

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

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

Appellant: Maritime Employers' Association
Montreal, Quebec
Represented by: Gérard Rochon

Interested Party: Syndicat des débardeurs du port de Montréal
[Port of Montreal stevedores' union]
Montreal, Quebec
Represented by: Bernard Paquet

Mis-en-cause: Jean-Marie Laurier
Manager
Laurentian District
Labour Canada

Before: Bertrand Southière
Regional Safety Officer

The hearing was held on August 14, 1990, November 6, 1990, January 16, 1991 and January 23, 1992 at the Regional Office of Labour Canada in Montreal.

Subject-matter of litigation

On July 10, 1989, towards 23:00, three employees of the Terminus Maritimes Fédéraux company refused to work, pursuant to the provisions of the Canada Labour Code. The three employees were Sylvain Charron, René Dicrocci and Denis Wolfe. The reason for their refusal was the insufficient lighting in the sector where they were working, namely an area situated between Sheds #41 and #42 of the Port of Montreal and the edge of the wharf (see D-51), where a ship was being loaded.

The company's Director of Operations, John Dalling, contacted Labour Canada in order to summon a Safety Officer to the spot to make a ruling. Pierre Morin, Labour Canada Safety Officer, arrived on the site at about 23:30. After a brief inquiry, he accepted the refusal to work and directed the employer to correct the situation. This instruction was confirmed in writing the next day, July 11, 1989.

The language of the direction was not specific and ordered the employer to "take immediate measures to guard against the danger". Thereafter, until the end of August 1989, discussions were held on several occasions between the employer and the Safety Officer concerning the interpretation of Part VI, **Levels of Lighting**, of the Canada Occupational Safety and Health Regulations, without an agreement being reached.

The purpose of these discussions was to determine whether the sector in question should be grouped with "Loading platforms, storage rooms and warehouses: docks, piers and other locations where packages and containers are loaded and unloaded" (Schedule II, item 3(b)¹ of the lighting regulations, SOR 86-304) or with "Building exteriors: storage areas in which there is a high or moderate level of activity (Schedule III, item 1.(d)(i) of the same regulation). Depending on the interpretation adopted, the level of lighting required is 10 decalux in the first case and 3 decalux in the second.

At the end of August 1989, Jean-Marie Laurier, manager of the Laurentian Regional Office of Labour Canada and Pierre Morin's supervisor, took over the file. A few days later, on September 5, he sent a letter to John Dalling of Les Terminus Maritimes Fédéraux, in which he stated:

"We are of the opinion that the provisions of item 3(b) of Schedule II of Part VI of the Canada Occupational Safety and Health Regulations apply and that a level of lighting of 10 decalux (...) is required for industrial areas where loading and unloading work is carried out, regardless of whether such industrial areas are inside or outside a building."

On September 18, 1989, the Maritime Employers' Association appealed Jean-Marie Laurier's decision contained in his letter of September 5, 1989.

Decision on the Preliminary Issue

The intervenor submitted that the appellant's appeal was null and void. First, the direction by Safety Officer Pierre Morin of July 11, 1989 could not be appealed because the statutory period for doing so, ie within 14 days of receiving the direction (section 146 of the Code), had expired. The September 5 letter of Jean-Marie Laurier was not a direction but rather an explanation of the Regulations provided by the manager.

The appellant does not dispute the decision of Safety Officer Pierre Morin concerning the refusal to work, nor does it dispute Pierre Morin's direction of July 11, 1989. It is conceded that the prescribed deadline had been exceeded. The appellant also concedes that the lighting was inadequate on the night of July 10 and that the refusal to work was justified. What is disputed is the employer's obligation, according to the letter of Jean-Marie Laurier, to maintain a level of lighting of 10 decalux in the area previously identified.

¹ 2(b) in original - Tr.

