, a contravention to section 124 can be shown to exist either where the evidence is compelling that an extra level of protection is needed to protect the health and safety of employees or indicates that the employer failed to take reasonable steps to eliminate or minimize a health and safety hazard as much as reasonably possible. TCRC submits that, on the facts of this case, a breach of section 124 is apparent on either standard.

[114] Indeed, CN has not made any discernible response to the risks that are obviously associated with trainees' unsupervised performance of safety critical tasks, nor has it made effort to minimize and eliminate these safety risks following the accident of November 18, 2013. TCRC notes that CN's witnesses were unable to identify any modification of its training program to address the risks identified by HSO Kowalski and that, as such, it cannot be said that CN has taken every reasonable precaution to protect the health and safety of unqualified conductor trainees.

[115] Finally, TCRC submits that the facts and events described in HSO Kowalski's report demonstrate that supervising conductors must always be in a position to intervene when trainees are performing safety critical tasks and that CN has not yet conceived any requirements that trainee be directly observed. In these circumstances, TCRC argues that the evidence is compelling that an extra level of protection is needed to protect the health and safety of employees in respect of written reinforcement of the purpose and import of CROR rule 104(b) as well as the need for direct observation of unqualified trainees.

Assessment

[116] As was the case for Item 2 of the direction, CN's submissions that there is no basis for the issuance of a direction on supervision in the instant case since there is no prescribed supervision obligation in the regulations is legally incorrect. Even if, for this reason, paragraph 125(1)(q) of the Code cannot be relied upon to conclude that CN failed to adequately supervise the conductor trainee on the day of the accident, section 124 remains applicable.

[117] As a matter of law, the employer's general duty to ensure that the health and safety at work of every employee is protected under section 124 includes an obligation to supervise inexperienced employees. This was clearly established in 171817 Canada Inc. In that case, the appeals officer stated that in order to ensure that employees at work have a safe environment, "the employer has to put in place and apply health and safety procedures, training and supervision" (at para. 74).

[118] The supervision duty, embedded in section 124 of the Code, is not, however, absolute or limitless. Its boundaries are set by the previously discussed compliance standard under section 124, that is, the exercise of due care and diligence. This standard equates to taking all steps or measures reasonable in the circumstances of a given situation to ensure the employees' health and safety. Section 124 of the Code does not impose on the employer an obligation to provide protection over and beyond that reasonable threshold.

[119] Applying this standard to the facts underpinning Item 3 of the direction, the question becomes whether CN ought to have ensured, in the circumstances prevailing at the time of the accident, that the supervising conductor directly observed the conductor trainee while he performed the switching operation that resulted in the tragic loss of his life. Put another way, was direct observation a reasonable step that CN had to take in the circumstances to protect the health and safety at work of its employee?

[120] HSO Kowalski did not examine the issue from the perspective of whether CN exercised every reasonable precaution. The focal point of his direction and reasons is an analysis of the cause of the accident. He concluded that direct observation would have most likely permitted to prevent the accident and was therefore required. While this may be true, section 124 of the Code does not impose on an employer a duty to anticipate and prevent every possible failure or accident. All that is required is that reasonable steps be taken to eliminate or minimize hazards.

[121] HSO Kowalski also emphasized the fact that CN did not specifically instruct those in charge of the conductor trainee's on-the-job-supervision not to allow him to perform safety critical tasks without direct observation. Lastly, he assumed that the fact that the conductor trainee failed to properly line the switch as he was instructed to do meant that his performance of

switching operations was not reliable, consistent and compliant with the CROR and that he was essentially unqualified to perform such tasks on his own. These findings presuppose that direct observation or supervision in close proximity of a conductor trainee is always necessary.

[122] This is also the position advocated by TCRC in these proceedings. Echoing HSO Kowalski's findings, it argues that CN failed to provide any evidence of any instruction to supervising conductors regarding expectations of direct observation and direct supervision. It also relies on Mr. Hackl's statements at the hearing that supervising conductors must not be permitted to let conductor trainees leave their sight.

[123] However, section 124 of the Code does not require direct supervision in every situation. Whether such a level of supervision is necessary depends on the circumstances. The authorities clearly support this proposition. For example, in *R. v. Canadian National Railway Company*, 172 Man. R. (2d) 1, the Manitoba Provincial Court stated as follows:

Adequate and reasonable supervision does not in all cases require that a supervisor be physically present on site. The nature of the supervision that will be required will depend on the particular situation and the training, experience and knowledge of the employees. I agree [...] that it is not practical or reasonable to require that employers in all cases have supervisors physically present on site to oversee the work of their employees. Obviously the adequacy of supervision will depend on many factors [...]. (Para. 121).

