

CANADA / JUDGMENT

R. v. Canadian Pacific Railway Company

2020 BCSC 716

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2020 BCSC 716 R. v. Canadian Pacific Railway Company

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Canadian Pacific Railway Company,

2020 BCSC 716

Date: 20200511

Docket: 23273

Registry: Revelstoke

Regina

v.

Canadian Pacific Railway Company

Before: The Honourable Madam Justice Gerow

On appeal from: An order of the Provincial Court, dated July 16, 2018 (R. v. Canadian Pacific Railway Company, Jackson and McClelland, 2018 BCPC 181, Revelstoke File No. 23273-C-2).

Reasons for Judgment

Counsel for Crown:

A. Switzer

Counsel for Canadian Pacific Railway Company:

S. Hopkins-Utter

A. Blair

Place and Date of Hearing:

Vancouver, B.C.

February 28, 2020

Place and Date of Judgment:

Revelstoke, B.C.

May 11, 2020

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Introduction

- [1] Canadian Pacific Railway Company ("CPR"), Mark Jackson and Tim McClelland were charged with two counts of unlawfully contravening the Securement of Railway Equipment Emergency Directive (the "Directive") issued pursuant to the Railway Safety Act, R.S.C. 1985, c. 32 (4th Supp.) (the "Act").
 - a) Count 1 was that the accused contravened the Directive by not applying sufficient handbrakes to railway equipment on February 15, 2015, near Revelstoke, B.C.
 - b) Count 2 was that the accused contravened the Directive by not applying an additional physical securement measure or mechanisms to railway equipment.
- [2] Mr. Jackson was the Superintendent of the Mountain Subdivision and Mr. McClelland was the Director - Dispatching at CPR's Operations Centre in Calgary.
- [3] On July 16, 2018, Mr. McClelland was found guilty of both charges. Mr. Jackson and CPR were acquitted of both charges.
- [4] The Crown appeals the acquittal of CPR on the basis that the trial judge erred in finding that CPR had established the defence of due diligence.
- [5] The respondent, CPR takes the position that the trial judge was correct in determining that the defence of due diligence was made out and the appeal should be dismissed.

Background

- [6] The Directive was issued on October 29, 2014, as an emergency directive pursuant to s. 33 of the Act. The Directive was in response to the Lac-Mégantic disaster that occurred on July 6, 2013. A train carrying hazardous goods was left unattended on a rail line, on a grade, uphill from the town of Lac-Mégantic, Quebec. The train was not secured adequately and it rolled downhill, derailed in town, exploded and killed 47 people.
- [7] The purpose of the Directive was to prevent uncontrolled motion of railway equipment by ensuring railway equipment was sufficiently secured when it was left unattended. A train is left unattended when an employee is not in close enough proximity to take effective action.
- [8] Failing to apply the number of handbrakes to railway equipment or failing to apply additional physical securements measures or mechanisms required by the Directive is a contravention of the Act and is a strict liability offence.
- [9] The incident giving rise to the charges occurred early in the morning of February 15, 2015. The crew of CPR Train 401 left 58 railcars unattended on the main track at the Greely staging point, east of Revelstoke.
- [10] There was a six-day trial in the Provincial Court in Revelstoke, commencing May 7, 2018. The Crown called four witnesses, including the two crewmembers on Train 401, the conductor of the train, Stefaney Pacey, and the engineer, Curtis Ayotte. The Crown also called Inspector Robert Blair, the lead investigator for Transport Canada and Todd Horie, an expert in the area of train operations, including controlling and predicting the movement of trains.
- [11] CPR called Keith Shearer, CPR's Assistant Vice President for Safety and Sustainability. Mr. Shearer gave evidence about CPR's training and safety policies, and operational rules and procedures.
- [12] Mr. McClelland and Mr. Jackson did not testify.
- [13] The reasons for judgment was released on July 16, 2018 (the "Reasons"). The learned trial judge found that the actus reus of each offence had been proved beyond a reasonable doubt, but acquitted CPR on the basis it had established the defence of due diligence.
- [14] The Reasons contain a summary of the evidence. At the time of the incident, the Teamsters Union had served CPR with a strike notice and the strike was to begin at 10:00 p.m. on February 14, 2015. Train crews on trips that began before the strike commenced would finish their trips, but any further movement of trains had to be undertaken by management. CPR's management was planning to tie down some trains at locations where they could be secured and left standing.

