Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: DP World (Canada) Inc. v. International Longshore and Warehouse Union, Local 500 et al., 2013 OHSTC 3

Date: 2013-01-21
Case No.: 2010-43 and 45
Rendered at: Ottawa

Between:

DP World (Canada) Inc., Appellant, Respondent

and

International Longshore and Warehouse Union, Local 500, Respondent, Appellant
John Sullivan and Gino Guzzo, Respondents

Matter:	Appeal and cross-appeal under subsection 146(1) of the *Canada Labour Code* against two directions issued by a health and safety officer
Decision:	The directions are rescinded
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant/ respondent:	Mr. Alan D. Winter, Counsel, Harris & Company LLP
For the respondents/ appellant:	Ms. Stephanie Drake, Counsel, Victory Square Law Office LLP

REASONS

[1] This concerns an appeal and a cross-appeal brought under subsection 146(1) of the *Canada Labour Code* (Code) against two directions issued by Health and Safety Officer (HSO) Pierre Ka-Ling Wong on October 25, 2010. With the agreement of all parties, these appeals are being determined solely on the basis of the HSO investigation report, documentary evidence provided by both parties as well as their written submissions. There has thus been no formal *in persona* hearing by an appeals officer.

Background

[2] This case involves appeals filed by two parties against directions issued by HSO Ka-Ling Wong on the date mentioned above. On that date, two directions were issued, one to DP World (Canada) Inc. (DP World), a stevedoring company that operates in the Province of British Columbia and also operates a container terminal on the south shore of Vancouver's inner harbour. The other direction was issued to two employees of DP World, John Sullivan and Gino Guzzo.

[3] These directions related to a particular grain loading operation on board ships. This operation consists of the loading of grain during inclement weather through cement loading holes in the cargo hatch cover of vessels in order to ensure that the quality of the grain being loaded not be affected by rain.

[4] As described by cross-appellant International Longshore & Warehouse Union Local 500 (ILWU) in its submission of June 6, 2011, and not disputed by appellant DP World, in fair weather the practice on the docks in the Port of Vancouver is to open the hatch covers of grain vessels and pour the grain into the fully open hatch. Loading grain through open hatches provides better visibility during the loading process and allows dust to quickly dissipate. One drawback, however, of loading grain through open hatches is that the grain gets wet during inclement weather, and wet grain easily spoils.

[5] Cement loading holes on those vessels that have them are access hatches that are not designed to load grain, they are two feet in diameter and are described by ILWU as similar to a utility hole cover on a city street. It would appear that the size, shape and location of cement holes vary greatly from vessel to vessel and that there are no industry standards for such. It is uncontested that when grain is loaded through cement holes, the dust that is created by such operation does not have a chance to dissipate, at least not as easily or quickly as when the hatch covers are open, and thus may build up in the confined space. When grain dust accumulates in a confined space, it is susceptible to explosive combustion. The likelihood of such combustion depends on a variety of factors, including the grain product itself, particulate size, dust concentration, flow rate, humidity, grain moisture content and ignition source.

[6] It is against this general background that we now broach the subject matter of these appeals. The two directions that are the subject of the present appeals came at the conclusion of an investigation by HSO Wong into the refusals to work registered by

respondents John Sullivan and Gino Guzzo, regarding a cement hole grain loading operation aboard a ship at the James Richardson International Grain Terminal in Vancouver, British Columbia.

[7] The ship involved is identified as the Edel Weiss and although its flag of registry has not been specified, the HSO report states that all ships taking on grain at the Port of Vancouver are foreign flag ships. The statement of refusal by the two above-named employees was not provided to me and, according to the appellant, the danger created by the claimed excessive build-up of dust during the process formed the basis of the employees' work refusal. It should be noted here that both directions were issued by HSO Wong pursuant to subsection 145(2) of the Code in relation to a "danger" identified by the HSO. Such directions are usually referred to as "danger" directions.

[8] The first direction issued by the HSO to DP World (designated for ease of comprehension as PW Oct. 25, 2010) is being appealed by both DP World and ILWU. It appears to be directly related to two other directions that had been previously issued to DP World in 2007 by another HSO (HSO D'Sa) and relative to the same generic grain loading operation. It is thus necessary, in order to gain a full understanding of the background to the present case(s), to discuss the interim between the 2007 directions and the issuance of the directions at the basis of the present appeals.

[9] Those 2007 directions, also issued pursuant to subsection 145(2) of the Code, identified the "danger" concluded to by HSO D'Sa as follows:

> The process of loading grain through cement loading holes in cargo hatch cover constitutes a danger as [their] loading holes are not approved for grain loading. Proper documentation and procedures approved by a competent authority to be provided prior to loading.

[10] Following those 2007 directions, and in order to achieve compliance with the order, DP World had retained the services of an expert, Genesis Engineering Inc. (Genesis). Genesis was retained to investigate, conduct testing and produce a report on the safety of loading grain through cement loading holes in cargo hatch covers and approve safe working procedures for undertaking such loading operations. This investigation by Genesis eventually led to a final report (following three preliminary reports) on December 9, 2009. This report, as well as three preliminary reports have been provided to the HSO (D'Sa) and the ILWU.

[11] The report included an attachment entitled "Manual Opacity Probe". This attachment described the design and operation of a tool, an opacity probe, for use in satisfying one of the safety precautions stipulated in the Genesis report conclusions. The opacity probe would also serve to determine and evaluate at various levels, the concentration of grain dust within the closed hatch during the cement hole loading operation. Consequently, the probe would serve to modulate the loading rate or even interrupt such loading in order to remain within safe working conditions.

[12] The Genesis report led to the development of a draft safe work procedure, entitled "Pouring Grain through Feeder Holes – Draft Procedure, January 19th, 2010." This document set out detailed procedures for loading grain through cement loading holes in cargo hatch covers. That procedure included a mechanism and process for monitoring dust levels through visual opacity testing using the Manual Opacity Probe mentioned above, as recommended in the Genesis final report. Once this had been submitted to the originating HSO (2007, D'Sa), the latter found and confirmed in writing on January 29, 2010, that the requirements of his 2007 directions had been complied with. That communication by the HSO also indicated that the employer was required to consult with the work place health and safety committee prior to finalizing the said safety procedures.

[13] As a result of the HSO's conclusion, employer DP World abandoned the appeal it had launched against that 2007 direction and opted to resume this type of loading once the safe work procedures had been completed. The requirement formulated by HSO D'Sa regarding the needed consultation prior to finalizing the cement hole loading procedures appears to have led to a large number of exchanges, predominantly between BCMEA, on behalf of the appellant, and ILWU Local 500 on behalf of the worker representatives on the work place committee. This exchange seems to have come in the form of numerous communications, correspondence, faxes and meetings as evidenced from the documents provided by the appellant that I have read in their entirety.

[14] There is, however, a contentious issue between the parties as to whether record of those exchanges evidence that true consultation had occurred. This will be dealt with later in this decision. Suffice it to say for the purpose of background information that the consultations would have begun as early as 2009, while Genesis, the expert retained by the employer, was conducting its investigation and testing on a number of vessels in relation to the grain loading issue. This consultation continued right up until October 2010, when the appellant recommenced the loading of grain through the cement loading holes in the cargo hatch covers following the adoption and implementation by the appellant of the new safe work procedures.

[15] While it is not necessary at this point to go through all of these exchanges, one can derive from them that the opposing parties never arrived at a consensus on the issues raised in this matter. There were extremes ranging on the one hand in the expressed BCMEA opinion that the Union's agreement would never be forthcoming, and on the other hand to ILWU disappointment in the consultation process and disputing that the BCMEA had consulted in good faith.

[16] After it had been informed that it was in compliance with the D'Sa directions, the BCMEA also received copies of communications that had been prepared by two representatives of the Human Resources and Skills Development department's Labour Program (Eva Karpinski, Industrial Hygiene Engineer and Evan Vandoros, Industrial Safety Engineer). These copies of communications documented their comments on the final Genesis Report and the safe work procedures that had been prepared for loading grain through cement loading holes in cargo hatch covers. Those documents, which

appear to raise some doubts about some of the conclusions arrived at by Genesis, were provided to said Genesis by the BCMEA for their feedback.

[17] On March 19, 2010 (thus after the compliance letter from HSO D'Sa, but prior to the work refusals that brought about the two October 25, 2010 directions by HSO Wong presently being considered at appeal), Genesis replied to the Vandoros and Karpinski communications by stating with explanations the following:

> [A]ll of the issues brought forward by Eva Karpinski and Evan Vandoros of the HRSDC Labour Program have been considered in the study. The loading of grain through a cement-hole is considered to be safe provided that proper loading procedures are followed.

[18] Following this, no further comments were offered by either Engineers, even though their comments were sought by at least one HRSDC official. It is important to note here an important occurrence that took place in the interim between the 2007 D'Sa directions and the October 2010 decision by BCMEA and the appellant to resume cement hole grain loading. Having in their opinion finalized the development of proper safe loading procedures, the employer DP World and BCMEA members were not loading grain through cement holes.

[19] As stated above, the first direction issued in 2010 by HSO Wong is being appealed by both DP World and ILWU. That direction requires DP World to have a "competent person […] evaluate the findings of Genesis Engineering Inc. Report and address the concerns raised by ILWU, local 500, about the opacity probe used for grain loading."

[20] It bears noting here that apart from the preceding wording of the direction that seemingly is seeking the party to whom it is addressed to take certain steps, this "danger" direction describes said danger solely in the generic terminology found at subsection 128(1) of the Code and the standard general form used in the issuance of directions to wit, "The said safety officer considers that the use or operation of a machine or thing/a condition in any place constitutes a danger to an employee while at work."

[21] It should be noted that the Code, at subsection 128(1), refers, one could say generically, to the use or operation of a machine or thing, a condition existing in the work place or the performance of an activity as believed to constitute a danger and constituting "the matter" to be investigated by a health and safety officer pursuant to subsection 129(1) to determine whether "the danger exists" pursuant to subsection 129(4) of the Code. In the case of DP World, its appeal raises three grounds stated in the alternative.

[22] The first ground, which contended that HSO Wong had erred in law and exceeded his jurisdiction, has been dealt with in a previous decision. The remaining two grounds of appeal by DP World, still stated in the alternative by the appellant, and which call for the directions to be rescinded, are as follows: "HSO Wong erred in finding that there was an unsafe condition that constitutes a danger to an employee, which was a necessary

precondition to HSO Wong issuing the 2010 Directions pursuant to section 145(2) of the Code", and in the alternative to not succeeding on this ground, the appellant seeks rescission of the direction(s) "because it appears that they were premised on the HSO's misapprehension that the appellant had failed to meet its statutory obligation to consult with the work place committee regarding the implementation of the safe work procedures for the operation that was the subject of the work refusal" by employees Sullivan and Guzzo.

[23] The appellant ILWU, as regards the direction issued to DP World, did not indicate in its notice of appeal whether it was seeking a rescission or a variance of the direction. However, the wording of the ground raised for the appeal would seem to indicate that it is seeking a variance of that first direction. According to ILWU, it is appealing the direction "because it did not cover all the issues associated with this operation", as required by the direction, and "the evaluation of the report by the competent person reviewed a new report issued after the issuance of the direction".

[24] The second direction, which is addressed to the two refusing employees Sullivan and Guzzo (PW Oct. 25, 2010 A) and refers for substance to the direction issued to DP World, directed that they not use or operate the opacity probe used for grain loading until the direction addressed to DP World had been complied with. It is appealed by DP World on the same grounds raised against the direction of which it was the subject, and thus the outcome of the appeal vis-à-vis the first direction (PW Oct. 25, 2010) will dictate the outcome of the appeal against the second direction.

[25] As stated above, the two directions under appeal followed an investigation conducted by HSO Wong who produced a rather lengthy report (including numerous appended documents) that I have had the opportunity to examine fully. While it is not necessary to reproduce the entire report in this decision, as it forms the basis for the issuance of the directions under appeal, a better understanding of the rationale of HSO Wong requires that its conclusions be cited at length.

[26] It bears noting however that its coverage is extensive and would appear to at least mention matters that would exceed coverage of the Code and consequently my jurisdiction as I am required pursuant to the Code to determine whether at the time of the refusal to work and the ensuing investigation there existed a danger within the meaning of the Code for employees of a federal jurisdiction employer and coming within coverage and application of the Code.

[27] It should also be noted at the outset that HSO Wong's conclusions demonstrate what can be described as the latter's strong disagreement with the conclusions previously arrived at on the same issue by HSO D'Sa in his 2007 directions and the latter's subsequent determination in 2010 that there had been compliance by the employer with his 2007 directions as well as with the actual 2010 directions issued by HSO Wong. Part of the text and the conclusions of HSO Wong read as follows:

(1) Some years ago a Norwegian Shipping Company approached this Transport Canada Marine Office (TCM) to seek approval to load grain through "cement hole" of the ships flying Norwegian flag. Cement holes are so called openings on the ships hatch covers and as the name suggests, that can be used to load cement during bad weather. It does not signify loading any other cargo that may cause dust liable to explode.

(2) The company was advised by this office that as a first step they are to get permission from their "**Flag State**" or "**Classification Society**" **on behalf of their Flag State** to provide approval for loading through "cement hole". Flag State is the flag the vessel is flying, in this case the Norwegian government.

(3) Understandably the company could not obtain the above approval from the Flag State or Classification Society, and it is understood that is because of **LIABILITY considerations** and lack of backing from International Maritime Organization (IMO).

(4) Thereafter the company, it appears that someone thought of staging a planned refusal to work, thereby getting a **"direction"** and submits a procedure purporting to comply with the direction. **This appears to be a back door approach**.

(5) The BCMEA/their legal counsel tried to transfer liability to TCM [Transport Canada Marine] (letter dated December 29, 2009 from their legal counsel […] asking TCM to approve their procedure:
"Determine the direction PD/07/04A are adequate, and whether you agree that grain may safely be loaded through cement hole" in other words coercing TCM to approve the Engineering Study and their loading "**procedure**" dated October 5, 2010."

