

CANADA LABOUR CODE  
PART II  
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146  
of the Canada Labour Code, Part II  
of a direction issued by a safety officer

Applicant: Halterm Limited  
Halifax, Nova Scotia  
Represented by: Captain Anthony McGuinness  
Vice-President  
and  
Maritime Employers Association  
Halifax, Nova Scotia  
Represented by: Mr. Robert L. Lacroix  
Vice-President

Interested Party: Mr. Mickey Proude  
President and Business Agent  
Halifax International Longshoring Association  
Halifax, Nova Scotia

Mis en cause: Mr. Ron P. Thibault  
Safety Officer  
Labour Canada

Before: Serge Cadieux  
Regional Safety Officer

An oral hearing was held on November 27, 1991 in Halifax, Nova Scotia.

**Background**

The facts in this case are as follow. On September 13, 1991 Labour Canada's District Office in Halifax was notified that a serious accident had occurred at Pier "C" on the waterfront at Halterm Limited, also known as Halterm Container Terminal. The accident involved a front-end loader and a tractor trailer. The front-end loader had been operated by Mr. Jim Rose, a waterfront employee, whereas the tractor trailer was operated by Mr. Howard McDonald, an employee of Conrad's Transport.

The circumstances surrounding the accident have been described by witnesses through written statements. Mr. Rose was told to pick up a container and load it on a Conrad truck. The truck

would be arriving shortly at a specified location on the Terminal. Mr. Rose picked up the container and backed up to position himself for the arrival of the truck. Mr. McDonald arrived and parked his truck at the specified location and walked around it, adjusting the "conlocks" on the chassis. At approximately the same time, the front-end loader approached the truck with the container in the air. As the front-end loader approached the chassis, the back wheels started to lift up. At that moment, the front-end loader toppled over, injuring Mr. McDonald.

Safety officer Ron Thibault, accompanied by another safety officer, responded to the notification for the purpose of carrying out an investigation into the matter. During the course of his investigation, several measurements and photographs were obtained. Information pertaining to the training of employees and the employer's safety policy was gathered by the safety officer.

Furthermore, the safety officer attempted, on a number of occasions, to determine who would be investigating the accident on behalf of the employer. The safety officer also discussed the role of the safety and health committee in accident investigation.

On October 7, 1991 the safety officer issued a direction to Halterm Limited. The direction addressed four specific points, each of which will be addressed separately in my decision.

### **Decision**

At the onset of the hearing Mr. Lacroix questioned, by way of a preliminary objection, the participation of the union in proceedings of this nature. Mr. Lacroix stated that the issues to be addressed and resolved at the hearing were to be debated between the safety officer and the applicant. Mr. Lacroix felt that nowhere in the Code does it say that the union, per se, has a participatory role given that they were not directly affected by the direction.

In reply, it was explained that, while the direction of the safety officer is addressed, in the instant case, to the employer, a review by the Regional Safety Officer may have a direct impact on the safety of the employees affected by this direction. Since the Regional Safety Officer review process is bound by the rules of natural justice and procedural fairness, it is in respect of these principles that all of those directly affected by the decision of the Regional Safety Officer can and should be allowed to participate in such an inquiry. At this point, the matter was considered closed.

The direction of the safety officer identified four specific violations of the Code and the pursuant Regulations.

### **ACCIDENT vs TRAINING**

The first issue to be decided is whether the first item identified in the direction constituted a violation. It states:

"Mobile equipment will be operated in accordance with procedures outlined in the manufacturer's operator's guide. These procedures will be monitored and properly supervised in accordance with the Canada Labour Code, Part II, subsection 125(q) (sic) and the Canada Occupational Safety and Health Regulations, Part XIV, Materials Handling, section 14.33."

Paragraph 125(q) of the Code states:

125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by him,

(q) provide, in the prescribed manner, each of his employees with the information, instruction, training and supervision necessary to ensure the safety and health at work of that employee;

Likewise, section 14.33 of the Canada Occupational Safety and Health Regulations, Part XIV, Materials Handling, states:

14.33 Where mobile equipment is travelling with a raised or suspended load, the operator of the equipment shall ensure that the load is carried as close to the ground or floor level as the situation permits and in no case shall the load be carried at a point above

- (a) the centre of gravity of the loaded mobile equipment; or
- (b) the point at which the loaded mobile equipment becomes unstable.

