

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

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

Applicant: Forest Products Terminal Corporation Ltd.
Represented by: Mr. Bruce Harding
General Manager, Operations

Respondent: International Longshoreman's Association
Represented by: Mr. Brian Duplessis,
International Longshoremen's Association

Mis-en-cause: Pierre St-Arnauld
Safety Officer
Human Resources Development Canada

Before: Douglas Malanka
Regional Safety Officer
Human Resources Development Canada

Background

During a visit to the work place at Forest Products Terminal Corporation Ltd. (Forest Products), a safety officer observed that warning devices were not functioning on several fork lift trucks operating in the reverse direction during stevedoring operations. The employer agreed to remedy this and provided the safety officer with an Assurance of Voluntary Compliance (AVC) to this effect. Shortly thereafter, the employer wrote to the safety officer and requested a meeting with him to appeal the AVC. He stated that the subject of back-up alarms has been discussed many times in the past with other safety officers and it was always concluded that back-up alarms would not enhance employee occupational safety and health relative to operations at Forest Products. Instead, the safety officer issued a direction to the employer specifying that the employer was in contravention of paragraph 125.(i) of the Canada Labour Code, hereto referred to as the Code or Part II, and paragraph 14.16 of the Canada Occupational Safety and Health Regulations, hereto referred to as the COSH Regulations. He directed the employer to cease the contravention no later than May 21, 1997. A copy of Direction is attached.

The employer then requested that the direction be reviewed by a Regional Safety Officer and a hearing was held in Saint John, New Brunswick on October 15, 1998.

Safety Officer:

Safety officer Pierre St-Arnauld submitted a copy of his report and testified at the hearing. His report and testimony will not be reproduced here, but forms part of the file. I retain the following from his report and testimony.

During his visit to Forest Products on April 21, 1997, the safety officer observed that warning devices were not functioning on several forklift trucks when operating in reverse direction. He stated that he could not immediately tell if the warning devices were simply disconnected, or if they had been removed entirely from the forklift trucks. He accepted the employer's voluntary agreement to ensure that the warning devices would be functional. However, he returned to the work place on May 7, 1997, and observed that the warning devices were still not operational when the forklift trucks operated in reverse. He issued his direction that day, May 7, 1997.

Safety officer Arnauld testified that there was no record at Human Resources Development Canada that safety officers had previously sanctioned the practice at Forest Products of operating forklift trucks in the reverse direction without back-up alarms.

Applicant:

Mr. Harding, General Manager, Operations, Forest Products, submitted written reasons for requesting a review of the direction. These form part of the file and will not be repeated here. I retain the following from his document and testimony.

Forest Products operates two terminal facilities in the Port of Saint John. The forest products terminal includes 4 warehouses totaling 500,000 square feet and 20 acres of open storage area. The container terminal comprises approximately 40 acres of outside storage. The two facilities operate with one fleet of equipment which includes:

- 1) approximately 80 forklift trucks in the 6,000 to 15,000 pound capacity used in the sheds, on board vessels and in the open areas of the terminal. Most of these smaller forklift trucks are not fitted with back-up alarms and many are not equipped with reverse activating switches;
- 2) 7 forklift trucks in the 20,000 to 36,000 pound capacity, used in sheds, on board vessels and in open areas of the terminal. All units are fitted with back-up alarms;
- 3) 6 fork lift truck in the 23 ton capacity which are used in the open areas of the terminal. All are fitted with back-up alarms;
- 4) 20 Ottawa yard trucks and 9 John Deere which are used in the sheds, on board ships and in the open areas of the terminal. All units are fitted with back-up alarms.

He testified that the Port of Saint John occupational safety and health committee has examined the use of back-up alarms on the smaller forklift trucks (6,000 to 15,000 pound capacity) and concluded that the back-up alarms would not improve employee workplace safety and health. In addition, he said that he consulted numerous other Ports in Canada concerning back-up alarms and understood that they are not in use on all equipment.

Mr. Harding stated that it is not uncommon to have numerous forklift trucks operating in close proximity due to the nature of the operations in their warehouse and on-board ships. For example, there could be 6 or more pieces of equipment working in an area of less than 1000 square feet. Since operating procedures require that the forklift trucks be operated in the reverse direction when the load obstructs the operator's view, Mr. Harding estimated that their forklift trucks operate fifty percent of the time in the reverse direction.

