Decision No: 98-015

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: Darren Parry
Respondent:	International Longshoremen's and Warehousemen's Union Represented by: Albert Le Monnier Chairperson, Health and Safety Committee Local 500
Mis en cause:	Diana Smith Safety Officer Human Resources Development Canada
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada

This case was heard on October 27 and November 26, 1998 in Vancouver B.C..

BACKGROUND

Neptune Bulk Terminals (Canada) Ltd. (hereafter "Neptune") is a bulk terminal located in North Vancouver in the inner harbour of Burrard Inlet. Neptune is an automated site, which uses high speed conveyors to move bulk products to/from storage to/from train or vessel.

On June 10, 1998, around noon, Mr. Leslie Kalo, a longshore worker dispatched to work as a labourer at Neptune, refused to work. In a signed statement on the Refusal to work registration form, Mr. Kalo described the condition he feared as follows:

> I felt that there was danger because I was working alone in an isolated area high up off the ground.

Safety officer Diana Smith arrived at the work site at approximately 15:00[1] hr. that day to investigate the refusal to work. Her report notes that Mr. Kalo had been assigned alternate work following his refusal to work but when she arrived at the site he had just left for the day.

[1] The employer submits that the safety officer arrived at Neptune's work site at 16:10 hr. that afternoon.

Nevertheless, she decided to investigate the refusal to work and proceeded to visit the work site and area in question in the presence of employer and employee representatives.

Mr. Kalo had been assigned to remove excess grease from around bearings in the #32 Transfer Tower, a three level metal structure. To do so, Mr. Kalo would put excess grease that had accumulated around the bearings located on each level into a bucket and dispose of it.

The safety officer's Report of Refusal to Work describes in detail the work site and the activity to be carried out by Mr. Kalo in the following terms:

> *"The tower was an open air structure and had three levels. Bearings were located on each level, accessible by a broad, expanded metal staircase in good repair. At the ground level, the bearings at #32 belt drive 'A' and 'B' were accessed via a ramp. At the time of the investigation the ramp and guardrails were coated with wet potash residue which was like dense, slippery mud. On the top/third level, in one location, bearings were accessed by climbing/squeezing between two pieces of equipment into a space large enough only for a person to squat in and directly adjacent to a conveyor.*
>
> *The belts had been locked out but Mr. Kalo did not use a personal lock, himself, and had not been instructed that this was required. Part 13, Section 13.11 of the Canada Occupational Safety & Health (COSH) Regulations states that 'every employee shall be instructed and trained by a qualified person appointed by his employer in the safe and proper inspection, maintenance and use of all tools and machinery that he is required to use'. In addition Neptune's written lock-out procedure requires that, for a clean-up crew and when accompanied by a supervisor, one worker is required to put a lock on each isolation point.*
>
> *Committee and Union representatives told the safety officer that Mr. Kalo had refused not for the reasons cited above, but because he was required to work alone in the Transfer Tower. Neptune has no written procedure for working alone. According to Mr. Smith [Foreman of Maintenance], when he became aware of Mr. Kalo's concerns, he offered Mr. Kalo a radio and volunteered to work with him. Mr. Kalo still refused and was given alternate work until the end of his shift and until the matter was investigated.*
>
> *At the end of the site visit the Safety Officer determined that danger existed for the reasons cited in the direction. Union and Committee representatives considered that it was dangerous to work alone. The Safety Officer considered that is* (sic) *was safe to work alone if the area was free of hazards, such as the potash residue, a proper lock-out procedure was followed, and a procedure existed which provided for some kind of monitoring system of employees working alone. Mr. Parry arranged for the ramp and guardrail to be cleaned immediately. A written direction was hand delivered on June 12th which confirmed the directions given orally on June 10th. (*See Appendix*)"*

Submission for the Employer

The detailed submission of Mr. Parry is on record. Mr. Parry's lengthy rationale for requesting that the direction be rescinded or amended as submitted below is on record and will not be repeated here. However, Mr. Parry did review the facts of this case and cited the jurisprudence applicable in support of his arguments which dealt with each item in the direction.

