Decision No. 98-005

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:	Bunge du Canada Ltée Quebec City, Quebec Represented by: Conrad Desnoyers
Respondent:	Canadian Union of Public Employees (CUPE) Represented by: Paul Gervais
Mis-en-cause:	Gilles Marcotte Safety Officer Transport Canada
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada

The hearing was held in Quebec City, Quebec, on March 2, 1998.

Background

On October 17, 1997, Mr. André Gauvreau, a longshoreman employed by Bunge du Canada Ltée, a stevedoring company, made a refusal to work under the Canada Labour Code, Part II (hereinafter referred to as the Code). The reason for the refusal, as set out in the Refusal to Work Registration form, is as follows:

> Asked Jacques Langlois for the material safety data sheet at 8:30 in the morning to 12:45 and he did not have it I stopped working and called Transport Canada. (sic)

Gilles Marcotte, the safety officer, intervened in this case at 1:10 p.m. the same day. He arrived at the stevedoring company's work place at section 28 of the Port of Quebec where the ship M.V. H-Star was docked. He investigated Mr. Gauvreau's refusal to work.

Deposition by the safety officer

The investigation report submitted by the safety officer sets out the events that led to the issuance of the directions contested as follows:

At the request of the master of the vessel via the shipping agency, company XXX was authorized to carry out the fumigation of hold number 3 of the ship M.V. H-Star and to monitor the use of fumigation products in accordance with accepted trade practices and also to ensure that the site was not dangerous before allowing the ship's crew or the Bunge employees to work in the aforementioned hold.

After the fumigation had been completed and the gas evaporation time had elapsed, that is, by the time we had arrived at the site around 1 p.m., company XXX had issued a certificate confirming that the hold was danger-free with a reading of 0.5 PPM (admissible value must be a maximum of 3 PPM).

Mr. Gauvreau and Mr. Berthiaume told us that a request had been made to Mr. Langlois for a material safety data sheet around 8:30 a.m. The product data sheet was not available until 12:45 p.m.

The owner's representatives admit that the data sheet was given to the complainant around 12:45.

Upon our arrival around 1:10, we noted that the data sheet was available, and we questioned XXX's chemist, Mr. Sylvain Gauthier, agronomist, certificate C700005. He stated that, while the fumigation was being carried out, instructions to protect the crew and longshoremen were posted. The material safety data sheet was provided upon request by Bunge.

The safety officer stated at the hearing that his investigation had been carried out in an atmosphere of discord between the parties. While he thought that it was not dangerous for the longshoremen to work after the fumigation, since a certificate (ANNEX A) had been issued by an authorized chemist, he was of the opinion that the employees were entitled to know details about products used before working around the hold of a ship that had been treated.

A direction (ANNEX B) for danger was issued to the company.

Employer's arguments

Mr. Desnoyers presented a submission to the safety officer in which he set out his reasons for contesting the decision of danger and the direction issued. He stated the following:

a) Company XXX carried out the fumigation at the request of a shipping agency that had been authorized by the shipowner.

b) The fumigation had been carried out in accordance with the control standards on the use of fumigants on vessels established by Transport Canada and the Canada Labour Code.

c) Once the fumigation was completed and the gas evaporation time elapsed, company XXX conducted gas detection tests and, based on the results, issued a certificate specifying that a reading of 0.5 PPM had been recorded. (The admissible value must be a maximum of 3.0 PPM.)

d) Once the certificate was issued, the crew was able to go back on board; Mr. Marc Poitras from the Department of Agriculture Canada went down into hold #3, which had been fumigated, to conduct a health inspection, without having to wear any specific equipment.

e) At 12:45 p.m., the vessel was delivered to the shipping agency ready for loading. The shipping agency then advised our stevedoring office to start loading at 1:00 p.m.

f) At 1:00 p.m., we started loading the ship assuming no liability with respect to the stages that had been carried out earlier. We were no longer obligated to provide a material safety data sheet for the fumigation product since we were not liable for the fumigation work.

g) The shipping agency delivered us the ship with a "GAS FREE / CLEARANCE CERTIFICATE" issued by company XXX, and the certificate was presented to the longshoremen before they started work. The only liability that we acknowledge was to ensure that the certificate was issued.

In addition, in your decision, you indicated that, pursuant to subsection 129(2), the employees are entitled to know details about products used before entering the hold of a ship that has been treated. The results of your investigation should have shown that the longshoremen did not have to go down into the ship's holds but that their work was limited to the deck in the open air.

In conclusion, in view of the above, we believe that the longshoremen acted in an abusive manner by refusing to work, and that your investigation did not reveal all of the facts that should have been taken into consideration in your decision.