Given the concentration of forklift trucks that often occurs in their operations, Mr. Harding said that both the employer and the employees are concerned that employees would become indifferent to the sound of the back-up alarms and would begin to ignore them. They also felt that employees could be confused by the back-up alarms and would have difficulty discerning the true course of travel of the forklift trucks, or their proximity. They further feared that, if the use of back-up alarms was made mandatory, employees would start wearing hearing protection to negate the sound of the back-up alarms.

Mr. Harding conceded that warning devices would be needed where visibility was impaired. However he contended that, where there is no impairment to visibility, the confusion caused by the back-up alarms must be considered. He submitted numerous photos taken from the operator position on various forklift trucks to show that the visibility for the smaller forklift trucks is not impaired.

Mr. Harding testified that the safety and health of employees is protected by other preventative measures in force at Forest Products. He said, for example, that all Forest Products equipment operators must complete a 3 to 5 day training course for each type of equipment that they operate. Employees are also required to wear reflective vests in all areas of the sheds, open areas and on board ships. In addition, designated walkways are delineated inside the warehouse, and procedures are in place for walking anywhere in the warehouses. Mr. Harding reiterated that the issue of back-up alarms has been discussed numerous times by the safety and health committee and it is felt that alarms or flashing light would not improve employee occupational safety and health.

Finally, Mr. Harding argued that Longshoring is different from most other industries. He testified that he had consulted other ports in Canada and the United States of America and could not find any clear policy concerning the use of back-up alarms when fork lifts operate in reverse. He further indicated that over the past 13 years of operation, 4 or 5 safety officers have visited the site and took no action concerning the absence of back-up alarms on the smaller forklift trucks used at Forest Products. He held that back-up alarms represent a cost to employers and that, if the regulations are to be enforced, they should be enforced everywhere so that there is a level playing field for everyone.

Respondent:

A document signed by four employee members of the safety and health committee at Port of Saint John, who are also members of the International Longshoreman's Association (ILA), was submitted prior to the hearing. The document confirmed that the issue of back-up alarms on the smaller forklift trucks at Forest Products has been discussed on numerous occasions and the signees were not in favour of installing and using back-up alarms on these forklift trucks. The

document, which was included in the documents submitted by the employer, forms part of the file and will not be repeated here. In addition, one of the signees, Mr. B. Duplessis, co-chair, safety and health committee and ILA Union representative, testified at the hearing. I retain the following from his testimony.

Mr. Duplessis stated that he has operated all types of forklift trucks since 1975. He became a member of the ILA local in 1978, and a member of the safety and health committee at Forest Products in 1990. He testified that accidents at this work place have decreased over the years and this reflects the good work practices used there.

He told me that he is currently a fork lift operator trainer at Forest Products. He explained that a progressive training system is used at the Terminals whereby operators progress up to larger forklift trucks after they have acquired experience on smaller forklift trucks, and after they have completed further operator training. Drivers continue to be coached as they gain experience.

Mr. Duplessis stated that the safety and health committee is very proactive and actively monitors occupational safety and health at the work place. He stated that safety prevention program at Forest Products terminal is focused on employee awareness and the use of high-visibility vests.

Submissions:

Mr. Harding argued that the issue of backup alarms is something that has been in existence for many years on the Port, and an aspect of the Code that has not been enforced by the company or by Departmental safety officers.

He argued that the employer and the safety and health committee have reviewed the alarm issue numerous times and both the employer and employees agree that the back-up alarms will not improve occupational safety and health of employees.

Mr. Duplessis essentially supported Mr. Harding's position. He insisted that the Port Saint John safety and health committee is adamant about safety and is very proactive. The committee looks at accidents and takes action if there are problems. He pointed out that union and management do not always agree on safety items, but they are in agreement on this issue. He stated that accidents have decreased since 1991 when the company required employees to wear high-visibility vests and provided stringent employee training. He argued that it should not be necessary to take action when there is no history of a problem. He indicated concern that requirements in the Code and COSH Regulations do not always take the particular work place into account. He felt that safety officers should address situations where the employer and employees cannot agree on occupational safety and health.

