

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: Neptune Bulk Terminals (Canada) Ltd.
Vancouver, British Columbia
Represented by: Mr. Gibson, Counsel

Respondent: International Longshoremen's and Warehousemen's Union
Represented by Al. LeMonnier
Chairperson, Health and Safety Committee
Local 500

Mis en cause: Lyn Peters
Safety Officer
HRDC

Before: Doug Malanka
Regional Safety Officer
Human Resources Development Canada

Background

In May of 1996, Mr. J. Variah, employee co-chair of the Neptune Bulk Terminals Limited safety and health committee, contacted safety officer Lyn Peters at Human Resources Development Canada for clarification of subsection 9.40(f) of the Canada Occupational Safety and Health (COSH) Regulations. Specifically, Mr. Variah wanted to know if this subsection required the employer to provide separate tables and chairs in the cafeteria as opposed to the single construction table and bench units found at Neptune Bulk Terminals Ltd. since 1983.

Safety officer Peters wrote to Mr. Variah on July 31, 1996, and provided him with a copy of a departmental interpretation on the section. The interpretation confirmed that the definition of "chair" in French and English language dictionaries suggest that single construction table and bench units would not meet the requirements in subsection 9.40(f) of the COSH regulations. However, it qualified that the table and bench units probably met the intent of the regulations and noted that the pre -1989 regulations permitted variations to separate tables and chairs. Safety officer Peters indicated in her letter of reply that she hoped that the information would help the safety and health committee at Neptune Bulk Terminals Ltd. to resolve the issue through consensus.

In August of 1997, Mr. Variah complained to safety officer Peters that the safety and health committee had been unable to resolve the matter concerning the table and bench units in the lunch room. Safety officer Peters visited the company on August 22, 1997, and accepted an assurance of voluntary compliance (AVC) signed by the employer which covered several safety and health issues including the lunch room table and bench units. Neptune Bulk Terminals Ltd. later confirmed to safety officer Peters that they believed the units to be in compliance with the Code and COSH Regulations. On November 13, 1997, safety officer Peters issued a direction pursuant to subsection 145.(1) and ordered Neptune Bulk Terminals Ltd. to terminate the contravention of subsection 9.40(f) no later than December 12, 1997.

On November 27, 1997, the employer called the office of the Regional Safety Officer and requested a review of the direction pursuant to section 146 of the Code. A fax confirmed the request the following day. A review hearing was subsequently conducted on February 27, 1998, in Vancouver, B.C.

Preliminary Hearing

On December 22, 1997, a pre-hearing by telephone conference call was held at the employer's request to review the compliance date portion of the direction. Based on the statements and evidence submitted by the parties, and the safety officer's opinion that the safety and health of employees would not be adversely affected by my varying the compliance date to coincide with the date when I will have reviewed the rest of the direction and issued my written decision, I so varied the direction.

Preliminary Objection

At the hearing, Mr. LeMonnier, employee spokesperson, lodged a preliminary objection stating that I did not have jurisdiction to hear the case because the 14 day time limit specified in subsection 146.(1) for requesting an appeal was exceeded. He noted that the safety officer's direction was dated November 13, 1997, and that, while the letter from Neptune Bulk Terminals Ltd. requesting the Regional Safety Officer to review the direction was dated November 27, 1997, it was only faxed to Regional Safety Officer S. Cadieux on November 28, 1997. He said that, if one counts the day of the direction, as specified in subsection 146.(1), then the appeal period was exceeded by two days.

Safety officer Peters clarified that her direction was issued on November 13, 1997, but only served to Neptune Bulk Terminals Ltd. on November 14, 1997. Mr. Gibson confirmed that the direction was received at Neptune Bulk Terminals Ltd.'s registered and records office on November 14, 1997. He also reminded me that Mr. Darren Parry of Neptune Bulk Terminals Ltd. spoke to Ms. Paris, secretary, office of the Regional Safety Officer, on November 27, 1997, and orally requested a review of the direction. Mr. Parry confirmed his request by facsimile message the next day, November 28, 1997.

