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Canada Labour Code

Before the Public Service Labour Relations Board

BETWEEN

ANTONIO FERRUSI AND GAETANO GIORNOFELICE

Complainants

and

TREASURY BOARD
(Canada Border Services Agency)

Respondent

Indexed as
Ferrusi and Giornofelice v. Treasury Board (Canada Border Services Agency)

In the matter of complaints made under section 133 of the *Canada Labour Code*

REASONS FOR DECISION

Before: Beth Bilson, Board Member

For the Complainants: Andrew Raven and Lisa Addario, counsel

For the Respondent: Richard E. Fader, counsel

Heard at Ottawa, Ontario,
May 31, June 1 and 2, and June 23, 2006.

Complaints before the Board

[1] Antonio Ferrusi and Gaetano Giornofelice ("the complainants") are Customs Officers employed by the Canada Border Services Agency (CBSA), at Peace Bridge, Fort Erie, Ontario. This application concerns complaints filed by the complainants alleging that the employer failed to follow proper procedures when the complainants exercised their right to refuse to work pursuant to Part II of the *Canada Labour Code* ("the *Code*") and that the employer improperly withheld compensation for a period during which they were exercising their rights under the *Code*. Since the complainants based their complaints on the same sequence of events, the parties agreed that evidence would be adduced only in relation to the complaint of Mr. Ferrusi, and that the conclusions of the Public Service Labour Relations Board ("the Board") would be taken to apply to both sets of complaints.

[2] The portions of Part II of the *Code* that are of most significance for the purposes of this decision read as follows:

. . .

122. *(1) In this Part,*

. . .

"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;

. . .

128. *(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that*

. . .

(c) the performance of the activity constitutes a danger to the employee or to another employee.

. . .

(6) An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.

. . .

(8) If the employer agrees that a danger exists, the employer shall take immediate action to protect employees from the danger. The employer shall inform the work place committee or the health and safety representative of the matter and the action taken to resolve it.

(9) If the matter is not resolved under subsection (8), the employee may, if otherwise entitled to under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer and to the work place committee or the health and safety representative.

(10) An employer shall, immediately after being informed of the continued refusal under subsection (9), investigate the matter in the presence of the employee who reported it and of

(a) at least one member of the work place committee who does not exercise managerial functions;

(b) the health and safety representative; or

(c) if no person is available under paragraph (a) or (b), at least one person from the work place who is selected by the employee.

. . .

(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.

(14) An employer shall inform the work place committee or the health and safety representative of any steps taken by the employer under subsection (13).

***128.1** (1) Unless otherwise provided in a collective agreement or other agreement, employees who are affected by a stoppage of work arising from the application of section 127.1, 128 or 129 or subsection 145(2) are deemed, for the purpose of*

calculating wages and benefits, to be at work during the stoppage until work resumes or until the end of the scheduled work period or shift, whichever period is shorter.

. . .

129. *(1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is*

(a) an employee member of the work place committee;

(b) the health and safety representative; or

(c) if a person mentioned in paragraph (a) or (b) is not available, another employee from the work place who is designated by the employee.

. . .

(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.

. . .

(6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.

(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

. . .

133. *(1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*

. . .

> *(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.*

. . .

> ***147.*** *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*

. . .

> (c) *has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*

> ***147.1*** *(1) An employer may, after all the investigations and appeals have been exhausted by the employee who has exercised rights under sections 128 and 129, take disciplinary action against the employee who the employer can demonstrate has wilfully abused those rights.*

. . .

Other related provisions outline the powers of health and safety officers to conduct investigations and issue directions, as well as the powers of appeals officers to amend or add to directions issued by health and safety officers.

Summary of the evidence

[3] The complaints concerned two instances in which the complainants and other employees purported to exercise their right to refuse to work under section 128 of the *Code*. These refusals occurred on November 11 and November 16, 2005. In addressing these refusals to work, the employer linked them to two earlier refusals to work, which occurred on August 18 and October 24, 2005; Mr. Ferrusi was among the employees who refused to work on those two occasions.

[4] All four of these refusals to work were also connected to a broader set of concerns about workplace safety that had been the subject of discussion between employees in the customs and immigration service at the border, their bargaining

representatives, and the employer over a number of years. These discussions had led to the provision of additional safety equipment for officers, and the revision of protocols concerning the risks associated with the work of these officers. At the time of the work refusals by Mr. Ferrusi in 2005, customs officers across the country were raising particular issues with respect to workplace safety, and there had been a number of refusals to work in border ports in different parts of Canada. Mr. Ferrusi said that several significant issues were outstanding. The first of these was whether customs officers were equipped with adequate "tools" to deal effectively with dangerous or violent individuals who might create situations by putting the officers or others at risk; Mr. Ferrusi said that, though officers are currently equipped with batons, OC spray (a version of pepper spray) and protective clothing, the position of many of the officers is that they should be equipped with side arms. The current policy, referred to as "release and notify," requires that, in cases where officers recognize an individual who has been identified as a threat in an "armed and dangerous lookout" notice, they are to allow the individual to proceed and notify the nearest law enforcement officers. Mr. Ferrusi said that he and other officers feel that the response time of local law enforcement personnel to these situations is inadequate to protect the safety of the customs officers and others who may be endangered by the entry of dangerous individuals into Canada.

[5] Another issue is the level of training given to officers, including weapons training, to provide the skills necessary to confront dangerous circumstances. A further issue is the adequacy and timeliness of the information provided to officers about unfolding situations or about individuals who may be dangerous.

[6] In his testimony, Mr. Ferrusi reviewed his current job description, which refers, in a number of places, to the physical and psychological demands of the job, and recounted a number of examples of situations in which he has faced unpredictable or threatening individuals.