Safety officer Pierre Morin testified that he had prepared two documents subsequent to his investigation on the night of July 10, one entitled "Decision" (D-4) and the other "Direction". The latter accompanied a letter sent to John Dalling of Les Terminus Maritimes Fédéraux. This letter (D-3) reads as follows:

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

DIRECTION TO EMPLOYER UNDER PARAGRAPH 145(2)(b)

The undersigned Safety Officer did, on the 10th day of July 1989, attend at the work place operated by Les Terminus Maritimes Fédéraux, being an employer subject to the Canada Labour Code, Part II, at Shed 42E, Port of Montreal, Quebec, said work place being sometimes known as FEDNAV, and having conducted an examination at the said work place, and being of the opinion that the inadequate lighting and the absence of lighting in certain areas of the work place did constitute a danger to an employee while at work;

1. Hereby directs the said employer under paragraph 145(2)(b) (**here there is a handwritten correction indicating that the reference should be to paragraph 145(2)(a)**) of the Canada Labour Code to take immediate measures for guarding against the danger;

THE EMPLOYER IS FURTHER DIRECTED to take the above action no later than July 14, 1989;

THE EMPLOYER IS FURTHER DIRECTED, pursuant to paragraph 145(2)(b) of the Canada Labour Code, not to operate or make use of during the hours of darkness the area in respect of which this direction is made until the above direction has been complied with.

Issued at Montreal, this 11th day of July 1989.

Pierre Morin
Safety Officer

Document D-4 reads as follows:

"LABOUR CANADA

DECISION

IN THE MATTER OF THE CANADA LABOUR CODE, SECTION 145(2)(b), SUBSEQUENT TO A REFUSAL TO WORK BY SYLVAIN CHARRON AT TERMINUS MARITIMES FEDERAUX, SHED 42 EAST, PORT OF MONTREAL, MONTREAL, QUEBEC.

PROLOGUE

The undersigned Safety Officer, Pierre Morin, intervened with the parties on July 10, 1989, under the powers conferred by subsection 129(2) of the Canada Labour Code, Part II, RSC 1985 c. 39, section 20.

INQUIRY AND FACTS

The reason given by Sylvain Charron for his refusal was:

- inadequate lighting in the areas where most or all of our work is performed.

The undersigned noted that:

1. The level of lighting record for certain areas showed:

- 0 decalux for the exterior work area situated across from the ageilek² administrative office.
- 1 decalux for that part of the exterior yard facing Shed No 42.
- 11 decalux for the inside of Shed 42-B5, under the ceiling light.
- 0 decalux for the central part of the exterior yard.
- 0.8 decalux on the edge of the loading dock.

2. The average level of lighting required under schedule III, item 6.4, column 1, item 3 is 10 decalux for docks, piers and other locations where packages and containers are loaded and unloaded.

DECISIONS

The undersigned Pierre Morin rules:

That the handling work performed without adequate lighting at the loading, unloading and storage work place operated by Les Terminus Maritimes Fédéraux, Shed 42-E, Port of Montreal, constitutes a danger.

In witness whereof I have signed at Montreal, this 11th day of July, 1989.

Pierre Morin"

The testimony of Safety Officer Pierre Morin as well as that of John Dalling of Les Terminus Maritimes Fédéraux and André Lachaine of the Maritime Employers Association confirms that this document (D-4) should not have been sent to the employer but only to Sylvain Charron. In the file I was initially given, there was a copy of the decision sent to Sylvain Charron but no accompanying letter.

² ? - Tr.

The decisions and accompanying letters sent to Sylvain Charron, Denis Wolfe and René Dicrocci (D-48, D-49, and D-50) were only forwarded to me at the time of the testimony of Pierre Morin, August 14, 1989. This document (D-4) was brought to the employer's knowledge only when André Mathieu, the Regional Safety Officer originally assigned to this matter, sent a copy of it, in a letter dated December 29, 1989, (D-23) to counsel for the appellant. This was the only document issued in the wake of the refusal to work wherein it is stated that a level of lighting of 10 decalux is required.