(6) It may be noted that all vessel loading grain in BC are foreign Flag vessels and the control of vessel's work is under the authority of the Master and carried out by his crew. Such being the case, the ship should have a procedure document and approval for cement hole loading from the "**Flag State"** or "**Classification on behalf of Flag State**". Noting that none of this document is available on board. The first direction given by the Safety Officer should **have included the Flag State approval** as mentioned above in the Direction PD/07/04A dated April 25/07 attached issued by P. D'Sa…
[…]

(8) The Safety Officer (P.D.) issued a document dated January 29, 2010 advising BCMEA that BCMEA has complied with his direction.

(9) Another refusal ensued on October 25, 2010, dealing with the engineering report, the "**probe**" and various matters…
The undersigned Safety Officer attended the vessel for refusal to load through cement hole and report as follows: Direction no: PWOCT25, 2010. "Competent person to evaluate the findings of Genesis Engineering INC report and address the concerns raised by ILWU Local 500 and about the visual opacity probe used for grain loading".
My above direction was lifted by the same Safety Officer (P. D.) without discussion with me although I was within reach by phone.

CONCLUSION:
A) Right from beginning it is understood that a reputable Flag state and Classification Society appears to refuse approving a document for grain loading through cement hole, due to their fear of liability.
B) Dust explosion is known to be a serious hazard. I have reports of two **explosions in Grain Terminal** in Greater Vancouver Regional District, in the province of British Columbia.
C) Considering that Foreign Flag Vessels and crews are involved. It is prudent for the proponent Flag State to take the matter directly to International Maritime Organization (IMO) via its own government which in this case is the Norwegian Government for a full and credible research and implementation through an International Instrument via the International Maritime Organization, inserted in the International Grain code, International Maritime Solid Bulk Code (IMSBC) and in the International Convention dealing with Safety of Life at Sea better known as SOLAS 1974. That way it will not be a unilateral Canadian action or any one State, but an international consensus.

Details of my fact finding, it is not safe to load grain through cement hole, are as follows:

1) There are various flaws in the "Genesis Engineering Inc" Report and that is one of the reasons that a 3rd party review was asked for by the appeals officer.

2) It seems that the third party review is just backing "each other up" and without any real precautionary measure that appear to be missing in the "Genesis Report". E.g.:

a) There was no grounding of probe with the ship's hull, especially during removal and insertion. The probe is giving the concentration at that opening spot only and does not indicate the true value in the Cargo hold.
b) There was no secure proper grounding between loader pipe and the ship.
c) Even with the use of grounding cable from hatch cover to the loading pipe, on certain conditions the bonding will not be made, when the hatch cover is floating on the rubber packing.
d) Collection of grain dust is possible inside the hold structure on beams and under side of the hatch cover and subsequent release of the grain dust upon a primary **explosion, which will fuel a secondary explosion** that may be catastrophic.
e) Electrical lighting, wiring etc. in the cargo hold is not mentioned in the report as a source of ignition. It is a common marine precaution to electrically isolate such electrical connections.
f) The above sources of ignition cannot be totally eliminated; therefore a source of ignition exists. In that case the MOSH requirement of 10% of LEL must be observed. Further hot metal parts may break loose & fall into the pipe. However Genesis Engineering claims that there are "no source of ignition" which we do not agree with.

3) During the "Refusal to Load" on 25th October, 2010, the employees had various complaints and questions about the "Genesis Report" dealing with safety, which the attending Employers representatives (at least 4

persons) were unable to answer. One of the questions was how the probe relates to the amount of grain dust (gm/m3). Further it was reported that there was only a "five" minutes training for foreman. In fact one foreman that approached the Safety Officers had said that he has no training at all. If the foreman has no training, how can he safely lead the team to avoid accident/explosion? And note the **ships crews have no procedure or** training at all, although their action is equally important for safety…

4) The ILWU (employees) complained that the required "consultation" for making safety procedures did not take place satisfactorily. They said that they had made "inputs" in the previous meetings, but the inputs were neglected or ignored in the following meetings.

5) One of the letters from the BCMEA mentions that the Grain Commission acknowledges that grain loading through cement hole is a normal procedure around the world, but no one has produced any authoritative document, where the Port State Government has approved such loading, therefore such claims are considered anecdotal. **And it is critical to note that around the world their federal Governments are not being dragged in "cement hole" loading matters and shoulder the responsibilities. And it is noteworthy to see how seriously the US Government is proceeding with its numerous public hearings and subsequent expert research on the subject.**

6) Loading through cement hole is like loading in an enclosed environment, and the external humidity will have little effect with such high volume of loading process. The report states that other studies indicate the LEL from 20 to 55gm/m3; therefore it is prudent for safety to use the lower figure at 20gm/m3.

7) Quick stopping of loading may not be possible e.g.: load person will consult with the foreman and the foreman will call the terminal, then the terminal may have further process to finally stop or slow down, all this will take inordinate amount of time.

8) As per Genesis Report, tests were carried out with predetermined/tested low Free Fine Dust (FFD). But the actual loading must have different FFD that could be higher (i.e.: no testing is done) and thus add to the danger of explosion. Further more the terminal collect dust and re-introduce an amount into the pipe as that forms part of the cargo.

9) Another source of ignition has been identified by many observers during loading. When the grain is deflected to change direction, the spout at that point is seen glowing red-hot.

10) It appears that Genesis Report does not observe the 3 reviews by HRSDC Evan Vandoros, M. Eng, P. Eng. (attached in document already sent).

11) The ships crew who forms an important safety component has no procedure or training, therefore a uniform international approach is required.

[28] The refusal to work that eventually brought about the HSO Wong investigation and directions arose when the appellant DP World directed ILWU Local 500 grain gang members to load grain through cement holes in inclement weather on a ship called the Edel Weiss. This represented the resumption on that date of such grain loading since it had been interrupted in 2007 following the D'Sa directions.

[29] The employees who made the refusal considered that there was a danger associated with this type of operation and raised a dual concern to wit, that in their opinion the opacity probe did not give them an accurate reading of the dust levels, and that unlike the former crane cab operated by the workers, the terminal's new remote loading crane system did not provide a warning (warning light) when the terminal's dust collection system became disabled.

[30] As the employer agreed to move the loading to a different crane and address and thus correct the warning light issue, the focus of the refusals and thus of the investigation by the HSO turned to the concern related to the use of the opacity probe to measure dust levels during the loading procedure. At that time then, it would appear that the concerns raised by the respondent union regarding the use of the opacity probe were:

- the employer could not provide a specific value for the level of dust at any given point on the opacity probe;
- the ILWU wanted the appellant to use a direct reading instrument, rather than an opacity probe, to monitor dust levels during grain loading;
- the opacity probe did not give an accurate reading of the dust levels during grain loading through the cement loading holes in the cargo hatch cover of the vessel;
- there had been inadequate consultation with the workplace committee by the appellant and the BCMEA , and the ILWU Local 500 had not approved the safe work procedures pertaining to the use of the opacity probe.

[31] Similarly, it would appear that the appellant and BCMEA formulated to HSO Wong the following responses to the concerns raised by the respondent union:

- there existed no such direct reading instrument that could operate at the levels proposed by the respondent union;
- on the basis of the Genesis report obtained in compliance with the previous D'Sa directions, the appellant employer could confirm that while a specific value could not be given for the level of dust at any given point of the probe, the value was not above the lower explosive limit (LEL) and the procedures required shut down prior to that level being attained so that an appropriate safety factor was maintained;
- the use of the opacity probe had already been approved as safe by a "competent person" (Genesis) and HSO D'Sa from Transport Canada had already accepted that the report and the ensuing procedures satisfied the requirements of the previous D'Sa directions so its use did not constitute an immediate danger and was not subject to further review by HSO Wong;

- at the time of the grain pouring in this case, the dust was clear and the gang superintendent could see far beyond the opacity probe down to the grain pile in the vessel hatch, thus further supporting the contention that there was no immediate danger at that time;
- the appellant and BCMEA on behalf of the appellant had more than satisfied the duty to consult with the workplace committee pursuant to paragraph 125(1)(z.06) of the Code, as had been recognized, at least verbally, by the Union's representatives Paulo Branco and Michael Rondpre, and that the appellant's duty to consult did not require, as appeared to be suggested by HSO Wong, that the parties reach agreement on all matters or issues.

[32] It is with those positions formulated by both sides that HSO Wong eventually issued his danger directions pursuant to subsection 145(2) of the Code to appellant DP World and the two refusing employees.

[33] While the following element may not directly relate to the actual issuing of the said directions, as it occurred subsequent to their issuance, it does however, in my opinion, represent an important part of the circumstances surrounding this case that may enter into my consideration of this matter.

[34] As the direction by HSO Wong to appellant DP World directed that a "competent person to evaluate the findings of Genesis Engineering Inc. Report and address the concerns raised by ILWU Local 500 about the visual opacity probe used for grain loading", although disagreeing with the position taken by HSO Wong and actually challenging the directions at appeal, the appellant nonetheless obtained the services of EHS Partnerships Ltd. (Glyn Jones) as a competent person to review the final Genesis report dated December 9, 2009, and address the concerns raised by ILWU Local 500 regarding the use of the visual opacity probe. This resulted in a report to BCMEA, dated November 1, 2010, which was passed on to HSO D'Sa on the same date.

[35] The appellant has provided no explanation as to why it, or the BCMEA, chose to pass on this report to HSO D'Sa instead of HSO Wong who had authored the direction(s), although one could argue that any person vested with the authority of a health and safety officer would be satisfactory. Without going into the details of that review, its conclusion stated that "based on the results of the review it is our opinion that the work was completed following sound principles with sufficient detail and the results and findings cannot be refuted. In our opinion the study and the findings are valid." There followed on November 2, 2010, an email from HSO D'Sa to BCMEA confirming that the October 2010 directions issued to the appellant by HSO Wong had been complied with. This, as well as the EHS Partnerships report, was passed on to ILWU Local 500 on the same day.

Issue(s)

[36] The directions that are the subject of these appeal proceedings were issued pursuant to subsection 145(2) of the Code and are referred to as "danger" directions. That provision provides that where a health and safety officer comes to the conclusion, after an

investigation, that the facts and circumstances of a situation or occurrence come within one of the categories listed therein, to wit the use or operation of a machine or thing, a condition in a place, or the performance of an activity, such that a danger to an employee at work is constituted, the health and safety officer shall notify the employer of what that danger is and issue a direction in writing to the employer to correct that which constitutes the danger and protect any person from the danger that has been identified.

[37] Subparagraph 145(2)(a)(i) refers to what constitutes a danger as a hazard, a condition or an activity. Therefore, in order for a direction pursuant to subsection 145(2) to be valid and maintained at appeal, the reviewing appeal officer needs to conclude first that a specific danger, adhering to whichever form described in the Code provision, did exist at the time of an employee's or employees' refusal to work that eventually led to an investigation by a health and safety officer, said investigation ending in the issuance of such a direction or directions.

[38] In the case at hand, as stated above, the appellant DP World is challenging the directions on two grounds, presented in the alternative, to wit first that at the time of the refusal to work by the two employees involved in the cement hole loading operation, there existed no danger that would have warranted the issuance of the directions, and second, that the said "danger" directions were based on an erroneous conclusion by HSO Wong that the appellant had failed in its obligation to consult with the work place committee on the implementation of the safe work procedures for the cement hole loading procedure that was the subject of the work refusal, although the HSO identified no actual contravention to the Code in the said directions.

[39] Finally, where the cross-appellant is concerned, its contention is not that there was or was not a danger requiring issuance of a direction, but rather that given the presence of a danger, the basis of its challenge is that the direction that ensued is incomplete or insufficiently comprehensive in that it needs to be varied to encompass what it describes as its "outstanding concerns about the opacity probe, the dangerous conditions during cement hole loading and the Genesis Report methodology" and additionally that the employer be further directed to have a new qualified third party examine the Genesis Report in light of those concerns and have additional testing conducted at different humidity levels and pouring rates while at the same time being prohibited from doing such loading except for specific testing purposes until compliance with such direction be attained.

[40] It is clear from what precedes, the fact that the directions were issued pursuant to subsection 145(2) of the Code and that neither the wording of those directions nor the wording of HSO Wong's investigation report specifically refer to a contravention of a provision or provisions of the Code and/or its regulations, that the central issue underlying any of the grounds raised by either party is whether, at the time of the refusals to work that brought about the Wong directions, a danger was present that warranted the issuance of those directions. That is the issue that I will first examine, having in mind the actual wording of said directions. Should I conclude that there indeed was a danger

present at that time, it may then become necessary to consider those other issues raised by either party.

Submissions of the parties

[41] As previously stated, the present appeals are being decided based on written submissions provided by the appellant and the cross-appellant. The parties have both crafted those submissions by addressing separately the individual issues mentioned in the above paragraph, and they did so by formulating primary submissions in support of their own position and reply submissions to the arguments put forth by opposing party. Those were followed, in the case of appellant ILWU, by a brief sur-reply submission to some arguments presented by appellant DP World in reply to the primary arguments submitted by appellant ILWU, with appellant DP World in turn responding in part to some elements formulated in the sur-reply by ILWU. What follows are those submissions, by either party and in either form, that deal with the primary or central issue of danger.

A) Appellant DP World submissions on "danger".

[42] DP World argues that grain loading through cement holes did not constitute a "danger" or, to use its own words, that at the time of the refusals to work and the investigation by HSO Wong, there did not exist an unsafe condition that constituted a danger so as to support the issuance of the "danger" directions pursuant to paragraphs 145(2)(a) and (b).

[43] Noting that the opening words of subsection 145(2) of the Code provide for the issuance of a direction "if a health and safety officer considers that the use or operation of a machine or thing, a condition in a place or the performance of an activity constitutes a danger to an employee while at work", the appellant refers to the definition of the term "danger" at section 122 of the Code where the terminology speaks of "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 […]."

