Canada Appeals Office on Occupational Health and Safety
Bureau d'appel canadien en santé et sécurité au travail

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Canada Labour Code
Part II
Occupational Health and Safety

Terminal maritime Sorel-Tracy
Applicant

and

Alain Gauvin
Francis Gagnon
health and safety officers

Decision No. 02-26
October 29, 2002

This case was decided by appeals officer Michèle Beauchamp, based on documents sent by health and safety officer Alain Gauvin and written arguments from André Joli-Coeur, the legal counsel representing the employer, Terminal maritime Sorel-Tracy.

After being notified of the appeal submitted by the employer, Longshoremen's Union Local 4333 stated on the telephone that it had nothing to add and made no other observations.

[1] This appeal was originally launched on June 6, 2001, pursuant to section 146 of the *Canada Labour Code*, Part II, by Denis Caron, occupational health and safety manager at Terminal maritime Sorel-Tracy. The appeal is against the direction (see Appendix) given by Transport Canada Marine Safety health and safety officers Alain Gauvin and Francis Gagnon to the employer on May 16, 2001 under the *Canada Labour Code*, Part II.

[2] This direction was part of the investigation conducted by the health and safety officers into the fatal accident suffered on May 14, 2001, by Maurice Lemoine, a hydraulic excavator operator with Les Entreprises Pierreville, as he was unloading the vessel, Kartal 7, at Terminal maritime Sorel-Tracy.

[3] Here is a brief summary of the circumstances that led the health and safety officers to issue their direction. This summary is based on the accident report sent by officer Gauvin as part of the appeal process.[1]

- On May 14, two teams of longshoremen arrived at the dock around 8:10 a.m. to unload the Kartal 7. Cargo boom #3 was then used to lower the first hydraulic excavator into hold #2 and cargo boom #2 was used to lower the second excavator into hold #1. Each of the cargo booms has a load capacity of 22 tonnes.
- Unloading began around 9:30 a.m. The supervisor showed the winch and cargo boom operators as well as the excavator operator where to start unloading. He asked them to put four or five bulk buckets per container when using cargo booms #2 and #3 and then lift the load.
- During the morning, there were several power outages on the ship during the unloading with cargo booms #2 and #3. These were caused by overloading of the electrical system, since the ship only had one electric generator operational while the other was being repaired.
- To remedy the situation, unloading continued with only two buckets per container by cargo booms #1 and #4, each of which has an 8-tonne capacity.
- Around 4 p.m., a new shift of longshoremen took over, but the hydraulic excavator operators of the previous shift were not replaced.
- Around 5 p.m., the operator of cargo boom #4 lowered the container to the bottom of hold #2 and one of the container's two removable chains uhooked itself. Mr. Lemoine, the hydraulic excavator operator, put two bulk buckets of cargo in the container, then left his cabin to reset the chain before heading back to his machine.
- While Mr. Lemoine was on the left-hand crawler of his machine returning to his cabin, the operator of cargo boom #4 lifted the load approximately two metres with the winch by pulling the right-hand lever towards himself; he then applied the boom's pay-out and pull-in winches. The container immediately moved to the left while continuing to rise and struck the partially opened excavator cabin door, jamming Mr. Lemoine between it and the doorframe.
- As soon as the container moved to the left, the boom operator tried to bring it back. After the container had hit the cabin door, he managed to bring it over to the far right and place it on the bottom of the hold He then saw Mr. Lemoine get down from the excavator, move towards the front of his machine and collapse on the bulk cargo. Help was quickly mobilized, but Mr. Lemoine was pronounced dead at the hospital.
- The terminal's general manager suspended unloading until the next morning and arranged for a secure area to be set up around the accident site. He then informed the Canadian Coast Guard of the accident and asked them to inform Transport Canada Marine Safety.
- On May 15, a crew of longshoremen continued to unload hold #1, with a hydraulic mobile crane from Armand Guay Inc. rather than with the ship's cargo boom.

[1] The direction to the employers was jointly issued and signed by health and safety officers Alain Gauvin and Francis Gagnon. However, for appeal purposes, I will only mention officer Gauvin, because he is the one who subsequently signed the letters to the employer and the documents sent to the appeals officer.