Essentially, Mr. Parry explained that when Mr. Kalo was briefed on the details of the task to be accomplished, he was informed by foreman Smith[2] of Neptune's lock-out policy and procedure. He was told that he (foreman Smith) had placed his "Supervisors" locks on the appropriate lock-out points, that two other preventive maintenance employees would be doing the same as they would also be working on transfer tower #32 and that he should also place his personal lock-outs on those corresponding lock-out points. According to foreman Smith, Mr. Kalo declined to do so.

Mr. Kalo was wearing the appropriate personal protective equipment to do the job safely. After explaining the clean-up work to be carried out, foreman Smith left Mr. Kalo for a short period of time and came back shortly thereafter. This happened twice in the morning. Mr. Smith was not advised of Mr. Kalo's safety concerns during the morning other than a reference by Mr. Kalo that this was a two man job. Nevertheless, Mr. Smith helped Mr. Kalo carry the buckets of grease down to the truck to dispose of them appropriately.

Around 12:30, Mr. Veriah, safety and health committee co-chairperson and employee representative, informed Mr. Smith of Mr. Kalo's refusal to work under section 128 of the Canada Labour Code, Part II (hereafter the Code). An employer investigation ensued in the presence of Mr. Kalo and employee representatives. Mr. Parry's response to Mr. Kalo's concerns were that:

A) working at heights was not an issue as the tower while high is safe. There are guardrails, toe boards, etc., there is no possibility of one falling.
B) the employer was of the view this was a one man job however, as an interim measure, foreman Smith would remain with Mr. Kalo for the remainder of the shift and assist in the clean-up.
C) Mr. Kalo would be provided with a radio in the event that the foreman would have to leave.

Mr. Parry stated that Mr. Veriah appeared to be satisfied with the employer's resolution of Mr. Kalo's concern since Mr. Veriah and himself jointly recommended to have the foreman remain with the employee for the remainder of the shift and to provide him with a radio in case of emergency. However, Mr. Kalo continued to refuse to work and safety officer Diana Smith was called in to investigate in accordance with the Code.

Mr. Parry submitted that Ms. Smith arrived at the work site at precisely 16:10 that afternoon, well after Mr. Kalo had left the work site. The investigation proceeded in the absence of Mr. Kalo.

[2] Mr. Parry clarified that Foreman Smith is not an employer representative but a member of Local 514 of the I.L.W.U..

Mr. Parry submitted that the direction should be rescinded because:

> "there was no violation of Canada Labour Code Section 124, 125(p), (q) or Section 2.12(2) of the Canada Occupational Safety and Health Regulations."

Or, in the alternative, it should be varied

> "by rescinding #2 Section 125(q) and #3 Section 125(p), and vary #1 to Section 124 that "danger" did exist but as it was "inherent" pursuant to section 129(2)(b) of the Canada Labour Code."

Mr. Parry closed his submission by asserting that the right to refuse is an emergency measure. This right "cannot be employed in those situations where "danger" is inherent in the work or constitute a normal condition of employment. In this case working high up on the tower was not dangerous, is a normal condition of employment as would be the requirement to work alone."

Submission for the Employee

Mr. Le Monnier requested that the Regional Safety Officer consider the three separate points of the direction in the context of the employee's reason for refusing to work. The reason for this is that the safety officer did not issue a direction on the basis that working alone is a danger but because the three observations stated in the direction made working alone dangerous.

Mr. Le Monnier analyses the chronology of events submitted by Mr. Parry to show that many facts considered and reported by Mr. Parry have been misconstrued, are irrelevant or simply have no application to this case. For example, when foreman Smith suggests that Mr. Kalo declined to put his locks on the appropriate points, Mr. Le Monnier submits that Mr. Kalo categorically denies ever being informed of any lock-out procedures. Also, while Mr. Smith asserts the clean-up job was a one man job, Mr. Le Monnier notes that the foreman proceeded to help Mr. Kalo in carrying buckets of grease, a clear contradiction of his assertion not to mention that this is contrary to their collective agreement. The photographs introduced as evidence by Mr. Parry show a worker "in the bite" with an improper lock-out since only the foreman had his lock on this point. Mr. Le Monnier pointed to other photos that show a tower structure that would hide an injured worker, that show a cramped area, or that show a slippery platform with grease everywhere.