[44] In order to get a proper sense of what is meant by that terminology, it is the appellant's view that one must refer to the published Interpretations, Policies and Guidelines ("IPG") put out by HRSDC, which administers the Code through the Labour Program and the health and safety officers designated pursuant to the legislation, offering guidance to assist in the interpretation and application of the definition of "danger" under Part II of the Code. As such, on the definition of "danger", that IPG (905-1-IPG-062) sees HRSDC describing the characteristics of "danger" in terms of "what it is" and "what it is not" as follows:

> What it is:
> - danger is a situation, actual or potential, which requires that the employee be immediately protected from the hazard, condition or activity in order to prevent

a probable injury or illness from occurring.

What it is not:

- danger should not be equated with risk; the mere presence of a hazard with some degree of risk or effective risk mitigation controls does not necessarily constitute a danger.
- minimal or insignificant illness or injury does not constitute a danger.
- hypothetical or speculative situations do not constitute a danger.

[45] The appellant also points to the same IPG where the words "potential hazard or condition" and "future activity" are described as meaning that "there is a reasonable possibility (not a mere possibility) that such circumstances will occur sometime in the future. This must be assessed bearing in mind past and present circumstances. This excludes hypothetical or speculative situations. The hazard need not be recurring and can be established in a "one-off" occurrence."

[46] Based on this, the appellant submits that HSO Wong's finding that a danger existed in the case at hand does not satisfy the definition of "danger" in either the Code or the IPG where HRSDC formulates guidance for the health and safety officers, among others, operating under the legislation. DP World maintains that the only possible reference to an alleged danger in the 2010 Wong directions, as formulated, would be the HSO's reference to "concerns raised by ILWU Local 500 about the visual opacity probe use for grain loading", HSO Wong thus not describing the presence of any actual or potential hazard that required the employees to be immediately protected.

[47] The appellant further puts forth, based on the recollections by BCMEA's training manager (Donovan Hides) of the discussions by the parties during the Wong investigation, that at the time of the grain pouring that gave rise to the refusals, the dust in the hold was clear, such that the superintendent of the operation could see far beyond the opacity probe down to the grain pile, which would support the conclusion of absence of danger at that specific time.

[48] Adding to this, the appellant maintains that the safe work procedures in place for using the opacity probe required that the loading operation be interrupted prior to dust levels reaching the lower explosive limit (LEL) thereby ensuring that an appropriate safety factor was maintained.

[49] It is thus DP World's conclusion that the finding of danger by HSO Wong was unsupported by any objective evidence and was merely based upon the hypothetical or speculative concerns expressed by respondent ILWU regarding the use of the opacity probe.

[50] According to the appellant, the fact was and is that the use of the visual opacity probe in grain loading had been fully described in the Final Genesis Report and in the safe work procedures approved by Genesis, both of which had already been accepted by another health and safety officer, HSO D'Sa, who had issued a compliance letter in

January 2010 vis-à-vis the directions the latter had issued in 2007. The appellant maintains therefore that since the use of the opacity probe in grain loading had already been approved by HSO D'Sa and Transport Canada Marine, it would be patently unreasonable to suggest that the mere use of the opacity probe constitutes "a danger to an employee while at work" so as to justify the directions issued in 2010 by another HSO under subsection 145(2) of the Code.

B) Respondent ILWU, Local 500, submissions on "danger".

[51] The respondent states that it continues to base its submissions on the elements it had initially formulated and that have been incorporated into the factual background enunciated above. However, it also indicates basing its submissions on the following additional facts concerning grain dust.

[52] First, the respondent re-affirms what has already transpired from other sources and is not questioned, that is that grain dust is explosive and that grain dust explosions are known to have occurred in grain elevators, including in the Port of Vancouver in 1974. As such, four basic factors must be present to cause explosions: fuel, oxygen, confinement and an ignition source.

[53] Of those four factors, the respondent puts forth that a ship's hold with a closed hatch except for two small manhole sized holes (one serving to load and one serving to exhaust grain dust) provides the requisite confinement and oxygen source.

[54] As for fuel, in this case grain dust, it becomes combustible when the amount suspended in the air is equal to or higher than the minimum explosive concentration ("MEC" also referred to elsewhere in this decision and documents as Lower Explosive Limit or "LEL"). Respondent ILWU states as fact that while the MEC of grain dust varies depending on the grain product, on average there must be a concentration of 50-100g/m3 and that generally, the smaller the grain dust particles, the more explosive the grain dust. As such, different types of grain produce different sized grain particles and different amounts of dust per weight and consequently present differing explosive risks. The common grain shipments in the Port of Vancouver are wheat, barley, canola, peas and flax.

[55] Finally, referring to the Genesis Engineering company hired by BCMEA to do testing on cement hole loading, respondent ILWU notes that it recognized in its report that dockage, which is waste material removed from grain during cleaning and which elevators may add back in certain amounts to the product being loaded, may result in unsafe dust levels when such dockage being added back to the product prior to loading proves to be excessively dusty.

[56] Although most have been mentioned in the various documentation that is part of the record, the respondent enunciates the following as potential ignition sources for dust:

- flames and direct heat
- self-heating/spontaneous combustion

- hot work – heat generated by welding or cutting
- incandescent material – e.g. smouldering particles
- hot surfaces – e.g. steam pipes, electric lamps
- electrostatic sparks
- electrical sparks
- friction sparks and "hot spots"
- impact sparks
- static electricity
- lightning, shock waves

[57] The respondent acknowledges that the Code affords an appeals officers extensive powers to review directions of health and safety officers, that under that legislation an appeals officer can inquire into the circumstances and reasons of the direction the latter is reviewing, and that this review is a *de novo* process.

[58] At the same time, ILWU describes the investigation to be conducted by a health and safety officer looking into a work refusal as being a factual investigation with the purpose of determining, on the specific facts and circumstances the HSO collects at the time of the investigation whether a danger exists at that time, or, if the danger is prospective, that it is not hypothetical or speculative, on the basis of the definition of "danger" in the Code.

[59] As such, ILWU describes the employer's position in this appeal as premised on the assertion that the Genesis Reports prepared at the requests of BCMEA stand as a definitive and unassailable conclusion that loading grain through cement holes does not constitute a danger provided the BCMEA's procedures adopted as a result of those reports are followed, signifying that since those procedures and reports have been approved by Transport Canada (as a result of the compliance findings by HSO D'Sa relative to both the 2007 and 2010 directions) they cannot be further questioned. ILWU is however of the view that the resolution of the 2007 directions (compliance acknowledgement by HSO D'Sa in January 2010) did not conclude the matter of the safety of this type of grain loading operation for all time and in all circumstances.

[60] In point of fact, the respondent does point out in this respect that while the 2007 and 2010 directions, the latter issued by HSO Wong, may have been found by HSO D'Sa to have been complied with, there remained others within Transport Canada, including HSO Wong, who still held concerns about the safety of such loading.

[61] Since the claimed danger does not have to be immediately present and can be prospective, the respondent sees the appellant's argument regarding the level of dust at the specific time of the issuance of the direction by HSO Wong as not ending the matter. In point of fact, on this question of prospective danger, respondent ILWU offers a number of examples of past dangerous conditions during such loading to support the contention that the determination of whether a danger exists at a given time must be arrived at on a case by case basis depending on such factors as the terminal, ship, loading

equipment, speed of loading, weather conditions, grain crop being loaded, etc.

[62] As part of those factors, one is “ignition hazards” with the respondent citing a number of examples or occurrences that have been mentioned by its members. In one mid 1980s case, a member saw grain smouldering and smoking in the hold of a ship with the source of ignition unknown. Firemen had to intervene. According to other members, the “elbow” on the end of the loading pipe for cement hole loading gets extremely hot, to the point of glowing in the dark or producing steam when rained upon, due to friction created by the high rate of speed of pouring and the change in direction as the product passes through the elbow.

[63] Other members have noted the potential generation of sparks that would be caused by the occasional contact between the spout of the pipe and the lid of the cement hole. While the BCMEA procedures call for rubber matting around the hole to alleviate the risk of sparking, it apparently cannot prevent all contact as the tides and waves may cause the ship to move. According to other ILWU members, an additional sparking hazard may be caused by pieces of metal being inadvertently dropped down the pipe from the grain elevator, causing metal to metal contact with the already heated metal on the bottom of the elbow.

[64] Another hazard or set of hazards raised by the respondent has to do with working conditions on hatch covers. During cement hole loading, the combination of rainwater and dust and/or product on the hatch covers may render conditions treacherous. In support of this, the respondent cites the example of one of its members who, in 1996, slipped on the wet product on the hatch cover and fell into the cement hole and down into the ship hold, sustaining serious injury.

[65] Along the same line, ILWU considers that the process of inserting the opacity probe into a cement hole could create the same hazard, particularly if the grating covers over the cement holes are not secured properly so as to avoid moving and possibly resulting in a fall for the person handling the opacity probe. According to the respondent, it would appear that some members have advised that no fall arrest equipment is provided during cement hole loading in spite of the fact that some ship hatches are 8 to 9 feet high and the hatch covers surface may be rendered slick due to pooled water and spilled product, thus causing a slipping hazard.

[66] Respondent ILWU also notes that grain dust inhalation represents an additional safety issue around cement hole loading and particularly around the use of the opacity probe since it would appear that in order to read the opacity probe, the employee operating such is required to extend his head directly over the cement hole being used as a vent, with the dust coming up the vent hole directly into the face of the longshoreman reading said probe.

[67] That dust can, on occasion be tick enough that the number 4 (closest to the longshoreman and indicating the highest dust concentration) on the probe cannot be seen. Grain dust in itself can be a health hazard for workers exposed to it and the *Maritime*

Occupational Health and Safety Regulations (MOSH) provide that exposure to a concentration of airborne grain dust may not exceed 10mg/m3.

[68] The respondent notes that the Genesis Reports are modelled on a lower dust concentration in the ship's hold of 25% of an LEL of 50g/m3, which is far above the exposure limit prescribed by the MOSH regulations. Such concern was raised with the BCMEA in October 2010, and while it indicated that procedures would be developed in regard to grain dust exposure while reading the opacity probe, it would appear that nothing specific has been done. ILWU recognizes however that masks are available during any grain loading process.

[69] The directions under appeal, as stated earlier, were issued pursuant to subsection 145(2) of the Code, in principle therefore because of the presence or existence of a "danger" at the time of the refusals to work. Referring to the actual text of those directions, the appellant has commented that the only possible reference to a danger would be HSO Wong's reference to "the concerns raised by ILWU Local 500 about the visual opacity probe used for grain loading".

[70] In its submissions on "danger", respondent ILWU states that "various concerns around the opacity probe were the primary impetus for the work refusal that led to the 2010 directions", and makes the following submissions on this particular subject. First, as regards the so-called visual opacity probe, the respondent asserts that a more precise instrument should be used, contrary to the position taken by the BCMEA and the appellant that no such instrument exists at an affordable cost. ILWU refers along those lines to the instrument (Rader Hi-Volume Dust Sampler) used for testing by Genesis Engineering.

[71] The respondent also mentions existing technology using lasers/light beams and reflectors used to sense percent opacity for smoke aerosols and opines that the appellant and BCMEA did not adequately canvass whether such equipment could be used (with modifications if necessary) to measure grain dust opacity. Instead, the respondent is of the opinion that BCMEA and the appellant settled on the inexpensive opacity probe which ILWU views as inaccurate and as increasing employee exposure to grain dust.

[72] Also, ILWU contends that while Genesis Engineering had recommended fogging nozzles with water as a means of suppressing dust, ILWU opines again that this does not appear to have been pursued as an option by the appellant employer despite the fact that it would presumably be economical and simple to effect.

[73] The respondent pays particular attention to the fact that the Genesis Report conclusions and recommendations which have been implemented by the appellant employer rest on the assumption that below 25% of the Lower Explosive Limit (LEL) is safe for loading, and that an LEL for grain dust of 50g/m3 is the standard put forth in the literature on the subject.

[74] However, the respondent points to the apparent disagreement expressed by a Labour Program/HRSDC industrial safety engineer (Evan Vandoros) to the effect that such LEL is part of a range of reported values in the literature varying from 20 to 55 g/m3, and that pursuant to the MOSH Regulations (subsection 255(6)) on ignition of a concentration of an **airborne chemical agent** or **combination of airborne chemical agents** in a work place, that said concentration must not exceed 10% of said LEL for the chemical agent or combination of such. It is thus the opinion of the respondent that while 50g/m3 is reported in the literature as the LEL for grain dust, it could be too high given some other reported values, and while there may be an industry standard that states 25% of LEL as a safe level for loading, it is not the standard under health and safety regulations with which the employer is required to comply.

[75] Respondent ILWU thus opines that while the standard of 25% of LEL serves as a basis for the Genesis Engineering model and the loading procedures developed by the BCMEA, that ceiling is not adequate to protect safety in accordance with the MOSH Regulations and inconsistent with inhalation limits. While the respondent acknowledges that Genesis Engineering did indicate in a letter that it had considered and addressed the concerns set out by Labour Program engineers in this respect, it argues that Genesis provided no explanation as to how it justified using a ceiling of 25% of LEL given the MOSH Regulations, and that the BCMEA is in error when claiming that those regulations do not require an under 10% LEL since there is no source of ignition during such loading because of the various measures that are taken.

[76] The respondent holds a different view, given the various potential ignition sources that it states its members have described or that are mentioned in the relevant literature or by HRSDC engineers. Furthermore, it contends that loading rates during testing by Genesis varied between 70 and 200 tons per hour, with one exception at 500 tons while there have been instances where loading rates have gone up to 1000 tons/hour and thus, given the acknowledgment by Genesis that dust would increase proportionately to increases in loading rates, this would be cause for concern since testing conditions were not the same as usual conditions.

[77] The respondent also is not satisfied with the statement by Genesis that the potential sparking hazard due to static electricity raised by HRSDC engineers would be mitigated due to high humidity conditions caused by rainy weather during cement hole loading. It is ILWU's understanding that humidity level monitoring did not form part of the testing methodology applied by Genesis. In addition, the respondent claims to have been given no satisfactory explanation regarding the Genesis statement that checking the opacity probe every 15-30 minutes would be satisfactory when it understands that the probe was checked every 5 minutes during testing.