- Health and safety officers Gagnon and Gauvin tested the operation of the ship's winches and cargo booms in the presence of both ship and terminal representatives.
- On May 16, other operating tests were conducted on the ship's winches and cargo booms, but no unloading took place.
- Also on May 16, health and safety officers Gagnon and Gauvin delivered to the terminal's manager, Rodney Corrigan a direction in writing under sub-section 145.1 of the *Canada Labour Code*, Part II.
- This direction informed Mr. Corrigan that the employer had contravened section 124 of the *Canada Labour Code*, Part II, by not ensuring that the employees using the Kartal 7's cargo booms had received the education and training required for safe operation of the vessel's cargo booms to unload. As a result, they directed him to take immediate action before continuing to use the ship's cargo booms for unloading.
- On May 17, a new crew of longshoremen continued to unload holds # 1 and 2 with the ship's cargo boom. These longshoremen worked for Quebec Ports Terminal Inc., a company affiliated with Terminal maritime Sorel-Tracy. Usually assigned to the ports of Manane and Gros-Cacouna, these workers had extensive experience with the type of equipment available on the Kartal 7. Three of the four new workers were cargo-boom operators and the fourth was a heavy equipment operator.
- Unloading finished on May 23 and the ship left Sorel harbour on May 24.

[4] In a letter addressed to Rodney Corrigan on July 30, health and safety officer Gauvin indicated that on several occasions since May 16, he had successively asked him or Denis Caron, the terminal's health and safety manager, for the training files of the employees present at the time of the accident, the specification sheets for the products on the ship, and the collective agreement of the terminal's employees and longshoremen. On each occasion, either Mr. Caron or Mr. Corrigan assured him that he would receive them shortly, but at the time officer Gauvin wrote his letter, all he had received was the list of employees present at the time of the accident. He therefore demanded that Rodney Corrigan send him the documents in question by August 3.

[5] In addition, in a letter addressed to the appeals officer on July 20, health and safety officer Gauvin stated "every indication pointed to the cargo-boom operators not being qualified to safely operate the type of boom controls the ship was equipped with." He added that, despite several requests, the employer "was not in a position to immediately provide the files on the training his employees had taken."

[6] In a letter to the appeals officer on September 4, André Joli-Coeur, the legal counsel representing the employer, advanced the following arguments to support the appeal lodged by the employer on June 6 against the direction that the health and safety officers had issued on May 16.

[7] First, Mr. Joli-Cœur acknowledged that health and safety officer Gauvin had possibly been mistaken when he issued his direction in writing to the employer under section 145.1 of the *Canada Labour Code*, rather than under sub-section 145(1). On the other hand, the counsel objected to the fact that, by not using government forms to issue the direction, the health and safety officer had prevented the employer from being fully aware of his rights and obligations under sub-sections 146(1) and (2).

[8] With respect to the direction itself, Mr. Joli-Coeur argued that paragraphs *a)* or *b)* in sub-section 145(1) of the *Canada Labour Code* imply either terminating the action constituting the contravention or timeframes and specific measures. Since the health and safety officer had not directed the employer to take specific action nor terminate any contravention, Mr. Joli-Coeur argued that the document sent should not be considered a direction under the terms of sub-section 145(1).

[9] According to Mr. Joli-Cœur, in view of the nature of the charge made against the employer for not ensuring that "the operators using the cargo booms on the Kartal 7 had received the education and training required to safely operate the ship's cargo booms for unloading," the health and safety officer was not correct in issuing him a direction based on a contravention of section 124. Indeed, Mr. Joli-Cœur stated, because sub-section 125(1) stipulates specific obligations, it has precedence over section 124, which is general in scope. Specifically, paragraph 124(1)*q)* stipulates the employer's obligations with respect to employee training and if a contravention had occurred, Mr. Joli-Cœur pointed out, it could only have been with respect to this provision.

