

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: Rosedale Transportation Ltd.  
Represented by: J. Yoon, Counsel

Respondent: None

Mis-en-cause: Yves Laberge  
Safety Officer  
Human Resources Development Canada

Before: Douglas Malanka  
Regional Safety Officer  
Human Resources Development Canada

Background:

On August 17, 1998, an employee driver moved a tractor trailer from a loading dock without proper authorization and without following established Company procedures. A forklift truck operating on the dock plate which bridged the tractor trailer and the loading dock fell to the ground. Fortunately, the forklift truck operator was not injured. The Company investigated the accident and decided that the employee driver who moved the tractor trailer was responsible for the accident and dismissed him.

The employee driver subsequently complained to the Department of Human Resources Development Canada that he had been unjustly dismissed by the Company. A safety officer with the Department conducted an investigation into the accident and the dismissal. The safety officer later decided that the Company was in violation of paragraph 125.(q) of the Canada Labour Code, Part II, (hereto referred to as the "Code" or "Part II") and paragraph 14.23(1)(c) of the Canada Occupational Safety and Health Regulations (hereto referred to as the COSH Regulations) because it had not ensured that the forklift truck operator involved in the accident had been instructed and trained in accordance with the COSH Regulations.

The Company requested that the direction be reviewed and rescinded by a Regional Safety Officer claiming that the forklift operator had been instructed and trained in accordance with paragraph 14.23(1)(c) of the COSH Regulations prior to the accident. The Company further argued that, even if this initial instruction and training did not meet the prescribed requirements in the Regulations, of which they denied, the direction should still be rescinded because they had provided additional

instruction and training to the forklift truck operator following the accident, approximately two months prior to the direction. Therefore, there was no ongoing contravention envisaged in subsection 145.(1) of the Code when the direction was issued. An oral hearing was held on January 14, 2000, to review the direction.

Safety Officer:

Safety officer Laberge provided the Office of the Regional Safety Officer with his Report concerning his investigation of the accident. He also testified at the hearing. His Report forms part of the file and will not be reproduced here. I retain the following facts from his Report and testimony relative to the direction issued to Rosedale Transport Inc. (hereto referred to as "Rosedale")

Safety officer Laberge testified that he and another safety officer interviewed everyone that was present at the workplace when the accident occurred.

Mr. D. Carbonneau, the employee driver who moved the tractor trailer involved in the accident on August 17, 1998, stated in his signed declaration that there were no procedures at Rosedale for operating a forklift truck, and that none of the training was in French.

Mr. Schmid, the operator of the forklift truck involved in the accident, stated in his written declaration that he had not received any official forklift truck operating instructions at Rosedale. However, he told safety officer Laberge that he had practiced operating a forklift truck at Rosedale under the supervision of Mr. Mahomed prior to being employed there as a forklift truck operator, and, that he received further instruction and training from Mr. Mahomed after he was assigned as a forklift truck operator.

Safety officer Laberge testified that he met with Mr. Harris, Terminal Manager at Rosedale, and Mr. B Topping, Director of Safety at Rosedale. Mr. Harris reviewed the accident with him, and Mr. Topping provided him with requested documents which included a copy of Rosedale's General Safety Rules, a copy of a May 23, 1998, Training Attendance Record, and a copy of Rosedale's Professional Drivers and Dock Associate Handbook.

Safety officer Laberge said that he concluded from his findings that Rosedale was in contravention of 125.(q) of the Code and paragraph 14.23(1)(c) of the COSH Regulations relative to Mr. Colin Schmid.

Applicant :

Prior to the hearing, Ms. Yoon provided a letter to the Office of the Regional Safety Officer outlining reasons for requesting that the direction be rescinded, and presented four (4) witnesses at the hearing. I retain the following from the documents and witnesses.

Mr. Schmid testified that, when he declared to safety officer Laberge that he had not received any forklift truck training at Rosedale, he meant that he had not received training from anyone outside of the Company. He stated that safety officer Laberge had used the term "official training" in his

inquiry and he understood this to mean training from the government or from an outside private training company. He said he also interpreted the term to mean training that lasts a couple of days and that covers theory and practice. He reiterated that he had practiced operating a forklift truck under the supervision of Mr. Raymond Mahomed before being employed as a forklift truck operator at Rosedale and that he had received approximately two weeks of constant on the job training from Mr. Mahomed after being employed as a forklift truck operator. He testified that during this training period Mr. Mahomed taught him how to safely operate a forklift truck, how to safely lift and transport carpet with the forklift truck and how to safely maneuver the forklift truck within the warehouse at Rosedale.

Mr. Mahomed, Mr. Schmid's supervisor at the time of the accident, testified that he had approximately 12 years experience as a forklift truck operator and that he had received forklift truck operator training while employed outside of Rosedale. He confirmed that he had not provided Mr. Schmid with classroom type of instruction but rather with on the job instruction and training. He said that he taught Mr. Schmid how to operate a forklift truck to move carpet at Rosedale, and instructed him on Company rules. He acknowledged that he did not have or follow a written syllabus for his forklift truck training, and he did not keep a record of the instruction and training provided to Mr. Schmid.