[78] Finally, as to the addition of dockage to the grain being loaded, which could cause unsafe dust levels during loading if said dockage proves to be excessively dusty, the respondent points out the fact that the amount of dockage added at any given time lies within the elevator operator's discretion and may vary without warning. This could mean that such addition could occur within a short period of the loading operation, for example

during the last 25% of the load, with the consequent risk of increased dust levels at any given time.

[79] As noted at paragraph 11 of this decision, in addition to his January 2010 acknowledgement of compliance to his own 2007 directions, HSO D'Sa also confirmed on November 2, 2010, that the appellant had complied with the directions issued by HSO Wong in October 2010 and presently under review in the present appeal(s). Respondent ILWU takes issue with that conclusion because, in its opinion, the "competent authority" (EHS Partnerships Ltd.) retained by the appellant, as directed by HSO Wong, to review the Genesis reports did only a cursory review of the Genesis conclusions and did not address ILWU's concerns regarding the opacity probe since it is not clear, in the respondent's opinion, that any specific concerns were raised with EHS in order that the reviewing engineers could turn their minds to them.

[80] The respondent adds that the Genesis Reports, completed in compliance with the D'Sa directions but prior to the Wong directions of October 2010, dealt sparsely with the opacity probe, but were complemented by an additional report on the use of the opacity probe commissioned by the appellant following the Wong directions and assessed together with the other Genesis material on November 1, 2010. The respondent asserts that this last Genesis report did not form part of the consultations with ILWU Local 500.

C) Appellant DP World's reply to ILWU Local 500's submissions on "danger".

[81] In addition to its somewhat brief initial submissions in support of its appeal position, the appellant has filed a lengthy document which it terms a final reply on behalf of the employer to ILWU's submissions. That document is part of the record, as would be the other submissions by the respondent and the appellant, and thus need not be reproduced at length herein. That being said, those reply submissions stand for the following.

[82] The appellant acknowledges, as did the respondent, that an appeal before an appeals officer is *de novo* in nature and that the appeals officer is vested with broad powers under the Code, those including all the powers of a health and safety officer, the authority to vary, rescind or confirm directions of a HSO as well as the authority to issue directions that the appeals officer deems appropriate.

[83] The appellant further acknowledges that in conducting an inquiry into the circumstances of a direction issued by a health and safety officer, in this case one issued pursuant to subsection 145(2) of the Code following a refusal to work, an appeals officer has the authority to consider the evidence of dangerous conditions raised by employees in support of their work refusal which were not referenced or relied upon by a health and safety officer.

[84] Notwithstanding what precedes, the appellant submits that my consideration in this case should be narrowly focused on what has been described by the respondent as the "primary impetus" for the employees' work refusal that led to the direction under review

to wit, the "various concerns around the opacity probe." On this point, the appellant first comments that my consideration of these appeals cannot ignore the relevant historical background, particularly that concerns with respect to the loading of grain through cement feeder holes was the impetus of the employees' earlier work refusals in 2007, which led to the investigation and subsequent issuance of the 2007 directions by HSO D'Sa, as well as the latter's compliance letter in January 2010 relative to the 2007 directions and just a few months preceding the work refusals relative to the same grain loading operations that have led to the present appeal(s).

[85] The appellant argues along those lines that in determining whether a danger existed at the time of the work refusals and thus deciding which decision to vary, rescind or confirm should ensue, I should avoid a broad reconsideration of the past decision or direction of a HSO which involved the same parties as in this case, the consideration of essentially the same underlying circumstances as those raised in the present appeal, which were not the subject of an appeal by those same parties at that time. In brief, this "scenario" is exactly what the respondent ILWU is requesting this appeals officer to do in the present appeals with respect to the earlier 2007 directions by HSO D'Sa and the latter's subsequent compliance determination.

[86] The appellant further submits that while respondent ILWU has acknowledged that the primary impetus which led to the employees' October, 2010 refusals was ILWU's various concerns around the opacity probe, concerns about a malfunctioning warning system on the employer's crane formulated by the refusing employees cannot be considered since it is undisputed evidence that the employees' concerns in this respect had been resolved by the employer prior to HSO Wong's attendance at the work place and did not form part of the latter's investigation or issuance of his directions.

[87] The appellant adds further that at the time of the refusals, as per the recollection of employer representatives who investigated the matter, the refusing employees raised various other concerns regarding this loading operation, but that those concerns were not pursued by the employee representatives when challenged by the employer representatives during the investigation, with the result that those did not come under HSO Wong's consideration in issuing his directions.

[88] Regarding my considering circumstances and facts as they existed at the time of the refusals, the appellant notes that ILWU's submissions set out anecdotal evidence of retrospective and/or prospective concerns in support of the respondent's assertion that the loading of grain through the cement feeder holes constitutes a danger or potential danger for the purposes of the Code.

[89] This anecdotal evidence consists of evidence of hazards allegedly, to use the words of counsel, associated with the loading of grain through cement holes including ignition hazards, unsafe working conditions on hatch covers, grain dust inhalation hazards and hazards associated with the use of the opacity probe.

[90] It is the appellant's view that this anecdotal evidence is generally hypothetical and speculative, played no significant part in the circumstances leading up to the refusals to work of October 2010, and should not be the focus of my consideration in determining the present appeals. Furthermore, the appellant submits that the evidence presented by the respondent ILWU does not support a conclusion that there was either an existing or potential danger to the employees, as defined in the Code, **at the time of the work refusals** so as to justify HSO Wong's directions pursuant to subsection 145(2) of the legislation.

[91] In arguing that there was no danger to the employees when the HSO issued his directions in October 2010, the appellant submits that in evaluating whether a danger existed at the time of the work refusals, it is important to recognize that not all hazards or potential hazards constitute a "danger" within the meaning of the Code, and that evidence of hypothetical or speculative situations is not sufficient to support such a finding of "danger".

[92] Noting that the definition of "danger" means that the hazard or condition can be existing or potential and the activity current or future, the appellant points out however that in *Juan Verville and Correctional Service of Canada, Kent Institution*[1] (*Verville*), the Honourable Justice Gauthier of the Federal Court determined that for arriving at a finding of danger, one must ascertain in what circumstances the potential hazard or condition or future activity could reasonably be expected to cause injury or illness to any person and to determine that such circumstances will occur in the future as a reasonable possibility, as opposed to a mere possibility.

[93] Along those lines, the appellant sees the recent words of Mr. Justice Rothstein of the Federal Court of Appeal in *Douglas Martin and Public Service Alliance of Canada v. Canada (Attorney General)* [2] as reinforcing the notion that the future occurrence of circumstances be looked at under the guise of "reasonable possibility" where he states that he agrees that a finding of danger:

> […] cannot be based on speculation or hypothesis. However, when attempting to ascertain whether a potential hazard or future activity could reasonably be expected to cause injury before the hazard could be corrected or the activity altered, one is necessarily dealing with the future. Tribunals are regularly required to infer from past and present circumstances what is expected to transpire in the future. The task of the tribunal in such cases is to weigh the evidence to determine whether it is more likely than not that what an applicant is asserting will take place in the future.

[94] That being said, the appellant submits that case law does establish that the definition of "danger" in the Code still requires an impending element since the injury or illness has to occur before the hazard or condition can be corrected or the activity altered,

[1] *Verville v. Canada (Service correctionnel),* 2004 FC 767.
[2] *Martin v. Canada (Attorney General*, 2005 FCA 156.

but that this does not require that injury or illness result every time a hazard, condition or activity occurs, although it must be capable of causing such injury or illness at any time, thus accenting the potentiality of injury or illness as opposed to its certainty, and that the necessity remains to determine the circumstances under which the "impending" element of the definition will come into effect, although it is not necessary to establish the precise time when the hazard will occur or that it occurs every time.

[95] For the appellant, there follows from the interpretation of the "danger" test that precedes that the concept of "danger" must be distinguished from that of "risk", and that the mere presence of a hazard with some degree of risk does not constitute a danger where the employer has implemented measures which effectively eliminate, control or personally protect the employees from the underlying hazards. In simpler words, it is the appellant's position that in cases where hazards exist but the employer has taken measures, to the extent reasonably practicable, to eliminate or control the hazards or personally protect the workers from the hazards, the mere presence of the underlying hazard (what would be described by others as normal conditions of employment) will not constitute a danger as described in the Code.

[96] Having enunciated at length what it considers as the applicable test, the appellant's submissions address the application of the test for "danger" to the specific case at hand through a number of subjects, those being the significance of the Genesis Report and HSO D'Sa's compliance finding, the contention that the respondent's post work refusal allegations of danger ought not to be considered in the circumstances of the present appeals and lastly the issues respecting the Genesis Report and the use of the opacity probe as enunciated in the respondent's submissions.

[97] On the first subject, the significance of the Genesis Report and the D'Sa compliance finding, the appellant points out that contrary to what respondent ILWU is claiming, it is not asserting that the Genesis Report represents a definitive and unassailable conclusion, for all time and in all circumstances, that loading grain through cement holes does not constitute a danger provided the employer's safe work procedures are followed. In fact, the appellant agrees in principle that the Genesis Report and the employer's safe work procedures do not put a definitive end to the issue of the safety of cement hole loading.

[98] Obviously, if different conditions arise or are introduced into the loading process that potentially create a hazard not covered by either the Genesis report or the employer's safe work procedures such that they are alleged to pose a danger to employees, a health and safety officer could determine whether such a danger existed, as per the definition found in the Code. However, this would have to be achieved based on the facts and circumstances as they would exist at the time.

[99] If employees base a new work refusal on the same hazards contemplated and addressed by the Genesis Report as well as the employer's safe work procedures that constituted the basis of HSO D'Sa's compliance finding in January 2010 to the latter's 2007 direction, the existence of such hazards should not support a new finding of

"danger" to the employees. The employer acknowledges that when HSO D'Sa confirmed compliance with his direction, he did not formally approve any particular process for grain loading through cement holes.

[100] However, it is the appellant's submission that the effect or consequence of the D'Sa compliance recognition was to find that the Genesis Report and the resulting safe work procedures developed by the employer had, to the extent reasonably practicable, eliminated or controlled any of the hazards associated with the cement hole grain loading operation that had been identified, such that the mere presence of the underlying hazards no longer constituted a danger as defined by the legislation.

[101] Furthermore, the appellant contends that when one reads together the D'Sa direction, ordering that proper documentation and procedures approved by a competent authority be provided prior to loading through cement holes, with the latter's compliance letter which only noted the requirement to consult with the health and safety committee prior to finalizing the said procedures, the said compliance ruling meant that the employer was entitled to resume grain loading in that fashion, subject only to satisfying the statutory requirement to consult.

[102] According to the appellant, the inference to be necessarily drawn from the D'Sa compliance finding was that absent the identification of hazardous circumstances not contemplated by the Genesis Report and the employer's safe work procedures, the process of grain loading through cement holes was no longer considered to constitute a danger to the employees, and consequently they were no longer entitled to refuse to perform that operation. In point of fact, the appellant adds that the compliance recognition by HSO D'Sa serves to confirm that by obtaining the Genesis Report and developing its safe work procedures, DP World satisfied its employer obligations under the Code to ensure the health and safety of its employees and protect them from hazards in the work place.

[103] As regards this same first subject, the appellant makes reference to what appears to be the respondent's suggestion that with the exception of HSO D'Sa, all federal officials, this including the manager of Cargo Services for Transport Canada as well as apparently all other Transport HSO, including HSO Wong, remained concerned that grain loading through cement holes, even following the recommendations in the Genesis Report and the appellant's safe work procedures and HSO D'Sa's compliance acknowledgment, is dangerous and unsafe.

[104] Noting that the various communications by these individuals on this allegation all occurred around the time of the D'Sa compliance acknowledgement vis-à-vis the latter's 2007 direction and that no other such communications had been advanced by HSO Wong relative to such differing views in the course of the latter's investigation of the October 2010 work refusals, the appellant submits that such a suggestion is both misleading and inaccurate.

[105] The appellant points out first that the concerns by the Cargo Services manager, expressed as the concerns of himself and of all his inspectors, safe HSO D'Sa, were substantially based upon irrelevant considerations, namely that the employer was trying to shift liability to Transport Canada and thus the need to protect the department and the Minister, the concern with whether or not the employer would require the permission of the foreign administration or Flag State and the Classification Society (Lloyds) for proceeding with such an operation and speculation that the work refusal had been staged by the employer ("back door approach").

[106] More important, in the appellant's opinion, is the fact that none of those concerns would appear to have been based upon any consideration or evaluation of the Genesis Report or the employer's safe work procedures or any objective evaluation of the hazards of such an operation and whether such hazards would have still constituted a danger once the recommendations of the Genesis Report and the safe work procedures had been satisfied. In point of fact, the appellant submits that by failing to consider the measures proposed by the employer to eliminate, control or personally protect the employees from the hazards of this operation, those federal officials alluded to by the respondent could not possibly have made an informed decision as to whether such loading process, after implementation of those measures, constituted a danger.

[107] It is in fact the position of the appellant that when the various federal officials have considered the requirements of the Genesis report and the employer's safe work procedures, they have concluded that the process of grain loading through cement holes does not constitute a danger as long as those requirements are satisfied. Along this line, the appellant refers to statements made by both HRSDC Engineer Eva Karpinsky as well as that of Transport Canada's Manager Cargoes and Ship Port Interface J. Zwaan as supporting that conclusion, once informed of the measures that would derive from the Genesis recommendations and the safe work procedures, contrarily to the interpretation put on those by the respondent.

[108] On this, the appellant also refers to an information meeting called by HSO D'Sa just a few days following the October 2010 work refusals, a meeting attended by the author of the Genesis Report as well as BCMEA's manager of labour relations and apparently all of the local Transport Canada Officers, with the exception of HSO Wong.