- [15] The plan was to tie down Train 401 on a main track. However, Train 401 consisted of 152 cars, 21 of which were carrying hazardous goods. Nineteen of these cars were carrying fuel and two cars were carrying ammonium nitrate. Any train with more than 20 cars of hazardous goods is referred to as a "key train" and special rules apply. Key trains cannot be left unattended on a main track.
- [16] Train 401 could not be tied down on the main track as a key train and the Revelstoke rail yard was full. A decision was made to have the crew of Train 401, Mr. Ayotte and Ms. Pacey, separate the 19 cars containing the fuel oil from the rest of the train, and set them off on a backtrack at Greely. A backtrack is a short section of track beside the main track. After setting off the cars, Train 401 would no longer be a key train and could be tied down on the main track.
- [17] Mr. Ayotte and Ms. Pacey were the only crew on Train 401 and were members of the Teamsters Union. They received instructions from the Rail Traffic Controller (the "RTC"). The RTC's role is to transmit instructions to the crew from the Director. The RTC responsible for Train 401 at time of the incident was Chris Plumb.
- [18] The learned trial judge reviewed the various options open to the crew to accomplish the plan for Train 401. Mr. Ayotte and Ms. Pacey testified that the plan was unusual, and neither of them had performed the switching movement required by the plan before or since. The crew made several calls to the RTC with questions and concerns about the movement as they understood it. Mr. McClelland was working in the Operations Centre with the RTC and made several phone calls seeking advice, including one to Mr. Jackson. The phone calls were audio recorded.
- [19] The Reasons quote portions of the phone calls and refers to Mr. Ayotte's evidence that he repeated the RTC's directions back to him because he wanted to point out how "absurd" it was to leave railcars unattended on a mountain grade without handbrakes.
- [20] The trial judge found that the crew reluctantly performed the movements and left the tail end of the train standing unattended without handbrakes or additional physical securement measures. The cars were left "in emergency" which means the crew relied on the air brakes to keep the cars from moving.
- [21] The 58 railcars left without handbrakes weighed approximately 7,100 tons. The railcars were left on a 1.1% grade, and would have required at least 18 handbrakes and an additional physical securement mechanism pursuant to the Directive. Two of the 58 railcars contained hazardous material, namely ammonium nitrate.

- [22] The trial judge found that the incident arose as a result of different understandings about where Train 401 was going be when the 19 cars were moved on to the backtrack. Mr. Ayotte and Ms. Pacey believed they were to stop the train and make the cut east of the Greely where the rear end of the train could be left without obstructing the private crossings. Making the cut at that place required them to leave the train unattended while they moved the front of the train and backed into the backtrack.
- [23] The trial judge found that the crew knew that leaving the train unattended on the main track while they made the switch without handbrakes would contravene the Directive. The trial judge found that according to CPR's policy, the final resort of employees is to refuse to perform work. However, Mr. Ayotte and Ms. Pacey believed that a conductor or engineer who refused to perform work as directed would be terminated for insubordination. They believed they were required to "work now, grieve later".
- [24] The trial judge found the crew committed the actus reus of both offence at the direction of and as agents for Mr. Jackson and Mr. McClelland, and as employees of CPR.
- [25] The trial judge discussed strict liability offences and at para. 65 stated that since the Crown had proved the actus reus of the offences, the onus shifted to the accused to advance a defence of due diligence.
- [26] The trial judge examined whether the due diligence defence was available to each of the accused.
- [27] The trial judge noted that Mr. McClelland was responsible for determining the locations of the trains throughout the relevant corridor of the railway network. Mr. McClelland was working closely with the RTC and the RTC provided Mr. McClelland's plan to deal with Train 401 to the crewmembers. The trial judge found that Mr. McClelland knew the crew was concerned with the number of handbrakes needed. The trial judge concluded that if Mr. McClelland thought the crew understood his instruction to mean they should not leave part of the train unattended when he ordered the train to be left in emergency, his mistake was not reasonable.
- [28] At para 77 of the Reasons, the trial judge wrote:

With respect to any due diligence, the steps taken by Mr. McClelland to inform himself about what the crew were about to do were also not reasonable. He did not contact the crew directly. He did not instruct the RTC to tell them exactly where he wanted them to make the cut. Despite his responsibility for overseeing the operations on that corridor of the network, and despite the confusion and frustration expressed by the crew and the RTC, he did not make his plan for the movement of the train sufficiently clear before directing that it be left in emergency. On a balance of probabilities, Mr. McClelland did not exercise all due diligence to prevent the commission of the offences.