Mr. B. Topping, Safety Director at Rosedale, explained that general safety meetings are held biannually to up-date Rosedale employees on new legislation or legislative requirements in Canada or the USA. He said the difference between the biannual safety meetings he conducts and the on the job training provided by individual terminal supervisors is that he addresses general subjects while the supervisors provide their employees with specific and personal on the job training. Mr. Topping confirmed that two (2) safety biannual meetings had been held since the accident. The first was held on November 14, 1998 and focused on training to replace propane fuel tanks on forklift trucks. The second was held on January 23, 1999, and provided forklift truck instruction and training.

He testified that the forklift truck course<sup>1</sup> presented to employees on January 23, 1999, included 6-8 hours of instruction on the safe use and operation of a forklift truck, a written test, and a practical evaluation on a forklift truck. Employees obtained a certificate after completing the course. Mr. Topping noted that this instruction and training took place approximately two (2) months prior to the direction issued by safety officer Laberge and included Mr. Schmid.

#### Summations:

Ms. Yoon held that I should rescind the direction because Mr. Mahomed had provided Mr. Schmid with two weeks of on the job forklift truck operator instruction and training when he was hired at Rosedale as a forklift truck operator, and continued to provide him with ongoing on the job instruction and training. She argued that there is nothing in paragraph 125.(q) of the Code or paragraph 14.23(1)(c) of the COSH Regulations that specifies that instruction and training must be formal or "official" and so Rosedale was not in contravention of the law.

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<sup>1</sup> Following the hearing, Mr. Topping submitted to the Regional Safety Officer a copy of the Forklift Training Agenda for the January 23, 1999, Course, a copy Mr. Schmid's written test, a copy of Mr. Schmid's Operator Practical Evaluation, and a copy of Mr. Schmid's certificate.

She further argued that, should I decide that the initial on the job training provided to Mr. Schmid does not meet the requirements of paragraph 14.23(1)(c) of the COSH Regulations, the direction should still be rescinded. She noted that the direction issued to Rosedale was made pursuant to subsection 145.(1) of the Code and this subsection applies in respect of ongoing contraventions. She said that Mr. Schmid had received further forklift truck operator instruction and training from Rosedale following safety officer Laberge's investigation and approximately 2 months prior to his direction. Consequently, Rosedale could not terminate the contravention of paragraph 14.23(1)(c) of the COSH Regulations on April 9, 1999, because none existed at that time.

Decision:

The issue I must decide is whether Rosedale was in contravention of paragraph 125.(q) of the Code and paragraph 14.23(1)(c) of the COSH Regulations with regard to Mr. Schmid. The applicable legislation in this case reads as follows:

*“Section 125. Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer,  
(q) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure the safety and health at work of that employee;”* [My underline.]

In accordance with this, the employer is required to provide each employee with the information, instruction, training and supervision necessary to ensure the safety and health at work of that employee in the prescribed manner. According to safety officer Laberge, the prescribed regulation relative to the safe and proper use of a forklift truck is found in paragraph 14.23(1)(c) of the COSH Regulations. Paragraph 14.23(1)(c) of the COSH Regulations reads.

*“Paragraph 14.23.(1)(c) Subject to subsection (2), every employer shall ensure that every operator of motorized materials handling equipment has been instructed and trained in the procedures to be followed for*

*(c) its safe and proper use, in accordance with any instructions provided by the manufacturer and taking into account the conditions of the work place in which the operator will operate the materials handling equipment.”* [My underline.]

As noted above, the introductory wording in subsection 14.23(1) specifies that the employer is responsible for ensuring<sup>2</sup> that every operator of motorized materials handling equipment in their employ has been instructed and trained. However, “ensuring” this does not necessary mean that the employer must provide the actual instruction and training. Rather, the obligation is satisfied if the employer makes certain, at the point of employment and during the time of employment, that every forklift truck operator has been instructed and trained in accordance with paragraph 14.23(1)(c) of the COSH Regulations. The employee may receive the prescribed instruction and training prior to being hired, or be instructed and trained in accordance with the COSH Regulations by an outside firm engaged by the employer for that purpose.

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<sup>2</sup> The word “ensure” is defined in Merriam Webster's Collegiate Dictionary, 1998, as follows: “ensure; to make sure, certain or safe.”

Ms. Yoon held that the on the job training that Mr. Mahomed provided to Mr. Schmid met the regulatory requirement in paragraph 14.23(1)(c) of the COSH Regulations because paragraph 14.23(1)(c) does not specify the manner in which the prescribed instruction and training is to be provided. Even if I were to agree with this interpretation, which I do not completely, I can not agree with her that the on the job training that Mr. Mahomed provided to Mr. Schmid met the requirements of paragraph 14.23(1)(c) of the COSH Regulations.