[109] It would appear that at the conclusion of that meeting, said Transport Canada officials, including HSO D'Sa, stated that while an official endorsement of the employers' safe work procedures could not be provided, as per normal practice, they were satisfied that sufficient work had been accomplished to alleviate the concerns they may have had with the operation of loading grain through cement holes.

[110] In summation on this first subject, it is the appellant's view that contrary to respondent ILWU's assertion, when the views of the Transport Canada officers who have reviewed the Genesis Report and the employer's safe work procedures are properly considered, it is apparent that, with the possible exception of HSO Wong, they are no longer concerned that such grain loading operation constitutes a danger to the employees.

[111] While the Transport Canada officers may recognize that there are hazards associated with that operation, the appellant argues that they are satisfied that those are sufficiently eliminated or controlled through the implementation of the safe work procedures such that they do not constitute a danger as defined by the Code.

[112] According to the appellant, it would appear that in the end, only HSO Wong still entertained concerns about the effectiveness of the employer's safe work procedures and of the latter's response to the requirements of the Genesis Report in mitigating the hazards associated with such a loading process, such that danger would remain. The appellant sees this view by HSO Wong as being without foundation.

[113] The appellant addresses the second subject of these reply submissions to wit, the contention that the respondent's post work refusal allegations of danger should not be considered in my consideration of the present appeal, by drawing attention to the actual wording of the directions ("address the concerns raised by ILWU Local 500 about the visual opacity probe used for grain loading"), arguing that the anecdotal evidence presented by ILWU Local 500 in support of its assertion that there was a danger to the employees at the time of the October 25, 2010 work refusal did not form the basis of such refusal.

[114] The appellant recognizes that in the course of the employer's investigation into the work refusal of October 2010, an investigation that precedes the involvement of a health and safety officer, and the investigation by HSO Wong, the employees did raise some other more generic concerns associated with grain handling.

[115] However, according to the appellant those concerns were not pursued by the employee representatives when broached by the employer representatives, and were not included in the actual Wong directions, as attested by the text of said directions, and thus in the end, the concern regarding the absence of a warning alarm on the new remote crane system having been addressed and resolved prior to the involvement of the HSO, the sole remaining concern in the case had to do with the effectiveness of the opacity probe, as recognized by the respondent in its submissions and evident from the actual wording of the direction issued by HSO Wong.

[116] Along this thinking, the appellant insists on the fact that only one element or ground was the subject of the direction issued by HSO Wong, as demonstrated by the HSO's wording in the direction to wit, "competent person to evaluate the findings of Genesis Engineering report and address the concerns raised by the ILWU Local 500 about the visual opacity probe used for grain loading."

[117] However, the appellant also points out that HSO Wong, in his 33 pages summary investigation report, undated but clearly prepared after the issuance of the directions, altered the wording of his direction reproduced therein to support the latter's suggestion that the work refusal of October 25, 2010 and the ensuing direction of the same date were based on broader concerns than just the opacity probe, the wording therein thus reading

"competent person to evaluate the findings of Genesis Engineering Inc. Report and address the concerns raised by the ILWU Local 500 **and** about the visual opacity probe used for grain loading."

[118] In the appellant's view, HSO Wong was quite correct, in his direction, not to refer to a broader range of hazards associated with loading grain through cement holes because those would have been basic hazards already considered and addressed by the Genesis Report and the employer's safe work procedures developed in response to the D'Sa previous direction and concerning which the said HSO had acknowledged compliance by the employer.

[119] As concerns the modified terminology in HSO Wong's report, it is the appellant's opinion that it only represents an "after the fact" rationalization that reflects HSO Wong's ongoing disagreement with HSO D'Sa's earlier decision to find in 2010 that the employer had complied with the latter's 2007 directions thereby allowing the appellant employer to resume loading grain through cement holes.

[120] The appellant also addresses, as earlier stated, what it designates as respondent ILWU's anecdotal evidence and generally concludes that such evidence does not establish the presence of danger, or more precisely, that even if such anecdotal evidence were to be considered, it would not support a conclusion that there was either an existing or a potential danger to the employees at the time of the work refusal so as to justify the 2010 HSO Wong's directions.

[121] In the appellants view, this anecdotal evidence either embellishes the existence or extent of the hazards associated with grain loading through cement holes, identifies alleged hazards that are hypothetical or speculative, or identifies hazards that have already been eliminated or controlled to the extent practicable by the employer, and thus does not meet the test for a finding that a danger or potential danger existed at the time of the work refusal and consequently should not be considered.

[122] While the appellant contends that those hazards raised by the respondent are not the object of the Wong direction, it nonetheless does formulate some more specific submissions on each. In addressing the ignition hazards raised by the respondent, the appellant submits that the former had to go back 25 years to obtain an example of an unexplained ignition hazard, which had been easily corrected at the time before it posed any risk of injury, that in the case of heat generated when high load speeds are used and the allegation that the loading elbows would become so hot as to create a risk of fire or necessitate interruption of the loading operation, there was no record of such interruption or of any fire caused by an overheated elbow and, regarding the risk of sparks caused by contact between the spout of the loading pipe and the lid of the cement hole, that while such a hazard may exist, that appropriate safety measures, such as rubber matting to prevent incidental contact, actual specific design of the loading pipe with external rubber lining for direct insertion into the cement hole and use of wooden hoppers around the feeder hole to contain minor spills have been implemented, with some incorporated in the

employer's safe work procedures in response to concerns raised during the consultation process.

[123] The appellant acknowledges that it is however remotely possible that metal objects may inadvertently be dropped down the loading pipe from the elevator but that it or other BCMEA employers are unaware of any instance where such an occurrence may have resulted in an explosion.

[124] It is the appellant's submission regarding ignition hazards referred to by the respondent that they are too speculative or hypothetical to constitute a danger within the meaning of the Code. Along the same lines, HSO Wong had to go back almost 30 years to mention an example or examples of grain dust explosions in the Vancouver area, with the only detail being that those may have occurred in elevators, with no other particulars as to what the conditions and/or operations may have been at the time.

[125] The claim of hazardous working conditions on hatch covers made by the respondent was also addressed by the appellant who argued that those hazards identified by the respondent have been eliminated or controlled, to the extent reasonably practicable, through the implementation of the employer's safe work procedures. While it acknowledges the occurrence, in 1996, of an incident where a stevedore fell through the cement hole, safety improvements have since been made to prevent similar occurrences.

[126] The employer now uses grates over the cement holes to prevent fall hazards and while those can be removed, their weight means that this would have to be done deliberately. Furthermore, the appellant is of the view that use of the opacity probe does not pose a similar hazard since the grate does not have to be removed to allow for use of the probe, thus effectively eliminating the risk of a fall through the hole. The appellant also sees adherence to the safe work procedures put in place by the employer as effectively eliminating or controlling such fall hazards.

[127] Along the same line, it is noted by the appellant that the said safe work procedures contain certain fall prevention measures such as the use of delineation cones and caution tape to establish a control zone and define a safe working zone, with pouring through cement holes not occurring when said holes are located close to the edge of a ship's hold.

[128] The appellant thus disagrees with the respondent's assertion that fall protection measures are not taken during cement hole loading and in any event adds that in the present case, no fall protection issue was ever raised by anyone regarding this operation either during the employer's investigation of the refusal or during the investigation by HSO Wong.

[129] The appellant also maintains that respondent ILWU's assertions that employees involved in cement hole grain loading are overexposed to grain dust concentrations that constitute a danger are unfounded. While stating to have never been made aware of an instance of such overexposure while monitoring the opacity probe, although the respondent did mention one such occurrence in its submissions, the position taken by the

appellant is that such exposure "would not have resulted in a hazardous overexposure to grain dust".

[130] According to the appellant, respondent ILWU puts forth that paragraph 255(1)(b) of the MOSH Regulations states that "an employee must not be exposed to a concentration of airborne grain dust, respirable and non-respirable, of more than 10 mg/m3" and that the Genesis Report is modelled on a dust concentration **in the ship's hold** of 25% of an LEL of 50g/m3, thus equating to a dust concentration **in the ship's hold** of 12500mg/m3 and consequently overexposure to grain dust during monitoring the opacity probe.

[131] However, according to the appellant employer, the exposure specified in the MOSH Regulations constitutes an exposure to dust exceeding the 10mg/m3TLV measured over an 8 hour period, signifying that to be overexposed, an employee's entire shift would have to be spent in a dust cloud exceeding the exposure limit prescribed by regulation, something that does not happen.

[132] It is the appellant's position that the dust concentrations mentioned in the Genesis Report for assessing explosive hazards are measured in the hold of the ship, not outside the hold where stevedores would be working and monitoring the opacity probe, and thus cannot be subjected to the exposure alleged by the respondent. Furthermore, even on the assumption that the dust exiting the cement hole would exceed the MOSH Regulations exposure limit, the appellant contends that this would still not constitute dust overexposure because the employer's safe work procedures contemplate the employees monitoring the opacity probe no more than once every 15 minutes, thus avoiding a potential dust overexposure.

[133] The appellant also acknowledges that in monitoring the opacity probe at various intervals, the employee must look into the cement hole and consequently get dust blown occasionally into his or her face. However, as recognized by the respondent in its own submissions, the employer supplies employees with effective personal protective equipment, in this case dust masks, to protect against this potential hazard, which thus does not constitute a danger, as defined by the Code.

[134] As stated above, and even in light of what immediately precedes, the appellant has argued, based on the actual wording of the directions, that the matter or matters to be considered in this appeal should be restricted to issues respecting the Genesis Report and the use of the opacity probe. Given the submissions by the respondent along those lines, the appellant has thus argued in reply as follows.

[135] First, as concerns the actual instrument called Visual Opacity Probe and the contention by the respondent that a different, better and more precise instrument should be used for this operation, the appellant puts forth that there is no instrument available to be used in place of the opacity probe to provide a more precise measure of the grain dust concentration in the ship's hold during cement hole loading.

[136] It is the appellant's position that although the purpose of using the said instrument is to obtain a "live, real time" dust level measurement, a precise measure is not needed as the safe work procedures for the use of the probe set very conservative standards for what dust levels are acceptable, such that if those conservative levels are exceeded during loading, the procedures require that it be slowed or stopped until safe levels are present.

[137] On the same subject of an alternative to the probe, the appellant replies to the respondent's suggestion that the same instrument as had been used by Genesis to conduct its testing be used to measure dust levels during actual normal loading operations, or even that laser technology be used for particle opacity sensing, by pointing out that in the case of the Rader Hi-Volume Dust Sampler used by Genesis in conducting its study, that instrument would be ineffective as it does not have the capacity to provide the needed "live, real-time" needed results since the collected samples need to be processed in laboratory, thus rendering impossible any feedback regarding dust levels as the loading is taking place.

[138] As for laser technology, it is designed for use in measuring extremely small concentrations of particles, for example the presence of dust in a clean room, and consequently could not work, even at levels of dust far below the safe dust levels for loading.

[139] Finally on that subject of alternate instruments, the appellant argues also that during the process of consultation with the respondent, the limitations of the above mentioned alternatives to the opacity probe were explained with the respondent being encouraged to conduct its own research to find any other alternatives. According to the appellant, the respondent has not indicated to the appellant being able to find any workable alternatives to the Visual Opacity Probe. The respondent also alluded to a suggestion made by Genesis Engineering in its June 2009 report that a means of dust suppression during the cement hole loading operation might be the use of fogging nozzles with water.

[140] To the fact that the suggestion has not been acted upon, the appellant has replied first that the federal body that regulates the grain industry, the Canadian Grain Commission, prohibits the use of such fogging nozzles, and that although the proposal may have been made when Genesis was still engaged in testing, it became later apparent that this would not be necessary.

[141] An additional point of contention raised by the respondent concerns the acceptance by Genesis of an LEL for grain dust of 50g/m3 and the assumption that dust levels below 25% of LEL would be safe for loading. Respondent ILWU's view is that this would be contrary to the requirements of the MOSH Regulations (subsection 255(6)) that the concentration of an airborne chemical agent or combination thereof not exceed 10% of LEL, and is based on comments expressed by two HRSDC engineers, Evan Vandoros (potential static electricity hazard) and Eva Karpinski (LEL for grain dust).

[142] The appellant replies to this by noting that Genesis Engineering was made aware of those comments and did respond in March 2010 that those concerns had been considered in preparing its report, thus prior to the refusal to work and directions presently considered in this appeal.

[143] In brief, while LEL values for grain dust had been reported that are lower than 50g/m3, those were not considered credible by Genesis, the presence of static electricity from loading grain had been considered by Genesis who had concluded that it would be mitigated due to the obvious high humidity levels prevalent when loading grain through cement holes of a ship on a large body of water when it is raining and finally, mechanical sparking was mitigated by using rubber matting to insulate the cement hole opening and voltage-induced sparking between the loading spout and the hatch was mitigated by connecting the spout to the hatch using a heavy electrical conductor cable.

[144] Given what precedes, it is the appellant's position that the 10% of LEL standard in the MOSH Regulations finds no application in the present case. It would appear that those comments by Genesis were eventually transmitted to the two HRSDC engineers who offered no further comments.

[145] Concerning ILWU's continued questioning of the appellant's assertion that there are no sources of ignition during this type of operation, the appellant clarifies that neither the employer nor Genesis have stated that there are no potential sources of ignition but rather that by following the requirements of the Genesis Report and the employer's safe work procedures, the potential sources of ignition are effectively eliminated or controlled to the extent that no danger within the meaning of the Code can be found to exist.

[146] On the issue of a reasonable time interval for checking the opacity probe during loading operations, respondent ILWU has questioned the fact that while testing by Genesis was being conducted, such checks occurred every five minutes with the assent of Genesis although subsequently, Genesis did accept as reasonable, intervals of 15-30 minutes and those have been made part of the safe work procedures developed by the employer, thus creating a danger for employees.