[124] The jurisprudence invoked by TCRC (e.g., *R. v. Miller Shipping Ltd.*, [2005] N.J. No. 54) also suggests that whether section 124 of the Code requires direct supervision in a particular context depends on the circumstances. There can also be situations in which injuries result from the employees' failure to follow the instructions and procedures given by an employer, such that the conduct of the employee causing injury cannot be attributed to an employer's breach of section 124. Indeed, it is the employees' duty to comply with the instructions of employers concerning health and safety as is stated in paragraph 126(1)(d) of the Code.

[125] Accordingly, in itself, allowing a conductor trainee to perform switching operations without direct observation does not necessarily contravene section 124. I am therefore of the respectful view that HSO Kowalski erred in finding that the Code requires direct supervision of trainees when performing safety critical tasks regardless of the circumstances.

[126] Again, section 124 of the Code is a due diligence duty provision. As such, the relevant inquiry is not to examine whether direct observation of the conductor trainee would have prevented the accident from happening. I must rather consider whether, in the circumstances of this case, direct observation of the conductor trainee while performing switching activities was an additional step to protect his safety and health that a reasonable person having knowledge of the legislation and the workplace and workplace hazards would have deemed necessary.

[127] In this regard, I first note that while switching errors can have catastrophic consequences, the task of performing switching activities is relatively simple. In fact, HSO Kowalski stated in his report that the "task of operating any single switch is not an overly complicated one" (at page 73). Mr. Hoyt also testified that switching activities are frequently performed and do not often result in workplace injuries. They are not considered "safety-sensitive" activities that require special attention or intervention by the employer. This evidence thus indicates that the conductor

trainee was being asked to perform routine tasks, as opposed to particularly hazardous tasks, when the accident occurred.

[128] Looking at the particular situation of the conductor trainee, I first note that he was nearing the end of the conductor qualification process when the accident occurred. CN's conductor training program includes three weeks of classroom training, followed by two weeks of field intensive training (including the use of actual switches at CN's campus to gain hands-on experience), two further weeks of classroom training, followed by a minimum of 45 (and up to 60) trips with an actual crew (referred to as structured trips) prior to being eligible to qualify as a conductor. The conductor trainee had completed 57 on the job training trips when the accident occurred.

[129] Prior to the commencement of the structured trip portion of his training, his field intensive evaluation indicates that he was performing well on all of the activities, including switching activities and compliance with CROR rule 104. He therefore had received significant training, demonstrated that he had acquired knowledge and had gained valuable experience in performing switching activities when the accident occurred.

[130] CN's witnesses also testified that a conductor trainee on training trips would initially be restricted to purely observing the activities of the crew. He would then be asked to perform the tasks of a qualified conductor under direct supervision but, as he gradually becomes more experienced, he would gain more responsibility and, consequently, require less supervision.

[131] In my view, this approach is reasonable. To the extent that trainees demonstrate the ability to perform the required tasks satisfactorily as they progress in the training program, it is expected that they will eventually perform the tasks of a qualified conductor without direct observation. After all, as was stated by Mr. Radford and Mr. Hoziel at the hearing, the objective is to prepare conductor trainees to perform all of the activities of a qualified conductor without any supervision.

[132] In the case of the conductor trainee, there is persuasive evidence that his performance relating to lining switches was meeting or exceeding expectations. On November 18, 2013, the day of the fatality, a total of 44 electronic evaluations of his performance had been completed and logged into CN's TEF System. Alerts on his performance had been generated for only two trips, the 13th and the 15th. His performance relating to lining switches was either meeting or exceeding expectations since the 18th trip. There is only one comment that specifically criticized his ability to perform switching activities on his own. This was on his 17th trip, for which it is indicated that he needed to pay better attention to switches. Since that trip, his performance evaluations all demonstrate good progress and indicate that he required minimal coaching.

[133] This evidence contradicts the HSO's conclusion that "the employer's system of operating employee proficiency testing did not include any field testing in the rule on the trainee conductor necessary to in order to determine if performance was reliable and compliant." To the contrary, by all accounts, CN training includes field testing to monitor a trainee's performance of switching activities and the conductor trainee had demonstrated that he was capable of properly lining switches when the accident occurred.