[7] On the morning of August 18, 2005, Mr. Ferrusi and three other employees indicated that they were exercising their right to refuse to work. Shortly after they commenced the work refusal, the employer contacted Lindsay Harrower, Health and Safety Officer, Human Resources and Social Development Canada (HRSDC) and requested his assistance. Mr. Harrower, who is based in London, Ontario, reached the Peace Bridge at approximately 11:30 a.m. On his arrival, he discovered that the

employer had not conducted an investigation as required by subsection 128(10) of the *Code*. Mr. Harrower waited for this investigation to be carried out and then, as the employees were continuing to refuse to work, proceeded with his own investigation. At the end of his investigation, at approximately 3:45 a.m. on August 19, Mr. Harrower communicated to the parties that he found no danger to exist, and the employees returned to work. Mr. Harrower subsequently provided the parties with a substantial written report, which was released on August 30 (Exhibit E-2).

[8] In the report, the reasons given by Mr. Ferrusi for refusing to work are recorded as follows:

> . . .
>
> - *Recommendations from the Senate Committee Report called Borderline Insecure, in which they indicated that there should be 24/7 RCM Police presents* [sic] *or Customs should be armed*
>
> - *2 recent critical incidents*
>
> - *Customs Inspectors as well as Student Customs Inspectors are not trained to deal with these and other types of critical situations*
>
> - *I am left blind to danger that I may face and am unable to respond appropriately, due to a problematic computer system as well as lack of data being input into PALS [Primary Automated Lookout System] and ICES [Integrated Customs Enforcement System]*
>
> . . .

Mr. Harrower also recorded the reasons given by the other employees, which raised, substantially, the same issues.

[9] Mr. Harrower also listed the documentation provided to him by Mr. Ferrusi:

> 1. *Senate Committee Report entitled "Borderline Insecure – An Interim Report of the Senate Committee on National Security and Defence – June 2005"*
>
> 2. *Canada Customs and Revenue Agency "Customs Inspectors and Superintendents Job Hazard Analysis Report – Phase 1 Documentation Review" prepared by ModuSpec Risk Management Services Canada Ltd. London, Ontario dated July 2002*

3. *An internet copy of a National Post article entitled "gaps found in border database Dangerous individuals not red-flagged" by Adrian Humphreys of the National Post dated August 16, 2005*

4. *Five complaints that are currently under review/investigation by the employer as per Section 127.1 of the Canada Labour Code, Part II which address the following complaints:*

    - *The CBSA does not equip me with a sidearm*
    - *That I am not provided with access to ALL known information listed in CPIC and other law enforcement databases used by Customs' national and international law enforcement partners*
    - *That I am not provided with access to ALL known armed and dangerous lookouts listed on the CPIC and other law enforcement databases used by Customs' national and international law enforcement partners while working the primary line*
    - *That I am not provided with access to ALL known terrorist lookouts listed with CSIS and similar international law enforcement partners*
    - *That CBSA does not have a national, centralized reporting mechanism for Customs Officers in which Officers can log: a) why police were called for backup or assistance or support, b) what police response times were when called by Customs Officers, and c) what police verbatim responses were to explain why no backup or assistance or support would be forthcoming.*

[10] It is clear from the report that Mr. Harrower engaged in extensive discussion of all of these issues with representatives of the employer and with the refusing employees, including Mr. Ferrusi. There is obvious overlap between the grounds on which the refusal to work was based and the complaints filed for consideration by the internal process outlined in section 127.1 of the *Code*. Both in his discussion with Mr. Harrower summarized in the report and in his testimony before me, Mr. Ferrusi acknowledged that the five enumerated complaints had been the subject of discussion by the Joint Safety and Health Committee in the workplace, but he stated his view that this process was not moving swiftly enough towards a resolution of the issues, and

that he felt that exercising his right to refuse to work under section 128 of the *Code* was the only way to move things forward.

[11] In his evidence, Mr. Harrower said that the employer had described the work refusal of August 18 as a continuation of an earlier refusal on May 26 that had raised many of the same issues, and that the employer had urged him to decline to conduct an investigation. His view, however, was that every work refusal had to be dealt with as a separate incident and investigated, unless the circumstances were identical.

[12] On the basis of his investigation, Mr. Harrower concluded that there was no danger. His report dealt in turn with the issues raised by the employees. With respect to the report of the Senate Committee on National Security and Defence, *Borderline Insecure* (Exhibit U-1), he made the following comment:

. . .

> *The report in question is interim in nature and has been presented to the government of the day for review and consideration and contains recommendations only. As an Interim report this document has, over a broad spectrum, reviewed all aspects of National Security and Defence under which the issue of border points has been included. Until such time as those Departments and/or Agencies addressed by this report have had the opportunity to thoroughly review and comment upon those recommendations that may impact their established policies, procedures or practices it would be premature to react to any of the report recommendations as being anything other than what they are.*

. . .

[13] In connection with the report prepared by ModuSpec Risk Management Services, he drew attention to the statement in the report that ". . . It should be emphasized that the recommended corrective actions are preliminary in nature and may be modified based on findings in Phase 2 of this study. . . ." In any case, he noted that the employer was addressing many of the issues raised in the report through an action plan, which would provide a basis for amending safety policies throughout the border services system.

[14] Under the existing system, customs officers in the primary inspection line were provided with information through a number of computer databases, including PALS and ICES. Officers in the secondary inspection line also had access to national police

databases (CPIC and PIRS), which were maintained by the Royal Canadian Mounted Police. In his report, Mr. Harrower considered the contention of the employees that this difference in access to information caused confusion and could prevent officers on the primary inspection line from having information necessary to their safety. He concluded that there was no evidence ". . . to support the allegation that the provision of CPIC at a Primary Inspection Line (PIL) would effectively increase the level of safety or security, to an inspector at a PIL. . . ."