[147] The appellant replies to this that the five minute interval during testing was dictated by the fact that Genesis Engineering was conducting a scientific study where the frequent collection of data was of paramount concern, and that at the "production" loading phase, such concern no longer exists. Furthermore, contrary to what has been submitted by respondent, the appellant notes that although Mr. Esplin of Genesis did state that a five minute interval would be reasonable, the latter also indicated in answer to questions on the subject that such interval was not necessary and that checks of the probe every 15-30 minutes would be reasonable to ensure the safety of the operation. The appellant therefore concludes that what has been put forth by the respondent on this subject does not lead to the conclusion that the checking of the Opacity Probe as stipulated in the employer's safe work procedures represents a danger as defined by the Code.

[148] The appellant also addresses the concerns raised by the respondent to the effect that the addition of "excessively dusty dockage", that is grain dust that can be added to the grain being loaded, could result in unsafe dust levels.

[149] According to the appellant, the use of these words by the respondent constitutes a misnomer because it falsely suggests that what is being added to the grain being loaded is grain dust, where in fact dockage is an allowance of seed, chaff, shrunken or broken seeds and attrition in a specification. Furthermore, the assertion by ILWU on this matter of addition of "dusty dockage" is factually incorrect in that such addition is not simply based upon the overall tonnage of the load. It is also based upon the contract between the vendor and purchaser of the grain and is subject to maximum levels allowed by the Department of Agriculture and the Canadian Grain Commission.

[150] According to the appellant, the respondent is also incorrect in its assertion that the amount of dockage added at any given time is at the discretion of the elevator operator, varies without warning, is added only to the last 25% of the load and thus causes an increase in dust levels at the end of the pour.

[151] The appellant thus puts forth that the Canadian Grain Commission requires each load of grain to be of uniform quality and thus conducts tests every 2000 tonnes or less to ensure that the standards are maintained, failing which the cargo may have to be unloaded.

[152] Furthermore, even if the dockage could all be added at the end of the load, no hazardous increase in dust levels would ensue because with the process of cement hole loading, only 75% of the load is poured through such openings, after which the vessel's hatch has to be opened to level the grain and finish filling the hold, with the potential confinement required for a dust explosion being consequently non existent. The appellant is therefore of the opinion that the respondent's assertion that the process of adding dockage to grain being loaded creates a danger to employees is not supported factually.

D) Respondent ILWU, Local 500 sur-reply on "danger"

[153] Although respondent is of the view that the appellant's reply to ILWU's submissions has exceeded the scope of permissible reply and has in fact expanded on its earlier submissions regarding what constitutes a "danger" under the Code, it has opted not to challenge what it considers new elements and maintains that the definition of danger is well established, has been met in this case and thus it continues to rely on its initial submission.

[154] This being said, in its sur-reply, the respondent seeks to note the following. First, as regards a meeting that the employer states occurred on November 4, 2010, between BCMEA members and representatives from Transport Canada (Captain Ghosal and HSO D'Sa) where the latter would have stated their concerns mitigated as a result of the work done by BCMEA employers, the respondent notes that there is apparently no record of such meeting nor was Local 500 invited to take part, with the result that the respondent is

not aware of what transpired on that occasion, and that as such no credence should be given to this.

[155] The respondent also adds that notwithstanding what this undocumented meeting may have produced, HSO Wong clearly was not satisfied as of November 2010 that such operation did not constitute a danger.

[156] As to the contention by the appellant that HSO Wong, in the report he redacted subsequent to the issuance of the directions, altered the wording used in the directions in an effort to support the appearance that the work refusal was based on broader concerns, and in doing so sought to mislead the Tribunal as to the scope of the directions, the respondent submits that the wording addition could easily be a transcription error and that the appellant's theory that HSO Wong intentionally changed the wording should not be lightly accepted.

[157] Finally, in addition to noting that the specifics of certain incidents occurring at Cascadia Terminal after the issuance of the directions, and recalled by employees Stewart and Piotrowski, may not have been precise, those were documented in a letter attached to the respondent's submission to the Tribunal, and the respondent adds that Local 500 members are not aware of any formal process by which they are to report incidents such as dust inhalation, and furthermore, that although the appellant employer may have stated that the exposure limit to dust in MOSH Regulations is measured over an 8 hour period, no authority has been cited for this proposition and section 255 of the said Regulations make no such mention.

Submissions on "consultation"

[158] As stated above, although the directions issued by HSO Wong make no mention of a "consultation" issue, the actual undated background document prepared by the latter regarding said directions which was provided to me on March 3, 2011, states that the "ILWU (employees) complained that the required "consultation" for making safety procedures, did not take place satisfactorily. They said that they had made "inputs" in the previous meetings, but the inputs were neglected or ignored in the following meetings."

[159] The required "consultation" being alluded to by HSO Wong stems from the general obligation formulated at paragraph 125(1)(z.06) of the Code and, more precisely in the matter at hand, from the compliance letter of January 29, 2010, issued by HSO D'Sa to BCMEA relative to the latter's direction of April 25, 2007, concerning this same operation of cement hole grain loading. That letter stated that "[t]he *Canada Labour Code*, Part II, requires you to consult with the Health and Safety Committee prior to finalising the procedures." The procedures mentioned in that letter refer to the employer's safe work procedures that have been mentioned numerous times throughout the present decision.

A) Appellant DP World submissions on "consultation".

[160] The appellant argues that it did satisfy its obligation to consult with the work place committee before finalizing and implementing the procedures for loading grain through cement loading holes in cargo hatch covers. Such consultation is stated to have begun as early as 2009 when Genesis was conducting its investigation and testing in relation to the grain loading issue and to have continued right up until October 2010, when the appellant recommenced such loading following the adoption and implementation by the appellant of its safe work procedures.

[161] According to the latter, the required consultation occurred through communications in person at meetings and through correspondence in various forms, predominantly between BCMEA, on behalf of the appellant, and representatives of ILWU Local 500, on behalf of the worker representatives on the committee.

[162] To document its claim that consultation did in fact occur, the appellant has presented to this appeals officer a collection of 33 letters, faxes, emails, records of conversations, discussions, meetings and agreements that it presents as evidencing its efforts at satisfying its obligation to consult. While it is not necessary at this juncture to reproduce all of those, I have had occasion to read each of the documents presented.

[163] It is the appellant's opinion that the nature or extent of the obligation to consult, as it has been expressed by the Canada Industrial Relations Board in its *Professional Institute of the Public Service of Canada and Canadian Tourism Commission*[3] decision, finds equal application in the present case and the employer obligation to consult established by the Code. As stated by the CIRB, "an obligation of consultation is not an obligation to achieve agreement with the other party. It is an obligation to fairly meet and take into consideration the concerns of the other party."

[164] According to the appellant, its obligation, as it relates to consulting the work place committee, is to fairly meet and take into consideration the concerns of the work place committee. However, the employer is not obligated to reach agreement with the committee on all issues. Ultimately, it is and was the employer's right and obligation to make the final decision on how it would proceed with the implementation of new work processes and procedures in the workplace. However, the appellant asserts that it did, and that BCMEA also did, on its behalf, go to great lengths to obtain input from what it refers to as the Union's "Grain Dust Committee" and involve them as active participants in the investigation and testing process.

[165] Those efforts to consult continued after the issuance of the final Genesis Report (as stated earlier, there were three preceding reports) and HSO D'Sa's compliance letter relative to the latter's 2007 direction, and in doing so, the appellant repeatedly initiated

[3] *Professional Institute of the Public Service of Canada and Canadian Tourism Commission*, [2009] C.I..R.B.D. No.25.

contact with the Union in an effort to discuss and finalize the draft safe work procedures as required by the Code, although the respondent did not always respond to those overtures, attend meetings and cooperate in the consultation process.

[166] The appellant finds support for such position in the correspondence documenting the appellant's consultation efforts, including reference in said documentation to a meeting of February 3, 2010, between the parties where the Union is stated to have indicated that "Local 500 made it clear that it would not agree to pour through feeder holes at this time", which would have caused the BCMEA to have expressed the opinion that the Union's agreement would never be forthcoming.

[167] The appellant puts forth however that despite such view being expressed, it, as well as the BCMEA, persevered and continued to correspond with and meet with the Union on several occasions into the Fall of 2010, as can be verified in the documents mentioned above, in an effort to consult with and obtain the Union's input into the finalization of the safe work procedures. The appellant submits therefore that it is clear from the correspondence documenting its efforts that those efforts were meaningful and not a mere pretence or façade of consultation.

[168] The value of the Union's input was acknowledged by the appellant and the BCMEA who incorporated several of the Union's suggestions into the safe work procedures, with those being documented in letters to the Union of October 5 and November 10, 2010, where a table listed the agreements that had been reached between the parties and incorporated in the safe work procedures. That is not to say, as acknowledged by both the appellant and the BCMEA, that an agreement was reached on all issues in dispute with the Union.

[169] However, the appellant does reiterate that the duty to consult does not require that such an agreement be reached on all issues. As additional support for the position that the duty to consult has been satisfied, the appellant refers me to correspondence of September 24, 2010, from BCMEA and follow-up telephone conversation between parties' representatives wherein the Union would have acknowledged and agreed that BCMEA had to date satisfied its requirements to consult on the issues, and which would have caused the BCMEA to proceed to implement the training initiatives that had been proposed by the Union and agreed to by BCMEA.

[170] Given what precedes, it is the appellant's submission that it has satisfied its statutory obligation to consult, and that therefore there would be no basis for finding that the 2010 directions by HSO Wong were justified on the basis of any failure by the appellant to consult.

B) Respondent ILWU, Local 500 submissions on "consultation".

[171] As could be expected, the respondent does not share the opinion expressed by the appellant on the issue of consultation. In its opinion, said consultation on the issue of cement hole loading and safe work procedures for same was in fact not adequate.

[172] On the assertion by the appellant employer that the Union was not always co-operative and responsive to the former's numerous efforts to set up meetings, it states that it was not being uncooperative but rather had informed the employer on January 29, 2010, that it wished to await Transport Canada's decision before engaging in those discussions.

[173] The respondent also points out that contrary to the appellant's meaning put on exchanges between the parties in September and October 2010, those clearly show that the respondent did not agree with the BCMEA and the appellant that consultation was adequate or that they were considering the Union's concerns and suggestions with an open mind.

[174] Also, according to the respondent, the appellant employer had also been making changes to the draft procedures in such a way, in the words of the respondent, "without using strikeouts or another method of setting them out", making it thus difficult for the latter to assess and respond to those changes.

[175] The respondent further notes that even though the BCMEA purported to address the Union's concerns by its letter of November 4, 2010, which offered a list of the various items in the safe work procedures that would have been changed or incorporated as a result of the consultation between the parties, such was not the result and, as an example, the respondent notes that contrary to the BCMEA's chart in the said letter, the opacity probe had not been agreed by the Union as a methodology for measuring dust opacity, which left whole the concerns of the respondent in this regard.

[176] In the end, the respondent puts forth that the appellant employer finalized its work procedures for feeder hole loading without waiting for the Union's response to the latter's letter of November 4, 2010, even though it had sent the Union the wrong draft procedures for review with the said letter.

C) Reply by appellant to ILCU, Local 500 submissions on "consultation".

[177] According to the appellant, the respondent has not established that the employer has failed to satisfy its regulatory obligation to consult, and instead has merely suggested, at best, that it disagreed with some aspects of the feeder hole loading safe work procedures developed by the employer. The employer is of the view that the respondent is being disingenuous in its continued assertion that the obligation to consult was not satisfied since it has previously acknowledged and agreed to the contrary, in both oral and written form, as is documented in the employer's submissions.

[178] To further buttress this affirmation, the employer also has provided and refers to a written agreement reached February 11, 2011, and executed on or about February 16, 2011 by BCMEA's VP Training and Recruitment (John Beckett) and Local 500 Vice President (Michael Rondpre) which, under title "Loading Grain Through Feeder Holes", reads at its paragraph 2 that "The Union agrees, as per previous correspondence, that

BCMEA and its member employers have met all of their statutory obligations regarding consultation with the Union on Feeder Hole Loading".

D) Respondent ILWU, Local 500 sur-reply on "consultation".

[179] The respondent's sur-reply concerns solely the reference by the appellant to the agreement mentioned in the previous paragraph about the adequacy of consultation. The respondent asserts that this document was a confidential settlement agreement and that as such, the employer should not be relying on its content and it should be disregarded by me. In support of that position, the respondent notes that the appellant employer also attempted to raise this agreement in a proceeding before the Canada Industrial Relations Board, ostensibly about an alleged illegal strike, and the Board apparently verbally ruled this document inadmissible because of its confidential nature.

[180] Should I nonetheless accept to consider the said document, the respondent points to the fact that it expressly states that the agreement is without prejudice to any position the parties may take in any other matters.

E) Appellant DP World response to sur-reply on "consultation".

[181] The appellant contends on this very limited point that the appellant employer's reliance on that agreement of February 11, 2011, is entirely appropriate in the limited circumstances of the present appeals as it is being utilized for credibility purposes, particularly in countering the assertion by counsel for the respondent in its July 19, 2011, submission that "In Local 500's view, consultation was in fact not adequate on the issue of cement hole loading and safe work procedures for same, contrary to the Employer's assertions." The appellant describes this statement as being clearly false and the latter should be entitled to rely upon the said agreement to refute said statement.

Analysis

[182] My role as an Appeals Officer is to determine on a *de novo* basis whether there existed a danger for the refusing employees, or to other employees, pursuant to section 128 of the Code. I am to assess this based on the balance of probabilities. Section 128 of the Code reads as follows:

> 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
>
> a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
> b) a condition exists in the place that constitutes a danger to the employee; or
> c) the performance of the activity constitutes a danger to the employee or to another employee.