The document entitled "Direction" (D-3) is therefore the only one that was sent to the employer and it contains no specific direction. It is therefore clear that before September 5, 1989, the employer believed in good faith that a level of lighting of 3 decalux was satisfactory. On August 17, 1989, John Dalling, on behalf of Les Terminus Maritimes Fédéraux signed an assurance of voluntary compliance (D-6) wherein he committed himself to maintaining a level of lighting of 3 decalux in the work place.

Jean-Marie Laurier's letter of September 5, 1989 (D-2) is therefore the first notice to the employer that Labour Canada considered the required level of lighting to be 10 decalux. The language used in this letter is peremptory and leaves no room for discussion. Moreover, it is specified at the beginning of the letter that discussions with the employer took place; the Department's position as set out in the letter is therefore a definitive one:

"Subject:Direction issued July 11, 1989 - Lighting

This letter is further to the discussions between your representatives and those of the Department, as well as our review of the considerations raised last week by your representatives, with respect to the situation mentioned above, and is intended to clarify our position, particularly with respect to the level of lighting required, which apparently has given rise to varying interpretations.

(...)

As to the matter of the level of lighting and in order to clear up any misunderstanding, we are of the opinion that the provisions of item 3(b) of Schedule II of Part VI of the Canada Occupational Safety and Health Regulations apply and require a level of lighting of 10 decalux (...) for industrial areas where loading or unloading work is carried out, regardless of whether these areas are inside or outside a building.

(...)

We hope that this will help to guide the steps that you will take to reach and maintain the required level of compliance and we are requesting you to inform us when this will be achieved."

It is interesting to compare the language of the this letter, particularly the second part, with that of section 145 of the Code:

"145(1) Where a safety officer is of the opinion that any provision of this Part is being contravened, the officer may direct the employer or employee concerned to terminate the contravention within such time as the officer may specify and the officer shall, if requested by the employer or employee concerned, confirm the direction in writing if the direction was given orally."

Moreover, the title itself of the letter "Direction issued July 11, 1989 - Lighting" clearly indicates the subject dealt with. Despite Jean-Marie Laurier's statement during his testimony that this letter was not a direction, its tone is that of a direction; there is no discussion of an administrative problem as might be expected between managers, but rather instructions are given; the employer is told what to do but given some time.

In his report of September 1, 1989 (D-7), Pierre Morin writes at the very end:

"On August 29, 1989, I was to hand over the file to Jean-Marie Laurier, the manager, who is in charge of it."

The manager thus substituted himself for the Safety Officer and took over his role: we should note in passing that Jean-Marie Laurier is also a Safety Officer.

For these reasons, I am of the opinion that the letter of September 5, 1989, sent by Jean-Marie Laurier to John Dalling was indeed a direction and that request for review of the Maritime Employers' Association is admissible.

ARGUMENTS

A preliminary argument advanced by the appellant has to do with Labour Canada's jurisdiction in this field. It is argued that, further to a memorandum of understanding between Labour Canada and Transport Canada, Transport Canada is responsible for safety and health regulations aboard ships and in ports in the neighbourhood of ships. Based on the regulations passed under the Canada Shipping Act, among others the Tackle Regulations, c. 1494 and the Safe Working Regulations, c. 1467, it is submitted that Transport Canada's jurisdiction extends to "any area on shore that is within the reach of any derrick, crane, or other hoisting equipment that is employed in loading or unloading the ship and the immediate approaches to such an area, but does not include any sheds, warehouses or any part of a wharf forward or aft of the ship's mooring lines." (Safe Working Regulations c. 1467, section 2, passed under the Canada Shipping Act.) In response to this argument, my role is not to uphold the memorandum of understanding but the Canada Labour Code: the memorandum is an administrative document and it is incumbent on the departments in question to settle the matter. As far as I am concerned, the Canada Labour Code applies to all work places under federal jurisdiction in Canada, including ports. The Code speaks of safety officers without distinction, whether they are employed by Labour Canada, Transport Canada or a province:

"140(1) The Department may designate any person as a regional safety officer or as a safety officer for the purposes of this Part."

