Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Canadian National Transportation Limited, 2013 OHSTC 15

Date: 2013-04-29
Case No.: 2012-24
Rendered at: Ottawa

Between:

Canadian National Transportation Limited, Applicant

Matter: An Application for a stay of a direction

Decision: The stay of the direction is granted

Decision rendered by: Pierre Hamel, Appeals Officer

Language of decision: English

For the Applicant: Me Simon-Pierre Paquette, Counsel, CN Railway Law Department

REASONS

[1] These reasons concern an application for a stay of a direction issued on March 23, 2012 by Mr. Sylvain Renaud, Health and Safety Officer (HSO) with Human Resources and Skills Development Canada (HRSDC) in Montréal. The application was filed with the Tribunal on March 22, 2013 by Me Simon-Pierre Paquette on behalf of Canadian National Transportation Limited (hereafter "CNTL" or "the Company"). The Company is seeking:

> (i) a stay of the direction "until the Tribunal issues its decision on the merits of the appeal" and
>
> (ii) an extension of the duration of the stay order "for a further period of sixty (60) days following the decision on the merits" or the suspension of "the enforceability of the Tribunal's direction for a period of sixty (60) days following the date of issuance in the event the Tribunal does not rescind the direction issued on March 23, 2102 by HSO Renaud".

[2] The Company is also appealing the direction on its merits and has filed its appeal on April 20, 2012, within the 30-day limitation period prescribed by section 146 of the *Canada Labour Code* (the Code). There is no respondent in this matter.

Background

[3] In order to put this application in its proper context and to better understand its timing, it is useful to quote the direction issued on March 23, 2012 by HSO Sylvain Renaud:

> **DANS L'AFFAIRE DU *CODE CANADIEN DU TRAVAIL***
> **PARTIE II - SANTÉ ET SÉCURITÉ AU TRAVAIL**
>
> INSTRUCTION À L'EMPLOYEUR EN VERTU
> DU PARAGRAPHE 145(1) a)
>
> Le 23 mars 2012, l'agent de santé et de sécurité soussigné a procédé à une inspection dans le lieu de travail exploité par Canadien National Transport limité, employeur assujetti à la partie II du *Code canadien du travail*, et sis au 935, rue de la Gauchetière Ouest, Montréal, Québec, H3B2M9, ledit lieu étant parfois connu sous le nom de CNTL.
>
> Ledit agent de santé et de sécurité est d'avis que l'article 135 (1) de la partie II du *Code canadien du travail* est enfreint.
>
> **No. / No : 1**
>
> 145.(1) – Partie II du *Code canadien du travail*, -
>
> > L'employeur n'a pas constitué pour chaque lieu de travail placé sous son entière autorité et occupant habituellement au moins vingt employés, un comité local chargé d'examiner les questions qui concernent le lieu de travail en matière de santé et de sécurité.

> Par conséquent, il vous est ORDONNÉ PAR LES PRÉSENTES, en vertu de l'alinéa 145(1)*a*) de la partie II du *Code canadien du travail*, de cesser toute contravention au plus tard le 23 mars 2013.
>
> Fait à Montréal ce 23ème jour de mars 2012.
>
> (s) Sylvain Renaud
> Agent de santé et de sécurité

[4] The direction was handed out to Me Simon-Pierre Paquette, counsel for the Company, on the day of its issuance. It is worth noting that HSO Renaud gave the Company a period of one year, i.e. until March 23, 2013, to establish a work place health and safety committee. The central point of disagreement raised by the Company in its appeal of the direction is that the persons for whom the HSO is ordering the establishment of a work place health and safety committee are not "employees" within the meaning of Part II of the Code. The Company is involved in the business of trucking brokerage services. It is contracted by its clients to arrange for the movement of goods to and from CN's rail yards to be transported over long distances over CN's rail network. The dispute turns on the proper characterization of the legal relationship between a group of approximately 80 drivers, commonly referred to as "Brokers Montreal" (or "the Contractors"), whom the Company contends are independent contractors, who own their tractor-trailers and have entered into service contracts with CNTL to transport freight, as opposed to being employed by the Company. The Company takes the position that since there is no employer-employee relationship with the drivers, there is no obligation under subsection 135(1) of the Code to establish a work place safety and health committee for those persons.

