

Canada Labour Code
Part II
Occupational Health and Safety

Consolidated Fastfrate Inc.
applicant

and

Teamsters Canada
Local Union 938
respondent

Decision No. 05-047
November 28, 2005

This case was heard on June 23 and on October 24, 2005, in Toronto, Ontario, by Douglas Malanka, Appeals Officer.

Appearances

For the applicant

Mario Migliazza, Consultant, Total Loss Control Group

Steve Coombs, Vice President and Ontario General Manager, Consolidated Fastfrate Inc.

Patricia Scott, Human Resources Manager, Consolidated Fastfrate Inc.

George Bishara, Operations Manager, Consolidated Fastfrate Inc.

For the respondent

Giuseppe Castellano

Business Agent, Teamsters Union Canada, Local 938

James Williams

Dockworker and work place health and safety committee employee chairman

Tim Koenig

Dockworker and work place health and safety committee member

Health and Safety Officer

Jane Shimono,

Human Resources and Skills Development Canada, Labour Program, Toronto, Ontario

- [1] This case concerns an appeal made on May 17, 2004, by Consolidated Fastfrate Inc. under subsection 146(1) of the *Canada Labour Code*, Part II (the *Code*), against a direction issued by health and safety officer (HSO) Jane Shimono on May 10, 2004, after she conducted an inspection in a work place operated by the company in Woodbridge, Toronto, Ontario.
- [2] On September 22, 2003, HSO Shimono conducted a review of an investigation made by the employer concerning a fork lift truck accident which occurred on July 10, 2003. The accident happened when a fork lift operator was driving onto a trailer to remove skids of freight. At the same time, the driver of the truck began to drive away from the dock. This caused the dock plate to fall to the ground, as well as the fork lift truck with the operator inside. The fork lift landed on the ground outside of the building with its back end landing on the plate. The fork lift operator received serious injuries and could not return to work for several months. According to the employer's investigation report, the direct cause of the accident was that the truck driver failed to ensure that the dock plate was removed and the trailer emptied before hooking up and driving away.
- [3] I retain the following from HSO Shimono's inspection report and testimony at the hearing on June 23, 2005.
- [4] During HSO Shimono's review, the employer provided her with a copy of Consolidated Fastfrate Inc.'s *Procedures for Empty Trailers*. These procedures state that the truck driver is responsible to go up onto the dock and ensure that the trailer is empty or properly loaded, that the dock plate is removed and that no person or any company equipment remains in the trailer before the truck driver departs from the loading dock. After the accident, the company took corrective measures to ensure that employees adhered to these procedures and disciplined the truck driver involved in the accident with a few days suspension.
- [5] The employer also informed HSO Shimono that the past practice of drivers taking trailers as directed by dispatch without notification to the dock foreman was changed. Following the accident, Consolidated Fastfrate Inc. issued a memo dated August 6, 2003, which instructed that from that date, all truck drivers had to check with the dock foreman before pulling an empty trailer from the dock and that dispatch could not authorize any driver to leave the dock. The employer advised HSO Shimono that he was in the process of installing orange posts and ropes at each door on the dock. In addition, the employer instructed all fork lift operators to sign the load's paperwork ("folder") indicating that the dock plate had been removed. The folder was to be forwarded to the dock foreman for both empty and loaded trailers. As an additional safety measure, the fork lift operators were required to secure the rope across the dock door to indicate that no further loading or unloading would occur. The truck drivers were then required to go to the dock foreman to obtain the folder and, prior to departure, they had to verify within the building that the trailer was ready to be moved.