- [29] The trial judge then discussed Mr. Jackson and found that on the evidence his mistaken belief that the trail end of the train would not be left unattended was reasonable.
- [30] The learned trial judge dealt with the due diligence defence in regards to CPR in paras. 85-86, as follows:
- [85] With respect to the Canadian Pacific Railway Company and the defence of due diligence, it is important I remind myself that the focus of the due diligence test is the conduct which was or was not exercised in relation to the "particular event" giving rise to the charges, and not a more general standard of care. The particular event giving rise to the charges in this case is the direction to leave the tail end of Train 401 standing on the main track without handbrakes or additional physical securement.
- [86] In some of the questions asked and submissions made during the trial, there was a suggestion that the Canadian Pacific Railway Company placed more emphasis on efficiency and profitability than on compliance with railway safety rules. On the evidence led at the trial, I cannot make that finding.
- [87] The Canadian Pacific Railway Company had a training and operational plan that included requirements that employees comply with rules, and processes like "escalating up" to obtain clarity for confusing directions. It was not reasonably foreseeable that a Director - Dispatching like Mr. McClelland would perform his duties in a way that resulted in a direction that railway equipment be left unattended without being properly secured. I am satisfied, on a balance of probabilities, that the Canadian Pacific Railway Company exercised all due diligence to prevent the commission of the offences.

Legal Parameters

- [31] The Crown has brought the appeal against CPR pursuant to s. 813(b)(i) of the Criminal Code. Under s. 813(b)(i), the Crown may appeal the dismissal of charges based on errors of fact, mixed fact and law, or law alone: *R. v. Labadie*, 2011 ONCA 227 at para. 50.
- [32] Section 822 of the Criminal Code provides that ss. 683 to 689, except for ss. 683(3) and 686(5), apply, with such modifications as the circumstances require, to such an appeal.
- [33] The Crown asserts that in this case, the applicable appellate review for the trial judge's findings of fact is correctness, citing *Labadie*, *R. v. Starvish*, [1987] N.S.J. No. 223 (C.A.) at para. 8, and *R. v. J.M.H.*, 2011 SCC 45 at para. 28-30.
- [34] However, it is clear from the cases that whether a trial judge's findings of fact are assessed on the bases of correctness is determined by the circumstances. In *Starvish* at para. 8, the Court stated that although the Crown has a right to appeal on questions of fact in summary conviction cases, a verdict of acquittal should only be set aside where it is "unreasonable or cannot be supported by the evidence". In *J.M.H.* at para. 28, the Court stated an appellate court may review a decision when "the trial judge's error, if there is one may be safely traced to a question of law rather than to any question about how to weigh the evidence".

[35] As noted in *R. v. F.A.S. Seafood Producers Ltd.*, 2000 BCCA 464 at para. 72:

Whether the due diligence defence has been established on the balance of probabilities is ordinarily a determination left to the finder of fact and will not be interfered with by an appellate court if there is an evidentiary basis for the finding.

[36] In this case, the Crown argues that verdict is not supported by the evidence and as a result the standard of appellate review is correctness. CPR asserts that the cases relied on by the Crown do not say that the Reasons are subject to appellate review on the standard of correctness. Instead, the case law establishes that a trial judge's decision should be given deference if there is evidence to support his or her findings.

[37] The approach articulated by CPR is consistent with the conclusion in *F.A.S.* that a trial judge's findings of fact about whether due diligence has been established will not be interfered with unless there is no evidentiary basis. In other words, if there is evidence supporting the trial judge's findings the standard of appellate review is not correctness, and it is not the appellate court's role to reweigh the evidence.

[38] As set out in the Reasons, the offences CPR was charged with are strict liability offences. Once the Crown proves the *actus reus*, the onus shifts to the accused to establish the defence of due diligence on the balance of probabilities.