[134] For this reason, I disagree with HSO Kowalski that the reliable performance by the conductor trainee of the checks required by CROR rule 104(b) was not documented. When

considered as a whole, the reviews of his performance do not indicate that he had yet to form the habit of performing switching activities in accordance with this rule.

[135] In my view, the fact that the conductor trainee made a series of errors that led to the accident does not, as was stated by HSO Kowalski, entail that the situation faced by CN on that day was that of an employee that has not formed the habit of applying Rule 104(b) reliably. One cannot conclude, as HSO Kowalski essentially did, that because mistakes having devastating consequences were made, the conductor trainee was not ready to perform switching operations without direct supervision and that CN failed to provide the required oversight.

[136] In order to determine if the level of supervision was adequate, I must consider the particular situation of the conductor trainee and the information available to CN before the accident. At that point in time, he had received substantial training concerning CROR rule 104(b). He also had performed the task of lining switches frequently in many different locations without noticeable difficulties. I fail to see clear indication in the records of the conductor trainee's progress in the training program which suggests that, on November 18, 2013, CN had reason to believe that he was not, as a matter of routine, performing an examination of the switch points and observing the switch target to determine if the movement was lined up for the route to be used every time he turned a switch.

[137] As well, it is clear that CN's training program is gradual in nature. The closer a conductor trainee was to the completion of the program and the qualification as a conductor, as was the case for the conductor trainee, the more he was required to work autonomously. This does not mean that he is left without supervision. In the instant case, the evidence indicates that the supervising conductor conducted a job briefing, was able to communicate with the conductor trainee at all times via radio and provided him with clear instructions to line the appropriate switch (TS 22) in the normal position. Considering his advancement in the program and his demonstrated abilities from prior training trips, allowing him to perform the switching operation in question without direct observation by the supervising conductor does not appear unreasonable.

[138] Other evidence indicates that CN's training program outlines the role and responsibilities of conductor trainee. These include to stay focused on safety and alertness, listen carefully to instructions, ask questions to ensure understanding, communicate with co-workers and, most importantly, stop and ask questions before attempting any task of which the trainee is unsure. Given the evidence indicating that CN: (1) provided ample instructions to the conductor trainee on how to perform switching operations in accordance with CROR rule 104(b); (2) ensured that he had demonstrated an understanding of the rule; and (3) reminded him of the level of vigilance required and of the option to stop the performance of the work in case of uncertainties, the additional step of direct observation was seemingly not required to meet the due diligence standard of section 124.

[139] Moreover, CN's performance evaluation system is set up in such a way that all evaluations, which each assigned supervising conductor is required to complete after each trip, are entered into CN's TEF System. They are then accessible by the relevant on-the-job trainer and other CN's training personnel. The evidence also indicates that the TEF System generates automatic alerts regarding conductor trainees with unsatisfactory results.

[140] Mr. Hoziel provided uncontested testimony that, in that event, CN takes measures to ensure that the concerns are addressed with the trainee by the relevant on-the-job trainer. In this way, CN has the ability to monitor and evaluate their conductor trainees on an on-going basis and can intervene, if necessary, should a trainee fail to meet expectations in the performance of the tasks normally assigned to a conductor, including switching activities. Thus, contrary to HSO Kowalski's finding, the evidence before me establishes that CN did in fact "record" the effectiveness and reliability of the trainee to perform the task of handling switches in accordance with CROR rule 104(b).

[141] It warrants emphasizing there were no recent alerts regarding the performance of the conductor trainee and, crucially, no recent concerns recorded concerning his ability to correctly line switches. This strongly suggests that he was handling switches safely and properly and was able to do so without being directly observed every time he performed a switching operation. In short, there is little evidence that CN should have foreseen or anticipated that he would not follow the safety rules and procedures prescribed by CROR rule 104(b) on the day of the accident, such that direct observation would have been required. Rather, the preponderant evidence indicates that, on that day, he had sufficient training, knowledge and experience to handle switches without being directly observed by a supervising conductor.