[10] Mr. Joli-Coeur also argued that the health and safety officer was not entitled to issue a direction under sub-section 145(1) on the grounds that he felt section 124 had been contravened, since the officer was unaware when he issued the direction — and was still unaware at the time of Mr. Joli-Coeur's letter — exactly what education and training the employees had received.

[11] The health and safety officer, Mr. Joli-Coeur stated, issued a direction following a specific accident in a specific place that involved only two people. On the other hand, the direction in question covered all the employees using cargo booms on the Kartal 7, regardless of their shifts or the cargo booms that they were assigned to. In these circumstances, he claimed, the health and safety officer was not entitled to issue a direction on anything other than the accident itself or an aspect which concerned all employees, since the training of the other employees had nothing to do with the accident. Furthermore, Mr. Joli-Coeur continued, the health and safety officer, contrary to his previous opinion, was satisfied with the training of at least one employee, since, when reconstituting the accident after the direction was issued, he used the services of another employee, who had also worked on unloading the Kartal 7, to operate the cargo boom in the hold where the accident had taken place.

[12] Since the accident happened while unloading the Kartal 7, the health and safety officer's direction, Mr. Joli-Coeur stated, was not based on any legal obligation under the *Canada Labour Code* Part II, because, in fact, sub-section 12.22(1) of Part XII of the *Marine Occupational Health and Safety Regulations* stipulate that the employer should give each

operator of materials-handling equipment the education and training required to inspect the equipment, use it correctly and safely, and provide it with fuel as needed. However, Mr. Joli-Coeur added, the preceding section specifies that part XII does not apply to the use and operation of loading equipment during the loading or unloading of ships.

[13] In addition, the *Canada Labour Code* and its regulations, Mr. Joli-Cour argued, do not stipulate any employer obligation to train cargo boom operators. On the contrary, section 38 of the *Tackle Regulations*, adopted under the *Canada Shipping Act*, simply states that "only capable and reliable persons shall operate lifting machinery or transporting machinery, give signals to a driver of such machinery, or attend to cargo falls on winch ends or winch drums."

[14] Mr. Joli-Coeur said that the cargo-boom operator in question had received training that exceeded the regulation's requirements. At the time of the accident and at the time Mr. Joli-Coeur wrote his letter to the appeals officer, this operator was, and is, a competent and reliable person, Mr. Joli-Coeur stated. For the last 5 years, he has been classified as a winch operator in the collective agreement governing the employer's labour relations and has worked more than 10,000 hours on handling and lifting machinery. Even though he has worked on different configurations of lifting equipment on various ships, Mr. Joli-Coeur added, this operator has worked hundreds of hours on machinery of the same kind as the one he was using the day the accident occurred on the Kartal 7.

[15] Lastly, in a letter to health and safety officer Gauvin on August 3, 2001, Mr. Joli-Coeur reminded him that, even before officer Gauvin had issued his direction, the employer had offered to inform him about the training the cargo-boom operator had received. Mr. Joli-Coeur also attached to this letter the results of the exams that the employee had taken during his training in 1994, pointing out that these results were prior to 1995, the year from which health and safety officer Gauvin had requested the operator's training files.

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[16] According to sub-section 146.1(1) of the *Canada Labour Code*, when an appeal against a direction is brought, the appeals officer inquires into the circumstances that resulted in the direction and the reasons for it, and may, among several options, vary, rescind or confirm the direction.

[17] In this particular case, health and safety officer Gauvin issued a direction to the employer because he believed that the employer had contravened section 124 of the *Canada Labour Code* Part II by not ensuring that the employees using cargo booms on the Kartal 7 had received the education and training required to safely operate the ship's cargo booms for unloading. As a result, the officer ordered the employer to "immediately take appropriate steps before continuing to use the ship's cargo booms for unloading." Even though the employer appealed the direction, he complied with it by having the ship unloaded by a new group of longshoremen who were normally assigned to other ports.

[18] As an appeals officer, I must therefore inquire into the circumstances that led the health and safety officer to issue his direction under sub-section 145(1) of the *Canada Labour Code* and determine whether this was justified.