[39] In *R. v. MacMillan Bloedel Ltd.*, 2002 BCCA 510 at para. 46-48, the majority reiterated the test for due diligence set out in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 applied, stating:

[47] Thus, there are two alternative branches of the due- diligence defence. The first applies when the accused can establish that he did not know and could not reasonably have known of the existence of the hazard. The second applies when the accused knew or ought to have known of the hazard. In that case, the accused may escape liability by establishing that he took reasonable care to avoid the "particular event". This point is elucidated in the reasons of Dickson J. in *Sault Ste. Marie*, at pp. 365-66, where, after referring to cases in which the offences turned on the unlawful status of a person or place, he said:

In such cases, negligence consists of an unreasonable failure to know the facts which constitute the offence. It is clear, however, that in principle the defence is that all reasonable care was taken. In other circumstances, the issue will be whether the accused's behaviour was negligent in bringing about the forbidden event when he knew the relevant facts. Once the defence of reasonable mistake of fact is accepted, there is no barrier to acceptance of the other constituent part of a defence of due diligence.

[48] The important point to be drawn from this discussion is that whether the accused's conduct was "innocent", under the first branch of the defence, or whether the accused took "all reasonable steps", under the second branch, must be considered in the context of the "particular event."

- [40] In *MacMillan Bloedel* at para. 44, the majority noted that the focus of the inquiry must be on the foreseeability of the actus reus of the offence charged not general foreseeability.
- [41] In *R. v. Emil K. Fishing*, 2008 BCCA 490, the Court at para. 19, clarified that "the defence of due diligence will only be available if the accused can demonstrate that it has exercised due diligence to avoid the specific type of occurrence giving rise to the charges against it", but that the accused did not have the onus of demonstrating the precise mechanism by which the act occurred.
- [42] The Court distinguished between an employer's vicarious liability and responsibility to take steps to safeguard against employee's negligence, stating at para. 30:

As is apparent from the *Gulf of Georgia Towing* case, an employer may be required to put systems in place to avoid employee negligence and to prevent such negligence as might occur from having adverse consequences. An employer who fails to put reasonable systems in place to avoid and to mitigate the consequences of negligence may be unable to avail itself of a defence of due diligence. This is not, however, to say that an employer's liability is vicarious in nature. As was stated in *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 at S.C.R. 1331, C.C.C. 377-78:

Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

Parties' Positions

Crown's Position

- [43] The Crown takes the position that the trial judge erred, under either branch of the analysis, in finding that CPR had established the defence of due diligence. The Crown submits the learned trial judge erred determining that the first branch of the due diligence analysis was available in this case. The Crown submits that reasonable but mistaken belief was not available to CPR as a defence because the cause of the offence and the actus reus are both human error, which is inevitable, and therefore a mistaken belief that employees will not err cannot be reasonable.

- [44] In the alternative, the Crown submits that if the first branch of the due diligence analysis is available to CPR, that a) the human error - management's faulty direction - was reasonably foreseeable, and b) the facts do not support the inference drawn by the trial judge to establish the existence of a mistaken belief, and the reasonableness of such a belief.
- [45] The Crown submits that if the trial judge relied on the second branch of the due diligence test, the facts do not establish that CPR took all reasonable steps to avoid the particular event. The Crown argues that the standard of appellate review is correctness because the evidence does not support the trial judge's findings.

Respondent's Position

- [46] CPR takes the position that the trial judge correctly applied the legal test for a defence of due diligence, and reasonably concluded on a review of the evidence that the defence was made out on a balance of probabilities in respect of CPR. CPR submits that the defence could have been established under either branch of the test, but that the trial judge did not acquit CPR on mistake of fact but on the second branch, i.e. that CPR had taken reasonable steps to prevent the offences. CPR submits, that contrary to the Crown's submissions, there was evidence to support the trial judge's findings that it had exercised all due diligence to prevent the commission of the offences. CPR submits the appeal should be dismissed.

Analysis

- [47] In this case, the trial judge found that the incident arose out of different understandings about exactly where Train 401 was going to be when the 19 cars were removed. The RTC never told the crew where to stop the train. The crew stopped at a location that required them to leave part of the train unattended on the main track. The crew knew that leaving the tail end of the train unattended on the main track without sufficient securement was a breach of the Directive.
- [48] While the Reasons does not state what branch of the due diligence test is being applied to CPR, it is clear from reading the Reasons as a whole that CPR was acquitted on the basis of the second branch of the due diligence test, not on the basis of mistake of fact. The trial judge refers to the training and operational plan CPR had in place to prevent the commission of the offences.
- [49] The Crown takes the position that the trial judge erred in his definition of the particular event. The Crown says that the law is clear that the particular event is the actus reus of the charge, which in this case was the failure to apply handbrakes or an additional physical securement.
- [50] However, the trial judge clearly focused on the actus reus, which was leaving the train unattended without handbrakes or additional securement measures.