- [6] HSO Shimono considered these corrective measures to be satisfactory.
- [7] However, HSO Shimono stated at the hearing that she felt that the injuries suffered by the fork lift operator would have been minimized to some extent if he had been wearing a seat-belt. In addition, she believed that any time a fork lift falls from a dock, there is the potential for it to tip over. Should that happen, a fatality may be prevented by wearing the seat-belt, as it would help to restrain the fork lift operator and remind him to keep his entire body within the cage area rather than trying to jump off the fork lift while it is falling.
- [8] HSO Shimono also stated that at the time of her investigation, Consolidated Fastfrate Inc. did not have mechanical truck restraints and signal lights, which offer a greater degree of safety.
- [9] HSO Shimono added that, while most companies require fork lift operators to go outside to check that the wheel chock is in place before entering a trailer, Consolidated Fastfrate Inc. still relied on the truck drivers to notate on the folders that they had chocked their respective trailers. This was to prevent employees from being injured by moving trucks in the yard. She noted that this is an extremely large cross-dock operation and the fork lift operators would have to walk outside a great distance to access and check that a particular trailer is chocked.
- [10] As a consequence, there was no visual confirmation for the fork lift operator that the trailer had been or remained chocked by the time he actually entered the trailer. Although brackets had just been installed on the exterior walls beside each door to store the chocks and help prevent them from becoming lost or stuck in the ice, this again did not guarantee the trailers would be properly chocked.
- [11] HSO Shimono added that, during her review, she was informed that a similar fork lift incident occurred after the accident, when a truck driver drove his truck away without realizing that a fork lift operator had remained inside the trailer.
- [12] Following her review, HSO Shimono received an Assurance of Voluntary Compliance (AVC) on September 22, 2003, from Consolidated Fastfrate Inc., which confirmed that the employer would:
- ensure all drivers of motorized materials handling equipment wear a seat-belt or shoulder-type strap restraining device while operating the equipment at all times;
 - ensure all drivers of motorized materials equipment shall be instructed on the safe and proper use of the seat-belts/restraining devices.
- [13] On September 26, 2003, the employer provided HSO Shimono with a copy of a new procedure indicating that all fork lift operators would wear the supplied seat-belt at all times while operating a fork lift. Consolidated Fastfrate Inc. also confirmed that this new procedure would be implemented and verified on a regular basis to ensure compliance.

- [14] On April 26, 2004, HSO Shimono visited the work place to verify Consolidated Fastfrate Inc.'s compliance with the AVC. When she walked onto the dock, she noticed that none of the operators were wearing a seat-belt while operating their fork lift trucks.
- [15] HSO Shimono stated that the employer acknowledged the non-compliance with the AVC at the time and confirmed to her that no disciplinary action had been taken to date to enforce the use of the seat-belts. In addition, she reviewed the work place health and safety committee minutes from October 23, 2003, to April 13, 2004, which further established that seat-belts were not being worn by the fork lift operators.
- [16] On May 10, 2004, HSO Shimono hand-delivered to the employer a direction under subsection 145(1) of the *Code*, pertaining to seat-belt use. Her direction referred to section 124 of the *Code*, which states:
- Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.
- [17] In her direction, HSO Shimono wrote that she was of the opinion that section 124 had been contravened because:
- The employer has failed to ensure that their fork lift operators are wearing the manufacturer-supplied seat-belt/restraining device while operating their fork lift trucks.
- [18] HSO Shimono referred to paragraph 14.23(1)(c) of the *Canada Occupational Health and Safety Regulations* (COHSR) to support her reasoning. Paragraph 14.23(1)(c) describes the employer's duties concerning "Instruction and Training" for the use and operation of motorized materials handling equipment as follows:
- 14.23(1)** 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.
- [19] HSO Shimono stated that almost all Consolidated Fastfrate Inc.'s fork lift trucks are the Toyota FGCU25 model. She produced the "Toyota's Operator's and Owner's Manual" and referred to pages 33 and 34 of this manual, which state:
- Operator Restraint System
- A specially designed operator's seat and seat-belt are provided for your safety.
- Warning
- Always wear your seat-belt when driving the truck. The truck can tip over if operated improperly.

- To protect operators from risk of serious injury or death in the event of a tip over, it is best to be held securely in the seat. The seat and seat-belt will help to keep you safely within the truck and operator's compartment. In the event of a tip over, don't jump.
- Grip the steering wheel, brace your feet, lean away from the direction of tip over, and stay with the truck.

[20] By not ensuring that his employees respected the warning of the manufacturer to always wear the seat-belt when driving their fork lift truck, HSO Shimono opined that the employer had not met the requirements of paragraph 14.23(1)(c) of the COHSR.