Mr. Le Monnier responded to each argument submitted by Mr. Parry in regards to the three items specified in the direction. In response to the last argument respecting Refusal to work, Mr. Le Monnier stated "We vehemently oppose to the notion that the right to refuse work can be applied only as an emergency measure. Such thinking if it became enshrined would send the Canadian workplace back to third world conditions. The word imminent was removed in the Code for that reason."

Decision

The issue to be decided in this case is whether Mr. Kalo was in danger when the safety officer investigated. In this regards, the Federal Court of Appeal established, on two occasions, the principle that danger must exist at the time of the safety officer's investigation. In *Bidulka v. Canada (Treasury Board)*, [1987] 3 F.C. 630, 76 N.R. 374 (C.A.), the Honourable Judge Pratte ruled in Decision A-524-86 that

> *The task of the safety officer under paragraph 86(2)(b)* [now 129(2)(b)] *is clearly to determine whether, at the time of the investigation, a condition exists… that constitutes a danger to the employee.* (my underlining)

and he later reaffirmed this principle in *Canada (Attorney General) v. Bonfa* (1989), 33 C.C.E.L. 105, 73 D.L.R. (4th) 364, 113 N.R. 224 (Fed. C.A.), Decision A-138-89, in which he stated:

> *These considerations were unrelated to the questions which the regional safety officer had to answer, and in particular to the first of these questions as to whether at the time the safety officer did his investigation the respondent's workplace presented such dangers that employees were justified in not working there until the situation was corrected. The fact that before the safety officer did his investigation the respondent may have had legitimate grounds for refusing to do the work assigned to him cannot affect the answer to be given to this question; and the fact that under s.145(1) the safety officer could have found that the employer was in breach of Part II and directed it to terminate this breach was also not germane to the issue, since the safety officer never found such a breach to exist and never gave a direction to the employer under s.145(1).* (My underlining)

The parties were asked to consider the application of the Bonfa decision above, as issued by the Federal Court of Appeal in a case arising out of a refusal to work. Despite Mr. Le Monnier's contention that the circumstances of this case were quite different from the current case, the decisions of the Federal Court, Trial and Appeal Divisions, constitute an important body of jurisprudence which establish principles for interpreting the legislation and which cannot be ignored by the Regional Safety Officer.

In addition to the Federal Court decisions, decisions of the Boards (CLRB and PSSRB) and past decisions of the Regional Safety Officer have also contributed to this body of jurisprudence and are taken into consideration when deciding cases before the Regional Safety Officer.

In *Air Canada v. Canadian Union of Public Employees*, unreported RSO Decision No. 94-007, I dealt with the concept of danger in relation to seats for flight attendants. The following excerpt from this decision will be useful to Mr. Le Monnier in understanding that the concept of danger, as currently defined in the Code, has not significantly changed from the concept of imminent danger that existed before the Canada Labour Code, Part II (hereafter the Code) was amended in 1984. I wrote:

In order to answer these questions, I must consult the definition of the word "danger" in subsection 122(1) of the Code and apply this definition in light of the case law. "Danger" is defined as follows:

"danger" 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. (underlining added)

The courts have had many opportunities to interpret the scope of the term "danger". From this case law two extremely important points have emerged that have guided me in my decision.

The first point is that the danger must be immediate. Thus, the expression "before the hazard or condition can be corrected" has been associated with the concept of "imminent danger" that existed before the Code was amended in 1984. In Pratt, the Vice-Chairman of the Canada Labour Relations Board, Hugh R. Jamieson, wrote:

"...Parliament removed the word "imminent" from the concept of danger...but replaced it with a definition that has virtually the same meaning."

The second point I take from a large number of decisions is that the employee's exposure to the hazard or situation must be such that the likelihood of injury is obvious. Accordingly, the danger must be more than hypothetical, or there must be more than a small probability of its becoming a reality. The danger must be immediate and real, and no doubt must remain regarding its imminence. It must be sufficiently serious to justify, in the case under consideration, discontinuation of use of the seats for flight attendants.