[15] Mr. Ferrusi gave evidence about the nature of the "two recent critical incidents" listed among the grounds for the work refusal. On one of these occasions, the driver of a vehicle claimed during the primary contact that he was lost and had not intended to enter Canada. He was referred to the "secondary line" for more intensive scrutiny, and it was discovered that there were drugs and a stun gun in the car; on closer questioning, one of the occupants of the car said that they had been on their way to an Ontario location to take part in a home invasion. In the second incident, officers at the primary line had been alerted to a particular car by a "weapons lookout", but their initial search of the vehicle did not turn up any weapons. They referred the car to the secondary line, where it was discovered that the driver had concealed guns and ammunition.

[16] Mr. Harrower dealt with these incidents very briefly in his report. He said in his testimony that he did not think they were relevant to the August 18 work refusal, as they had no direct bearing on the conditions in place when the refusal took place.

[17] Mr. Harrower described the kind and extent of training given to customs officers and student inspectors, and, apparently, did not find it deficient enough to justify the work refusal on this particular occasion. He also outlined the policy in place for obtaining the assistance of the police. He did say that "response times can vary in time", but said that the current direction to officers to contact the Central Dispatch Service of the Niagara Regional Police provided "the most expeditious response."

[18] Finally, Mr. Harrower referred to the article from the *National Post* cited by the employees. He concluded that "no substantiation of the *National Post* allegations has been brought forward", and that the article itself did not provide reliable information.

[19] I have described the August 18, 2005, work refusal and the subsequent investigation, in some detail for two reasons. Firstly, it is a clear instance where the

process initiated by the decision to refuse to work under section 128 was, in the view of Mr. Ferrusi, the correct one. It is true that the employer originally failed to conduct an internal investigation, but this was remedied once Mr. Harrower arrived. It should also be noted that Mr. Ferrusi approved the process, but not the finding of Mr. Harrower that no danger existed; this conclusion was the subject of an appeal that had not yet been determined at the time of this hearing. Secondly, the report issued by Mr. Harrower also gives a fairly complete summary of the major issues that have been raised in all the work refusals germane to this proceeding.

[20] On October 24, 2005, another work refusal took place involving approximately 49 employees, including Mr. Ferrusi. Mr. Harrower was the health and safety officer called to investigate this refusal, and he concluded that there was no danger in existence. Again, the employees returned to work.

[21] The refusal on October 24 was triggered by a particular "armed and dangerous lookout", which was summarized in Mr. Harrower's report (Exhibit E-4) as follows:

. . .

> *Within the details of the Lookout it was indicated that the suspect was a prime suspect in a recent burglary in the Lewiston, New York area in which an automatic weapon and a quantity of ammunition were noted as missing and that the individual in question has an extensive criminal history in the United states* [*sic*] *which includes convictions for assault of police and criminally negligent homicide. The subject was also believed to be operating a black Chevy S1-pick-up truck with unknown license plates.*

. . .

Officers were instructed to follow the "release and notify" policy. In their discussion with Mr. Harrower during the investigation, the employees raised issues related to equipment, training and information similar to those that had been discussed at the time of the August 18 refusal. In addition, as they had on August 18, the employees expressed particular concern about the difficulties of dealing with a dangerous individual in the context of bus travel.

[22] As a result of his investigation, Mr. Harrower concluded that there was no evidence that the individual who was the subject of the armed and dangerous lookout was crossing, or had any intention to cross, the border with Canada, was in possession

of firearms, or had any residence in Canada. Mr. Harrower found that the suspect was not the subject of a "man hunt" in the United States, but was simply wanted for questioning about the burglary; the purpose of alerting the Canadian authorities was to ask them to inform United States law enforcement if they sighted the suspect. Though Mr. Harrower's report suggested that ". . . there are areas of communication, procedure and training that should be re-evaluated and enhanced to increase the overall margin of safety for the employees in this work environment," he found that the existing policies, on the whole, were sufficient to prevent the circumstances in which the refusal had occurred from constituting a danger within the meaning of Part II of the *Code*.

[23] On November 11, 2005, Mr. Ferrusi reported at the beginning of his shift, at about 9:10 p.m., that he would be refusing to work, based on a statement made by the Hon. Anne McLellan, Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness, some days earlier. Mr. Ferrusi initially made an oral statement to this effect to the three superintendents who were present - Carol Chernish, Steve Jones and John Eldridge. Mr. Jones later made a dossier to record this set of events (Exhibit E-7), and he set down Mr. Ferrusi's statement in these words:

. . .

> *The Honourable Anne McLellan Deputy Prime Minister and Minister of Public Safety and Emergency Preparedness made a statement to the Senate concerning the Government considering providing an Armed presence at major Canadian land Ports of Entry. That this statement is believed to acknowledge a change in the Governments* [*sic*] *position and recognizes my need to have an armed presence, thus constituting a danger to me without it.*

. . .

Counsel for the complainants provided the Board with a copy of the transcript of Minister McLellan's testimony to the Senate committee (Exhibit U-9) in which her exact statement is presumably recorded. Mr. Ferrusi testified, however, that he had based his work refusal on a report of this statement in a newspaper (Exhibit U-15), rather than on seeing any official version. In his testimony, he said that he regarded it as highly significant that Minister McLellan, who was ultimately responsible for the operations of the employer, appeared to be supporting the position that had been taken by him and many other employees.

[24] Mr. Ferrusi was eventually joined in the work refusal by approximately 28 other employees. In most cases, the work refusal forms in which they formally recorded their refusal to work had a typed statement attached, which reads as follows:

> *Statement of Refusal to Work*
>
> *Deputy Prime Minister Anne McLellan announced to the standing Senate Committee on National Security and Defence, and to Canadians including Customs Officers, on October 31, 2005.* [sic] *that she had mandated the President of the Canadian Border Services Agency and the Commissioner of the RCMP to give her options on how the Government of Canada will provide an enhanced, armed presence at the border.*
>
> *The Deputy Prime Minister's announcement that the border requires an armed presence confirms my belief that my work place is not safe.*
>
> *There is currently no police presence at my work location. I am not nor are any of my coworkers properly trained or have the proper tools.*
>
> *The Standing Senate Committee on National Security and Defence Committee reported in June 2005 that Customs management altered an independent report that confirmed the border should have an armed presence.*