[5] On August 12, 2012, the Tribunal informed the Company that the appeal would be dealt with by way of written submissions and on the basis of the Tribunal's record, there being no need for an oral hearing given the nature of the issue raised by the appeal. The Company eventually filed its written submissions on November 5, 2012. As the period within which the Company was directed to establish a work place safety and health committee was about to end, and no decision having yet been rendered by the Tribunal on the appeal, the Company filed its application for a stay on the day prior to the expiry of that deadline, i.e. March 22, 2013.

[6] A teleconference was held on April 2, 2013 during which counsel for the Company presented the salient points of his argument in support of the application. HSO Sylvain Renaud participated in the teleconference and was given an opportunity to make observations on the Company's position and factual basis underlying the application.

Arguments for the Applicant

[7] The Company's arguments in support of the application may be summarized as follows: first, the appeal raises a serious and complex question related to the proper legal characterization of the relationship between CNTL and its owner-operators. The original investigation by HRSDC that eventually led to the issuance of the direction in March

2012 goes back to late 2008, following a fatal accident involving a replacement driver, Mr. Albert Foucher. There were several meetings and communications between CNTL and a number of health and safety officers of HRSDC over that four year period, to establish the facts. The Company points out that no safety and health issues or concerns affecting the drivers were recorded by health and safety officers or communicated to CNTL at any time over that period. The Company argues that there is no urgency to the establishment of a work place health and safety committee in that context. The direction under review relates to the establishment of a committee structure, as opposed to the correction of a more serious contravention of the Code or one of its regulatory requirements that could endanger the health and safety of employees. Counsel points out that HSO Renaud, who was well aware of CNTL's disagreement with his finding that an employment relationship existed and of its intention to appeal his direction, gave the Company a period of one year to comply with his direction, on the assumption that the Company's appeal to the Tribunal would be heard and decided within that period of time.

[8] Counsel for the Company further argued that the contractual arrangements with the owner-operators have been in place since 1995 and the Company would suffer significant harm if that business model was to be completely changed, with all its ramifications such as developing new policies and procedures for the contractors and the ensuing costs and disruption that would follow, knowing that the Tribunal is likely to render its decision on the merits in the very near future. Should that decision uphold the appeal, the Company would have to undo the committee after incurring significant and unnecessary costs. The Company would hence be seriously prejudiced if it were to establish the work place health and safety committee contemplated in subsection 135(1) of the Code for the owner-operators, "while neither CNTL, the Contractors or the CAW, ever considered that the Contractors were engaged in an employment relationship with CNTL".

[9] Finally, the Company contends that it has in place all of the internal safety rules and guidelines that apply to every person who enter CNTL and CN property. These rules apply to Contractors whenever they enter those premises to pick up or drop off intermodal containers. In addition, CNTL sponsors safety briefings aimed at sharing with Contractors information concerning safe driving operations. Counsel also pointed to the highly regulated environment in which the drivers carry out their business, which they must comply with as part of their contractual arrangements with CNTL, and which is aimed at ensuring the drivers' health and safety.

Decision

[10] On April 3, 2013, I rendered my decision to grant the application for a stay and the Tribunal so informed the Company and the HSO on that same day. I now set out the reasons in support of my decision in the following pages.

Analysis

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

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

[12] The Code does not specify the conditions or factors that an Appeals Officer must consider in the exercise of such authority. It is trite to state that the Appeals Officer's discretion must not be arbitrarily exercised and must be consistent with the purpose of the Code as found in section 122.1, which is to "prevent accidents and injuries to health arising out of, linked with or occurring in the course of employment to which this Part applies". It is clear that Parliament intended that directions issued under the Code would be effective upon their issuance, notwithstanding an appeal, unless an Appeals Officer has compelling reasons to decide otherwise, based on the circumstances of each case.