[19] As a first step, the health and safety officer issued a direction in writing to the employer under section 145.1 of the *Canada Labour Code*, rather than under sub-section 145(1). There is no doubt in my mind that the health and safety officer cited this section by mistake; at the same time, I do not think that such a mistake invalidates the direction.

[20] Indeed, it is very clear from the tenor of the direction, including the way in which it is formulated, and from the subsequent correspondence between the health and safety officer and the employer, that the health and safety officer genuinely believed that his direction had been issued under sub-section 145(1). However, in this regard, I would like to stress how important it is that health and safety officers always use the forms that the Department has specifically prepared for directions. They will thus avoid, as the employer's lawyer implies, any misunderstanding or confusion with respect to the rights and obligations incumbent on the party receiving the direction and to the aspect of the Act's application being invoked in the directions.

[21] Secondly, also as an appeals officer, I cannot simply believe someone else's word that the employer had contravened the Act by not ensuring that his operators were educated and trained in the safe operation of the ship's cargo booms. There is need to provide evidence showing that a contravention had indeed taken place.

[22] In reading the documents that were sent to me by both parties, it appears clear that the main thing the health and safety officer was primarily trying to achieve was to obtain the employees' training files so as to ensure that they had, in fact, been educated and trained on how to safely use the ship's cargo booms.

[23] In his letter of July 30 to Rodney Corrigan, the health and safety officer mentioned that he had several times asked him and Denis Caron for the employees' training files. And despite what Mr. Joli-Coeur states in his letter of September 4 to the appeals officer, it is of little importance to me at this time to know whether the employees in question were really trained. Rather, I would have preferred that Mr. Joli-Coeur explain why an employer like Terminal maritime Sorel-Tracy did not have its employees' training files on hand and why he was not able to give them to the health and safety officer as soon as they were requested from either Mr. Corrigan or Mr. Caron.

[24] I would also have liked to read in the health and safety officer's documents the testimony or evidence that had led him to believe that the employer had not ensured that his employees were educated and trained to use cargo booms safely. I would also have wanted him to explain what meaning or significance he attached to the word "every," when in his letter of July 20 to the appeals officer, he wrote that "every indication pointed to the cargo-boom operators not being qualified to safely operate the type of boom controls the ship was equipped with."

[25] However, before rendering my decision, I would like to make the following comment. I am convinced that had the employer lost no time in giving the health and safety officer the documents requested, the two of them together could then have applied all the energy spent discussing that issue on something else — for example, their respective inquiries into the causes of this unfortunate accident. I also believe that it would be useful at this juncture to remember that the *Canada Labour Code* Part II assigns to both the employer and the health and safety officer responsibilities that clearly set out their respective occupational health and safety roles. The employer must protect the health and safety of his employees, which implies, in my view, that in such a sad and regrettable case as this, he must, among other things, take all necessary steps to immediately identify and correct the causes of the accident and ensure that it will not happen again. In such circumstances, the cooperative support of a health and safety officer can be of great assistance to the employer, notwithstanding the health and safety officer's role, as stipulated in the Act, which includes issuing directions to ensure that the Act is complied with.

[26] In practice, under paragraph 141(1)*h)* of the *Canada Labour Code*, Part II, the health and safety officer possessed all the powers needed to obtain the documents he was looking for. Had he issued a direction under this provision, rather than under sub-section 145(1), he might have been able to remove the misunderstanding that seems to have occurred between himself and the employer's representatives and thereby enlisted their cooperation more readily.

[27] I would thus have liked to have been able to change the direction that the health and safety officer issued under sub-section 145(1) to one issued under section 141. I am convinced however that the *Canada Labour Code* does not authorize me to act in this manner, nor does it authorize me to issue other types of directions than those, as stipulated in paragraph 146.1 (1) *b)*, I could give under sub-sections 145(2) or (2.1).