The intent in providing an employee with the right to refuse unsafe work is to ensure that when an employee, while at work, genuinely believes he/she is facing a situation likely to cause him/her injury imminently, the employee can withdraw his/her services (ss.128(1)), have the matter investigated promptly by his/her employer (ss.128(7)) and, if the employee is not satisfied with the outcome of the employer's investigation, have a safety officer investigate forthwith (ss.129(1)) and decide whether the employee is in fact in danger (ss.129(2)). Where the safety officer decides the employee is in danger, the safety officer must give directions to the employer under subsection 145(2) to take measures to protect the refusing employee (ss.129(4)). In reading the right to refuse provisions, one clearly has a sense that there is a need in dealing with the employee's health and safety concern expeditiously. Failure to do so is most likely to result in an injury if danger exists.

To answer the question at issue, I should therefore ask myself whether the situation feared by Mr. Kalo constituted a danger to him within the meaning of the Code and whether it was real and immediate at the time of the safety officer's investigation. However, to do this in the instant case, I must turn my attention to Mr. Kalo's absence from his workplace when the safety officer investigated and determine whether his absence should have affected the decision of the safety officer.

Mr. Le Monnier submitted that Mr. Kalo had been assigned alternate work by Neptune in accordance subsection 129(3) of the Code which provides:

> Prior to the investigation and decision of a safety officer under this section, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made or assign the employee reasonable alternate work, and shall not assign any other employee to use or operate the machine or thing or to work in that place unless that other employee has been advised of the refusal of the employee concerned.

and that he had not been told to remain at the work site for the investigation of the safety officer. That, according to Mr. Le Monnier, should not invalidate the entire investigation of the safety officer who did find danger to exist and who issued a direction for danger.

In reply, I should say that I would have been prepared to receive this argument had Mr. Kalo been at work or at least that he had been expected to return to the same work site for some other work related purposes. Mr. Kalo, as it turned out, had left the premises and was not expected to return. The clean-up of the grease had been accomplished and this task was not expected to be repeated for approximately another three months. This provision is intended to protect the employee before and until the investigation of the safety officer is completed. If no danger is found to exist, the employee returns to his/her work and cannot continue to refuse. It is also intended to ensure that no other employee is assigned to the work unless he/she has been advised of the refusal to work.

For danger to exist, an employee must be working under conditions likely to cause injury before the hazard or condition can be corrected. Since Mr. Kalo was not expected to return to his workplace, the safety officer should have concluded that no danger existed to him at that point in time and not issue a direction under subsection 145(2) for danger. It should be understood that when the safety officer is investigating a refusal to work, he/she is looking at the circumstances that exist at the time of his/her investigation and not at the time the employee refused to work. As noted by Justice Pratt in Bonfa,

> *The fact that before the safety officer did his investigation the respondent may have had legitimate grounds for refusing to do the work assigned to him cannot affect the answer to be given to this question;*

Had the safety officer decided, as she should have, that Mr. Kalo was not in danger when she investigated, she would have accomplished her mandate under section 129 of the Code which is to decide on the existence of danger to the refusing employee at the time of her investigation. This would have settled Mr. Kalo's refusal to work for danger.

However, I should also say that I concur with Mr. Le Monnier who argued that the absence of Mr. Kalo should not invalidate the entire investigation of the safety officer simply because he was absent from his workplace. The fact that the safety officer would have resolved Mr. Kalo's refusal to work by deciding on the absence of danger does not bring to an end the role of the safety officer. Again, as noted by Justice Pratt in Bonfa,

> *and the fact that under s.145(1) the safety officer could have found that the employer was in breach of Part II and directed it to terminate this breach was also not germane to the issue, since the safety officer never found such a breach to exist and never gave a direction to the employer under s.145(1).*

I interpret Justice Pratt's comment to mean that a safety officer is not restricted to just decide whether danger exists when he/she investigates a refusal to work. A safety officer can also look at whether the conditions investigated during the refusal to work are in contravention of any of the provisions of the Code and the Canada Occupational Safety and Health Regulations (hereafter the Regulations). Where this is the case, a safety officer can direct an employer to terminate a contravention to any provision of the legislation under subsection 145(1) of the Code.