Manifestly, section 14.33 of the Canada Occupational Safety and Health Regulations, Part XIV, Materials Handling is incompatible with paragraph 125(q) of the Code. As noted by Mr. Lacroix at the hearing, this section describes an instruction to the operator of the equipment. Its corresponding power in the enabling legislation are paragraphs 126(1)(b) and (c) of the Code and not paragraph 125(q) as quoted in the direction.

There exists a contradiction in this item of the direction between the two different provisions referenced. The first provision concerns the responsibility of the employer to provide instruction and training to his employee whereas the latter provision concerns the responsibility of the employee to follow a prescribed procedure. The contradiction arises from the safety officer discharging upon the employer the full responsibility for an employee's error which, in itself, constitutes a violation of a prescribed standard.

The safety officer testified that he intended to address the duty of the employer to provide additional training to the operator of the equipment subsequently to the initial formal training the employee had received. Operator training is addressed in subsection 14.23(1) of the same Regulations which states:

14.23 (1) Every operator of materials handling equipment shall be instructed and trained by the employer in the procedures to be followed for

- (a) the inspection of the materials handling equipment;
- (b) the fuelling of the materials handling equipment, where applicable; and
- (c) the safe and proper use of the equipment.

The basis for this item of the safety officer's direction is that the operator of the front-end loader made an error during the operation of the equipment which resulted in an accident. According to the safety officer, the accident is a consequence of the insufficient training given to this employee. Therefore, for failing to provide this employee with additional training, the employer should be held responsible.

The written statement given by Mr. Joe Newell, Checker on "empty Containers" at the Terminal in question, is corroborated by the measurements taken after the accident and the photographs. On the basis of this evidence, a reasonable assumption can be made that the front-end loader moved forward to approach the truck with the container high in the air. Then, at some point during this movement, the mast was tilted forward and the pistons extended a full 32.5 inches. It is therefore during this forward movement that the front-end loader toppled over, injuring Mr. McDonald. Hence, the primary cause of the accident is the height of the load relative to the position of the mast. Therefore, Mr. Rose operated the front-end loader in a manner that is contrary to standard and prescribed operating procedures.

It seems to me that, while it is possible that additional training would have prevented the accident, it is reasonably certain that no accident would have occurred if the operator of the equipment had followed the prescribed procedure, as outlined in section 14.33 of the Regulations, which he failed to do.

Mr. Rose was trained, by a specialized organization, in the operation of a front-end loader and was graded "above average". I interpret the expression "shall be instructed and trained" in subsection 14.23(1) of the Regulations as a responsibility devolved upon the employer to ensure that a state of instruction and training exists for every operator of materials handling equipment. In my view, the requirement to have training or upgrading of the initial training finds particular support in this line of work where the machine, the environment and the load are constantly changing.

There is however no indication, in this provision, of what would constitute adequate instruction and training to attain the goal of "the safe and proper use of the equipment." The employer has therefore a major role in deciding what would be sufficient, in this instance, to satisfy the requirement of subsection 14.23(1) of the Regulations. In this case, the employer has submitted that, in addition to the formal training received by its employees, Halterm's employees are monitored and supervised on a regular basis. Furthermore, there has been no report submitted by Mr. Rose's peers that would indicate he required additional training. Had there been such reports, the employer stated they would have acted on them. I have no reason to doubt the employer in this instance. I am also satisfied that Mr. Rose was adequately informed and trained by his employer in the operation of a front-end loader.

On balance, I believe that this item of the direction must be deleted. To decide otherwise, I would have to ignore that the operator of the front-end loader contravened a prescribed standard which resulted in an accident and charge the employer with the full responsibility for the accident on the only basis that additional training was not given to Mr. Rose. This position would be, in my view, untenable.

Therefore, for the reasons given above, I hereby rescind the first item of this direction.