Pierre Morin and Jean-Marie Laurier are safety officers and are therefore authorized to issue directions to any employer under federal jurisdiction. Therefore the directions issued by them in this case are valid within the meaning of the Act.

The plaintiff's second argument is to the effect that the Regulation that applies in this case is:

**REGULATIONS MADE UNDER PART IV OF THE CANADA LABOUR CODE
RESPECTING OCCUPATIONAL SAFETY AND HEALTH OF EMPLOYEES
EMPLOYED ON SHIPS REGISTERED IN CANADA OR ON UNCOMMISSIONED SHIPS
OF HER MAJESTY IN RIGHT OF CANADA AND EMPLOYEES EMPLOYED IN THE
LOADING AND UNLOADING OF SHIPS. (SOR 87-183)**

Part IV of this Regulation, Levels of Lighting, contains the relevant provisions. Nowhere in this part is there mention of the level of lighting on a wharf during the loading or unloading of a ship. Even the question of the level of lighting in the hold during these loading and unloading operations is not dealt with. I therefore conclude that in the matter at hand, namely lighting on wharves, Regulation SOR/86-304, the Canada Occupational Safety and Health Regulations, applies.

This question settled, the requirements of the Regulations with respect to the work place in question remain to be determined. It should be noted that Part VI, Levels of Lighting, of the Canada Occupational Safety and Health Regulations, was amended October 26, 1989, ie shortly after the direction issued by Jean-Marie Laurier. My ruling is therefore based on the Regulations as they were when the direction was issued: however, the ramifications of the Regulations as amended have been taken into account. Moreover, my argument relies on certain information presented at the time of the implementation of the amended Regulations.

At first glance, item 3(b) of Schedule II, (SOR/86-304) seems to apply to this case. It reads:

SCHEDULE II
AVERAGE LEVEL OF LIGHTING IN INDUSTRIAL AREAS

(...)

3. LOADING PLATFORMS, STORAGE ROOMS AND WAREHOUSES

(...)

(b) Docks, piers and other locations where packages and containers are loaded and unloaded

10 decalux³

The employer, however, contends that the relevant requirements are in item 1(c)(1) or in item 1(d)(1) of Schedule III, which reads as follows:

³ One decalux equals 10 lux; therefore 10 decalux = 100 lux

SCHEDULE III
AVERAGE AREAS OF LIGHTING - GENERAL AREAS

(...)

1. BUILDING EXTERIORS

(...)

(c) Areas used by pedestrians and mobile equipment in which there is

(i) a high or moderate level of activity
2 decalux

(ii) a low level of activity
1 decalux

(d) Storage areas in which there is

(i) a high or moderate level of activity
3 decalux

(ii) a low level of activity
1 decalux

The corresponding amended sections of the Regulations (SOR/89-515) read as follows:

SCHEDULE II - LEVELS OF LIGHTING IN INDUSTRIAL AREAS

1. LEVELS OF LIGHTING IN INDUSTRIAL AREAS

(...)

3. LOADING PLATFORMS, STORAGE ROOMS AND WAREHOUSES

(...)

(c) Docks (indoor and outdoor), piers and other locations where packages and containers are loaded and unloaded;

150 lux⁴

⁴ This is a significantly increased level; it was previously 100 lux.

SCHEDULE III - LEVELS OF LIGHTING - GENERAL AREAS

1. BUILDING EXTERIORS

(...)

(c) Areas used by pedestrians and mobile equipment in which there is

(i) a high or moderate level of activity
20 lux

(ii) a low level of activity
10 lux

(d) Storage areas in which there is

(i) a high or moderate level of activity
30 lux

(ii) a low level of activity
10 lux

For the following reasons, I am of the opinion that item 3(b) of Schedule II does not apply to the matter at hand:

1) All of the spaces described in Schedule II are spaces inside buildings; item 3(b) would seem to refer to the loading docks for trucks often found inside buildings or along an outside wall, and not to wharves for ships.