Mr. Desnoyers stated that a material safety data sheet had existed at the time of Mr. Gauvreau's refusal and that, while it may have been somewhat difficult to read and was only in English, it was given to the longshoremen. In addition, the certificate was nevertheless a very serious document, which had been issued by a specialized, certified firm.

Arguments for the employee

Mr. Gervais confirmed that obtaining the material safety data sheet was essential to Mr. Gauvreau's safety since it is in this data sheet that the risks and the precautions to be taken are set out. According to Mr. Gervais, by asking for the material safety data sheet pertaining to methyl bromide, the product used to fumigate the ship, Mr. Gauvreau wanted to know and assess the toxicity and risks associated with the product, the routes of entry, the safety measures to be taken and the protective equipment required and, in the final analysis, everything a person needed to know to work in complete safety with the product. According to Mr. Gauvreau, who is also the work place union representative, the certificate issued by company XXX cannot replace the material safety data sheet.

Mr. Gervais confirmed that Mr. Gauvreau's employer is Bunge du Canada Ltée and not company XXX, and consequently it is up to the employer to take measures to protect the employee. Mr. Gauvreau stated that he had heard that the product was highly toxic and wanted to find out the

risks and determine whether there was any danger if he were exposed to this product. There may be a danger in working with this product, and it is with the material safety data sheet that he would be able to assess the risk. The fact that a certificate is issued does not tell an employee anything about the risks in working with the product and the measures to be taken to protect himself.

The "material safety data sheet" that was eventually given to Mr. Gauvreau around 1:30 was not very legible and was only in English; it did not tell Mr. Gauvreau about the Threshold Limit Value (TLV) or the specific precautions to be taken.

Decision

The point to be resolved in this case is as follows: When the safety officer conducted his investigation, was there a danger to Mr. Gauvreau in working on the ship such that the safety officer was justified in issuing a direction for a dangerous situation under paragraph 145(2)(a) of the Canada Labour Code, Part II (hereinafter referred to as the Code), in order to protect the employee?

Mr. Desnoyers's defence was based almost entirely on the obtaining of the certificate issued by company XXX and the fact that the document released him of all liability. I am not as convinced of the validity of this argument as he is, but I do find that it has merit. During the hearing of this case, it was shown that there were some points of confusion regarding the certificate, on which I will not elaborate here. Mr. Bureau from company XXX assisted us in clarifying this aspect of the case. Accordingly, the following was established:

i) the gas-free certificate was issued under the *Ship Fumigation Regulations*, DORS/89-106, February 16, 1989, under the *Canada Shipping Act.*
ii) the TLV for methyl bromide set out in the *Ship Fumigation Regulations* is 5 PPM[1];
iii) the notion of "gas-free" is defined in the Regulations and "means a space in which the presence of a fumigant cannot be detected by a fumigator-in-charge or other competent person using appropriate detection methods and equipment."

It is not clear whether the safety officer had the information on hand when he investigated Mr. Gauvreau's refusal to work. In any event, the safety officer's investigation is governed by section 129 of the Code. Subsections 129(2) and (4) are of particular relevance to the circumstances in this case. The provisions read as follows:

> *129(2) A safety officer shall, on completion of an investigation made pursuant to subsection (1), decide <u>whether</u> or not*
> *a) the use or operation of the machine or thing in respect of which the investigation was made constitutes a danger to any employee, or*
> *b) <u>a condition exists in the place</u> in respect of which the investigation was <u>made</u> <u>that constitutes a danger to the employee</u> referred to in subsection (1),*

1 It should be noted that, in its publication entitled Threshold Limit Values and Biological Exposures Indices, published in 1997, the American Conference of Governmental Industrial Hygienists (ACGIH) **lowered the TLV for methyl bromide from 5 PPM to 1 PPM**. This change was announced in the 1996 publication. However, it must be recognized that the *Ship Fumigation Regulations* adopted a value of 5 PPM only with no reference to the ACGIH.

and he shall forthwith notify the employer and the employee of his decision.

(4) Where a safety officer decides that the use or operation of a machine or thing constitutes a danger to an employee or that a condition exists in a place that constitutes a danger to an employee, the officer shall give such direction under subsection 145(2) as the officer considers appropriate….

The term "danger" is defined in subsection 122(1) and means

"any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected."

In order to issue the directions under subsection 145(2) of the Code that he issued, the safety officer had to conclude that there was a danger as defined in the Code and that it actually constituted a danger. To reach this conclusion, the safety officer's decision had to be based on verifiable facts at Mr. Gauvreau's work place. Consequently, the first question (in two parts) that the safety officer had to ask himself to determine whether the employee was in danger by exposure to methyl bromide was as follows: What is the Threshold Limit Value (TLV) of this gas as it applies to longshoremen, and what concentration of this gas is actually present in Mr. Gauvreau's work area?