Some of the work refusal forms also had additional handwritten comments such as the following:

> *I am left blind to danger that I may face and am unable to respond appropriately due to a problematic computer system as well as lack of data being input into PALS and ICES*
>
> *I am not provided with access to all known armed and dangerous lookouts listed on CPIC, NCIC databases while working primary line which is our first point of contact with the travelling public*

[25] Mr. Jones testified that he began to consult with other management about the work refusal, and to make arrangements for management personnel to assume some of the responsibilities of the employees who had withdrawn their services. In particular, he consulted Peter Morocco, the district director, who travelled to Fort Erie in person, arriving at around midnight on November 11. By that time, according to Mr. Jones, there were only five employees, including Mr. Ferrusi, who were continuing the work refusal. Mr. Morocco was briefed about the situation, and then proceeded to

meet with the group of refusing employees. At this meeting, he handed each of them a letter bearing his signature. This letter reads:

. . .

> *This is in response to your refusal of this date, based on no armed presence at your work place. The employer has reviewed the circumstances of your current refusal and determined that they are the same as those of the withdrawal from work on* ***August 18, 2005.***
>
> *The HRSDC-Labour Program health and safety officer's investigation on* ***August 18, 2005****, resulted in a decision of no danger. It was the opinion of the officer at that time that there was no evidence to support a need for an armed presence at the Peace Bridge. Based on the written notice of no danger of the health and safety officer given to you on* ***August 19, 2005****, the employer believes that your current actions constitute a "continued" refusal. Therefore you are no longer entitled under section 128 or subsection 129(7) of the Canada Labour Code, Part II (the Code) to continue to refuse to work.*
>
> *Therefore, I ask that you return to your duties immediately. Your continued refusal to report to work will be considered as unauthorized absence and you will not be paid for the remainder of your shift. In addition, disciplinary action may be taken, which could include a financial penalty.*
>
> . . .
>
> [Emphasis in the original]

This letter was also given to the other employees who had initially been part of the work refusal. Mr. Ferrusi testified that when Mr. Morocco gave him and the other employees the letter, Mr. Morocco said that this letter represented the official position of the CBSA, and that he had "no latitude" in his discussions with them. Mr. Morocco said that he did not recall making any statement of this kind, and that he understood the letter to have been drafted at the regional office; he was not aware of a letter in nearly identical terms (Exhibit U-10) that had been delivered to an employee of the CBSA in British Columbia.

[26] Mr. Ferrusi testified that he was uncertain of the position he and his fellow employees were in at that point. He asked Mr. Morocco whether they could have an opportunity to discuss it, and Mr. Morocco let them remain in the conference room. Mr. Ferrusi decided to contact HRSDC and reached Darlene Tunney, Health and Safety

Officer. Mr. Ferrusi indicated that the employees had received a letter threatening them with disciplinary action and indicating that the employer was regarding this not as a new refusal of work that required investigation, but as a continuation of the August 18 refusal. Ms. Tunney said that she would "make some calls" and get back to Mr. Ferrusi. Before she called back, Mr. Ferrusi testified, it was agreed among the employees that they would all return to work so that they would not be exposed to disciplinary action.

[27] Ms. Tunney said that she contacted a representative of the employer – she assumed it was Mr. Morocco – and relayed the inquiries made by Mr. Ferrusi. She said that Mr. Morocco told her it was the position of the employer that the purported work refusal of the employees should be regarded as a continuation of the August 18, 2005, refusal, and that this justified the reference to disciplinary action; the corollary of this was that no investigation of the work refusal would be done. She asked whether the employer "really wanted to go down this road," and Mr. Morocco said that this was now the "national position" of the employer. Ms. Tunney said that by the time she telephoned Mr. Ferrusi to talk to him again the employees had returned to work, and that no investigation was undertaken of the circumstances in which this refusal occurred.

[28] Ms. Tunney expressed her personal view that, though there might be situations where the actions of employees constituted a "continuation" of a refusal to work that had been determined to be unfounded, it was not open to the employer to unilaterally decide what situations were comparable and to refuse to proceed with the investigation process. She felt that each new work refusal should be investigated, and that it should be possible for employees to call on impartial health and safety officers to assess the circumstances.

[29] The complainants each filed a complaint in connection with this November 11 refusal, alleging that the decision of the employer to treat the refusal as the continuation of an earlier refusal and to foreclose the possibility of an investigation was in violation of the *Code*.

[30] During the course of his shift on November 16, 2005, Mr. Ferrusi received a call from one of his counterparts at the Windsor port of entry asking whether he and his colleagues had received a particular armed and dangerous lookout. Mr. Ferrusi said that they hadn't, and the officer in Windsor faxed him a copy. This lookout related to an individual who had committed a sexual assault in California; the notice suggested

the possibility that he might be on his way to an unknown destination in Canada on a Greyhound bus. Mr. Ferrusi conducted a data check on ICES concerning this person. As a result, Mr. Giornofelice decided, at about 5:00 p.m., that he would refuse to work, and asked Mr. Ferrusi to be the health and safety representative for the investigation. A written refusal to work was presented to the superintendent, Mr. Jones, who was on duty. The superintendent indicated that he would be speaking to his management superiors to determine what course to take.

[31] By about 5:15 p.m., according to the dossier compiled by Mr. Jones (Exhibit E-8), a number of other officers had joined Mr. Giornofelice in refusing to work. At 5:20 p.m. Mr. Jones informed Mr. Ferrusi that no internal investigation would be conducted, and he instructed him to return to work at the primary line. At this point, Mr. Ferrusi joined the work refusal, bringing the number of refusing employees to 18. Mr. Morocco was asked to come to the site, and he addressed the employees at approximately 5:55 p.m. He provided them with a letter in similar terms to that given to employees on November 11, advising them that the employer was regarding this refusal as a continuation of the refusal that had occurred on October 24, 2005, and advising them of the possibility of disciplinary action. Mr. Ferrusi gave Mr. Morocco a copy of section 147.1 of the *Code,* and said he did not think that the employer had the power to take the approach it was taking. According to Mr. Ferrusi (though, again, Mr. Morocco said that he could not remember making these statements), Mr. Morocco said that this was "the direction the CBSA was going" and that he, personally, had no latitude to take a different approach.