For determining if I have jurisdiction to hear the case I refer to subsection 146.(1) of the Canada Labour Code and subsection 27.(5) of the Statutory Instruments Act, 1985, c. 1-21. According to subsection 146.(1) of the Canada Labour Code:

“146.(1) Any employer, employee or trade union that considers himself or itself aggrieved by any direction issued by a safety officer under this Part may, **within fourteen days of the date of the direction**, request that the direction be reviewed by a regional safety officer for the region in which the place, machine or thing in respect of which the direction was issued is situated.” (Emphasis Added)

Subsection 27.(5) of the Statutory Instruments Act, 1985, 1-21 specifies:

“27.(5) Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day. R.S., c.I-23, s.25”

Taking these two provisions into account, I conclude that the day the direction is issued is not included in the calculation of the 14 days so that the last day for appealing the direction in this case was November 27, 1997. Since Mr. Perry verbally communicated his request for appeal to Ms. Paris on November 27, 1997, it is my decision that I have jurisdiction to review the direction.

Having responded to the preliminary question of jurisdiction, I now turn my attention to the direction itself.

Safety Officer

The report by safety officer Peters forms part of the file and will not be repeated here. A copy of her direction is attached as Appendix.

Safety officer Peters testified that she has been responsible for administering the Code in respect of Neptune Bulk Terminals Ltd. facility since the early 1990's. During that period of time she inspected the site many times and attended several safety and health committee meetings there. During her visits to the workplace she noticed that the table and bench units in the lunch room did not comply with the regulations but did not take any action prior to Mr. Variah's complaint. This was because she wanted advice from her office on interpreting subsection 9.40(f).

She confirmed that Mr. Variah first raised the issue with her in May of 1996, and then later in July of 1996. He mentioned to her that there was an ergonomic problem with the benches in the lunch room and that employees found them uncomfortable. He requested an interpretation of subsection 9.40(f) of the COSH Regulations relative to the table and bench units.

For this, she consulted Mr. Joe Sullivan, her Technical Advisor, and other safety officers. She learned from them that an Occupational Safety and Health Program Advisor in Ottawa had previously provided an interpretation on this subsection. The interpretation provided concluded that, given the actual wording in subsection 9.40(f), the employer was probably in contravention of the regulation. However, the author of the document also opined:

“I am inclined to think that the intent of the regulation is to enable employees to have some form of seating in the lunch room and that a bench is acceptable to that end. This opinion is reinforced by the previous Sanitation Regulations

(SOR/DOR/79-891) provision on that subject, requiring at paragraph 60(f) that the lunch room be furnished with tables and chairs or other equivalent facilities.”

Safety officer Peters explained that her July 31, 1996, letter of reply to Mr. Variah essentially reprinted the contents of the interpretation, and clarified that none of the opinions expressed in the letter were her own. She said she expected Mr. Variah would take the interpretation to the safety and health committee and that the matter would be resolved there.

Later, Mr. Variah advised safety officer Peters that the issue was not resolved by the safety and health committee. On August 21, 1997, she visited the workplace and presented the employer with an AVC which noted among other things that chairs are not provided in the lunch room as specified in subsection 9.40(f). She subsequently issued a direction to Neptune Bulk Terminals Ltd. on November 13, 1997, because the company failed to take action pursuant to the AVC.

In response to Mr. Gibson, safety officer Peters confirmed that she did not regard the matter as a comfort issue and that she issued the direction to Neptune Bulk Terminals Ltd. based on the word “chair” in subsection 9.40(f). She said that the matter was raised to her as an ergonomic complaint, but there are no specific ergonomic regulations made pursuant to the Code. She acknowledged that she is not qualified to comment on the ergonomic design of the table and bench units, but held that the units may not be ergonomically appropriate for employees as indicated by the employee occupational safety and health complaints.

Employer Position

Prior to the hearing, the employer submitted documents in support of its request for review of the direction. In addition, Mr. Gibson tabled two other documents at the hearing entitled, “Employer’s Book of Documents, Volume 1” and “Employer’s Outline Of Argument and Brief Of Authorities, Volume 2.” They form part of the file and will not be repeated here. Instead, I will refer to them in the decision part of the report.

Mr. Taylor, Operations Manager, Neptune Bulk Terminals Ltd., testified that he has worked for the company and been a safety and health committee member for approximately 10 years. He recalled that the issue of the lunch room table and bench units was first raised in 1996. The company was modifying its locker rooms and brought its plans to the safety and health committee for comment. He said that discussions led the group to a review of the COSH Regulations. According to Mr. Taylor, it was then that employees noted subsection 9.40(f) and asked for chairs in the lunch room. He said the issue was not related to any occupational safety and health concern.

Mr. Taylor contended that Mr. Variah never told the safety and health committee that an employee returning to work following recovery from a back injury had complained about the tables and bench units when the units were discussed at the February 1997 safety and health committee meeting. He said that accommodations could have been made for the employee if it had been raised.