The role of the safety officer when carrying out an investigation is to gather the information that will enable him to make a sound decision that is reasonable under the circumstances. The officer is entitled to expect that the specialist on site will provide him with reliable information. However, when one party contests such information, he must check the information himself and ensure that it is correct. Thus if the safety officer had consulted his ACGIH handbook, *an essential tool in this case*, he would have noticed a contradiction between the TLV as reported by the ACGIH and the TLV indicated on the certificate. If he had looked closely at the "material safety data sheet," he would have quickly realized that what was given to the employee was in fact merely a label that indicated, unfortunately in English only, "READ LABEL BEFORE USING" with very little information useful to the employee. The investigation carried out by the safety officer must allow him to gather his own information or, if necessary, closely check the information obtained. To do this, the safety officer has all the powers necessary under section 141 of the Code to complete his investigation.

As far as I am concerned, I must also consider the situation that existed at the time of the safety officer's investigation and determine whether a real danger existed. The investigation that I conducted in this case has allowed me to state the following:

1. The TLV for methyl bromide, as prescribed in the Canada Occupational Safety and Health Regulations, paragraph 10.19(1)(a) of Part X (Hazardous Substances) of these Regulations, is 1 PPM. The value is set by the American Conference of Governmental Industrial Hygienists in its publication entitled Threshold Limit Values and Biological Exposures Indices, published in 1994-1995, as amended from time to time.

It is important to note that the M.V. H-Star is a foreign vessel. Consequently, the *Marine Occupational Safety and Health Regulations* do not apply in this case. However, the Canada Occupational Safety and Health Regulations do apply to longshoremen when they are working on land. Paragraph 10.19(1)(a) applies in this case since it establishes, with respect to the notion of danger, a minimum standard that is valid at all times and in any work place.

2. Analysis of the samples taken in hold #3 of the M.V. H-Star shows that it contained 0.5 PPM of methyl bromide, or fifty per cent (50%) of the permitted value in light of item #1 above. The chemist from company XXX certified in writing at the request of the regional safety officer that in actual fact three samples were taken in hold #3 using Drager tubes, and not just one as the certificate implied, and that the results were 0 PPM, 0 PPM and 0.5 PPM. No evidence was presented that would lead to me to doubt this statement. Consequently, I conclude that gas was present, contrary to what is stated in the certificate, but not in a quantity greater than the TLV.

3. The longshoremen, including Mr. Gauvreau, did not have to go down into the holds of the ship, and their work was limited to remaining on the deck in the open air, which constituted their place of work.

I also noted two other important facts that deserve particular attention, as follows:

4. The material safety data sheet that was given to Mr. Gauvreau was in fact merely a label, in English only; it was practically illegible and intended for the specialist carrying out the fumigation using methyl bromide. Consequently, Mr. Gauvreau never received a material safety data sheet or any other technical document that might have been of any use in informing him of the risks associated with exposure to this gas, a very disturbing situation in my opinion.

5. The safety officer stated that he had determined as a result of his investigation that there was no danger to the longshoremen but that he nevertheless issued a direction because in his opinion the employees were entitled to know the risks to which they were exposed.

<u>On the basis of facts 1, 2 and 3 above</u>, I conclude that there was not an excessive concentration of methyl bromide in Mr. Gauvreau's work place at the time of the safety officer's investigation. Consequently, there was actually no danger in Mr. Gauvreau's working on the deck of the ship on October 17, 1997. If there is any doubt about the method of analysis and the number of samples taken to determine the concentration[2] of gas in hold #3, it is quickly dispelled when we consider that Mr. Gauvreau did not have to work in the hold.

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2 Under the Canada Occupational Safety and Health Regulations, it is the ACGIH that sets the exposure standards. This organization refers to the "TLV-TWA" exposure level, which is based on exposure for eight hours. The *Ship Fumigation Regulations* require only one TLV measurement, which allows more leeway in the analytical methodology. The analytical method for determining the "TLV-TWA" requires more rigorous analysis and a larger number of samples.

On the basis of facts 4 and 5 above, I conclude that there were grounds for determining that the Code was contravened because of the fact that the employer failed to "ensure that each employee is made aware of every known or foreseeable safety or health hazard in the area where that employee works" (paragraph 125(s)). The safety officer was authorized to issue a direction under subsection 145(1) of the Code for such a contravention but he chose to take other action. In addition, it is important to emphasize that, when the regional safety officer takes action under section 146 of the Code, he does not have the authority to issue a new direction as a result of his investigation, merely to confirm, rescind or vary the direction under review. I therefore cannot correct this situation of non-compliance.