[32] Mr. Ferrusi said that he asked if the refusing employees could have an opportunity to consult about their position. Mr. Morocco and the other managers left the conference room at about 6:00 p.m. Mr. Ferrusi said that he called HRSDC and talked to Paul Danton. Mr. Danton is a compliance manager with some supervisory responsibilities; he also acts as a health and safety officer for the purposes of the *Code*. Mr. Ferrusi asked if Mr. Danton could conduct an investigation of the work refusal. Mr. Danton said that he would call back, and Mr. Ferrusi and the other employees waited in the conference room. At around 6:30 p.m., according to Mr. Ferrusi, Mr. Morocco appeared and asked if they were going back to work. The employees asked for more time, and Mr. Morocco left the room again.

[33] In his testimony, Mr. Danton said that he was at home when he received the call from Mr. Ferrusi. He talked to Mr. Morocco, who explained the position of the employer that the issues raised by the work refusal were similar to those raised in connection with an armed and dangerous lookout on October 24, 2005, and that the position of the employer was that these issues had already been disposed of in the earlier investigation. Mr. Danton also talked to a technical advisor in the Toronto office and asked whether it would be possible to carry out an investigation by conference call rather than by attending the site, since the work refusal had, at this point, been going on for some time. Mr. Danton then advised both Messrs. Morocco and Ferrusi that he would be talking to them by telephone.

[34] In cross-examination, Mr. Danton was presented with an operational program directive (Exhibit U-4) covering the investigation of work refusals by health and safety officers. Though it contemplates that an investigation may be conducted over the telephone, it cautions that, given the reference in subsection 129(1) of the *Code* to the investigation being conducted "in the presence of" the employer and the employees, a telephone investigation should be used as "a last resort." Mr. Danton explained that his intention was to ascertain over the telephone whether there was more to the circumstances than he understood from Messrs. Morocco and Ferrusi, and that he would have gone to the site if he thought it necessary.

[35] The conference call began around 7:00 p.m. The witnesses who described the conference call – Messrs. Ferrusi, Danton and Morocco – were in some disagreement as to how long the call lasted. Mr. Danton thought it lasted 15 or 20 minutes, Mr. Ferrusi recollected it as being about 8 to 10 minutes long, and Mr. Morocco thought the length of the call was 20 or 30 minutes. The chronology kept by Mr. Jones recorded that the call began at 7:00 p.m., and that at 7:15 p.m. Mr. Morocco was directing the employees to return to work; this suggests that the length of the call may have been more in keeping with the recollections of Messrs. Ferrusi and Danton that the call was quite brief.

[36] In any case, the call was primarily devoted to inquiries by Mr. Danton of Mr. Ferrusi about what characteristics would distinguish the circumstances on November 16 from those on October 24. Mr. Ferrusi explained that every armed and dangerous lookout presents different conditions; in this instance, such things as the criminal background of the individual referred to in the notice, the degree of possible

violence and the possibility that he would arrive by bus added new elements to the situation. Mr. Danton ultimately accepted the argument of the employer that the basic scenario – an armed and dangerous lookout requiring a degree of vigilance – was the same as that on October 24, though the details of the identity of the individual might differ; he concluded that there was no danger.

[37] Though Mr. Danton did not have the work refusal forms, the armed and dangerous lookout, or the letter circulated to the employees at hand when he reached this conclusion, he did treat this as a full investigation, and provided the parties with a written report (Exhibit E-6) containing his findings.

[38] Following Mr. Danton's communication to those on the conference call of his finding of no danger, the employees returned to work. They were subsequently advised that the employer would deduct one hour's wages from their remuneration, relating to the period from 6:00 p.m. to 7:00 p.m. on November 16. The evidence demonstrated that during this period the employees had remained in the conference room with the acquiescence of Mr. Morocco; it was during this time that they made contact with Mr. Danton and waited for him to decide how to proceed. The period ended with the commencement of the conference call involving Mr. Danton. The position of the employer was that the deduction of wages was not disciplinary in nature, but was due to the fact that the employees were not working when they were scheduled to work, and, therefore, could not expect to be paid.

[39] Messrs. Ferrusi and Giornofelice filed complaints alleging that the employer had not properly followed the investigatory process in the *Code,* and that the deduction of wages under the circumstances was unwarranted.

Summary of the arguments

[40] Counsel for the employer, Richard E. Fader, argued that the employer had dealt appropriately with the work refusals of November 11 and 16, 2005, by taking the position that they were continuations of earlier refusals. He referred me to decisions of the Canada Labour Relations Board (CLRB) in *Christine Nugent v. Communications Workers of Canada and Bell Canada*, [1982] CLRB Decision No. 360; and *Dave Davies v. Key Lake Mining Corporation,* [1987] CLRB Decision No. 660. In these cases, the CLRB

found that, once an authoritative finding of no danger had been made, the right of the employee to refuse to work expired. In the *Nugent* case, the CLRB held that a loss of wages was not a "financial or other penalty" within the meaning of the equivalent provision to section 147 of the *Code*. In *Hutchinson v. Treasury Board (Environment Canada)*, PSSRB File No. 160-2-52 (1998) (QL), this Board found that, when it has been determined there is no danger, there may no longer be reasonable cause for the employee to refuse work, and the employee's refusal to return to work may constitute an abuse of the provisions of the *Code*, thereby, entitling the employer to take disciplinary action.