[13] Appeals Officers have developed a three-pronged test as the framework within which to exercise their discretion under subsection 146(2). The elements of this test are as follows:

1) The applicant must satisfy the appeals officer that there is a serious question to be tried as opposed to a frivolous or vexatious claim.

2) The applicant must demonstrate that he or she would suffer significant harm if the direction is not stayed.

3) The applicant must demonstrate that should a stay be granted, measures will be put in place to protect the health and safety of employees or any person granted access to the work place.

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

[14] At the teleconference, I indicated to the applicant that from my initial assessment of this case, I was of the opinion that the question to be tried was serious. The proper characterization of the legal relationship between the Company and the drivers in this case is not an easy task and requires a thorough analysis of a number of factors developed over the years by tribunals and Courts. The record shows that even the health and safety officers involved in this case between 2008 and 2012, found such determination to be fraught with difficulty. The Company and HRSDC's health and safety officers have had numerous exchanges and discussions regarding the legal status of the Contractors over a period of more than three years, before a direction was finally issued. The question raised by this appeal is in no way frivolous, vexatious or otherwise dilatory. Rather, linking back to the purpose of the Code set out in its section 121.1, it is a threshold issue going to the applicability of the Code to those parties.

[15] Therefore, I am satisfied that the requirements for the first criterion have been met.

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

[16] The Company argues that it would suffer important inconveniences and expenditure of resources which may ultimately prove unnecessary, thereby causing it

significant harm, if the direction is maintained pending the disposition of the appeal. It stresses the fact that the « contract for services » relationship with the Contractors has existed since 1995 and that it is the "business model" which has governed their rapport since that date. These arrangements met no opposition from the drivers themselves nor from the bargaining agent who represents them for the purpose of Part I of the Code. The direction to set up a committee structure based on an alleged employment relationship is incompatible with the reality of these long-standing arrangements as independent contractors and would require the development of joint policies, procedures and processes, all of which could be unnecessary in the event that the Tribunal's decision, expected shortly, allows the Company's appeal on the merits.

[17] Appeals officers have stated in the past that financial costs or mere inconveniences resulting from compliance with a direction do not by themselves satisfy the significant harm criterion. The wording of subsection 146(2) of the Code shows Parliament's intent that a direction, once issued, is to have effect in spite of an appeal, while giving an appeals officer some discretion to assess all the circumstances in a given case, and order otherwise, without compromising the fulfilment of the objectives of the Code. With respect, had the Company's application been based solely on the financial considerations and inconveniences that complying with the direction would entail, I would not have granted it.

[18] But, in my opinion, there is more to it in this case. I accept the Company's argument that the effect of the direction, in our context, entails more than inconveniences or monetary expenditures. Indeed, the direction has the effect of transforming the nature of the relationship between those parties, which has been in place since 1995. I agree with counsel for the Company that on their face, the habitual and daily interactions between the Company and the drivers are consistent with the notion of them being "independent contractors". The Company referred me to a decision of the Work Place Safety and Insurance Board of Ontario dated July 27, 2009, which declares drivers for CNTL (the Contractors) to be « independent operators » that are not engaged in an employer-worker relationship for the purpose of the *Work Place Safety and Insurance Act*. This is not to say that such a finding by another authority is determinative of the merits of this appeal: it is not. However, for the purpose of this application, conflicting findings relating to the legal status of CNTL's drivers are not desirable and should be avoided. This factor, together with the statement set out in clause 2.05 of the "Standard Contract" (the parties' mutual intention not to create an employer-employee relationship), support the employer's contention that the parties have operated over a significant period of time on the premise that the drivers were self-employed, independent contractors. Against that background, the drivers' legal status and the consequences flowing from that status should, in my opinion, more appropriately be determined in due course by the merits of the appeal.