Decision:

The issue in this case is whether the safety officer erred in his interpretation or application of paragraph 125.(i) of the Code or paragraph 14.(16) of the COSH Regulations¹. when he issued his May 7, 1997, direction made pursuant to section 145.(1).

Looking at paragraph 125.(i), this provision requires the employer to ensure that the vehicles used by his or her employees meet prescribed safety standards found, in this case, in the COSH Regulations. It reads as follows:

- 125.(i) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,
- i) ensure that the vehicles and mobile equipment used by the employees in the course of their employment meet prescribed safety standards;

According to the safety officer, the prescribed standard in this case is section 14.16 of the COSH Regulations. Section 14.16 reads as follows:

14.16.(1) Motorized materials handling equipment that is used in an area occupied by employees and that travels

- (a) forward at speeds in excess of 8 km/h shall be fitted with a horn or other similar audible warning device; and
- (b) in reverse shall, subject to subsection 14.51(1), be fitted with a horn or other similar audible warning device that automatically operates while it travels in reverse. [My underline.]

14.16.(2) Where an audible warning device referred to in subsection (1) cannot be clearly heard above the noise of the motorized materials handling equipment and any surrounding noise, does not allow enough time for a person to avoid the danger in question or does not otherwise provide adequate warning, other visual, audible or tactile warning devices or methods shall be used so that adequate warning is provided.

“14.16(3) Where the use of an audible warning device referred to in subsection (1) would result in night-time noise levels in excess of those allowed by a municipal by-law applicable where the motorized material handling equipment is used, visual or tactile warning devices or methods may be used at night if such devices or methods provide an adequate warning.” [My underline.]

¹ The COSH Regulations do not apply in respect of employees employed on ships and, as a result, the COSH Regulations do not apply to the forklift trucks when they are operated on board ships. Section 1.4 of the COSH Regulations reads: “These Regulations do not apply in respect of employees employed ...(c) on ships.” However, it should be noted in passing that the Marine Occupational Safety and Health Regulations do apply in respect of employees employed on ships and section 12.14 of the Marine Occupational Safety and Health Regulations specifies:

“12.14 Mobile equipment shall be fitted with a horn or similar audible warning device having a distinctive sound that can be clearly heard above the noise of the equipment and any surrounding noise.”

However, sub-paragraph 14.16(1)(b) of the section 14.16 qualifies that the application of subparagraph 14.16(1)(b) is “subject to subsection 14.51(1)”. Subsection 14.51(1) reads:

14.51(1) Subject to subsection (3), motorized materials handling equipment that is in use at the time this amendment comes into force, and that meets the requirements of this Part as it reads immediately before the coming into force of this amendment, is exempt from having to comply with the amendment as long as the motorized materials handling equipment continues to meet those requirements. [My underline.]

In accordance with this provision, there are two conditions that apply before Forest Products’ smaller fork lift truck are exempted from the requirements in paragraph 14.16(1)(b). First, the motorized material handling equipment must have been in use at the time of the coming into force of the Part XIV amendments identified as SOR/96-400, August 7, 1996. Secondly, the equipment must also have met the requirements of the previous Part immediately before the coming into force of the revised amendments. In this case, the evidence shows that, while the smaller forklift trucks were in use at the time of the coming into force of the amendments to Part XIV of the COSH Regulations on August 7, 1996, the back-up alarms on these forklift trucks were either inoperative or non existent. Therefore, they did not meet the requirements of the previous Part. As a result, it is my view that the exemption in subparagraph 14.16(1)(b) of the COSH Regulations does not apply to the smaller forklift trucks (6,000 to 15,000 pound capacity) at Forest Products. Consequently, section 14.16 of the Part XIV (Materials Handling) COSH Regulations (SOR/96-400, 7 August, 1996), applies to the smaller forklift trucks.

Mr. Harding and Mr. Duplessis advanced several arguments to show that the regulation should not apply to their smaller forklift trucks. I have the following comments in response.

Argument #1

Stevedoring is different than other work places subject to the Code and COSH Regulations and the legislation should be applied differently.