In the instant case the safety officer directed her attention solely to danger and issued a direction under paragraph 145(2)(a) of the Code instead of 145(1). The question before me at this point is whether section 146 authorizes the Regional Safety Officer to correct this situation by deciding that the conditions investigated by the safety officer were in reality contraventions. Subsection 146(3), which specify the powers of the Regional Safety Officer, provides:

> 146. (3) The regional safety officer shall in a summary way inquire into the circumstances of the direction to be reviewed and the need therefor and may vary, rescind or confirm the direction and thereupon shall in writing notify the employee, employer or trade union concerned of the decision taken. (my underlining)

The powers vested in the Regional Safety Officer under subsection 146 are limited to reviewing a specific direction, which in the instant case is a direction issued under subsection 145(2) for danger, and to vary, rescind or confirm that direction and only that direction. Section 146 does not extend his powers to consider whether the safety officer purported to look at whether the employer was in contravention of the Code and the Regulations when she investigated Mr. Kalo's refusal to work and amend the direction accordingly. To do so would amount to issuing a new direction under subsection 145(1). I would be exceeding my jurisdiction in issuing a direction under subsection 145(1) when the safety officer found danger to exist and issued a direction for danger under subsection 145(2) of the Code. My only alternative in this case is to rescind the direction for danger.

For all the above reasons, **I HEREBY RESCIND** the direction issued under paragraph 145(2)(a) of the Code on June 12, 1998 by safety officer Diana Smith to Neptune Bulk Terminals (Canada) Ltd.

Decision rendered on December 23, 1998

Serge Cadieux
Regional Safety Officer

APPENDIX

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

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

On June 10th , 1998, the undersigned safety officer conducted an examination following the refusal to work made by Al Lamonnier(sic) on behalf of Leslie Kalo in the workplace 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.

The said safety officer considers that a condition constitutes a danger to an employee while at work due to the following reasons:

1. The ramp and guardrails leading to #32 Belt Drive "B" were covered with potash residue causing a slipping hazard contrary to the Canada Labour Code (CLC) Section 125 (p) and Section 2.12 (2) of the Canada Occupational Safety and Health (COSH) Regulations; and

2. The empoyee(sic), Leslie Kalo, had not received sufficient instruction, training and supervision in the proper lock-out procedure and did not use a personal lock contrary to CLC, Section 125 (q); and

3. There is no written procedure regarding employees who work alone contrary to CLC, Section 124.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2) (a) of the Canada Labour Code, Part II, to protect any person from danger immediately.

Issued at Vancouver, this 12th day of June 1998.

Diana Smith
Safety Officer
1982

To: NEPTUNE BULK TERMINALS (CANADA) LTD.
NEPTUNE BULK TERMINALS (CANADA) LTD.
1001 LOW LEVEL ROAD
NORTH VANCOUVER, B.C.
V7L 4K6

Decision: 98-015

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

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

Respondent: ILWU

KEY WORDS

Refusal to work, danger at time of safety officer's investigation, bulk terminal, working alone, lockout, written procedure for working alone, potash residue, Bonfa decision, danger real and immediate, employee absent from workplace, role of safety officer.

PROVISIONS

Code: 122(1), 124, 125(p),(q), 128, 128(1), 128(7), 129, 129(1), 129(2), 129(2)(b), 129(3), 129(4), 145(1), 145(2)(a), 146(3)

COSH Regulations: 13.11, 2.12(2)

SUMMARY

An employee refused to carry out a clean-up task on a transfer tower because he felt that working alone was a danger. When the safety officer arrived, the employee had left the workplace and was not expected to return to this site. The safety officer carried out her investigation and found that danger existed. The danger was described as a slipping hazard, insufficient employee instruction, training and supervision and the absence of a written procedure for working alone. Upon review the RSO held that the mandate of the safety officer when investigating a refusal to work was to determine whether danger existed to the refusing employee at the time of the investigation. Since the employee had left the premises and was not expected to return it precluded a finding of danger. The Regional Safety Officer ruled that the safety officer should have concluded that the employee was not in danger when she investigated and issue a decision of no danger. On that basis the Regional Safety Officer **RESCINDED** the direction. The Regional Safety Officer explained that in light of the Bonfa decision the role of the safety officer does not come to an end merely because no danger is found. The safety officer can issue a direction under subsection 145(1) for any contravention to the Code. However the RSO ruled that section 146 did not authorize him to change the direction from 145(2) to 145(1) because this would amount to issuing a new direction, a power he does not have under subsection 146(3).