- [51] The Crown asserts that the trial judge's findings are not supported by the evidence under the second branch of the due diligence test. The Crown argues that there is not an evidentiary foundation to support a finding that all reasonable precautions were taken.
- [52] It is apparent from a review of the Proceedings at Trial and the Appeal Books that there was extensive evidence before the trial judge about the training programs and policies of CPR put in place to prevent this type of offence. Employees and management were notified of the requirement of the Directive. A training program established that included testing to ensure employees understood the requirements of the Directive.
- [53] In the Reasons at paras. 18 - 20, CPR's training and dispute policies are discussed. The trial judge found that CPR had a well established training program that both the crewmembers, Mr. Ayotte and Ms. Pacey, and the managers, Mr. McClelland and Mr. Jackson had been through. Part of the training involved an approach to clarifying confusing instructions by escalating up. If train crews are in doubt as to the meaning of any rule or instruction, they are to seek clarification from the proper authority. The first step for train crews is to contact the RTC. If the RTC is unable to resolve the uncertainty, the RTC escalates the problem up to the Director. If the Director is unable to resolve the problem, he or she contacts the Superintendent.
- [54] The Crown says that the attitude of Mr. McClelland and Mr. Jackson did not reflect a diligent approach to safety concerns, and in the absence of evidence regarding what systems were in place vis-à-vis management directing the activities of the crew, the onus cannot be satisfied.
- [55] However, the trial judge found that Mr. Jackson established on a balance of probabilities that his mistaken belief that the tail end of Train 401 would not be left unattended was reasonable because he heard Mr. McClelland gave the RTC the instruction to leave it in emergency because the crew was within sight of the train. The Crown did not appeal his acquittal.
- [56] The Crown argues that the evidence proffered by CPR of its training program and policies did not address if, or how, CPR attempted to identify and prevent miscommunications, or what systems were in place to protect from management failures or illegal directions provided by supervisors. The Crown asserts that even if it is accepted that the rules and policies form part of a system designed to prevent accidents, the system presented is incomplete because there was no evidence regarding what training, rules, policies or procedures were in place to guide management. The Crown asserts that there was no evidence about what specifically was done with Mr. Jackson and Mr. McClelland to ensure they were diligent and cautious in their dealings.
- [57] Contrary to the Crown's submissions, there was evidence about what training CPR's managers received, including Mr. McClelland's and Mr. Jackson's training. CPR presented evidence that all employees, including Mr. Jackson and Mr. McClelland, were trained. Mr. Shearer testified regarding CPR's policies, systems and training of employees. Mr. Shearer testified that one of his areas of responsibility when changes were made, such as those set

out in the Directive, was to issue changes in the form of operating bulletins which would go out to the field.

- [58] The philosophy of CPR in 2015 was to ensure that managers understand the work and how it is done on the trains in order for them to be able to appropriately manage the employees they were in charge of. As a result, managers were trained to operate the trains. Mr. Shearer took part in the training program for managers. Training for managers was competency based.
- [59] Mr. Shearer testified that Mr. McClelland had received training to be a director. Mr. Shearer's evidence was that Mr. McClelland was a qualified RTC and had a deep understanding of the network he was overseeing. Mr. Shearer testified that Mr. Jackson was an experienced officer and that he was qualified as both a locomotive engineer and conductor. Mr. Shearer testified that Mr. Jackson was very familiar with the territory he was managing.
- [60] The 2015 CPR Corporate Health & Safety Plan was in evidence. Mr. Shearer testified regarding the plan. A document entitled Safety Management System was in evidence and set out the duties for every level of employees, including superintendents and directors.
- [61] There was evidence before the trial judge that CPR equipped all trains with radios so employees in remote areas could be supervised, and created a training system and put printed materials in the possession of the train crew with an express instruction that train crews "escalate" whenever they had concerns or questions with the work being done.
- [62] Mr. Shearer testified about steps CPR took to prevent these particular offences. Mr. Shearer testified that CPR was aware the Directive was going to be issued because CPR had been sharing drafts with the government. Mr. Shearer's evidence is that CPR prepared their own instructions so that as soon as the Directive was issued, it was immediately able to issue the changes and communicate them to the field. The changes were issued in the form of a bulletin.
- [63] A system bulletin dated October 31, 2014, set out the requirements of the Directive, including the requirements for handbrakes and supplemental securement. There was also a document entitled Hand Brakes - Leaving Equipment Q & As which was provided to clarify the changes in the instructions in the Directive for securing equipment in evidence. CPR had a communication process that it undertook with employees to ensure they were aware of the changes.
- [64] Mr. Shearer testified that there were a series of structured conference calls with the management team of CPR to explain all the changes and explain the document package that accompanied the Directive so they in turn could communicate the changes directly to the frontline employees. Mr. Shearer testified that the Q & A document was sent to all of the local managers. The managers were to meet with each crew as they came on duty to explain the changes so they were clearly understood. The next step was a validation process in the form of efficiency tests designed to test employees' understanding and knowledge of the