2. The English version of item 3(b) of Schedule II reads as follows;

3. LOADING PLATFORMS, STORAGE ROOMS AND WAREHOUSES

(...)

(b) Docks, piers and other locations where packages and containers are loaded and unloaded.

I do not believe that a maritime wharf is the same as a loading dock for trucks.

3. Under item 3(d) of Schedule II, the level of lighting in "areas ... where the goods are all of one kind" must be 30 lux (item 3(e) in the amended regulations). It has been shown that in the present case the goods in Sheds #41 and #42 consisted of "unitized pallets". These pallets are basically similar, with slight variations in size; their weight varies. They are therefore goods all of one kind and the above-mentioned item applies. At item 6(d) of the same Schedule, it is required that "Corridors and alleys that are used by mobile equipment only" have a level of lighting of 50 lux.

Thus the general level of lighting in sheds would be 30 lux, with the exception of the central aisles in which vehicles circulate, where 50 lux would be required. It seems illogical, under these circumstances, to require a level of lighting of 100 lux outdoors (150 lux in the amended regulations), ie a level of lighting higher outdoors than indoors. We might add that, technically speaking, it is desirable to maintain a uniform level of lighting in a work place.

4. When this part of the Regulations was last amended (October 1989), Labour Canada included as an appendix to the Regulations a Regulatory Impact Analysis Statement. In a section entitled "Anticipated Impact" at page 4588 of the Canada Gazette, Part II, Vol 123, No 23, it is stated in paragraph five that "The changes will probably generate certain costs for employers. The improved lighting levels in industrial loading and checking areas, described in items 3(a) and (c) of Schedule II could cost about \$1.7 million". In his testimony at page 216 of the depositions for November 6, 1990, Dominique Rheault, Head of Engineering for the Port of Montreal, quoted a figure of 3 to 5 million dollars to raise the level of lighting from 50 to 150 lux in the Port of Montreal alone. It would appear that these costs have not been included in the estimate prepared by the Department, particularly if we take the other ports in the country into account. We can therefore suppose that it was not the intention of the Department that item 3(c) in Schedule II should apply to the wharves of ports, with the same being true for item 3(b) of Schedule II in the previous version.

The Canada Labour Code was amended on March 28, 1978 (Canada Gazette, Part II, Vol 112, No 7, SOR/78-282) as follows:

"Part IV of the Canada Labour Code applies to and in respect of employment in the loading and unloading of ships in Canadian ports".

Therefore, such was not the case before.

In the original regulation on lighting safety, SOR/72-73, published in January 1972, we find in the schedule:

"2. The levels of illumination provided in warehouse, storage and transfer areas shall be as follows:

(...)

(e) in docks, piers, and similar locations where packages and containers are loaded and unloaded, 10 foot candles⁵;

Therefore, the same vocabulary was used then as now, even if maritimes wharves did not fall under Labour Canada's jurisdiction. Although maritime wharves are not under Labour Canada's jurisdiction now, it would appear that this was not consciously taken into account when the Regulations were amended.

⁵ A foot candle is approximately equal to 1 decalux or 10 lux.

6. In the Regulatory Impact Analysis Statement cited above, in the first paragraph of the part entitled "Description", we read: "The lighting regulations generally reflect national and international norms." The appellant has submitted in support of its position the recommendations of various organizations:

- International Labour Office: Safety and health in port handling operations; for work on wharves, 20 lux is recommended;
- Occupational Safety and Health Administration (US): Code of Federal Regulations, Title 29, Part 1917; a minimum of five foot candles is specified in "cargo transfer point" areas. Levels are less for other areas.
- Illuminating Engineering Society of North America: IES Lighting Handbook: this book recommends between 5 and 20 lux for work on a wharf; it is specified that these are minimum levels required to ensure employees' safety.