[142] As a final point, I note that HSO Kowalski stated in support of his direction on inadequate supervision that those supervising the trainee did not know the effectiveness and reliability of the trainee to perform the safety critical task of handling switches in accordance with CROR rule 104(b). This statement overlaps with the fourth contravention that he identified, namely CN's failure to provide adequate training and instructions to on-the-job trainers and supervising conductors. Even assuming, for the sake of argument, that the relevant on-the-job trainer did not know how to access the conductor trainee's performance evaluations and, thus, lacked information regarding his proficiency in handling switches,^{Footnote 4} nothing suggests that he would have taken a different approach for his supervision on the day of the accident had he consulted such reviews. Quite to the contrary, the evidence summarized above demonstrates that the conductor trainee's performance of switching operations was meeting or exceeding expectations. For this reason, whether or not the relevant on-the-job trainer reviewed the conductor trainee's past performance has no bearing on the question of the adequacy of the supervision provided on that day.

[143] In view of the totality of the evidence before me, which includes evidence that HSO Kowalski did not review or was not made available to him during his investigation, I am persuaded that, in the circumstances, CN provided reasonable and adequate supervision of the conductor trainee and that direct observation is a step that was not reasonably required. On balance, I accept CN's submissions that the conductor trainee was provided with a level of supervision that was commensurate with his experience and evaluations.

[144] I feel compelled to stress that my conclusion is case-specific and does not imply that direct observation or supervision of conductor trainees or of employees that have not yet completed an employer's on-the-job training is not generally required. Whether such a level of supervision is necessary will depend on factors such as the nature of the task or work to be performed, the training, experience and knowledge of the trainee, his performance evaluations and past behaviour, etc.

[145] As a rule, direct observation is certainly a prudent measure that appears necessary to protect the health and safety of unqualified employees. It should be implemented unless, such as in this case, the employer is able to demonstrate that in the particular situation of a given trainee, adequate training and mentoring has been provided and sufficient experience and knowledge has been acquired for allowing the performance of a given task without the presence of a supervisor in close proximity. In the instant case, my conclusion could have been different had the conductor trainee not been close to the completion of the training program and if there was cogent evidence signalling problems regarding his performance of switching activities that required special attention.

[146] Based on the foregoing, I find that in the particular circumstances of the instant case, CN did not contravene section 124 of the Code by allowing the conductor trainee to perform switching activities without direct observation. Therefore, I conclude that Item 3 of the direction must be rescinded.

Contravention No. 4 - Failure to provide adequate training and instructions to supervisors

[147] HSO Kowalski determined that CN contravened paragraph 125(1)(z) of the Code by failing to provide adequate training, instructions, educational materials and policies on how on-the-job trainers and supervising conductors are to perform their duties. He noted that CN failed to provide guidance describing how they were expected to supervise the trainees and, in this case, the relevant on-the-job trainer was not informed of how to access the supervising conductor's report on the trainee's performance.

Circumstances of the direction and reasons for it

[148] Item 4 of the direction stems from HSO Kowalski's opinion that in the work environment of a conductor, the terms of training cannot be left wholly discretionary. Some key specifics are necessary such as details or criteria on the level of supervision to be provided, the ability to observe and intervene during performance of safety critical tasks and the review and reporting on a trainee's performance.

[149] HSO Kowalski stated that such details on how a conductor is to train the trainee in this regard were not found in the documentation provided by CN. He added that the information on training that was provided on his request was inadequate in terms of specifying criteria that would be able to ensure the safety of the trainee conductor in this case.

[150] Concerning the role of the on-the-job trainer, HSO Kowalski found that specific criteria, in terms of experience or credentials required for this position, were not documented. He stated that, in this case, the on-the-job trainer was not provided with formal training or written instructions on the duties of a trainer. In addition, he lacked basic instruction and knowledge necessary for his role. For example, he did not know how to access the conductors' reports on the trainee's performance or that these were available electronically. HSO Kowalski also noted that the relevant on-the-job trainer did not himself provide training or perform testing on the performance of safety critical tasks by conductor trainees, nor was there any specific documented

procedure or instruction to do so. On that basis, he concluded that clear assigned roles, responsibility and training of those supervising is necessary to ensure continued vigilance, identification and correction of departures from safe practice.

Submissions of the parties

[151] CN submits that HSO Kowalski incorrectly determined that paragraph 125(1)(z) of the Code imposes on employers a general obligation to train the trainer. It argues that the Code does not set out a train the trainer requirement and the plain language of paragraph 125(1)(z) speaks solely of a legal requirement to ensure that supervisors are adequately trained in health and safety.

[152] As such, this provision does not contemplate the adequacy of training, instructions, educational materials and policies regarding how supervisors are to perform their duties in respect of conductor trainees, nor does it establish requirements on how supervisors and instructors are to provide on-the-job training. It simply does not regulate how employees with supervisory or managerial responsibilities are to train or supervise other employees and, thus, does not apply to the matters addressed in Item 4 of the direction.