[21] HSO Shimono also referred to subsections 14.6(1) and 14.6(2) of the COHSR. These subsections describe the employer's duties concerning the protection from overturning of material handling equipment as follows:

14.6(1) Subject to subsection 14.51(2), where motorized materials handling equipment is used in circumstances where it may turn over, it shall be fitted with a rollover protection device that meets the standards set out in CSA Standard B352-M1980, *Rollover Protective Structures (ROPS) for Agricultural, Construction, Earthmoving, Forestry, Industrial, and Mining Machines*, the English version of which is dated September 1980 and the French version of which is dated April 1991, as amended from time to time, and that will prevent the operator of the motorized materials handling equipment from being trapped or crushed under the equipment if it does turn over.

14.6(2) Subject to subsection 14.51(1), all motorized materials handling equipment used in circumstances described in subsection (1) shall be fitted with

(a) seat-belts; and

(b) restraining devices preventing the displacement of the battery if the equipment turns over.

[22] HSO Shimono also referred to section 14.7 of the COHSR. This section describes the employer's duties concerning seat-belts as follows:

14.7 Where motorized materials handling equipment is used under conditions where a seat-belt or shoulder-type strap restraining device is likely to contribute to the safety of the operator or passengers, the materials handling equipment shall be equipped with such a belt or device.

[23] Under the conditions that she observed, HSO Shimono stated that she believed that the use of the seat-belts was likely to contribute to the safety of the fork lift truck operators.

[24] HSO Shimono also opined that in the event of a hit between two fork lift trucks or that a fork lift truck hits a structure present in the dock areas (*i.e.* wall, beam, etc.), the head of the operator could be projected against the structure of the equipment, and in this case, the seat-belt would likely contribute to the safety of the fork lift operator.

- [25] HSO Shimono added that she finally consulted two other standards which also recommend the use of the seat-belt:
- ASME B56.1-1993 Standard, *Safety Standard for Low Lift and High Lift Trucks*, requires that “an active operator protection device or system, when provided, shall be used” (s. 5.3.19 – p. 12);
 - The American Occupational Safety and Health Administration (OSHA) refers to ASME standard with respect to the enforcement of the use of fork lift seat-belts (in documents entitled “*Use of Seat-belts on Powered Industrial Trucks*” and “*Enforcement of the Use of Seat-Belts on Powered Industrial Trucks in General Industry*”).
- [26] I retain the following from the arguments and documents presented by Mario Migliazza, the employer’s representative, during the hearing on June 23, 2005.
- [27] M. Migliazza held that the direction should be rescinded because Consolidated Fastfrate Inc. had been in compliance with section 124 of the *Code*, in one way or another, since the first day.
- [28] M. Migliazza stated that, following HSO Shimono’s direction, Consolidated Fastfrate Inc. consulted its work place health and safety committees regarding the use of the seat-belts at all times. The employer asked them to answer the two following questions:
1. Having reviewed the use of seat-belts by our fork lift operators while working on our docks, do you recommend that seat-belts be used at all times (give the reasons to support your recommendation)?
 2. Indicate any situations where the use of seat-belts on fork lifts is recommended (for example: working outside in the yard, working on flat-bed trucks, etc.)?
- [29] I retain the following from the documents produced by M. Migliazza.
- [30] The work place health and safety committees were of the opinion that there was no potential hazard that would warrant the use of seat-belts when fork lift operators were performing their daily tasks of loading and unloading trailers against the dock or when staging the freight on the dock platforms. Their reasons for this point of view were that the docks where the fork lifts operate are a flat and smooth surface with no bumps or no danger of the fork lifts tipping over. In addition, the freight is generally not elevated on the forks more than 4-5 feet, which also minimizes the risk of tip over. On the other hand, it was the committees’ belief that the seat-belt rule would not apply to employees operating fork lifts on smooth cement surfaces when operators are continuously (almost 50 times a day) on and off the machines for the complete shift. The point was also raised that the lap-belts that are installed on the fork lifts would not prevent the operator from hitting his head against the dash or steering wheel. They also stated that wearing a seat-belt would cause stress on the operator’s back when driving backwards.