### **NOTIFICATION**

The violation identified in the second item of the direction is not challenged by the employer although Captain McGuiness stated the committee had been "alerted" to the accident. The evidence supported the safety officer's findings in this matter. Consequently, the gist of this portion of the direction will remain intact. I will nonetheless bring a correction to its wording and also vary it by specifying the corresponding power in the Code, in the following manner:

"The employer shall without delay notify the safety and health committee of an accident, occupational disease or other hazardous occurrence affecting any of his employees in the course of employment and the name of the person appointed to investigate it in accordance with the Canada Labour Code, Part II, paragraph 125(c) and the Canada Occupational Safety and Health Regulations, Part XV, Hazardous Occurrence Investigation, Recording and Reporting, paragraph 15.4(1)(b)."

### **SAFETY POLICY**

The third item of the direction states:

"All non-Halterm vehicle operators must be made aware of the employer's safety policy while on the terminal in accordance with the Canada Labour Code, Part II, subsection 125(v) (sic); and the Canada Occupational Safety and Health Regulations, Part XII, Safety Materials, Equipment, Devices and Clothing, paragraph 12.1(b)."

The employer correctly pointed out that he cannot literally comply with this item of the direction since the reference to paragraph 12.1(b) of that Regulation addresses safety equipment that must be worn to protect from a hazard. Captain McGuiness stated they comply with this requirement but that this was not the issue. In this case, the safety officer intended to make persons entering the Terminal, other than Halterm's employees, aware of Halterm's general safety policy.

The statement made in this item of the direction i.e "All non-Halterm vehicle operators..." is generic and addressed to the wrong employer. All non-Halterm vehicle operators are not necessarily vehicle operators to the employ of federal employers. In the cases where they are employed by federal employers, a direction could be given to those employers to ascertain their employees follow prescribed standards. In cases where the employers are governed by provincial legislation, then the Canada Labour Code, Part II does not apply. In those latter cases, Halterm Limited may still wish to protect itself, from a liability perspective, by including specifications in its contracts with these third parties to ensure they respect Halterm's safety policy. This would unquestionably be a wise decision given that Halterm Limited is responsible at all times for the safety and health of its own employees.

I am of the view that this item of the direction is, as written, non specific and effectively non enforceable. There are other provisions in the Code which, for example, may require the employer to post a copy of his general safety policy. However, this would not guarantee that all non-Halterm vehicle operators are aware of the policy.

For the above reasons, I hereby rescind the third item of the direction.

### **COMMITTEE PARTICIPATION**

The fourth and last item of the direction states:

"The safety and health committee shall participate in all inquiries and investigations conducted by an employer pertaining to Occupational Safety and Health in accordance with the Canada Labour Code, Part II, Paragraph 135(6)(e)."

The position of the safety officer in this matter is that no member of the committee was asked or, for that matter, is at any time allowed to participate actively in accident investigation. The safety officer interprets the role of the safety and health committee, in accident investigation, as being an active "member" of an investigation team, mandated by the Code to take part in all aspects of the investigation. Hence, the committee's role would not be limited to the review of findings, as claimed by the employer.

The employer's position can be summarized in the following terms. The employer has full responsibility under section 125(c) of the Code for investigating all accidents. Therefore the employer, through the qualified person, will carry out the investigation, will advise the committee of the accident and then will turn full disclosure of his investigation to the committee. Only then can the committee review the findings and make recommendations.

When asked whether the committee had rules of procedure for its operation that would assist the committee in accident investigation, Mr. Lacroix replied that "this has not been done because they feel that no member of that committee has that right". This position was later corroborated by Captain McGuinness who stated "Yes, as the employer, I am responsible to do the investigation... Then I perceive that I will not be calling a committee member and I have not done (it) in the past...".

There clearly exists much confusion respecting the interpretation to be given to the mandatory requirement stipulated under paragraph 135(6)(e) of the Code, which states:

"(6) A safety and health committee  
(e) shall participate in all inquiries and investigations pertaining to occupational safety and health ..."

The expression "A safety and health committee" means that the committee will act as a unit, an entity. However, in my opinion, it has never been the intention of Parliament or of the drafters of this legislation to have the whole committee present during an investigation. This would put an unacceptable burden on the employer and his/her operations. It is likely for this reason that the

legislator has included in the Code a provision under subsection 135(13) which provides for the safety and health committee to establish "such procedures for its operation as it considers advisable." The committee could then determine the manner in which it will participate in investigations. A member of the committee, whether employer or employee, would be designated by the committee and authorized to act on its behalf during these investigations.