[153] CN submits that these matters are governed by a separate piece of legislation, namely the Railway Employee Qualification Standards Regulations, which is not enacted pursuant to the Code. On that basis, CN submits that the issues identified by HSO Kowalski do not fall within the ambit of paragraph 125(1)(z) of the Code.

[154] In the alternative, even if paragraph 125(1)(z) of the Code imposed a train the trainer requirement, CN submits that it provides adequate training, instructions, educational materials and policies on how on-the-job trainers and supervising conductors are to perform their duties. Its position is that it sets out in various documents filed in evidence the expectations describing how they are expected to supervise conductor trainees and that there is clear instructions and guidance as to how to access and utilize the TEF System.

[155] In response, TCRC submits that while CN's materials aimed at providing instructions to on-the-job trainers and supervising conductors generally speak to grading evaluations and providing feedback, no specific guidance regarding how evaluations are to be conducted in the field are given. It argues that there is no structure provided to guide the supervisors' evaluation process and that specific guidance is necessary to ensure trainees are evaluated on their consistent adherence to the requirements of the operating rules.

[156] TCRC further submits that the rules and tasks that a trainee is to be evaluated on cannot be left to chance or circumstance of a given assignment. In its view, there is nothing in CN's job aids, coaching documents or PowerPoint materials providing any guidance to supervising conductors on where and when trainees are to be evaluated and trained in the course of a given assignment. Moreover, supervising conductors are not provided with any materials that instruct them on how to marry their dual obligations as trainer of trainees and as conductor on a working assignment subject to ordinary productivity demands.

[157] TCRC also notes that there is nothing on record that confirms that the relevant on-the-job trainer on the day of the accident received any training to perform this duty. His evidence conveyed to HSO Kowalski that he did not even know how to access the conductor trainee's

evaluations forms and was not provided with training in his role as an on-the-job trainer was not contradicted.

[158] According to TCRC, the health and safety dimension of the omissions highlighted by HSO Kowalski are obvious. If there are gaps in the directions given to supervisors on how to integrate trainees into an assignment, accidents can occur. Similarly, if supervising conductors are not explicitly expected to evaluate trainees' abilities in specific tasks, an injury could be sustained due to a gap in a trainee's knowledge that was not captured by the ad hoc evaluation process in place.

[159] TCRC submits that this lack of instructions to supervising conductors on what to assess and evaluate leads to the dangerous possibility that a trainee's gap in fundamental skill set will not be assessed or corrected in time to prevent a hazardous occurrence. Accordingly, more proactive directions from CN are required and the fourth contravention is well-supported in law and in fact. It offers critical preventive guidance to ensure that trainees are provided a safe working environment.

Assessment

[160] In order to determine if HSO Kowalski erred in issuing Item 4 of the direction, I must first examine, whether paragraph 125(1)(z) of the Code contemplates the adequacy of training, instructions, educational materials and policies regarding how supervisors are to conduct their duties in respect of conductor trainees. If, as argued by CN, this provision does not impose a "train the trainers" obligation, then it does not apply in this matter and there was no basis for HSO Kowalski to find that CN contravened this provision.

[161] Paragraph 125(1)(z) of the Code reads as follows:

125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

(z) ensure that employees who have supervisory or managerial responsibilities are adequately trained in health and safety and are informed of the responsibilities they have under this Part where they act on behalf of their employer;

[Emphasis added]

[162] By its own unambiguous terms, this provision stipulates that an employer has a duty to adequately train supervisors and managers in health and safety and to inform them of their responsibilities under Part II of the Code entitled "Occupational Health and Safety." These are the two discrete matters that paragraph 125(1)(z) intends to address. Yet, Item 4 of the direction does not relate to such matters. Rather, it pertains to the guidance and training which, according to HSO Kowalski, CN must provide to ensure that supervising conductors and on-the-job trainers are qualified and equipped to adequately supervise trainees.

[163] As such, HSO Kowalski essentially read into the very specific duty set out in paragraph 125(1)(z) of the Code a general duty to adequately train supervisors and managers in their roles

as trainers and mentors. With respect, I fail to see how the clear words of paragraph 125(1)(z) can be interpreted to mean that this provision generally regulates how an employer is required to train employees who are themselves providing training or supervision to trainees or inexperienced employees. In the absence of a textual basis to support this conclusion, I find that this provision cannot be interpreted to include a requirement for an employer to ensure that an employee with supervisory or managerial responsibilities receives specific training to adequately train or supervise others on how to perform a task or to do their job.