[183] While it is the situation that prevails at the time of the refusal that must be looked at to ascertain whether a danger exists or not, the courts have made it clear that the said situation (some would say circumstances) may present past, present and even potential or future elements. In this respect, I note and agree with the following pronouncement by Mr. Justice Rothstein of the Federal Court of Appeal in *Douglas Martin and Public Service Alliance of Canada (Attorney General),* to the effect that evaluation of danger involves assessing the degree of likelihood of occurrence:

> I agree that a finding of danger cannot be based on speculation or hypothesis. However, when attempting to ascertain whether a potential hazard or future activity could reasonably be expected to cause injury before the hazard could be corrected or the activity altered, one is necessarily dealing with the future. Tribunals are regularly required to infer from past and present circumstances what is expected to transpire in the future. The task of the tribunal in such cases is to weigh the evidence to determine whether it is more likely than not that what an applicant is asserting will take place in the future. [Underline added]

[184] Having regard to the above, when one refers to the HRSDC Interpretations, Policies and Guidelines (IPG) mentioned by the appellant in its submissions, one notes that it is in line with Justice Rothstein's statement above. At the same time, I also agree with the said IPG when it states that danger and risk are not one and the same and that "the mere presence of a hazard with some degree of risk or effective risk mitigation controls does not necessarily constitute a danger", thereby bringing into the evaluation equation, the notion of "sufficiency of seriousness."

[185] This being said, the matter at hand offers certain particular aspects concerning which I feel it is important for me to comment prior to formulating a determination of the case. I feel that this is important for me to do in order to clarify what is really being put forth by both sides in support of their individual position, as well as what I can or cannot consider.

[186] First, the direction or directions being presently appealed came somewhat closely in time on the heels of the acknowledgment, in January 2010, by the issuing health and safety officer that BCMEA had complied with a previously given direction or directions in 2007 and 2010.

[187] The issuance of a new direction(s) on the same or closely related subject by another health and safety officer is certainly possible under the Code, even if on its face, the new direction(s) would appear to effectively contradict or impede the previously issued direction(s), or more precisely the actions taken in compliance of said direction(s). However, it is still of some importance to the resolution of the present appeal to remain aware of the fact that those directions and what they stood or stand for as well as the fact that compliance to those directions has been declared to have been achieved.

[188] I have already cited the operative texts of the 2007 and 2010 directions at paragraphs 4 and 6 above. Yet, in my opinion, they should be reproduced here to illustrate the coverage differentials of each.

[189] The operative specific text/wording of the 2007 direction, added to the generic terminology that appears on every direction form, and referred throughout this decision as the D'Sa direction, first identifies specifically what the HSO considers as the danger and then states specifically what the employer needs to do if it is to go on with the cement hole loading operation. This latter statement appears in the direction as follows:

> The process of loading grain through cement loading holes in cargo hatch cover constitutes a danger as these loading holes are not approved for grain loading. Proper documentation and procedures approved by a competent authority to be provided prior to loading.

[190] I have no difficulty in accepting that it flows from this that by his letter of January 29, 2010, which acknowledged compliance with his direction, HSO D'Sa effectively made it possible to resume loading through cement holes, with the provison in the said letter that finalizing the safe loading procedures required consultation with the health and safety committee.

[191] In contrast to HSO D'Sa's direction(s), HSO Wong's direction(s) describes no specific danger that the direction would seek to correct, and is simply couched in the general generic terminology found in section 128 of the Code. The sole original text or wording emanating from the HSO on the official direction template used by HSO Wong orders the appellant employer to take certain steps, presumably for the purpose of correcting or bringing remedy to a situation which is not specified. The wording I am referring to appears as follows:

> Competent person to evaluate the findings of Genesis Engineering Inc. report and address the concerns raised by ILWU Local 500 about the visual opacity probe used for grain loading […]

[192] This formulation would leave it to the reader to seek to identify the particulars of the danger through the HSO report, which although undated, can be understood upon its reading as having been redacted some time after the issuance of the direction(s), which was on October 25, 2010.

[193] Much has been made by both parties as well as HSO Wong about the compliance acknowledgments relative to the directions by HSOs D'Sa and Wong, and the relative weight this should receive. As such, I find it necessary to specify that while compliance with HSO D'Sa direction(s) may be seen as relevant in the present case, compliance with HSO D'Sa's direction(s) has no relevance to the matter at hand since it obviously is situated in time after HSO D'Sa issued his directions.

[194] In light of this, the issue I have to determine is not whether there was compliance with the directions but rather whether there was cause to issue them in the first place.

This brings us to a somewhat troubling element of the report about which both sides have commented. I am referring to the actual wording of the official direction vis-à-vis the manner in which the same text is presented in the HSO report mentioned in the previous paragraph. I would describe this as a discrepancy between the two texts.

[195] As a preliminary consideration, the appellant employer has presented this discrepancy as a possible attempt at misleading the Tribunal. In my opinion, making a determination on this point is not necessary to the disposition of the case. As such, I will make no such determination. That being said, I would be remiss not to acknowledge that this is certainly a curious discrepancy between the two texts.

[196] Be that as it may, a simple reading of the questionable wording in HSO Wong's report is sufficient to realize that the contested word "and", as it appears in the direction, needs to be ignored if the sentence of which it is part is to make any grammatical sense or offer any logical meaning from a syntax or construction point of view.

[197] Due to the fact that it is first and foremost the text or wording of the actual direction that is addressed to the employer, my consideration of this matter has been and will be on the basis of the wording in the actual direction. In light of this, I must note that in perusing the HSO report, I have ignored the contentious word, "and" which is found in the direction.

[198] In the initial stages of this decision, I briefly alluded to the fact that upon reading HSO Wong's report, I noted considerable mention of subjects that I felt may exceed my jurisdiction, and certainly appeared to have considerably coloured the opinion(s) expressed by the health and safety officer. I have already pointed out, in citing the said report, the affirmation by the HSO that the refusal(s) to work that are at the origin of the present directions may have been staged to force a determination on the matter of the cement hole loading operation without paying attention to a number of considerations having to do with navigation. I hasten to conclude that my consideration of all the material submitted to me does not support such an allegation.

[199] Furthermore, in expressing his opinion(s) relative to the operation of cement hole loading, one cannot ignore the fact that HSO Wong's investigation report makes abundant comment addressing the following: the "Flag State" of a ship or "Flag State permission" or permission of the "Classification Society on behalf of (their) Flag State"; the "backing from International Maritime Organization (IMO)"; the authority of the Master of a ship; the fact that ship crews, who may play a role in such operation, have no relevant training or procedure; the fact that Foreign Flag vessels and crews are involved; and the fact that it may be prudent for the "proponent Flag State to take the matter directly to [the] International Maritime Organization (IMO) via its own government […] for a full and credible research and implementation through an International Instrument via the International Maritime Organization."

[200] This latter suggestion was made for the purpose of ensuring that the decision to load through cement holes would not be a unilateral Canadian action "or any one state, but an international consensus."

[201] The uncontested evidence is that the ships that would be involved in grain transportation, and thus cement hole grain loading, at the Port of Vancouver, are all ships operating under foreign flags, thus not coming under the Canada Labour Code's navigation and shipping coverage. As such, it is important here to point out that these matters fall outside my jurisdiction.

[202] There is no doubt that as master of the ship, a captain can always allow or prohibit the loading of his ship in the manner he may consider appropriate. In this manner, one would obviously be justified in expecting that the captain would see fit to abide by the rules of the authority under which the ship is sailing.

[203] Be that as it may, this does not directly enter into my consideration because my jurisdiction is restricted to the Code and thus it is not my role to consider the occupational health and safety of the crew of a foreign flag ship. I am, however, empowered by the Code to make determinations on the occupational health and safety of the stevedores whose tasks constitute a federal undertaking, namely in relation to their responsibilities for loading on board any ship.

[204] In this respect, when considering stevedores' tasks, it is not whether or not their operation is authorized by the flag state, IMO or the master, but rather whether such tasks are executed under conditions that do not present a danger as defined by the Code.

[205] As stated earlier, I have to decide these matters based on the balance of probabilities. As such, while each party has put forth its position through its written submissions, neither party has to satisfy a specific onus of proof. I will then weigh their respective submissions to make a determination.

[206] In considering each party's submissions, it is incumbent upon the appeals officer to take into consideration the Code, and in the circumstances of the present case, more particularly the definition of "danger" as well as the provisions in the legislation that govern the right of refusal and the intervention of a health and safety officer.

[207] The notion or concept of "danger" is defined in the Code and this definition has been the subject of numerous interpretations by other appeals officers as well as by reviewing courts. The definition itself appears as follows at subsection 122(1) of the Code:

> "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;

[208] As such, the concept of "danger" as defined does not require an obligatory cause and effect link between hazard, condition or activity and injury or illness (it only needs to be reasonably possible), nor does it require that the being or existence of the hazard, condition or activity be pinpointed in time. Along that line, and particularly for the purpose of the determination in the present case, it is important to make reference to the words of the Honourable Justice Gauthier in *Verville*:

> In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in *Martin* […] to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.

[209] While it is clear from case law that the element of time in the occurrence of a condition, hazard or activity is not paramount, one cannot ignore however that such an element is still present in considering the matter in the course of assessing the foundation of a refusal to work by an employee, and the issuance of the direction that may derive from this. As such, Justice Tremblay-Lamer stated in *Martin v. Canada (Attorney General)*[4] that:

> Nevertheless, in my opinion, the new definition [definition of "danger adopted in 2000] still requires an impending element because the injury or illness has to occur "before the hazard or condition can be corrected or before the activity is altered.

[210] Justice Gauthier commented further on that question of time as follows in *Verville*:

> Also, I do not believe that the definition requires that it could reasonably be expected that every time the condition or activity occurs, it will cause injury. The French version "susceptible de causer" indicates that it must be capable of causing injury at any time but not necessarily every time.

[211] The provisions of the legislation that concern the right of refusal to work and, by extension, the intervention of a health and safety officer in determining whether a "danger" is present, and the appropriateness of issuing corrective directions, all refer to or are based on the concept of "danger" as previously outlined in the Code. Consequently, the interpretation and application of those provisions need to also adhere to the court pronouncements mentioned above.

[4] *Martin v. Canada (Attorney General)*, 2003 FC 1158.

[212] That being said, in fashioning such interpretation and application, one must also be conscious of the actual construction and of the words used by the legislator in constructing those provisions.

[213] In other words, while those provisions are constructed in such a manner as to find general application to any situation that may arise within the scope of the legislation, I am of the opinion that they are also formulated in such a manner as to require an element of specificity in order to isolate their application to individually identified cases and circumstances.

[214] As such, in making reference to "any" hazard, condition or activity, the definition of "danger" is obviously worded to indicate general coverage and thus is non-specific. In the same definition however, where intervention action is envisaged (hazard or condition corrected, activity altered), the wording changes from the indefinite to the definite "the". This, in my estimation, indicates that where there may be a general concept of danger that is to be applied through the legislation, in the event that an employee claims that there is a danger, there is a need for specific identification. This is because specific corrective action may be required.

[215] I will agree that such a distinction could be found to be somewhat tenuous, were it found only in the definition of "danger" by the Code. However, in the much more specific rights and actions of employees, including third party actions, this variance in the wording cannot, in my view, be ignored. In this respect, one need only look at the introductory paragraph to subsection 128(1) which was already reproduced earlier in this decision.

[216] Given what precedes, I am of the opinion that specificity is required in the intervention of the health and safety officer. I am reinforced in this determination by my comprehension that the right to refuse to work and the exercise thereof are personal rights of an employee, of employees on their own behalf, and also on the behalf of other employees.

[217] In other words, I am of the position that the Code requires that a work refusal be exercised personally by an employee or employees for reasons representing a danger that are specific or personal to that or those employees. As such, the investigation process of an HSO requires that the HSO consider those personal reasons initially invoked in support of the refusal. This must be factored into the potential decision to issue a direction in consideration with the HSO's remedial authority.

[218] It is thus, in my opinion, of primary importance to know with some specificity what has been invoked in support of the refusal prior or in addition to being informed of what the directed corrective action is ordered to be. Since, under the legislation, the "direction" issued by a health and safety officer constitutes the penultimate confirmation of the completion of the process envisaged by the legislation, I am of the view that the direction needs to incorporate in a sufficiently informative manner all the essential

elements relevant to that process.

[219] The above leads me to address the question of the actual formulation of the direction issued to the appellant, DP World. One could say that it was two directions that were issued, but the fact is that the direction issued directly to refusing employees Guzzo and Sullivan is written in such a manner that my comments on the first will apply entirely to the other.

[220] To be sure, I am of the view that there are situations where defects in the "form" of a direction will have consequences as to substance of the same. All directions have to be looked at generally as part of the means used by a health and safety officer to inform the party to whom it is addressed of the results of the HSO's investigation into the work refusal. This is because the direction, at a minimum, indicates what the danger is, and/or what corrective action needs to be taken. I say that a direction constitutes the "means" to inform the party because the Code, at subsection 129(4), makes it mandatory for the HSO who concludes that a danger exists to so inform "immediately" the employer and the employee.

[221] In the case at hand, the notification and direction(s) were delivered in writing apparently on the same day as the actual work refusals (October 25, 2010). The record with which I have been presented indicates that only at a later date was the actual investigation report of the HSO passed on to relevant parties.

[222] One only has to view the direction issued to the appellant employer to note that there is no mention of any danger that could be associated with the employees who had refused to work and were seeking protection through resorting to that process. This is to say that I am in agreement with the appellant's argument that HSO Wong failed to describe in the direction the presence of any actual or potential hazard that would have required the employees to be immediately protected.

[223] As I stated earlier, a simple reading of the actual direction brings me to the conclusion that the only element mentioned therein that could turn one's mind to a potential notion of danger is the mention of the "visual opacity probe" and the fact that the ILWU, Local 500, the respondent, entertained concerns about the said apparatus. It is true that in his report, HSO Wong did mention both that the October 25, 2010 refusal dealt with "the engineering report, the **probe** and various other matters", and also mentioned that "during the refusal to load on 25th October, 2010, the employees had various complaints and questions about the "Genesis Report" dealing with safety […]. One of the questions was how the probe relates to the amount of grain dust (gm/m3)."