Employee Position

Mr. LeMonnier tabled a report at the hearing. The document forms part of the file and will not be repeated here.

Mr. Variah said that he has worked at Neptune Bulk Terminals Ltd., for approximately 5 years and has been a co-chair of the safety and health committee since 1996. He said that he first raised the matter with safety officer Peters after receiving a complaint from a worker who had just returned from a disabling injury to his back. The employee complained that the table and bench units were uncomfortable because of his inability to move around on the bench, and because of the angle of the back rest to the seat. He added that other employees had also complained to him concerning the table and bench units.

He also testified that he first raised the employee complaint at the safety and health committee meeting in February of 1997, when the table and bench units were discussed. He said that he complained to safety officer Peters after the employer denied the request for chairs at the March, 1997, meeting of the safety and health committee.

Decision:

Under subsection 145.(1) of the Code, a safety officer is authorized to issue a direction where the officer is of the opinion that any provision of the Part is being contravened. In my view, the issue that I must decide in this case is whether the table and bench units found in Neptune Bulk Terminals Ltd. lunch rooms comply with subsection 9.40(f) of the COSH Regulations relative to the word “chairs” used therein.

Mr. Gibson first argued that I should rescind the direction because:

1. The table and bench units comply with subsection 9.40(f) or the COSH Regulations;
2. The direction is at odds with HRDC’s policy of ensuring that the COSH Regulations are consistently applied;
3. Retention of the units would not place the safety and health of any Neptune employee in jeopardy; and
4. Replacing the units with tables and chairs would have detrimental effects upon Neptune and its employees.
5. In the alternative, he argued that I should vary the direction so as to “grandfather” Neptune’s units until such time as they are replaced by the Company in the normal course; or that I should vary the direction so as to give Neptune sufficient time to comply with it.

With regard to his first argument that the table and bench units comply with subsection 9.40(f), Mr. Gibson held that the word “chair” in subsection 9.40(f) must be interpreted to include a “bench” to be consistent with the purpose of the legislation. Otherwise, he opined, the subsection is ultra vires. To justify interpreting subsection 9.40(f) in this matter, he referred to several examples of jurisprudence. According to the jurisprudence cited, where the language or terminology used in legislation is unclear, ambiguous or doubtful, the words or phrases must be

interpreted in a manner consistent with the purpose of the legislation, even if the meaning assigned is at odds with the definition commonly found in the dictionary.

Mr. Gibson also cited the letter of interpretation that safety officer Peters provided to Mr. Variah on July 31, 1996. He said that this shows that the meaning of “chair” includes a “bench”. In the letter, the author stated:

“...I am inclined to think that the intent of the regulation is to enable employees to have some form of seating in the lunch room and that a bench is acceptable to that end. This opinion is reinforced by the previous Sanitation Regulations (SOR/DOR/79-891) provision on that subject, requiring at paragraph 60(f) that the lunch room be furnished with tables and chairs or other equivalent facilities.”

On the other hand, Mr. LeMonnier argued that the language in subsection 9.40(f) is clear and unambiguous and not open for interpretation. He said that this subsection requires the employer to provide sufficient tables and “chairs” to accommodate employees. Since the definition of “chair” commonly found in French and English dictionaries agree that a “chair” is normally for one person, the table and bench units do not comply with subsection 9.40(f). He referred to the decision by Regional Safety Officer Serge Cadieux in the case of Transport Super Rapide Inc. (96-008). In that case Regional Safety Officer Serge Cadieux held that he could not interpret the word “structure” in section 12.10 of the COSH Regulations to include trucks because the courts¹ had determined that the definition of “structure” could not be expanded to include trucks. Mr. LeMonnier argued that, for the same reasoning in both cases, I cannot expand the definition of “chair” to include a “bench.”

After having considered the arguments and the jurisprudence cited, I am satisfied that the meaning of subsection 9.40(f) is neither unclear, ambiguous nor doubtful. If anything, it seems to me that the problem for the employer is that subsection 9.40(f) is too specific. As suggested in the interpretation safety officer Peters provided Mr. Variah on July 31, 1996, the definition of a “chair” commonly found in French and English dictionaries infer or confirm that the seating is designed for one person only. This meaning was verified in the dictionaries that I consulted which included, the Concise Oxford Dictionary, 1991, and Le Nouveau Petit Robert, 1996.