[164] In fact, neither HSO Kowalski nor TCRC referred to any precedent or legal interpretation that would extend the narrow scope of paragraph 125(1)(z) to encompass a duty to undertake what, according to HSO Kowalski, CN failed to do in the instant case, namely ensuring that supervisors and managers receive adequate training, instructions, educational materials on how to perform their duties as it pertains to trainee conductors and providing guidance describing how they were expected to supervise a trainee. In my view, the reason is that the issues identified by HSO Kowalski are topics that go beyond providing training in health and safety to employees who have supervisory or managerial duties and informing them of their responsibilities under Part II of the Code.

[165] In *Campbell Brothers Movers Ltd.*, 2011 OHSTC 26, while he did not squarely address the issue of the scope of paragraph 125(1)(z), the appeals officer implied that it is limited to health and safety training and the provision of information on Part II of the Code. In that case, reference was made to Labour Program, departmental policy named Interpretations, Policies and Guidelines (IPG), specifically; 104-2-IPG-061: Instruction and Training of Employees Who Have Supervisory or Managerial Responsibilities in Health and Safety. This policy, which is available to employers and the public, states that the employees referred to in paragraph 125(1)(z) must receive training on:

[...] the duties of the employer, the duties of the employees, the three basic rights of employees, and procedures required by the Code i.e. the proper steps to follow in cases of refusal to work, the internal complaint resolution procedure, etc. [...].

[166] In addition, the same IPG advises employers to offer the following:

[...] on-going programs of instruction and training sessions whereby the employer provides instruction and training to supervisors and managers of the Code requirements, and work practices and procedures specific to the particular work place [...]

[167] Nowhere in this document, or in the authorities before me, is there any support for the proposition that paragraph 125(1)(z) imposes upon employers an obligation to train the trainers in any particular manner. For these reasons, I agree with CN that the matters identified by HSO Kowalski do not fall within the ambit of paragraph 125(1)(z) of the Code.

[168] Accordingly, HSO Kowalski erred in finding that CN breached paragraph 125(1)(z) and issuing a direction including a contravention to this provision on the basis of the facts that he reviewed. This provision clearly does not include obligations regarding the training of supervising conductors and on-the-job trainers on their duties in these roles.

[169] However, does this mean that, as argued by CN, requirements or basic obligations in this regard do not exist in law? At this stage, it bears repeating that the power to vary a direction is

broad enough to allow the substitution of a different contravention than the one cited originally, provided that the new contravention is based on the same facts as those considered by the HSO.

[170] On this issue, as discussed throughout these reasons, the general duty of employers to ensure that the health and safety at work of every employee is protected is an overarching general obligation that always remains applicable. As previously discussed, this duty, which is set out in article 124 of the Code, includes an obligation to put in place certain health and safety procedures, including certain procedures for the training and supervision of employees. As applied to the facts of this case, this duty entails taking reasonable measures for the training and supervision of the work of conductor trainees.

[171] To the extent that, under its general duty under section 124, CN has the obligation to take, through its training program and supervision measures, all steps reasonable in the circumstances to protect the health and safety of conductor trainees, it follows that it must ensure that those who are providing the requisite training and supervision are qualified, well-informed and able to adequately perform such duties. Indeed, I consider that this is a reasonable step that is required for an employer to ensure that the health and safety at work of trainees and inexperienced employee is protected. In other words, adequate training and supervision can only be provided by supervisors who receive guidance describing how they are expected to supervise the trainees and know how to perform these duties.

[172] Otherwise, the employer would fail to comply with the applicable standard of compliance under section 124 by not exercising the required due care and diligence in the delivery of supervision to trainees. Simply put, a reasonable employer would not ask employees who do not have sufficient experience and have not received adequate training, instructions and educational materials to perform the duties of supervisors and instructors for trainees who are exposed to work hazards.

[173] I must therefore consider the evidence before me to assess whether CN fulfilled its general duty under section 124 of the Code by providing sufficient training and guidance to supervising conductors and on-the-job trainers.

[174] In this regard, I note that Item 4 of the direction is primarily based on HSO Kowalski's findings that clear instructions and adequate training of trainers is essential to safe and effective training and supervision of trainees. According to HSO Kowalski, CN failed to ensure that those entrusted with the responsibility to supervise are well informed of the specifics of this responsibility. In his view, clear criteria on evaluation and procedures on what is to be done when problems are identified are necessary and were lacking in this case.