- [31] Notwithstanding this, the committees recommended wearing seat-belts when an operator is performing certain tasks such as:
- operating units on uneven ground outside of the dock perimeters or outside of the building;
 - loading or unloading flatbed trucks or anything that is two feet above the roof, or over 2000 lbs;
 - moving products on the ramps leading in and out of the building;
 - operating fork lifts with attachments (ex.: carpet pullers, extended forks, or any other attachment) outside the perimeters of the manufacturers intended safe operating guidelines or intended use;
 - in the event that the floor is slippery or wet conditions exist.
- [32] Based on this, M. Migliazza argued that, because the employer consulted his work place health and safety committees, he duly followed the requirements of paragraphs 125(1)(z.01) to 125(1)(z.19) of the *Code*, in which certain employer's duties require that he establish, support and use the policy and work place health and safety committees for the development, the implementation and the monitoring of his safety program. As a result, the employer complied with the fundamental principle of the *Code* which is, in M. Migliazza's opinion, the Internal Responsibility System.
- [33] M. Migliazza added that the recommendations of the work place health and safety committees should be respected as they represent the Internal Responsibility System at work. M. Migliazza opined that not respecting work place health and safety committee recommendations would set a precedent which would require that every recommendation from every committee be reviewed by a health and safety officer.
- [34] M. Migliazza also introduced a letter on standard interpretations¹, of which the first question and response read as follows:
- Question 1:** Are seat-belts required to be installed on fork lift trucks? If so, under what standard and section is this addressed?
- Response:** OSHA does not have a specific standard that requires the use or installation of seat-belts, however, Section 5 (a)(1) of the Occupational Safety and Health Act (OSH ACT) requires employers to protect employees from serious and recognized hazards. Recognition of the hazard of powered industrial truck tip over and the need for the use of an operator restraint system is evidenced by certain requirements for powered industrial trucks as ASME B56.1-1993 – Safety Standard for Low Lift and High Lift Trucks. National consensus standard ASME B56.1-1993 requires that powered industrial trucks manufactured after 1992 must have a restraint device, system, or enclosure that

¹ Letter written on March 7, 1996 by John B. Miles, Director, Directorate of Compliance Program, OSHA, in response to a client enquiry.

is intended to assist the operator in reducing the risk of entrapment of the operator's head and/or torso between the truck and ground in the event of a tip over. Therefore, OSHA would enforce this standard under Section 5 (a)(1) of the OSH Act.

- [35] At this point, M. Migliazza referred to paragraph 5.3.18(a) of the ASME B56.1-1993 standard which describes as follows under what conditions an industrial truck may tip over:

5.3.18(a) An industrial truck, loaded or unloaded, may tip over if an operator fails to slow down to a safe speed before making turns. Indications that a truck is being driven at an excessive speed during turning maneuvers include:

- (1) tire skidding;
- (2) truck side sway;
- (3) wheel lift; and
- (4) the need to grip the steering wheel tightly to keep from sliding out of the seat.

(a) The likelihood of lateral tip over is increased under any of the following conditions, or combinations of them:

- (1) overloading;
- (2) traveling with the load elevated;
- (3) braking or accelerating sharply while turning;
- (4) rearward tilt or off-center positioning of the load;
- (5) traveling on an uneven surface;
- (6) traveling at excessive speed.

(b) Tipping forward can occur and its likelihood is increased under the following conditions, or combinations of them:

- (1) overloading;
- (2) traveling with the load tilted forward and/or elevated;
- (3) hard braking while traveling forward;
- (4) suddenly accelerating while traveling in reverse.

- [36] M. Migliazza opined that the conditions indicated above do not apply if the operators drive the fork lift trucks on the flat surface of their work place docks in a careful and reasonable manner under the right conditions.

- [37] To support this, M. Migliazza stated that the docks have smooth surfaces and loads are rarely lifted above 6 inches, and that when they are, which is estimated at being less than 5% of the time, they are lifted to no more than 6 feet, mainly to double stack pallet loads.

Speeds of the fork lift trucks are also well below 10 km per hour. In most cases they travel at about 6 km per hour, just a bit faster than walking speed.