For all the reasons indicated above, **I RESCIND** the direction issued under paragraph 145(2)(a) of the Code on October 28, 1997 by safety officer Gilles Marcotte to Bunge du Canada Ltée.

The parties have asked me to comment on the events that took place that day and to let them know their responsibilities in such a situation. I commend this initiative on their part, but I must decline to do so, as it goes beyond the role assigned to me by the legislator. I encourage them to contact the appropriate authorities - Transport Canada and Human Resources Development Canada (HRDC) - to ask about services that may be available to them and make use of these services. In the light of what has been reported to me, it is obvious that a number of errors were made on both sides in this case. It would be advisable to review this case in detail, with the assistance of specialists, in order to ensure that everyone is aware of his or her rights and responsibilities.

Issued on May 4, 1998.

Serge Cadieux
Regional Safety Officer

ANNEX A

Date 17.10.97
Certificate No. B-24822

GAS FREE/CLEARANCE CERTIFICATE

VESSEL NAME: M/V H-Star

LOCATION: Port of Quebec

We certify that the following compartments or spaces are X gas free/ ____clear and safe for workers

Description	Method used	Reading (ppm)	Time
Hold # 4	Halide Detector	0	12:40
Hold # 3	Drager Tube	0.5	12:30
Hold # 2	Halide Detector	0	12:15
Hold # 1	Halide Detector		12:10
Every rooms of the Engine Room	Halide Detector	0	12:05
Accomodation	Halide Detector	0	12:00

Name of toxic gas: Methyl Bromide

Safe Level: (TLV: 3ppm) (STEL: 15 ppm)

This is to certify that the referenced vessel is X gas free or __ clear and safe to enter at 12:45 p.m.; october 17th 1997.

Fumigator's endorsement: This is to certify that I have examined and tested all spaces in the foregoing list in accordance with the "Standard for the control of fumigant gas on vessels under fumigation adopted by Transport Canada and Health regulation of Canadian Labor Code" and have found the condition of each to be in accordance with above designation. This certificate is based on conditions existing at the time the inspection herein set forth was completed and is isssued subject to compliance with all qualifications and instruction.

Safe for workers: Means that in the compartment or space so designated: 1-toxic fumigant in the atmosphere are within the permissible concentration and, 2-the residues cannot produce toxic gas under atmospheric conditions as directed on the gas free certificate, 3-the oxygen content of the atmosphere is at least 19.5% and not more than 20% by volume.

Note:_____

(signed)
Sylvain Gauthier
Certified fumigator
Certificate #: C700005

(signed)
Master of vessel

ANNEX B

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)

The undersigned safety officer did, on the 17th day of October 1997, attend at the work place operated by Bunge du Canada Ltéé, being an employer subject to the Canada Labour Code, Part II, at 300 Dalhousie Street, Port of Quebec, P.O. Box 2537, Quebec City, Quebec G1K 7R3, the said work place being located in section 27 of the Port of Quebec. After inspecting the said work place and considering that a product for fumigation of the ship's hold was used, thereby constituting in some circumstances a danger to one or more employees while at work.

The refusal to provide the workers with the material safety data sheet describing the procedures and precautions relating to use of this product constitutes a danger.

Hereby directs the said employer, pursuant to paragraph 145(2)(a) of the Canada Labour Code, Part II, to take measures immediately for guarding the source of danger.

Issued at Quebec City, this 28th day of October 1997.

Gilles Marcotte
Safety Officer
No. 3028

Decision No.: 98-005

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Bunge du Canada Ltée
Quebec City, Quebec

Respondent: Canadian Union of Public Employees (CUPE)

KEYWORDS

Material safety data sheet, methyl bromide, TLV, certificate, foreign vessel, refusal to work, fumigation.

PROVISIONS

Code: 122(1), 129(2), 129(4), 141, 145(1), 145(2)(a)
COSHR: 10.19(1)(a)

SUMMARY

A foreign ship, the M.V. H-Star, was fumigated with methyl bromide. A longshoreman who was supposed to work on the ship asked for the material safety data sheet for this toxic product but had to refuse to work before receiving what proved to be an illegible label, in English only, containing little information useful to the employee. The safety officer who investigated the matter was of the opinion that there was no danger to the employee since a gas-free clearance certificate had been issued by a specialist firm, but nevertheless issued a direction for danger because the employees were entitled to know the risks to which they were to be exposed. On review, the Regional Safety Officer noted several contradictions in the certificate but decided that the refusal to give the employee a material safety data sheet was instead a contravention of the Code and not a danger in itself. The Regional Safety Officer determined that in actual fact the concentration of methyl bromide in the ship's hold was lower than the ACGIH standard and that the employees did not have to work in the ship's hold, but only on the deck in the open air. The Regional Safety Officer **RESCINDED** the direction.