

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: NuStar Terminals Canada Partnership, 2013 OHSTC 01

Date: 2013-01-15
Case No.: 2012-82
Rendered at: Ottawa

Between:

NuStar Terminals Canada Partnership, Applicant

Matter: An application for a stay of a direction
Decision: The stay of the direction is granted
Decision rendered by: Mr Michael Wiwchar, Appeals Officer
Language of decision: English
For the Applicant: Mr Eric Durnford, QC, Counsel, Ritch Durnford

REASONS

[1] On December 6, 2012, NuStar Terminals Canada Partnership filed an appeal under subsection 146(1) of the *Canada Labour Code* (the Code) of a direction issued by Mr William Gallant, Health and Safety Officers (HSO), on November 29, 2012. Joined to the appeal was an application for a stay of the direction until the matter is decided on its merits.

Background

[2] On November 21, 2012, HSO Gallant visited the work place operated by NuStar Terminals Canada Partnership, at 4090 Port Malcolm Road, Point Tupper, Nova Scotia, for the purpose of conducting an inspection. Upon his arrival, HSO Gallant was refused access to the work place by NuStar's general manager.

[3] Following the applicant's refusal to allow access, HSO Gallant issued a direction to NuStar on November 29, 2012. The direction reads as follows:

IN THE MATTER OF THE CANADA LABOUR CODE PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION THE EMPLOYER UNDER SUBSECTION 145(1)

On November 21, 2012, the undersigned health and safety officer conducted an inspection in the work place operated by NUSTAR TERMINALS CANADA PARTNERSHIP, being an employer subject to the *Canada Labour Code*, Part II, at 4090 Port Malcolm Road, Point Tupper, Nova Scotia, B9A 1Z5, the said work place being sometimes known as NuStar Terminals, Point Tupper.

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

143 - Canada Labour Code Part II,

Health and safety officer William Gallant was refused access to the NuStar Terminals, Point Tupper, by Blaise MacDonnell, General Manager on November 21, 2012.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contraventions no later than November 29, 2012.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at Dartmouth, NS this 29th day of November, 2012.

[4] On December 6, 2012, the applicant filed before this Tribunal an appeal of the direction issued by HSO Gallant accompanied with an application to stay the implementation of the direction.

[5] On December 13, 2012, I held a teleconference to hear the stay application. Present at the teleconference was Mr Durnford, counsel for the applicant, and HSO Gallant, who was briefly present at the beginning of the call.

[6] Later that same day, I rendered my decision to grant the application for a stay. The following are the reasons in support of my decision.

Analysis

[7] The authority of an appeals officer to grant a stay is derived from subsection 146(2) of the Code, which reads as follows:

146(2) Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

[8] In deciding this stay application, I applied the following three criteria which were sent to the applicant prior to the hearing:

- 1) The applicant must satisfy the appeals officer that there is a serious question to be tried as opposed to a frivolous or vexatious complaint.
- 2) The applicant must demonstrate that he or she would suffer significant harm if the direction is not stayed by the appeals officer.
- 3) The applicant must demonstrate that should a stay be granted, measures will be put in place to protect the health and safety of employees or any person granted access to the work place.

Is the question to be tried serious as opposed to frivolous or vexatious?

[9] At the teleconference, I indicated to the applicant that from my initial assessment of this case, I was of the opinion that the question to be tried was in fact serious. Therefore, I concluded that I am satisfied that the requirements for the first criterion have been met.

Would the applicant suffer significant harm if the direction is not stayed?

[10] In his written submissions and later reiterated during the teleconference, Mr Durnford argued that if NuStar is required, pending the appeal, to provide access to the federal authorities, the company would be adversely affected in a manner that could not be compensated by damages. In Mr Durnford's opinion, allowing access to the work place to a federal health and safety officer might result in decisions that are inconsistent with the decisions that might more properly be made by the provincial authorities. Therefore, there could be duplicity of proceedings by the two regulatory authorities, and undue costs and confusion could be caused.

[11] In light of the fact that the province of Nova Scotia already exercises its occupational health and safety regulatory authority over the activities of the applicant, I am convinced that the duplication of jurisdictions in this case could very well create serious confusion. I am of the opinion that the disruption and negative implications that can result from allowing authoritative bodies from two different jurisdictions to inspect and issue decisions and directions are considerable and could cause significant harm to the applicant. Furthermore, I believe that the conflict of jurisdictions that may arise if the direction is not stayed could potentially have an adverse effect on the protection of the health and safety of the applicant's employees. I therefore conclude that the applicant has met the second criterion.

What measures will be put in place to protect the health and safety of employees or any persons granted access to the workplace should the stay be granted?

[12] On the third criterion, Mr Durnford argued in his written submissions that this factor obviously does not apply in this case. At the teleconference, he further indicated that if a safety issue should arise, the provincial authorities would certainly respond since the company has an active engagement with the provincial authorities. He added that NuStar has always been highly respectful of the regulations and has a good record of safety.

[13] Mr Durnford also indicated that this is not a situation where a specific situation occurred that would require that some measures be put in place to eliminate a hazard. At the beginning of the teleconference, I asked HSO Gallant if his visit to NuStar's work place was in response to a specific situation or just a routine inspection. He confirmed that the purpose of his visit was only to conduct a routine inspection.

[14] On this point, it is clear to me that the very nature of the direction did not address a contravention of any occupational health and safety obligation found under the Code and its regulations. In view of this being a question of access to the work place, and due to the fact that HSO Gallant confirmed that his visit was simply for a routine inspection and not in response to a specific incident, I believe that additional measures are not warranted in the context of this intervention. I therefore conclude that the applicant has met the third criterion.

Decision

[15] The applicant's application for a stay of the direction issued by HSO William Gallant on November 29, 2012, is granted until the appeal is heard on its merits.

Michael Wiwchar
Appeals Officer