Part II and the COSH Regulations establish minimum occupational safety and health standards and are made for general application to all companies subject to federal jurisdiction. I note that Part XIV (Materials Handling Equipment) were last amended on August 7, 1996, and December 5, 1996, which is relatively recent compared to other COSH Regulations. Specifically, there is no mention in the current Part XIV COSH Regulations of a general exemption in respect of stevedoring and I must conclude that it was Parliament’s wish that the regulations also apply to this industry.

Argument #2

The accident statistics don’t show a problem and solutions to non-existent problems should not be pursued.

The COSH Regulations were drafted in consultation with employer, employees and unions in the federal jurisdiction and establish minimum occupational safety and health standards for the work place. One cannot use the very accident that the regulations are attempting to prevent as a trigger for determining when the regulations should apply. Such an approach would ignore near misses accidents which occupational safety and health experts say outnumber accidents in the work place considerably.

Argument #3

Numerous photos provided show that visibility is not an issue with smaller forklift trucks.

According to section 14.25 of the Part XIV COSH Regulations, an employer is not permitted to require an operator to operate motorized material handling equipment unless the operator has an unobstructed view of the area in which the equipment is being operated, or the operator is directed by a signaler. Section 14.25 reads:

- 14.25 No employer shall require an operator to operate motorized material handling equipment unless the operator
- (a) is directed by a signaler: or
 - (b) has an unobstructed view of the area in which the equipment is to be operated.

Therefore, the issue of whether or not the operator has an unobstructed view of the area in which the equipment is being operated is not a factor in the application of the section 14.16 of the COSH Regulations which is the subject of this review. Instead, I would suggest that subsection 14.16 has a different purpose which is to mitigate against human error where fork lift truck operators, or other employees moving about a material handling area, become distracted by their work or the physical environment in the work place, or become inattentive as a result of, among other things, work place factors. The argument by Mr. Harding and Mr. Duplessis that the use by employees of high-visibility vests, and employee awareness and vigilance to the movement of people and vehicles at the work place protects the occupational safety and health of employees, supports this human factors notion. This is different from the issue of visibility.

With regard to high-visibility jackets, section 12.13 of the COSH Regulations specifies:

- 12.13 Where an employee is regularly exposed to contact with moving vehicles during his work, he shall
- (a) wear a high-visibility vest or other similar clothing, or
 - (b) be protected by a barricade
- that is readily visible under all condition of use. [My underline.]

In my opinion, the purpose of the high-visibility jackets mitigate against human factors by inciting the vehicle operator's attention to the person wearing the jacket. This is especially important where the operator or other employee in the area may become distracted by their work or the physical environment in the work place, or inattentive because of, among other

things, work place factors. Nothing in the section 12.13 of COSH Regulations specifies that the high-visibility jackets substitute or relieves the employer's obligation in section 14.16 of the same Regulations.

Argument #4

The employer and safety and health committee examined the situation and agree that back-up alarms would not improve occupational safety and health at the work place. They are concerned that employees would be confused by the multitude of alarms in limited sized areas where numerous motorized material handling equipment are operated in close proximity. They further fear that, employees would become inattentive to the back-up alarms over time, and might wear hearing protectors to diminish the noise produced by back-up alarms.

Mr. Harding's and Mr. Duplessis's testimony showed a genuine concern and interest regarding employee occupational safety and health at their work place. They are commended for this. I am also persuaded that they are sincere in their belief that back-up alarms would not improve the occupational safety and health in their work place. However, I suggest that they have adopted this view without having obtained sufficient advice concerning "alarm" technology or alternative strategies for incorporating back-up alarms in their work place operations. In this regard, the safety officers present at the hearing spoke generally about the variety of alarms, including tactile alarms, that are available in the market place and being used in other work places.

Notwithstanding the challenges that must be addressed at a work place, where there is a multitude of forklift trucks operating with back-up alarms in limited sized areas, and where walls and surfaces are constantly reflecting and rebounding the light and sound of visual and auditory alarms, failure to comply with the legislation and incorporate all of the preventative measures prescribed in the COSH Regulations is not an option. Back-up alarms may create some confusion, but they could also be the last defense employees have before an accidental contact with a forklift truck.