[19] Counsel for the Company referred to *Bell Canada*, 2011 OHSTC 1, in support of his argument that maintaining *status quo* is appropriate in certain circumstances. In his decision granting the stay in that case, the appeals officer wrote as follows :

. . .

> [9] On the second criteria, Ms. Tremblay contended that if the direction is not stayed, Bell Canada would have to fundamentally alter the Committee Structure to which the union has agreed and which has been in place without complaints for more than ten years. In order to comply with the direction, additional committees or representatives will have to be established and at least eight new committee members or representatives would have to be appointed. As well the various business unit concerned with this issue would have to ensure the availability of additional replacement employee members with specialized skill sets.
>
> [10] To make such changes in the established structure, only to perhaps have to change it back to its original structure if the appeal of the direction is successful, would cause Bell Canada to suffer great and unnecessary inconvenience.
>
> [11] Based on the all the above, I am convinced that Bell Canada would suffer significant harm if the direction is not stayed.

[20] The nature of the direction and the facts described in the excerpt above are similar to the circumstances of the present case. While the measures the employer would have had to undertake in the *Bell* case may seem excessively onerous, i.e. move from an existing single committee to eight work place committees, the Company here is facing the obligation to establish a committee where none presently exists, for the reasons outlined earlier in these reasons. One only needs to read subsection 135(7) to appreciate the extent of the statutory requirements that the establishment and operation of a work place committee entails. Unlike the situation in *Bell*, the underlying question in the present case is whether that provision even applies to the Company and the Contractors in the first place. As I pointed out earlier in these reasons, this is a threshold issue in this case, which weighs in favour of maintaining the *status quo* pending a decision on the merits.

[21] The Company also points out that health and safety officers have never raised health or safety concerns in the past, not even during the significant period of time during which the investigation into the legal relationship between the Contractors and the Company was actively conducted. The Company also argues that there is no urgency in this matter and that this was confirmed by the health and safety officer himself, who purposely drafted his direction in a way that it only became « enforceable » one year after its issuance, on the assumption that that the dispute would be resolved by the Tribunal before the expiry of that timeline. I point out that the health and safety officer confirmed the accuracy of those statements during the teleconference of April 2, 2013.

[22] The legal status of the drivers has indeed been at the center of discussions between HRSDC and the Company for a period of more than three years. The record shows that many communications have taken place between HRSDC officers and CNTL over that period, related to the legal status of the drivers. But more importantly in my opinion, the record shows that the health and safety officer who issued the direction himself does not see any urgency to the direction being complied with immediately. He has designed his direction in a way to give the Company a period of one year to comply, precisely because he saw no urgency to require otherwise and on the assumption that a Tribunal decision would have likely clarified the matter by then. In my view, this was a

sensible approach in light of the history of this file, and more importantly, of the fact that at no point in time did any health and safety officer involved in this matter express concern regarding potentially dangerous situations or, more generally the health and safety of the drivers. HSO Sylvain Renaud has not raised reasons or concern that would justify immediate compliance with his direction. He has appropriately adopted a cooperative approach with the Company and I am of the view that the granting of the stay in this case is consistent with such an approach and does not prejudice the health and safety of the Contractors. I consider these circumstances to weigh in favour of granting the stay.

[23] The object of the direction is also a factor that I take into consideration in my decision to grant the stay in the present case. We are dealing with a direction requiring the Company to establish a work place health and safety committee, as opposed to a direction issued in the face of a dangerous situation or purporting to correct a violation of the Code or its *Regulations* that may endanger the health and safety of workers. In the latter cases, I am of the view that a stay should only be granted for very compelling and exceptional reasons. That said, I do not minimize the importance of work place safety and health committees and I acknowledge that employee participation in health and safety matters relating to their work place is a pillar of the scheme designed under the Code. However, I believe that the relative seriousness of the contravention and of its consequences is a relevant factor to take into account in assessing the prejudice caused to the parties and in exercising discretion under subsection 146(2). In *NuStar Terminals Canada partnership (Re),* 2013 OHSTC 1, the appeals officer granted a stay of execution of a direction in a situation where the employer contented that it was not a "federal undertaking" within the meaning of the Code and had no legal obligation to grant access to an HRSDC health and safety officer on its premises. The appeals officer wrote as follows, at paragraphs 13 and 14:

. . .