[41] Mr. Fader argued that, though this case does not involve a piece of equipment, as in *Nugent*, or contact with a substance, as in *Davies*, it does involve a repetition of the same issues, albeit in slightly different factual circumstances. It is those fundamental issues – the questions of training, equipment and information – raised by the employees that are at the heart of the refusal, not the slight variations in factual circumstances on each occasion. In the case of the two armed and dangerous lookouts of October 24 and November 16, for example, it is true that they involved two different individuals in two different locations. However, the refusals were based not on these factual distinctions, but on the general concerns of Mr. Ferrusi and other employees, which had been expressed on a number of occasions, and which Mr. Harrower had found on October 24 to constitute no danger. Mr. Fader cited the decision in an appeal of a decision by a health and safety officer in *Stone v. Canada (Correctional Service),* [2002] C.L.C.A.O.D. No. 27. The appeals officer in that case made the following comments:

. . .

> *[51] As it stands today, the right to refuse provisions in the Code are* [*sic*] *not meant to address long standing problems such as the problem identified by Mr. Stone in the instant case. The right to refuse in the Code remains an emergency measure to deal with situations where one can reasonable* [*sic*] *expect the employee to be injured when exposed to the hazard, condition or activity. However, it cannot be a danger that is inherent to the employee's work or is a normal condition of employment. This statement alone is fraught with consequences for correctional officers. Given that the likelihood of encountering violence is a normal condition of employment of the job of correctional officers, who are specifically trained to deal with these situations, it is very difficult to envisage a situation, in that environment, where a*

> *refusal to work for violence could be justified other than in a specific and exceptional circumstance.*
>
> . . .

[42] Mr. Fader stated that this question is one with significant operational implications for the employer. A work refusal involving a number of employees can inflict serious inconvenience and economic harm on those relying on efficient procedures at the border, even if it is investigated fairly promptly. The employer continues to be involved in efforts to resolve the general issues that border personnel have raised. However, if the employer cannot at some point treat the refusals to work as having been already determined, the possible consequences will be very serious.

[43] Andrew Raven, counsel for the complainants, argued that it is not open to the employer to make a unilateral decision that a work refusal is based on identical grounds to an earlier refusal, and to decline to follow the investigatory process under the *Code*. Unlike the instances in the *Nugent, Davies* and *Hutchinson* cases, where the equipment or condition that triggered the work refusal was a stable factor in the work environment, the situations to which customs officers must respond are volatile and have a wide range of characteristics. Mr. Ferrusi acknowledged that his job has inherent risks, and he did not initiate a work refusal in all situations where an armed and dangerous lookout was in force. He and other employees were exercising their judgment about heightened risks posed by particular situations, and the employer was not entitled to bypass the procedure outlined in the *Code* because of the employer's own assessment that these risks did not exist. Furthermore, unlike in *Brisson and Roy v. VIA Rail Canada Inc.,* [2004] CIRB Decision No. 273, also cited by Mr. Fader, the employees had on every occasion returned to work when a finding of no danger was made by a health and safety officer, and had availed themselves of their appeal rights rather than continued their refusal.

[44] Mr. Raven cited the following comment from *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (C.A.):

> . . .
>
> *[16] The* OHSA *is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public*

> *health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.*

. . .

[45] Counsel also referred me to a number of cases examining the respective responsibilities of the employee and the employer in relation to a refusal to work. In *Michael P. Chaney v. Auto Haulaway Inc.*, [2000] CIRB Decision No. 47, the Canada Industrial Relations Board (CIRB) stated:

. . .

> *[26] In cases of this type, a major consideration is whether the employee who has exercised the right to refuse did have reasonable cause to believe that danger existed. In this regard, the Board has always given the broadest interpretation possible to the concept of reasonable cause.*
>
> *[27] The purpose of the legislation is to prevent accidents and injury to health in the workplace. To achieve this goal, employees ought not to be discouraged from identifying potentially hazardous conditions by placing a heavy onus on them to establish that their fears were well founded. When employees complain that reprisals have been taken against them because they have exercised their right to refuse under the Code, the main focus should be on the reasons behind the employer's decision to take disciplinary action rather than on the reasonableness of the employee's refusal. . . .*

. . .

[46] It should be noted that in *Chaney* the CIRB was sitting, under provisions of the *Code* that were subsequently amended, on a reference from a decision of a health and safety officer and were performing the role filled under the current provisions by an appeals officer. This means that the task they were performing included a determination of whether the employee had reasonable cause to refuse work, a task that is not before me. Nonetheless, the passage from *Chaney* does seem to support the stress laid by Mr. Raven on the reverse onus in subsection 133(6) of the *Code*.

[47] This point was reiterated in *Kenneth G. Lequesne v. Canadian National Railway Company*, [2004] CIRB Decision No. 276:

. . .

> *[73] By placing the burden of proof on the employer, the Code creates an important exception to the general rule that the burden of proof is on the complainant. The reverse onus is predicated on the principle that employees should be free to exercise their legitimate rights without being hampered by undue coercion by the employer.*
>
> . . .

[48] In *Kinhnicki and Dupuis v. Canada Customs and Revenue Agency*, 2003 PSSRB 52, the adjudicator made this comment:

> . . .
>
> *[40] The combined effect of sections 147 and 147.1 has two purposes. First, to require employees to comply with the prescribed processes in sections 128 and 129, by making the employee subject to immediate sanctions or discipline if there is non-compliance. Secondly, to allow for the assessment of whether a danger actually existed to proceed through all review levels before considering if discipline should be imposed. Even then, the discipline is limited to where there was willful abuse of the right to refuse to work. The requirement that the employer demonstrate the willful abuse indicates a strong bias in favour of allowing employees the benefit of the doubt when they are relying upon the right to refuse to work pursuant to section 128.*
>
> . . .

[49] Mr. Raven pointed out that the employer explicitly refrained from attacking the *bona fides* of the employees who participated in the work refusals, including Mr. Ferrusi, and argued that it was not, therefore, entitled to characterize the actions of those employees as an abuse of the process on the grounds that they were part of some larger campaign.