Regarding the July 31, 1996 interpretation document safety officer Peters provided Mr. Variah, I have problems accepting the opinion contained therein that the word “chair” in subsection 9.40(f) could be interpreted to include a “bench” because the previous regulations permitted variances to “chairs.” To agree with this opinion, one must interpret that this aspect was simply overlooked by the legislator when the regulation was revised. Instead, of interpreting it as an oversight, I am inclined to think that, for whatever reason, the legislator intentionally removed the reference to “other equivalent facilities” when the regulation was amended. As such, I feel no justification for interpreting the word, “chair” in subsection 9.40(f) to include a “bench” based on this argument, and agree with the safety officer’s interpretation of the subsection.

¹ In Her Majesty the Queen v. Transport Provost inc., Mr. Justice J. H. Jenkins interpreted section 12.10 of the Regulations and affirmed the decision rendered by the Honourable Judge D. M. Stone of the Ontario Court (Provincial Division). In that case the Honourable Judge D. M. Stone determined that the ordinary meaning of the word “structure” in section 12.10 of the Regulations cannot include a truck or a tractor trailer.

Mr. Gibson further argued that the lunch room units at Neptune Bulk Terminals Ltd. comply with subsection 9.40(f) of the Regulations because the construction of the subsection shows that the essential purpose is to ensure that the table and seating arrangements in a lunch room are sufficient in number to accommodate adequately the number of employees who normally use the facility. He also held that reference to tables and chairs in the subsection is not related to occupational safety and health. While Neptune Bulk Terminals Ltd. may wish to argue this when the Department next reviews the regulations, it is not an interpretation that I am prepared to accept at this time.

Mr. Gibson's second argument was that the direction should be rescinded because it is at odds with HRDC's policy of ensuring that the COSH Regulations are consistently applied. This, however, is strictly a policy matter for HRDC and I will not comment on it. Neptune Bulk Terminals Ltd. can take the fairness issue up with the Department separately.

Another of Mr. Gibson's arguments was that replacing the units with tables and chairs would have detrimental effects upon Neptune Bulk Terminals Ltd. and its employees. He cited the fact that it would be more difficult to clean the furniture and that the tables and chairs could clutter passageways in the lunch room. To this end, the cleaner at Neptune Bulk Terminals Ltd. wrote a letter confirming these views. However, I cannot assign great weight to this because there was no opportunity for Mr. LeMonnier to question the author of the letter on the facts. More significantly, in response to Mr. Gibson's question, safety officer Peters testified that she did not agree that the chairs would represent a risk to the safety and health of employees. In my view the evidence placed before me that replacing the units with tables and chairs would have a detrimental effect on occupational safety and health of the employees at Neptune Bulk Terminals Ltd. is not sufficiently convincing to rescind the direction on this basis alone.

Finally, Mr. Gibson argued that the direction should be rescinded because retention of the units would not place the safety and health of any Neptune employee in jeopardy.

In my view, the questions bring into discussion the very nature of the regulations made pursuant to Code. Regulations made pursuant to the Code are generally considered to be minimum occupational safety and health standards and to be of general application. The employer may exceed the occupational safety and health standards, and is encouraged to do so, but the employer may not fall short of them.

Safety officers are empowered under subsection 145.(2) to use their discretion to decide if a danger exists or not. However, in the case of a contravention of the regulations, the only discretion that they have under subsection 145.(1) of the Code, is whether or not to issue a direction. That is, where there is a contravention of a regulation made pursuant to the Code, it is deemed to be related to occupational safety and health, since, in a sense, this has already been determined by the legislator. As noted by Mr. Gibson, regulations made pursuant to section 157 of the Code can only serve the purpose of a statute.

In this case, the facts presented show me that safety officer Peters was of the opinion that the table and bench units at Neptune Bulk Terminals Ltd. do not comply with subsection 9.40(f) because a "bench" cannot be construed to be a "chair", that the legislator amended the regulations in 1988 and removed the reference to the term "other equivalent facilities", confirming safety officer Peters

interpretation, and that the employee co-chair alleged that there was an occupational safety and health complaint. On that basis, it is my decision that safety officer Peters properly interpreted and applied subsection 9.40(f) of the COSH Regulations. As such, I have no basis for rescinding a direction that agrees with the law.

Mr. Gibson argued that, in the alternative to rescinding the direction, I should vary the direction so as to “grandfather” Neptune Bulk table and bench units until such time as they are replaced by the company in the normal course, or give Neptune sufficient time to comply with it. In this regard, he suggested a period of three months would be necessary for the Neptune Bulk Terminals Ltd. to order and obtain the replacement tables and chairs.