specific changes in the Directive.

- [65] The Crown points to the fact that while Mr. Shearer testified there was a policy of "escalating up" concerns, he was unable to point to any written rule. Although the Crown asserts there was no evidence of the procedure to escalate up, Mr. Shearer testified that CPR had an "escalation up" process. If an employee does not understand an instruction, the first step is to go to their immediate supervisor. In terms of train crew, they are required to call the RTC. If the RTC does know the answer, his point of escalation is to his director, who in turn can go to people in the field. Mr. Shearer testified that if you escalate up and get an answer you did not understand or thought was contrary to an obligation, you can escalate up again. Mr. Shearer's evidence that there was a procedure in place at CPR to escalate up was uncontradicted.
- [66] As well there was evidence before the trial judge that the crew was required to seek clarification if in doubt, not only by policy but also under the Canadian Railway Operating Rules (the "CROR"). The trial judge found that the crew did not communicate to the RTC that they were going to switch the train at a location that would result in leaving the train unattended during the switch. The trial judge found that the crew acted on their understanding of directions from the RTC without seeking further clarification.
- [67] The trial judge found the crew knew that by leaving the train unattended without handbrakes or additional securement, they were breaching the Directive. CPR argued that it was not foreseeable that the train crew would interpret an instruction from the union to "work now, grieve later" as justification to breach the CROR.
- [68] The Crown says that with respect to the argument that the crew ought to have known they could have refused the work they were directed to do, there was no evidence to establish that CPR had informed the crew they could refuse work. The Crown asserts that there was no evidence of how the crew was to respond to a clear but unlawful direction from management.
- [69] However, Mr. Shearer testified that employees are trained that they had to adhere to the rules and procedures outlined in the operating manuals. It was clear that the crew were aware of the Directive and knew that leaving the train without sufficient handbrakes and securement was a contravention of it.
- [70] The documents in the crews' possession were in evidence. The materials on communication made it clear that crew members must communicate by radio. When requesting an authority or instruction a crew member must provide the information needed for its issuance. In this case, the crew did not communicate that they were leaving the train unattended. Although the Crown argued there was no evidence that crewmembers were aware they could refuse work, a Safety Broadcast dated November 19, 2014, notifying employees of the procedure to refuse unsafe or hazardous work was in evidence.

- [71] There is nothing in how the incident was handled by the directing minds of CPR that would undermine the defence of due diligence. As found by the trial judge, Mr. Jackson's mistaken belief that the train would not be unattended was reasonable. Mr. Shearer testified he did not learn of the event until a warrant was executed in May 2016. Neither Mr. Jackson, nor Mr. Shearer, knew or could have reasonably have known or consented to the offence by the train crew acting on instructions to leave 58 cars unattended without handbrakes or additional securement other than emergency brakes.
- [72] This is not a case as argued by the Crown where there was no evidence to support the trial judge's findings that CPR had exercised all due diligence. There was evidence before the trial judge of CPR's training, procedures and policies, including the steps that were taken to bring the Directive to the attention of both crew and management, so that CPR work could be performed in a manner to avoid these offences. As well, there was evidence that employees were trained to adhere to rules and regulations, and had a right to refuse work.
- [73] In the circumstances, I find there is no basis to interfere with the trial judge's finding that CPR exercised all reasonable care by establishing a proper system to prevent commission of the offences and by taking reasonable steps to ensure the effective operation of the system, and thereby established the defence of due diligence on the balance of probabilities. Accordingly, the appeal is dismissed.

"Gerow J."

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