The levels recommended in other countries and by international organizations thus vary between 20 and 50 lux, and not 150 lux. The requirements of items 1(c) and 1(d) of Schedule III of the Regulations are thus closer to international standards than those of item 3(c) of Schedule II.

7. If we suppose for a moment that item 3(c) of Schedule II, which requires a level of 150 lux, applies in this case, we must also admit that the area in question fits the descriptions in items 1(c) and 1(d) of Schedule III, which require lighting levels of 20 and 30 lux respectively; I am of the opinion that in such a situation the less stringent requirement applies, namely that in Schedule III.

8. The appellant presented various arguments based on Standard RP-7 of the American National Standards Institute to the effect that:

- the minimum lighting required increases with age: over the years, the eye loses its sensitivity to light and the level of lighting must be increased to compensate;
- where good visibility is required, a minimum of 200 lux is necessary;
- in most industries, the recommended level for warehouses varies between 50 and 200 lux.

It remains true, however, that these standards are based on levels necessary for efficiency and comfort. As an appendix to this Standard, Table B-4 - "Categorization of port cargo handling and shipping facilities with recommended illuminance for safety" lists various levels between 5 and 50 lux. Since the purpose of the Regulations is to ensure safety and not efficiency or comfort, I am of the opinion that only the recommendations in Table B-4 are relevant.

The other documents from England and France only confirm the findings of the previous document, ie that levels of lighting between 20 and 50 lux are required to ensure the safety of personnel, but that higher levels increase efficiency and comfort. Since the purpose of the Canada Labour Code is to ensure the safety and health of employees, it is the recommendations in this respect and not those concerning productivity or comfort that we must adopt.

Decision

Therefore, the direction issued by Jean-Marie Laurier of September 5, 1989 concerning levels of lighting at the facilities of Les Terminus Maritimes Fédéraux at the Port of Montreal is hereby rescinded and replaced by the following:

In the sheds where bulk goods or goods all of the same kind, as for example the unitized pallets, the level of lighting must meet the requirements of item 3(e) of Schedule II, ie 30 lux;

In the central aisles of these sheds, the level of lighting must meet the requirements of items 6(c)(ii) or 6(d) of Schedule II, ie 50 lux;

In the area outside the shed generally consisting of the area between the wall of the shed and the edge of the wharf, where loading vehicles such as fork lifts circulate, the level of lighting must meet the requirements of item 1(c)(i) of Schedule III, ie 20 lux; where there is a warehouse, temporary or not, the lighting level must be 30 lux, under item 1(d)(i).

In response to a question raised earlier, namely to what areas do the requirements of the Regulations apply, we can say that the regulations apply to the work area, ie the area where the handling machines and the employees circulate in the course of their work; it is therefore not necessary to illuminate every remote corner, but only the work area; if the work area location changes, for example if a ship is moored on another spot, the employer is required to ensure that the required level of lighting is maintained in the new work area;

These levels of illumination are minimums and their purpose is to ensure employee safety; a higher level may be required for visual comfort. I would also point out that these levels must actually be met, in spite of dirty or old bulbs, and are not just targets to be aimed for.

Paragraph 6.11(1) of the Regulations is applicable; it reads as follows:

"6.11(1) Subject to subsections (2) to (4), the level of lighting at any place at a task position or in an area that may be measured for the purposes of section 6.3 shall not be less than one third of the level of lighting prescribed by this Part for that task position or area."

Paragraph 14.13(1) is also relevant to the present circumstances; it reads as follows:

"Subject to subsection (2), where mobile equipment is used or operated by an employee in a work place at night or at any time when the level of lighting within the workplace is less than one dalx, the mobile equipment shall be:

- (a) fitted on the front and rear thereof with warning lights that are visible from a distance of not less than 100 m; and
- (b) provided with lighting that ensures the safe operation of the equipment under all conditions of use."

Issued at Hull, Quebec, this second day of March 1992.

Bertrand Southière
Regional Safety Officer