> [13] Mr. Durnford also indicated that this is not a situation where a specific situation occurred that would require that some measures be put in place to eliminate a hazard. At the beginning of the teleconference, I asked HSO Gallant if his visit to NuStar's work place was in response to a specific situation or just a routine inspection. He confirmed that the purpose of his visit was only to conduct a routine inspection.
>
> [14] On this point, it is clear to me that the very nature of the direction did not address a contravention of any occupational health and safety obligation found under the Code and its regulations. In view of this being a question of access to the work place, and due to the fact that HSO Gallant confirmed that his visit was simply for a routine inspection and not in response to a specific incident, I believe that additional measures are not warranted in the context of this intervention.

. . .

[24] In *Shaw Satellite Services and Shaw Satellite G.P.*, 2011 OHSTC 12, the appeals officer also considered, at paragraph 14, that the direction « (…) was not related to a specific contravention of the Code regarding employee health and safety. Rather, it

pertained to the production of documents which she needed to complete the investigation (…) ».

[25] Consequently, when one considers all of the circumstances that led up to the issuance of the direction, the timeframes involved, the subject matter of the direction and the HSO's approach, I am of the opinion that a stay is appropriate in this case. When those factors are contrasted with the implications of immediate compliance for the Company at this point in time, with a decision on the merits of the appeal likely forthcoming, I am of the view that CNTL would suffer significant harm if the direction is not stayed. I am therefore satisfied that the second criterion has been met in the circumstances of this case.

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

[26] Regarding the third criterion, I am persuaded by the employer's assertion that a stay would not prejudice the health and safety of the drivers, in this case. They work with minimal supervision from CNTL and matters relating to their health and safety are mostly governed by laws and regulations applicable to the trucking industry. The drivers are responsible to ensure that their vehicles comply with applicable laws and regulations, and that their driving is in compliance with those laws and regulations (clause 2.04. of the "Standard Contract"). They must comply with several safety-related obligations set out throughout Article 2 of the "Standard Contract". The record, including the HSO's Reports of 2010 and 2012, does not reveal any situation of concern regarding the health and safety of the drivers. I am therefore persuaded that these contractual obligations and the body of laws and regulations to which it refers provide an adequate framework for the protection of the health and safety of the drivers when they are on the road carrying out their delivery business.

[27] By necessity, the drivers are called upon to enter CNTL and CN properties to pick up or drop off intermodal containers. It is not contested that when they do, they are subject to CNTL and CN's internal safety and health regulations and procedures. I was given no reason to doubt the assertion that CNTL and CN will continue to oversee strictly that any person who is given access to their property complies with the applicable safety regulations and policies.

[28] For those reasons, I am satisfied that the third criterion is met.

Additional Orders sought

[29] The Company is seeking that the direction be stayed until the decision on the merits of the appeal and I so ordered in my "bottom-line" decision communicated to the parties on April 3, 2013. The Company is also seeking that the stay be extended for sixty (60) days following the decision on the merits, or that the enforceability of the decision be suspended for sixty (60) days in the event that the direction is not rescinded by the appeals officer. Understandably, the Company wishes to ensure that it will have a reasonable period of time to implement the direction, should it be confirmed by the appeals officer.

[30] I am of the view that it is premature to consider those orders at this stage, and they are hereby denied. The orders sought are speculative and will only become relevant in the event that the direction is confirmed by the appeals officer. It has more to do with the modalities of the decision to be rendered on the merits of the appeal. It is more appropriate in my view that they be dealt with, as the case may be, by the appeals officer who will determine the appeal on the merits.

Decision

[31] The application for a stay of the direction issued by HSO Sylvain Renaud on March 23, 2012, is granted until the final disposition of the appeal on its merits.

Pierre Hamel
Appeals Officer