- [38] He also mentioned that in the case of the accident which occurred on July 10, 2003, the fork lift truck involved did not tip over.
- [39] In M. Migliazza's opinion, under such circumstances, the risk of a tip over is non-existent or, at least, could not be reasonably expected.
- [40] M. Migliazza also stated that subsections 14.6(1) and 14.6(2), and section 14.7 of the COHSR did not apply in this case.
- [41] M. Migliazza pointed out that subsections 14.6(1) or 14.6(2) do not state that the seat-belt must be worn at all times by the operator while he operates his fork lift truck. He maintained that the requirement of paragraph 14.6(2)(a) to fit a fork lift truck with the seat-belt, and indirectly, to use it, applies only under circumstances where the motorized materials equipment may tip over.
- [42] M. Migliazza further referred to the clauses of CSA Standard B335.04. He stated that section 5.3 recommends the use of seat-belts to protect the operator from a tip over or from "striking the ground" in the event of an early departure accident. He added that section 4.9.2.3 of the same standard also recommends the wearing of seat-belts to protect the operator in the event of lateral or longitudinal tip over. According to him, this section states that where fork lift trucks are not equipped with seat-belts, the employer should conduct a comprehensive risk assessment, in order to determine if the use of seat-belts will be required.
- [43] In M. Migliazza's opinion, the wording of section 14.7 "...where a seat-belt or shoulder-type strap restraining device is likely to contribute to the safety of the operator..." suggests that a risk assessment should be carried out to determine if the use of seat-belts is "likely" to contribute to the operator's safety.
- [44] Therefore, M. Migliazza reiterated that, because Consolidated Fastfrate Inc.'s risk assessment found that a tip over cannot occur when the fork lift truck operators are doing their usual tasks, seat-belts would not likely contribute to the safety of the operators.
- [45] Under these circumstances where the opportunity for the hazard is minimal to non-existent, M. Migliazza opined that the enforcement of the seat-belt does more harm than good.
- [46] Finally, M. Migliazza introduced the employer's *Policy and Procedure for all Trailers/Containers*, dated April 12, 2005. It states the following:

DOCK RESPONSIBILITY

Once a trailer/container has been stripped of all freight, or the loading of the unit is completed, it is the Dockworker's responsibility to:

- 1) Pull the dock plate.

- 2) Close the dock door.
- 3) Affix the rope to the posts on each side of the dock door.

* Dockworkers that strip loads must indicate on the slip of paper attached to the folder containing the bills of lading that the plate has been pulled; the door closed; and the rope affixed. Confirm this by signing the slip on the Checker's signature line.

DRIVER RESPONSIBILITY

A) Before hooking on to any trailer/container that is placed against the dock, it is the driver's responsibility to:

- 1) Go up on the dock and check with the Stripping Foreman, or Shift Supervisor, before hooking onto the unit.
- 2) Ensure that the unit has been pulled, and that no person or any company equipment is in the trailer.
- 3) Ensure that the unit has been inspected with either the Stripping Foreman or the Shift Supervisor prior to its departure.
- 4) Before leaving, remove wheel chock and hang on bracket by dock door.

B) When dropping a trailer:

- 1) Chock wheels immediately after dropping trailer.
- 2) Go to the Coordination office and indicate on the control slip attached to the folder that wheels have been chocked.
- 3) Confirm this by signing the slip on the Driver's line.
- 4) Ensure the chocking of the wheels is also confirmed on the run sheet.
- 5) Advise the dock foreman/shift supervisor if the wheel chock is missing.

[47] M. Migliazza alleged that, by establishing this safety policy and procedure, the potential risks of an "early departure" or an accidental movement of the trailer had been controlled and reduced. In fact, no accident occurred since July 10, 2003. By establishing this procedure, the employer ensured that the safety of its employees against these risks was protected.

[48] James Williams, dockworker and work place health and safety committee employee chairman at the work place in Woodbridge, Toronto, testified for the respondent.

[49] J. Williams stated that he decided not to sign the recommendations provided by his work place health and safety committee because he felt that doing so would have been like saying he was not in compliance with HSO Shimono's direction.

[50] J. Williams also declared that since the issue of HSO Shimono's direction, he had been wearing his seat-belt while operating his fork lift. By doing this, he felt safer.