Reasons

[50] It is not my function, in relation to these complaints, to assess in a substantive way the merits of the decision by Mr. Ferrusi to refuse to work on November 11 and 16. The *Code* provides that investigation by a health and safety officer and an appeal under section 146 will be the vehicles for the substantive determination of the legitimacy of a work refusal. My task is limited to deciding whether the employer was entitled to forego recourse to these mechanisms by characterizing the work refusals as a "continuation" of work refusals that had taken place on earlier occasions, and

whether the employer was entitled, with respect to November 16, to deduct wages for one hour when Mr. Ferrusi was not working. The task also entails determining whether the actions of the employer on November 11 and 16 constituted a violation of section 147 of the *Code*.

[51] The evidence indicates that, on November 11, the employer took the position that the employees were not entitled to "continue" to refuse to work, and they went back to work as directed. Despite the questions raised by Ms. Tunney, there was no internal investigation and no investigation by an HRSDC health and safety officer.

[52] For November 16 the picture is somewhat murkier. When Mr. Danton was contacted, he conducted what he viewed as an investigation, albeit by telephone and he provided a written report stating his reasons for a finding of no danger, as he would have done in any other investigation. Mr. Morocco said that the employer did not view the conversation over the telephone with Mr. Danton as an investigation, and thought no investigation was necessary, given the position the employer was taking. Mr. Ferrusi said that, whether or not Mr. Danton thought he was conducting an investigation, the process was not being followed properly from the point of view of the employees: there was no internal investigation, and the telephone discussion with Mr. Danton was not an adequate inquiry into the reasons for the refusal. With respect to the deduction of wages, Mr. Ferrusi said that he and the employees believed that the hour they spent in the conference room prior to the telephone conference with Mr. Danton was part of the work refusal process. Since they were contesting the legitimacy of the course the employer was following, and hoped that Mr. Danton would agree to conduct an investigation, they were not refusing to follow a proper instruction to return to work. They were encouraged in this view by the fact that Mr. Morocco allowed them to continue to use the conference room and did not directly order them to go back to work.

[53] Though many of the cases provided by counsel were suggestive and helpful in many ways, neither party was able to provide me with a case involving exactly these circumstances – that is, circumstances where the employer characterized a work refusal as a continuation of a refusal taking place at an earlier discrete time and, therefore, declined to acknowledge that the procedure outlined in the *Code* (internal investigation, investigation by a health and safety officer, and appeal) should be followed.

[54] It seems clear that the procedure governing work refusals set out in the *Code* is intended to provide protection for an employee whose assessment of his or her working circumstances is that they pose a risk of injury or illness. That employee is entitled to refuse to work – and is protected from the disciplinary consequences that would ordinarily attend such a withdrawal of services – until there is an opportunity for the alleged threat to health and safety to be investigated. In some cases, the employer may agree that the risk described by the employee is present and may make a commitment to ameliorate the risk. In other cases, the employer and the employee may disagree concerning the existence of a risk, and an external party – a health and safety officer employed by HRSDC – may be asked to conduct an assessment of the risk. During all of this investigation process, the employee is entitled to refrain from returning to work.

[55] Once the health and safety officer has given a definitive pronouncement that there is no danger, the employee is required to return to work. The recourse available then, in the event the employee is still convinced there is a risk, is through the appeal process. It is only when this whole process has been exhausted that the employer is permitted to contemplate discipline of an employee for wilfully abusing the process.

[56] Though this process is intended to provide recourse to employees who wish to have a health or safety issue addressed, it also recognizes the operational interests of the employer. The system contemplates that the investigatory stages of the procedure will be carried out with dispatch. Once the health and safety officer has communicated the view that there is no danger, the employee is required to return to work and await the outcome of the appeal, if there is one.

[57] With respect to these complaints, the employer is taking the position that the results of the investigations by Mr. Harrower on August 18 and October 24 were determinative of the issue of whether there was any danger to Mr. Ferrusi, and that the procedures spelled out in the *Code* are, therefore, irrelevant to the events of November 11 and 16, which were simply ongoing manifestations of the same situations in place on the earlier dates.

[58] I can find nothing in the provisions of the *Code* that would permit the employer to take this position on a unilateral basis. It is, of course, somewhat difficult to fit the environment in which the customs officers work and the circumstances raised by the employees as a basis for the work refusals, into a claim that ". . . the performance of

the activity constitutes a danger to the employee or to another employee." It is also, no doubt, difficult to determine what dangers are inherent in the job and what dangers may be legitimate grounds for a refusal to work. These are issues that a health and safety officer and an appeals officer may properly consider. To some extent, Mr. Danton did consider these issues in his telephone inquiry of November 16, though the employer did not regard this as an actual investigation. The question here is whether the employer can unilaterally decide that the circumstances are so similar on two occasions that there is, in fact, only one work refusal.

[59] It must be remembered that the right to refuse work is a right that belongs, in the first instance, to an individual employee. There may be other employees who have a common concern and decide to refuse work as well. There may be issues raised as the basis for a work refusal that are taken up by the union representing employees, or as a matter of general concern by a workplace health and safety committee. Nonetheless, the *Code* requires that the concerns of the individual employee that have led to a particular work refusal be addressed in accordance with the *Code*.

[60] In the case of the November 16 incident, it is possible that the final outcome of an appeal would be a finding that all armed and dangerous lookouts are simply an ordinary hazard of the job, though it is difficult to imagine that there would not be some basis for deciding that some pose greater risks than others. Mr. Ferrusi himself said that he has not refused to work on all occasions when an armed and dangerous lookout was in force, but that he thought there were particular risks attached to the two on October 24 and November 16. It is also possible that the outcome of the process in relation to the November 11 incident would be a finding that all statements by politicians are generic, and that such statements, do not in themselves, define situations as risks. The point is that it is not open to the employer to make the unilateral decision to characterize situations as continuations of earlier situations, without permitting employees to invoke the procedures intended to provide them with means of obtaining an assessment of workplace dangers that is independent of the tensions and operational pressures of the workplace. By deciding that the situations on November 11 and November 16 were "just like" those on August 18 and October 24, respectively, the employer unilaterally decided a question that the investigatory procedure was designed to address, and denied Mr. Ferrusi and other employees the opportunity to challenge this characterization before a health and safety officer and, ultimately, an appeals officer.