[175] These findings largely stem from HSO Kowalski's review of the documents that he reviewed at the time of his investigation and his interview with the on-the-job trainer that was on duty when the accident occurred. More specifically, HSO Kowalski concluded that, in light of the following facts, CN did not provide adequate instructions to those supervising conductor trainees in order to ensure the protection of their health and safety:

- Terms of training cannot be left wholly discretionary, key specifics, such as details or criteria on the level of supervision required the review and reporting on a trainee's performance, are necessary.
- Details on how a conductor is to train were not found in the documents provided by CN.

- Specific criteria in terms of experience or credentials required for the position of on-the-job trainers were not provided.
- The relevant on-the-job trainer was not provided with formal training or written instructions on his duties and did not know how to access the conductor trainee's performance reports or that these could be accessed electronically.
- The relevant on-the-job trainer did not himself provide training or perform testing on trainee conductors' execution of safety critical tasks, nor was there any specific documented procedure or instruction to do so.

[176] In the course of these proceedings, CN provided additional documents and persuasive evidence which undermine some, but not all, of the findings of fact set out in HSO Kowalski's report. For example, CN witnesses testified that the employer has in place a recurrent training procedure on three years intervals, which includes instructions for on-the-job trainers and supervising conductors.

[177] Moreover, details of the requirements for each supervising conductors and on-the-job trainers are set out in documents filed as exhibits by CN. These include the CN Student Conductor Trip Structure Job Aid and coaching documents which demonstrate that CN does in fact provide significant training to supervising conductors and on-the-job trainers to ensure that new employees learn proper work practices. Other documents with respect to CN's training excellence initiative materials demonstrate that the terms of training at CN are not left wholly discretionary.

[178] The training materials notably covers how the supervising conductors are to plan the work with conductor trainees and figure out the knowledge and comfort level of each trainee to determine which tasks can be performed. It also covers topics such as feedback and debriefings to be provided to conductor trainees and the mandatory completion of evaluation forms to report on the progress and performance of each trainee. Overall, there is sufficient evidence to conclude that CN has in place policies, instructions and materials describing how supervising conductors and on-the-job trainers are expected to supervise conductor trainees.

[179] However, to comply with its duty under section 124 of the Code, CN must also ensure that, in practice, its trainers and supervisors know how to use these instructional materials and policies. This involves taking measures to ensure that they are actually applied and followed by supervising employees. In my view, over and above establishing a framework for the adequate training of supervisors and the safe on-the-job training of new employees, taking measures aimed at ensuring that supervising employees abide by it is a reasonable step that is required to protect the health and safety of employees.

[180] On that score, HSO Kowalski determined, based on his interview with the on-the-job trainer that was on duty at Humboldt on the day of the accident, and the statements made by the latter, that he was not provided training in his role of on-the-job trainer and was provided very little by way of instructions. The on-the-job trainer also stated that he was not able to access conductors' reports on the performance of conductor trainees.

[181] I note that CN chose not to call this on-the-job trainer or any of the staff that was directly involved in the training of the conductor trainee as witnesses in these proceedings. I have no

reason to doubt the truthfulness of the statements made by the relevant on-the-job trainer that were reported by HSO Kowalski.

[182] In order to dispute this evidence, CN filed evidence aimed at demonstrating that it disseminates clear policies, notices and instructions regarding its TEF electronic evaluation System. After the hearing, it also filed an affidavit from Mr. Hoziel along with supporting documents to demonstrate that the relevant on-the-job trainer was familiar with the TEF System, knew how to access it and had information on what intervention he had to do if there were concerns arising with respect to conductor trainees he was overseeing.

[183] On my review, CN's evidence is not sufficient to establish that the relevant on-the-job trainer was provided with clear guidance describing how he was expected to supervise the conductor trainee. It is also insufficient to rebut the statements that he made to HSO Kowalski on the very little guidance and instructions that he was provided on his duties before the accident. In fact, Mr. Hoziel's affidavit and supporting documents merely indicate that he sometimes received instructions from his superior on how to intervene with certain trainees that had performance issues, not that he knew how to access the TEF System or that he was, as a matter of course, reviewing conductors' evaluation reports on trainees' performance. The only documents which clearly indicates that he was informed of how to access such reports (attachments "N" and "O" to Mr. Hoziel's affidavit) are dated May 1 and 8, 2014 (almost 6 months after the accident).