[28] This is the standpoint that, in my opinion, emerges from Mr. Justice Teitelbaum's Federal Court Trial Division decision in *CUPE Longshoremen's Union Local 375 vs. Federal Marine Terminals Ltd., Division of Fenav Ltd.*, docket T-938-99 — a decision that the Federal Court subsequently confirmed in another case (docket # A-349-00). In the former case, Mr. Justice Teitelbaum examined the review powers of a regional safety officer,[2] specifically with respect to the question of whether the regional safety officer could convert a direction issued under sub-section 145(2) into a direction issued under sub-section 145(1). Comparing these two powers to issue directions that the Code had assigned to safety officers, Mr. Justice Teitelbaum stated:

> [62] Parliament thus deliberately chose to divide these two powers into two distinct subsections, and this should be kept in mind when determining the scope of the power of review Parliament wished to give the regional officer in subsection 146(3). The Act is so constructed that the regional officer hearing a request under subsection 146(1) is reviewing a direction issued under the authority of one subsection, and it is a review of that direction that he must conduct.

[2] With the entry into force of the "new" Part II of the *Canada Labour Code* on September 30, 2000, the regional safety officer became the appeals officer.

> [63] Thus, in the context of his duties, the regional officer is led to analyze the statutory authority relied on by the safety officer and that authority, in the instant case, is subsection 145(2).
>
> [64] Now, if, in the exercise of his power of review, he decides to vary a direction issued by the safety officer, I am of the opinion that the regional officer must remain with the boundaries of the statutory authority under which the safety officer acted.
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> …
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> [67] … If Parliament had intended to allow the regional officer to issue new directions, it could have indicated this expressly in subsection 146(3) of the C.L.C. It did not do so.
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> …
>
> [70] Consequently, I conclude that the review authority contemplated by Parliament in subsection 146(3) of the C.L.C. cannot allow the issuance of new directions under subsection 145(1) when the directions under review were issued under subsection 145(2).

[29] Lastly, with respect to the direction that the health and safety officer issued on May 16, 2001, to Terminal maritime Sorel-Tracy under sub-section 145(1) of the *Canada Labour Code*, I do not find in the documents he submitted any testimony or evidence to make me conclude that the employer had indeed contravened section 124 of the *Canada Labour Code* by not ensuring that his employees had received the education and training required for safe operation of the ship's cargo booms.

[30] For these reasons, I REVOKE the direction the health and safety officer issued to Terminal maritime Sorel-Tracy under sub-section 145(1) of the *Canada Labour Code*, Part II.

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Michèle Beauchamp
Appeals Officer

APPENDIX

Mr. Rodney Corrigan
Terminal Maritime Sorel-Tracy
101 Montcalm Street
St Joseph de Sorel, PQ

Direction to the employer under section 145.1 of the CLC, Part II

Following the fatal accident that occurred to Mr. Maurice Lemoine, the undersigned health and safety officer visited the ship, Kartal 7, which was docked at section 5 in Sorel harbour, this workplace being under the responsibility of Terminal Maritime Sorel-Tracy, a company under federal jurisdiction.

The health and safety officers believe that section 24 of the Canada Labour Code Part II has been contravened in that the employer did not ensure that the employees using the cargo booms on the Kartal 7 had received the education and training required to safely operate the ship's cargo booms to unload the ship.

In consequence, you are directed to take immediate action before continuing to use the ship’s cargo booms to unload it.

Alain Gauvin
Francis Gagnon
Health and security officers

Direction received by Rodney Corrigan: (signed)

Summary of Appeals Officer Decision

Decision No.: 02-026

Employer: Terminal Maritime Sorel-Tracy

Health and safety officers: Alain Gauvin
Francis Gagnon

Before: Michèle Beauchamp

Key words: General
Specific

Provisions: *Code* 124, 125(1), 141, 145(1)
Regulations

Summary:
The health and safety officers issued a direction to the employer under sub-section 145(1), notifying him that he had contravened section 123 of Part II by not ensuring that the operators of ship cargo booms had received the education and training required to perform unloading duties.

In reality, it is clear from the documents provided that the health and safety officer's main interest was to obtain the employees' training documents to ensure that they had indeed been educated and trained in the safe use of the ship's cargo booms. In this regard, the health and safety officer could have used the powers delegated by section 141.

The appeals officer revoked the direction because there was no evidence of contravention. Moreover, the appeals officer did not have the necessary authority to convert the instruction issued under sub-section 145(1) into one issued under section 141.