[61] The evidence presented at the hearing suggests that the employer was motivated to take the approach it did by the disruption caused to its operations at the border by repeated work refusals by employees at Fort Erie and elsewhere. Its approach was based on grounds the employer viewed as similar, and that were under broad discussion at the levels of workplace health and safety committees, employer policy development, and political and public debate. In the long run, these issues may be resolved at any one of these levels, or through a general jurisprudence emerging from the appeals of individual cases.

[62] I am not empowered or equipped, however, to deal with these issues on such a broad canvas. I have been asked to look at the narrower questions of whether the employer failed to comply with the provisions of the *Code* by treating the work refusals of November 11 and 16 as continuations of the earlier work refusals of August 18 and October 24, and whether the statements of the employer and the letters distributed to employees on November 11 and 16 constituted threats of reprisal in violation of section 147. It will be recalled that, at the time of these earlier work refusals, Mr. Harrower found no danger in either case. The employees returned to work when he made these findings and subsequently filed appeals. In neither case has there been a decision by the appeals officer. One can, perhaps, understand the frustration on the part of the employer that led it to make the decision to identify the work refusals of November 11 and 16 as simple continuations of these earlier refusals. However, to allow the employer to ignore or truncate the process by determining unilaterally that there were no meaningful factual distinctions between these events would be to deny the employees the chance to challenge this assertion through the means provided under the *Code*. In addition to the capacity the employer currently has to contest the assertion of an employee that a risk exists, the employer would be able to make a decision that such an assertion should be ignored and not subjected to examination.

[63] With respect to the deduction of wages for the hour between 6:00 p.m. and 7:00 p.m. on November 16, the period occurred when the employees were waiting to hear whether Mr. Danton would be conducting an investigation and ended when the telephone conference with Mr. Danton began. The employer said that this was not a disciplinary response, but simply a calculation of the wages related to the time the employees were not working after the employer had made it clear that it did not regard it as a legitimate work refusal.

[64] I have found that the employer was not entitled to circumvent the investigation process by simply asserting that this was not a new work refusal but the continuation of an old one. I have also concluded that the employer has failed to satisfy the onus placed on it under subsection 133(6) of the *Code* to show that this was not a refusal to pay remuneration for a period during which employees were exercising their rights within the meaning of section 147 under the *Code* and that the letters and statements communicated to employees constituted improper threats under section 147.

[65] The employer first took its new approach to work refusals on November 11, when it announced that it was taking the position that the work refusal based on a new statement by the Deputy Prime Minister was a "continued" work refusal from August 18, and gave refusing employees a letter indicating that disciplinary action could ensue if they did not return to work. The response of the employees on that occasion was to return to work rather than face the prospect of discipline, even before Ms. Tunney had called back to advise the employees she thought the approach of the employer was inconsistent with the *Code*.

[66] On November 16 the employer took the same approach, tying the work refusal to the refusal of October 24, which had involved a different armed and dangerous lookout, and, again, circulating a letter advising of the possibility of discipline. The testimony of Mr. Ferrusi was that this left the employees in considerable doubt about what their rights were. As far as he was concerned, the period when they were in the conference room, during which they made initial contact with Mr. Danton and discussed what was happening, was a period during which the employees were exercising their right of refusal under the *Code*. They also got mixed signals from the representatives of the employer, who, other than the admonition contained in the letter, did not issue a direct order to return to work, but, in fact, allowed the employees to continue to use the conference room for their meeting. Given that Mr. Ferrusi had serious doubts about the legitimacy of the approach being taken by the employer, doubts that had been confirmed by his telephone conversation with Ms. Tunney on November 11, it was reasonable for him to think that the hour in the conference room was part of a process that would lead to a clarification of the issues and, he hoped, an investigation of the work refusal. Even if it had ultimately been determined that the employer was acting correctly by saying that the work refusals of October 24 and November 16 were one and the same, this issue was so unclear in that

hour that the employer cannot, in my view, be heard to say that the deduction of wages had nothing to do with the employees' exercise of their rights under the *Code*.

[67] The Board finds that the employer was in violation of sections 128 and 129 of the *Code* by refusing to participate in an internal investigation or to permit an investigation by a health and safety officer of the work refusals of November 11 and November 16, 2005.

[68] The Board finds that the employer was in violation of section 147 of the *Code* by refusing to pay Mr. Ferrusi remuneration for a period when he was exercising his right to refuse work under the *Code*.

[69] The Board finds that through communications to employees on November 11 and 16, and, in particular, through letters distributed to employees, the employer violated section 147 of the *Code* by making improper threats of reprisal against employees exercising their rights within the meaning of that section.

[70] The Board finds it appropriate in the circumstances to exercise its powers under paragraph 40(1)(*i*) of the *Public Service Labour Relations Act* to order the employer to post this decision in a place where it will be accessible to all employees.

[71] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

Order

[72] The Board declares that the employer was in violation of sections 128 and 129 of the *Code* by refusing to participate in an internal investigation or to permit investigation by a health and safety officer of the work refusals of November 11 and November 16, 2005.

[73] The Board declares that the letters given to Mr. Ferrusi on November 11 and November 16, 2005, and oral communications from the employer on those dates referring to the letters constitute improper threats within the meaning of section 147 of the *Code*, and violations of that section.

[74] The Board orders the employer to compensate Mr. Ferrusi for any lost wages and benefits associated with the period between 6:00 p.m. and 7:00 p.m. on November 16, 2005.

[75] The Board orders that the employer post this decision in a place where it will be accessible to all employees.

January 5, 2007.

Beth Bilson,
Board Member