Notwithstanding my decision that the direction should be confirmed, there is a technical error therein which must be corrected. In the body of his direction, safety officer St-Arnauld referred to subsection 14.16 of the Canada Occupational Safety and Health Regulations "in effect prior to January 1, 1997." As previously indicated in my report, the exemption in subparagraph 14.16(1)(b) of the COSH Regulations does not apply to the smaller forklift trucks (6,000 to 15,000 pound capacity) at Forest Products and consequently, section 14.16 of the current Part XIV (Materials Handling) COSH Regulations (SOR/96-400, 7 August, 1996), applies to the smaller forklift trucks." For the sole purpose of removing the words, "in effect prior to January 1, 1997", from the direction, I **HEREBY VARY** the direction issued by safety officer Pierre St-Arnauld pursuant to subsection 145.(1) of the Canada Labour Code to Forest Products Terminal Corporation Ltd. on May 7, 1997, to make this clarification. For certainty, the part of the direction varied now reads:

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

Paragraph 125.(i) of the Canada Labour Code, Part II and subsection 14.16 of the Canada Occupational Safety and Health Regulations.

Forklift trucks are not equipped with warning device.”

Decision issued on March 3, 1999.

Douglas Malanka
Regional Safety Officer

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On May 7, 1997, the undersigned safety officer conducted an inquiry in the work place operated by FOREST PRODUCTS TERMINAL CORPORATION LTD., being an employer subject to the Canada Labour Code, Part II, at NAVY ISLAND, P. O. BOX 3518, STATION B, SAINT JOHN, N. B., the said work place being sometimes known as FORTERM.

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

1. Paragraph 125(i) of the Canada Labour Code, Part II and subsection 14.16 of the Canada Occupational Safety and Health Regulations in effect prior to January 1, 1997.

Forklift trucks are not equipped with a warning device.

Therefore, you are HEREBY DIRECTED, pursuant to subsection 145(1) of the Canada Labour Code, Part II, to terminate the contravention no later than May 21st, 1997.

Issued at Saint John, this 7th day of May, 1997.

PIERRE ST-ARNAULD
Safety Officer
1753

To: FOREST PRODUCTS TERMINAL CORPORATION LTD.
NAVY ISLAND
P. O. BOX 3518, STATION B
SAINT JOHN, N. B.
E2M 4Y1

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Forest Products Terminal Corporation Ltd.

Respondent: International Longshoreman's Association

KEY WORDS

Stevedoring, terminal facilities, forklift trucks, 6,000 to 15,000 pound capacity, back-up alarms, visual alarms, auditory alarms, tactile alarms, multitude of alarms, employee confusion, employee indifference, high-visibility jackets, exemptions, prevention measures.

PROVISIONS

Code: 125.(i), 145.(1)

Regulations: 14.16, 14.25, 14.51

SUMMARY

A safety officer observed that warning devices were not functioning on several forklift trucks in the 6,000 to 15,000 pound capacity being operated in the reverse direction during stevedoring operations. The employer agreed to remedy this and provided the safety officer with an Assurance of Voluntary Compliance (AVC). Shortly thereafter, the employer requested a meeting with the safety officer to appeal the AVC. He stated that back-up alarms had been discussed many times in the past with other safety officers and it was always concluded that the back-up alarms on these forklift trucks would not enhance the employee occupational safety and health who worked there. The safety officer issued a direction to the employer specifying that the employer was in contravention of paragraph 125.(i) of the Canada Labour Code, hereto referred to as the Code or Part II, and paragraph 14.16 of the Canada Occupational Safety and Health Regulations, hereto referred to as the COSH Regulations. He directed the employer to cease the contravention no later than May 21, 1997. The employer requested that the direction be reviewed by the Regional Safety Officer and a hearing was held in Saint John, New Brunswick on October 15, 1998.

Following his review of the direction, the Regional Safety Officer decided that the exemption in subparagraph 14.16(1)(b) of the COSH Regulations does not apply to these forklift trucks at Forest Products because they did not conform with the previous Part XIV Regulations when the Regulations were revised and came into force on August 7, 1996. Consequently, section 14.16 of the current Part XIV (Materials Handling) of the COSH Regulations (SOR/96-400, 7 August, 1996), applies to the smaller forklift trucks at Forest Products. However, there was a minor technical error that had to be corrected and so the Regional Safety Officer **VARIED** the direction to correct the technical error.