[184] On balance, I am not convinced by this evidence that the relevant on-the-job trainer had received sufficient and reasonable coaching and training for the performance of his duties as on-the-job trainer and was generally aware of the conductor trainee's performance and progress within CN's conductor training program on the day of the accident. Similarly, I accept HSO's Kowalski's conclusion that, at the time of the accident, he did not know how to access the supervising conductors' report on the trainees' performance. I stress that given the manner in which CN's training program is structured, access to such reports is crucially important to assess which tasks a given trainee has demonstrated an ability to perform on his own.

[185] I am also not persuaded that he had an appropriate knowledge of CN's instructions and educational materials destined to on-the-job trainers. In my view, in order to ensure that the health and safety of the conductor trainee was protected, CN could and should have taken additional steps to ensure that the relevant on-the-job trainer was informed of the specific requirements of his duties and had clear guidance in respect of his role.

[186] For these reasons, I conclude that Item 4 of the direction should be varied as follows:

Section 124 of the Canada Labour Code, Part II

The employer failed to provide sufficient guidance to the on-the-job trainer (OJT) describing how he was expected to supervise the trainee. The OJT was not informed of how to access the supervising conductors' reports on the trainees' performance.

Decision

[187] For the reasons set out above, the direction issued by HSO Kowalski on July 30, 2014, is varied. More specifically, the first three contraventions identified by HSO Kowalski are rescinded and the fourth one is varied in the manner set out in paragraph 186 above. For greater clarity, the revised text of the direction is reproduced in the Appendix to these reasons.

Olivier Bellavigna-Ladoux
Appeals Officer

Appendix

In the matter of the Canada Labour Code Part II - Occupational health and safety

Direction to the employer under subsection 145(1) as varied by Appeals Officer Olivier Bellavigna-Ladoux on November 30, 2016

The undersigned health and safety officer investigated the death of an employee that occurred on November 18, 2013, in the work place that was operated by Canadian National Railway Company, being an employer subject to the Canada Labour Code, Part II, in the province of Saskatchewan on the Tisdale Subdivision, the closest milepost being 61, the said work place being sometimes known as Murphys.

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

1. [...]
2. [...]
3. [...]
4. Section 124 of the Canada Labour Code, Part II

The employer failed to provide sufficient guidance to the on-the-job trainer (OJT) describing how he was expected to supervise the trainee. The OJT was not informed of how to access the supervising conductors' reports on the trainees' performance.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the Canada Labour Code, Part II, to terminate the contravention(s) no later than September 30, 2014.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the Canada Labour Code, Part II, to take steps no later than September 30, 2014, to ensure that the contraventions do not continue or reoccur.

Issued at Saskatoon this 30th day of July, 2014.

[signed]

TC (Tyronne) Kowalski
Health and Safety Officer
7187

To:
Canadian National Railway Company
935 de La Gauchetière Street West
Montreal Quebec H3B 2M9

Footnotes

Footnote 1

The CROR are rules enacted pursuant to the Railway Safety Act that set out procedures to be followed for the proper and safe use of rolling stock. They are applied by every Canadian railway.

[Return to footnote1referrer](#)

Footnote 2

I considered CN's argument that subsection 10.12(2) of the On Board Trains Occupational Safety and Health Regulations has no connection with paragraph 125(1)(g) of the Code because, on its face, it mentions an instruction and training record as opposed to a health and safety record. However, I note that this requirement is included in regulations that govern, as its title indicates, the occupational safety and health of railway employees. In addition, the mandated instruction and training record concerns the "safe" use of rolling stock. For this reason, it is plausible that the record contemplated by subsection 10.12(2) might also constitute a safety record covered by paragraph 125(1)(g) of the Code. I have assumed for the purposes of my analysis that it is such a safety record.

[Return to footnote2referrer](#)

Footnote 3

I am mindful of CN's argument that locomotive engineers, not conductors, are operators of rolling stock and that, as such, section 10.12(2) did not apply in respect of the conductor trainee because he was not trained to qualify in locomotive operation. However, it is not necessary that I address this argument given my finding that CN complies with subsection 10.12(2) in any event.

[Return to footnote3referrer](#)

Footnote 4

The question of whether or not the relevant on-the-job trainer in fact knew how to access the reviews of the conductor trainee's performance will be addressed under my analysis of the fourth contravention below.

[Return to footnote4referrer](#)

Report a problem or mistake on this page
Date modified:

2017-01-31