A review of Part 9 of the COSH Regulations confirms that there is no authority in the regulations to “grandfather” any of the subsections in section 9.40. Therefore this option cannot be considered as an alternative. However, I am prepared to vary the compliance date portion of the direction to correspond to approximately 90 days from the date of this decision. The decision to vary the compliance date of the direction is based on the fact that the existing units have been in place for approximately 13 years, Mr. Lemonnier acceded that this is not an immediate or grievous occupational safety and health issue, Mr. Lemonnier did not object at the hearing to the employer’s request, and the earlier opinion of safety officer Peters during the pre-hearing on December 22, 1997. That is, she was of the opinion that the safety and health of employees would not be adversely affected by my varying the compliance date to coincide with the date when I will have reviewed the rest of the direction.

In this regard, Mr. Gibson requested that, if I confirm the direction, I also make a determination whether the units about which Neptune Bulk Terminals Ltd. sought Mr. Sullivan’s opinion would comply with subsection 9.40(f). However, I would suggest that it is not my role as Regional Safety Officer to make such a determination as there is nothing in section 146 of the Code that authorizes me to approve plans or equipment. I would further suggest that the approach taken in the Code is for employers to consult with their employees through their safety and health committee on matters affecting occupational safety and health. For example, Mr. Lemonnier already indicated in his submission that employees at Neptune Bulk Terminals Ltd. feel that the chairs should not be fixed. Thus, I would say that the first step would be for the Neptune Bulk Terminals Ltd. to consult with the safety and health committee, and I encourage them to do so.

For the above reasons, **I HEREBY VARY** the compliance date portion of the direction of safety officer Peters made pursuant to subsection 145.(1) and issued at Vancouver on the 13th day of November, 1997, to Neptune Bulk Terminals Ltd. located in the province of British Columbia as follows:

...“Therefore, you are **HEREBY DIRECTED**, pursuant to subsection 145.(1) of the Canada Labour Code, Part II, to terminate the contravention no later than September 7, 1998.”...

Decision rendered on June 8, 1998.

Doug Malanka
Regional Safety Officer

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145.(1)

On November 12, 1997, the undersigned safety officer conducted an inspection in the work place operated by Neptune Bulk Terminals (Canada) Ltd., being an employer subject to the Canada Labour Code, Part II, at 1001 Low Level Road, North Vancouver, B.C.

The said safety officer is of the opinion that the following provision of the Canada Labour Code, Part II, is being contravened:

Paragraph 125(g) of the Canada Labour Code, Part II and subsection 9.40(f) of the Canada Occupational Safety and Health Regulations.

The lunchroom provided by the employer for the use of Local 500 employees is not furnished with tables and chairs.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contravention no later than December 12, 1997.

Issued at Vancouver, this 13th day of November 1997.

Lyn Peters
Safety Officer
#1816

To: Neptune Bulk Terminals (Canada) Ltd.
Registered & Records Office
3000 Royal Centre
1055 West Georgia Street
Vancouver, B.C. V6E 3R3

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Neptune Bulk Terminals (Canada) Ltd., Vancouver, B.C.

Respondent: ILWU

KEY WORDS

Lunch room, tables and chairs, table and bench units, ergonomics, comfort.

PROVISIONS

Code: 145.(1), 146, 157
COSH Regulations: 9.40(f)

SUMMARY

The employee safety and health committee co-chairperson complained to a safety officer and his employer that the table and bench units found in the employee lunch room did not comply with subsection 9.40(f) of the Canada Occupational Safety and Health Regulations. Some employees found the units to be uncomfortable because they were not ergonomically suitable.

Believing that the table and bench units to be in compliance with subsection 9.40(f), despite the fact that the benches are attached to the tables, the employer refused to voluntarily replace them with separate tables and chairs. The safety officer issued a direction to the employer on November 13, 1997, to stop the contravention.

Following a review of the case, the Regional Safety Officer confirmed that the table and bench units found in Neptune Bulk Terminals Ltd. lunch rooms do not comply with subsection 9.40(f) of the COSH Regulations. He indicated that subsection 9.40(f) was sufficiently clear in its meaning and that the word "chair" could not be construed to include the word "bench."

However, at the request of the employer and based on the absence of any objection by the employee representative regarding the employer's request, and the earlier opinion of the safety officer during the pre-hearing on December 22, 1997, that the safety and health of employees would not be adversely affected if the compliance date were varied to coincide with the date when I will have reviewed the rest of the direction, the Regional Safety Officer **VARIED** the date of compliance in the direction to be September 7, 1998.