During his testimony, Mr. Mahomed confirmed that he did not use a formal or written syllabus for the on the job training he provided to Mr. Schmid, and did not maintain a record of Mr. Schmid's instruction and training. Thus, he relied on his personal experiences for determining what instruction and training to give Mr. Schmid, and on his memory for recalling what instruction and training remained outstanding. Thus, the on the job instruction and training provided was more random and reactive than planned and methodical, and could be more accurately characterized as close supervision rather than instruction and training. With such an approach, it is possible, and I would even say likely, that some hazards may only be addressed after they have arisen.

Turning to Ms. Yoon's argument that there was no ongoing violation at the time safety officer Laberge issued his direction to Rosedale, and consequently the safety officer was not authorized by subsection 145.(1) to issue his direction, I note that subsection 145.(1) reads:

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

For interpreting the words “is being contravened” reference is made to my earlier unreported decision in the case of Brinks Canada Limited and Mr. Phil Prince, Decision # 98-014, 1998. In that decision I wrote that a direction issued pursuant to subsection 145.(1) is still authorized if, at the time of issuance, the safety officer is of the view that the circumstances or conditions that led to the contravention still exist or are on-going. However, I am persuaded that this is not the situation here.

The evidence presented in this case showed that Rosedale has a safety and health program which includes a written policy and procedures for its dock associates. It also showed that the Company provides regular biannual instruction and training to its employees via its safety meetings, and voluntarily provided its forklift truck operators with forklift truck instruction and training following safety officer Laberge's investigation of the accident. I note that safety officer Laberge was unaware that Mr. Schmid had received forklift truck instruction and training on January 23, 1999, when he issued his direction, and that, according to Mr. Harris, the accident involving

Mr. Schmid was the first accident involving a forklift truck at his Terminal. For these reasons, and without prejudice to the safety officer's good work, I am persuaded that the circumstances or conditions that led to the contravention no longer exist and there is no need for the direction. As a result, I HEREBY RESCIND the direction that safety officer Laberge issued to Rosedale Transport Ltd. on April 9, 1999 pursuant to subsection 145.(1) of the Code.

Decision rendered on April 25, 2000.

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)

The 13<sup>th</sup> of November 1998, the undersigned, a health and safety officer commenced an inquiry concerning the fall of a fork-lift, on or about the 17<sup>th</sup> of August 1998, at the place of work operated by ROSEDALE TRANSPORT LTD., an employer subject to Part II of the Canada Labour Code, having a place of business in Quebec, at 510 Orly St. Dorval, Que., H9P 1E9. The health and safety officer finished his inquiry and I am of the opinion that subsection 125 q) of the Canada Labour Code, Part II and paragraph 14.23(1)c) of the Materials Handling Regulations have been violated by the employer.

On or about the August 17<sup>th</sup> 1998, Mr. Colin Schmid, an employees, operated a motorized material handling equipment without having received the instruction training required. Therefore, the employer did not provide, in the prescribed manner, to Mr. Colin Schmid with the information, instruction, training and supervision necessary to ensure the safety and health at work of that employee; as per subsection 125q) of the Canada Labour Code, Part II R.S.C. 1985, Chapter L-2 and paragraph 14.23(1)c) of the Canada Occupational Safety and Health Regulations "Materials Handling Regulations". SOR/86-304. As amended by: SOR/87-623; 88-44, 88-68, 88-632; 89-479, 89-515; 90-180; 91-448; 92-544; 94-33; 94-263; 95-286; 95-533; 96-294; 96-400; 96-525; 98-427; 98-456

Consequently, it is by the present ordered as per subsection 145(1) of the Canada Labour Code, Part II to cease all contravention at the latest April 9. 1999.

YVES LABERGE  
Health and Safety Officer  
#1903

c.c. Mrs. Jean Yoon, Counsel for Rosedale Transport Ltd.  
Mr. Brian Topping, Director of safety at Rosedale Transport Ltd.

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Rosedale Transportation Ltd.

Respondent: None

**KEY WORDS**

Accident, forklift truck, dock plate, tractor trailer, instruction and training, on the job training, on going contravention

**PROVISIONS**

*Code:* 125.(q) 145.(1),

*Reg:* 14.23(1)(c)

**SUMMARY**

On August 17, 1998, an employee driver moved a tractor trailer from a loading dock. A forklift truck operating on the dock plate which bridged the loading dock and the tractor trailer fell to the ground. Following his investigation of the accident a safety officer decided that the Company was in violation of paragraph 125.(q) of the Canada Labour Code, Part II and paragraph 14.23(1)(c) of the Canada Occupational Safety and Health Regulations because the forklift truck operator, who had improperly parked his forklift truck on the dock plate just before the accident, had not been adequately instructed and trained in conformity with the COSH Regulations.

The Regional Safety Officer rescinded the direction because the evidence in the case showed that the Company had provided the forklift truck operator referred to in the direction with forklift truck instruction and training following the accident and prior to the direction, that the Company routinely provides its employees with occupational safety and health instruction and training, and this was the first accident at the Terminal involving forklift truck operations.