[224] There are, however, no particulars relative to the danger that directly concerned the employees who were refusing. I have no difficulty in accepting the position taken by the appellant to the effect that in this case, "the only possible reference to an alleged danger in the 2010 Directions is HSO's Wong reference to "concerns raised by ILWU Local 500 about the visual opacity probe use for grain loading." I find this to be a general

statement that certainly does not provide any clarification as to the danger to the refusing employees.

[225] That being said, I understand how one can rationalize that the concerns of the union may include or relate in some manner to the situation affecting the refusing employees at the time of the refusal. Regardless. there is some difficulty with this since there is evidence from the appellant, unchallenged evidence I might add, emanating from one of the participants in the investigation of the refusal (Donovan Hides), to the effect that during "discussions between the parties during HSO Wong's investigation, the dust was clear at the time of the pouring (the Superintendent could see far beyond the opacity probe down to the grain pile) supporting the absence of any danger during the loading process."

[226] As a result, the direction can be found to be defective, since from its wording, it is certainly difficult to determine what it is that the refusing employees are asserting "is more likely than not (to) take place in the future", to repeat the words of Justice Rothstein in *Martin* cited above at paragraph 52. Such specification is essential for the purpose of evaluating whether the matter or condition identified constitutes a danger to them. In my opinion, a valid argument could have been made to the effect that such defect would suffice to invalidate the direction.

[227] The appellant however, while making passing mention of such direction shortcomings, has opted instead to challenge the direction on the basis that the arguments of the respondent only raised hypothetical or speculative concerns relative to the use of the opacity probe and that in fact, ILWU had formulated no compelling argument or reason or even offered any persuasive specific example of situations where employees could have been confronted with danger in the use of said probe.

[228] Stated generally, the appellant's position is that having acted in response to a previous direction relative to the same operation, a study or rather multiple studies had been conducted by an expert (G. Esplin, Genesis Engineering Inc.) on the safety of cement hole grain loading, which not only led to the development and adoption of a specific tool for measuring and controlling grain dust accumulation during such operation (visual opacity probe), but also to the development of safe work procedures to be followed during said loading operation – the whole having been found to be in compliance with said previous direction. The appellant also argues that nothing brought forth by either HSO Wong during his investigation or by the respondent in its submissions could support a conclusion of danger.

[229] In its opposition to the appeal, the respondent ILWU, Local 500, also generally, has claimed that the Genesis reports do not address fully the safety issues relative to the said cement hole loading operation and the opacity probe. The respondent has also argued that the visual opacity probe is inadequate as a grain dust measurement tool where safety of the employees is at issue. Additional points that the respondent argued was that many of its safety concerns have not been addressed and that the safe work procedures adopted by the appellant relative to this grain loading operation are insufficient or incomplete

since, in the respondent's opinion, there has been no or insufficient consultation with the respondent during their development.

[230] Stated in very general terms, it is clear that the concerns expressed by ILWU center on two major points. First, the risks associated with the accumulation of grain dust, the most specific being the risk of explosion. On this matter, I accept as uncontested fact that grain dust, under certain conditions, has an explosive capacity. The respondent's second concern is regarding the usefulness, adequacy and effectiveness of the visual opacity probe as a protective tool or means against the risk of explosion of accumulated grain dust in the course of cement hole loading.

[231] In forming my determination, I have read in its entirety the report by HSO Wong, all the Genesis Engineering reports that derive from the previous directions by HSO D'Sa, the safe work procedures adopted as a result of those reports, the comments made by the respondent regarding the said Genesis reports and those made in response by G. Esplin from Genesis.

[232] Relative to these comments, I have noted that the statement was made without further contestation that the concerns and questions raised by the ILWU and others (such as HRSDC engineers), had been taken into consideration in the formulation of its conclusions by Genesis.

[233] I have also read and examined the reports by the two HRSDC engineers (Karpinsky and Vandoros) that have taken on much importance in the eyes of the respondent. Furthermore, I have also taken note not only of their contents but also of the fact that both preceded the formulation of the safe work procedures that were in place at the time of the work refusals central to the present matter.

[234] Where the contents of the said engineers' reports are concerned, I have failed to find therein conclusions that are sufficiently assertive and convincing to lead me to give them the recognition sought by the respondent. By way of example, the Vandoros report states the following:

> [R]eports (Genesis) were professionally prepared and well researched" but that regarding the statement that there were no ignition source within the holds of ships, "this may not be correct", and that "in summary the BCMEA/Mr. Esplin's reports although have professionnally been prepared, the assumptions of "no ignition source" and "50 g/cubic meter LEL" may have been over optimistic.

[235] Given this type of wording, one would be hard pressed to derive from such text a strong assertive or affirmative conclusion. In the case of the Karpinsky report, its conclusion states that:

> in general, based on the testing conducted by Mr Esplin, the dust concentrations within the holds are well below 10g/m3 (50% of the LEL of 20 g/m3 where there is no ignition source). Nevertheless, due to a limiting factors that make loading of grain through cement holes safe, e.g.

> different LELs that may apply, variations in grain dust concentrations within the holds of vessels, loading rates, ventilation rates, a hazard of ignition by static electricity and the explosive nature of grain dust, the operation should be considered dangerous and if the vessels are to be loaded through cement holes, the employer must ensure that the safety requirements as per the MOSH Regulations including those specified by Mr.Esplin in his report are met.

[236] Here again, where the steps advocated in the Genesis reports appear to have been taken and there is no conclusive evidence that the safety requirements derived from the MOSH Regulations have not been adhered to. As such, I am of the opinion that I cannot legitimately arrive at a finding of danger on the basis of these two reports.

[237] I also noted the following in arriving at my conclusion. First, at the time of the work refusals, not only had various studies, such as the Genesis Reports, been completed and response and explanation from their author (G. Esplin) in reply to questions and objections by the respondent been received, but also that the tool destined to assist in controlling grain dust accumulation (visual opacity probe) during loading operations had been developed and was being used.

[238] I also noted that the safe work procedures developed as a result of the Genesis studies had been adopted and were in application. While it is true that the respondent has indicated its dissatisfaction with said safe work procedures, it has formulated no persuasive argument that they could not or would not be effective in ensuring the safety of employees.

[239] A second important finding that led me to my conclusion is that the evidence is to the effect that the visual opacity probe is, at present, the only viable workable apparatus to be used efficiently in this type of loading operation to not only control the accumulation of grain dust, but also offer the capacity to modulate the grain flow to the ship hold while remaining within safe parameters. In this respect, it should be repeated that while the respondent may have indicated its dissatisfaction with the said apparatus, it failed to bring forth a workable alternative.

[240] Third, while compliance with HSO Wong's direction may not be directly relevant to my determination, I cannot ignore the fact that in response to said direction, a competent third party has assessed the Genesis reports, as directed, and has determined that the conclusions in such reports were arrived at on the basis of sound scientific principles and methodology. Furthermore, I find noteworthy the fact that the appellant and BCMEA have not considered as definitive the measures advocated and taken as a result of the Genesis studies, but have formulated the undertaking to continue to seek to improve on those should future circumstances so require.

[241] The fourth consideration that led me to my conclusion is that apart from limited evidence to the effect that at the time of the work refusals at the origins of this appeal, accumulation of dust in the hold of the ship involved may have been negligible since one could apparently see down the hold to the grain pile therein. Furthermore, I am also

guided by the fact that no significant evidence as to the particular or personal circumstances affecting the two refusing employees has been provided by either party for my evaluation.

[242] That being said, I would be remiss if I ignored the fact that grain dust may be explosive and that such an operation as cement hole loading does present risks that need to be alleviated, thus requiring that measures be taken by an employer and be put in place to prevent the development of circumstances that could set the stage for the occurrence of such explosion.

[243] In the cases at hand, I have formed the opinion that the development and use of the visual opacity probe as well as the adoption and application of the safe work procedures are measures that reduce the level of risk and that consequently, on the balance of probabilities, the record supports the conclusion that at the time of the refusals and investigation by HSO Wong, there was no danger, and thus no foundation for the directions that were issued by the latter.

[244] This brings me to the cross-appeal by ILWU, Local 500. As stated at the outset of this decision, while appellant DP World was disputing the presence of danger as a basis of its appeal(s), cross-appellant ILWU, Local 500, was challenging the direction issued to DP World on the basis that it was incomplete or insufficiently comprehensive. The cross-appellant's position, thus, was that the direction needed to be varied to encompass the cross-appellant's outstanding concerns about the opacity probe. The cross-appellant also argued that the employer should be further directed to address the cross-appellant's concerns related to the dangerous conditions during cement hole loading and the Genesis Report(s) methodology.

[245] The cross-appellant also argued that the employer should be further directed in relation to having a new qualified third party examine said report(s) in light of the aforementioned concerns, and also sought a direction that required additional testing be conducted at different humidity levels and pouring rates. Further to this, the cross-appellant sought such a direction to stipulate that while the above considerations are being addressed employees be prohibited from doing such loading (except for specific testing) until compliance with the direction be attained.

[246] What the cross-appellant is seeking would essentially amount to the employer DP World and/or BCMEA conducting anew the process that had led to the Genesis study, the development of the opacity probe and the development of the safe work procedures. As such, the cross-appellant's sought after varied direction would require that the finding of danger be maintained.

[247] I have already come to the conclusion that there existed no danger justifying the issuance of HSO Wong's directions. It stands to reason, therefore, that in the absence of danger, there would no longer be a foundation for the direction and thus for the variance of said direction. Such is my conclusion. This, therefore, disposes of the cross-appeal by

ILWU, Local 500.

[248] Given all that precedes, the sole remaining issue concerns the question of consultation, and the fact that appellant, DP World, is claiming to have complied fully with its obligation under the Code to consult cross-appellant ILWU, Local 500 in relation to the adoption of safe work procedures. In other words, the position held by the cross-appellant ILWU, Local 500 is that it was not properly consulted on that matter.

[249] Determination of this question is not necessary to dispose of the appeal of the directions issued by HSO Wong. I would nonetheless offer the following comments.

[250] First, the obligation to consult is an employer obligation derived for paragraph 125(1)(z.06) of the Code. The obligation to launch and proceed with consultation falls therefore on the employer.

[251] Second, I fully agree with the position taken by the appellant on this question that consultation need not equate with agreement and that said consultation, as previously cited from a Canada Industrial Relations Board decision, is "an obligation to fairly meet and take into consideration the concerns of the other party."

[252] I am of the view, however, that actions or positions taken by one party with a view to delaying, obstructing or thwarting a normal consultation process should not bring about a conclusion of failure to comply with an obligation to consult.

[253] With this in mind, I have reviewed the considerable number of communications between the parties, noted the essence of each and considered the positions taken by each side. I have come to the conclusion that a true effort was made by the appellant and BCMEA to properly inform the opposing party and to seek their views.

[254] Such consultation appears to have started in early 2009 when Genesis was conducting its investigation and testing and has continued until October 2010 when the appellant recommenced the loading of grain through cement loading hole following the adoption and implementation of safe work procedures.

[255] My examination of all those communications and correspondence between the parties over that period also led me to conclude that there was an apparent reluctance on the part of ILWU to take part in the consulting process.

[256] This being said however, I have received as part of the record, documents showing that proper consultation had occurred. Although on the surface being presented by the ILWU as unsatisfactory, Contrary to what is alleged by ILWU, I do not find that there is good reason to determine that the consultation was unsatisfactory.

[257] On this point, it is important to note that the same Union was quite prepared to recognize, through a signed agreement, dated February 16, 2011 (thus prior to this appeal being determined), that "as per previous correspondence, that the BCMEA and its

member employers have met all of their regulatory obligations regarding consultation with the Union on Feeder Hole Loading", and that both parties agreed "that the practice of loading grain through feeder holes, as detailed in the current work procedures (safe work procedures), as attached , (had) been ruled to be a safe work practice although under appeal by the Union."

[258] This document, a copy of which was provided to me by the appellant, appears to have been concluded for the purpose of resolving an issue between the same parties but before another tribunal. It bears no mention of being confidential.

[259] On its face, the said agreement appears to resolve the issue of consultation, of the safety of the feeder hole loading operation and also the acceptability of the safe work practices or procedures in proceeding safely with the operation of cement hole loading.

[260] The position taken by the Union regarding this document is that it is confidential and that as such should have been kept from me and that I should disregard its content. Without offering any details or particulars, the ILWU refers to an oral ruling that would have been rendered by another tribunal to the effect that this was inadmissible as being a confidential settlement document.

[261] Not surprisingly, the appellant has claimed that I should retain this document in evidence as a means of assessing the credibility of the respondent.

[262] To all of this, I remind the parties that I am not bound by decisions of another tribunal and that any persuasive authority that one could derive from other administrative bodies would surely need to be contingent on being informed of the particulars of the case and the rationale by which a particular decision had been arrived at. As such, I believe that this would, in almost every case, exclude decisions issued verbally with little or no reasons.

[263] Having said that, I was somewhat surprised by ILWU's approach that essentially would have seen me kept in the dark about that party's own recognition that consultation, found to be sufficient and acceptable to ILWU, had occurred. That alone, in my view, negates the claim by ILWU as well as the conclusion by HSO Wong that the appropriate level of consultation had not occurred.

[264] The exercise of consultation is one of transmission of parties' views, opinions, concerns and even objections in good faith towards possibly, not obligatorily, swaying another party. Consultation is also acting in good faith to modify one's position or action. I cannot say, given what has been brought to my attention, that this has been the case for one party and I find it is enough for me to give little credence to that party's position.

[265] Given all the information that has been provided to me in this regard, it is my conclusion that the appellant DP world, directly or through the BCMEA, had satisfied its obligation to consult pursuant to the Code and the requirements stated by both HSOs D'Sa and Wong.

[266] As stated above, my determination of the appeal and cross-appeal regarding the directions issued by HSO Wong does not depend on my conclusion regarding consultation.

Decision

[267] In light of all that precedes, the directions issued by HSO Wong on October 25, 2010, are rescinded. Consequently, the appeal by DP World is granted and the cross-appeal by ILWU, Local 500 is dismissed.

Jean-Pierre Aubre
Appeals Officer