The expression "shall participate in all inquiries and investigations" means there is a mandatory requirement on the safety and health committee to take an active part in all aspects of an accident investigation. This interpretation is based on the following analysis of the provision.

"Shall" is mandatory and in this case, because members of the safety and health committee are not liable, means that the committee need not question itself on whether it will participate in the activity mentioned above but will concern itself on how to achieve this participation. Hence, the rules of procedure for its operation will assist the committee in this endeavour. Also, because there is a mandatory requirement on the safety and health committee to participate in inquiries and investigations, any outside interference with this role of the committee is illegal and reprehensible.

The term "participate" is defined consistently by all dictionaries as meaning "to take a part in". In my view, much of the controversy over the interpretation of the expression "participate in all inquiries and investigations" stems from the emphasis placed on defining the term "participate" without regard to the activity involved.

The expression "inquiries and investigations" should be interpreted as an entity in order to be consistent with the french version of this provision which translates both terms by the single word "enquête". This is also consistent with the definition of the Concise Oxford dictionary of "inquiry" which means "an investigation, esp. an official one". The Shorter Oxford English Dictionary further defines inquiry to mean " 1 The action of seeking, esp. (now always) for truth, knowledge, or information concerning something, search, research, investigation, examination, and, 2 The action of asking or questioning; interrogation". The term "investigation" is also defined in this latter dictionary to mean "1 The action of investigating; search, inquiry; systematic examination; minute and careful research". It should be noted that other dictionaries consulted provided similar definitions for the above expression.

In my opinion, it is abundantly clear from those definitions that a member of the safety and health committee must be physically present during a hazardous occurrence investigation in order to take part in all the actions described above. How else could the committee fulfil its role unless one of its members is physically present to take part in seeking, searching, researching, examining systematically, asking questions and interrogating. All those actions are integral parts of an effective accident investigation.

Reviewing reports and making recommendations, which is the position advocated by the employer, is a separate responsibility of the committee which is prescribed by section 15.8 of the above Regulations. In my view, this activity cannot be substituted for the more active role of the committee of participating in inquiries and investigations.

For all the above reasons, I concur with the safety officer respecting the fourth and last item of the direction. A member of the safety and health committee must be physically present to take part in all inquiries and investigations. This item will therefore remain intact and I hereby confirm it as is.

To summarize the above, I hereby vary the direction given on the 7th day of October 1991 by safety officer Ron P. Thibault to Halterm Limited in the manner described above.

Therefore, the direction of safety officer Ron P. Thibault will read as follows:

"IN THE MATTER OF THE CANADA LABOUR CODE PART II  
(OCCUPATIONAL SAFETY AND HEALTH)

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

The undersigned Safety Officer, did, on the 13th day of September, 1991, attend at the work place operated by Halterm Limited, being an employer subject to the Canada Labour Code, Part II, at Pier "C" the said work place being sometimes known as Halterm Container Terminal and having conducted a hazardous occurrence investigation at the said work place; and being of the opinion that the following provisions of the Canada Labour Code, Part II are being contravened:

The employer shall without delay notify the safety and health committee of an accident, occupational disease or other hazardous occurrence affecting any of his employees in the course of employment and the name of the person appointed to investigate it in accordance with the Canada Labour Code, Part II, paragraph 125(c) and the Canada Occupational Safety and Health Regulations, Part XV, Hazardous Occurrence Investigation, Recording and Reporting, paragraph 15.4(1)(b).

The safety and health committee shall participate in all inquiries and investigations conducted by an employer pertaining to Occupational Safety and Health in accordance with the Canada Labour Code, Part II, paragraph 135(6)(e).

HEREBY DIRECTS the said employer pursuant to subsection 145(1) of the Canada Labour Code, Part II to terminate the contraventions no later than the 23rd day of October 1991."

Decision issued this 9th day of January, 1992.

Serge Cadieux  
Regional Safety Officer