[51] Following the hearing, Giuseppe Castellano, the employees' representative, submitted documents on incidents mentioned by J. Williams during his testimony. I retain the following from these incident documents:

- On November 18, 2003, a dockworker had entered the trailer when a truck operator pulled his trailer from the dock. The plate ended up on the ground.
- On December 3, 2003, while being loaded a trailer slid away from the dock even though the trailer wheels were chocked. Ice under the wheel chocks had not been salted.
- On February 4 and 6, 2004, seven similar incidents were reported.
- On February 20, 2004, a truck operator refused to pick-up the trailer because he noticed that it was nose heavy. The company decided to transfer the freight to another trailer. The fork lift operator started to unload and transfer the load. When he left the first unit with a skid to the second unit, the first unit was pulled away from the dock by the C.P. clerk.
- On February 27, 2004, the policy of the company was again not followed when:
 - two trailers were pulled out from the dock without checking with the foreman in the section;
 - another trailer moved away approximately 10 inches from the dock. The plate was just hanging on. The trailer wheels were chocked. The cause of the trailer's movement was that the ice had not been salted;
 - a driver pulled out a trailer from the dock and then realized he had the wrong trailer. He returned the trailer back into the dock.
- On March 25, 2004, another incident occurred because company policy was not being followed. A trailer was pulled out by a driver without consulting the foreman while the plate was still on the unit. At the time, a follow up was requested and further revisions were made to the procedure to avoid "early departure" accidents.
- On April 2, 2004, there was another incident of a trailer being pulled out from the dock contrary to the policy. At the time, an employee was close at hand and radioed the truck operator to stop.
- On June 10, 2004, an employee was lining up the plate when the trailer was pulled. The foreman again was not approached about pulling the unit. On the same night, another unit was also pulled without consulting the foreman.
- On September 10, 2004, when a fork lift operator returned to load a pallet onto a trailer, the trailer was already 20 feet out in the yard and the plate was on the ground. The trailer was pulled out from the dock without consulting the foreman. The fork

lift operator asked why the driver had pulled out his trailer and the driver said that he was told to.

- On November 30, 2004, a trailer was not properly chocked. As a consequence, the trailer moved away from the dock while the fork lift operator was working in the trailer. The resulting gap prevented the fork lift truck operator from exiting.
- On March 4, 2005, a trailer had been chocked but the air had not been removed from the “air-ride” bags. This caused the trailer to lower and move out from the dock.

- [52] J. Williams and G. Castellano both agreed that they did not know if the mandatory wearing of seat-belts at all times was an adequate solution to these incidents.
- [53] M. Migliazza responded in writing to the incident documents submitted by G. Castellano.
- [54] In M. Migliazza’s opinion, the term “early departure” as used in these reports described scheduling/operational errors, rather than safety-related issues, or, in a few cases, situations that were considered to have caused accidents.
- [55] M. Migliazza believed that it is virtually impossible for “trailer creep” to cause a large enough gap for the fork lift to fall through to the ground below. Therefore, there is no need for a seat-belt to be worn because there is no risk of tip over in this case.
- [56] M. Migliazza stated that all the submitted reports dealt with potential rather than actual accidents and, that in fact, no accident as such took place. Only four of the incidents described non-safety related procedural errors which did not involve the fork lift operator. These situations generated revisions to the employer’s procedures dealing with the prevention of “early departure” accidents. These procedures have also been reviewed and revised on a continuous basis since 2004.
- [57] Following this information and because I found that the incident reports submitted by G. Castellano provide evidence that non-authorized movement of trailers (“early departure”) and accidental trailer movements (“trailer creep”) still occur at the same time that a fork lift truck operator is required to enter or exit the trailer, I requested both parties to respond to the following two issues:
- Whether or not the situation of “early departure” constituted, and still constitutes today, a danger for an employee at work?
 - Whether or not the situation of “trailer creep” constitutes today a contravention of subsection 14.37(2) of the COHSRs? Subsection 14.37(2) states:

Where motorized or manual materials handling equipment is required to enter or exit a vehicle other than a railway car to load or unload materials, goods or things to or from the vehicle, the vehicle shall be immobilized and secured against accidental movement, by means additional to the vehicle’s breaking system.

- [58] A second hearing was held on October 24, 2005, in order that the parties address these questions.
- [59] At that hearing, M. Migliazza stated that the situation of “early departure” was under control and had been addressed by Consolidated Fastfrate Inc. with the implementation of its *Policy and Procedure for all Trailers/Containers* dated April 12, 2005. M. Migliazza held that this safety procedure was provided to avoid “human errors” and if these still occurred, the enforcement of the safety procedure would rectify them.
- [60] Following M. Migliazza’s testimony, G. Castellano introduced two other incident reports dated September 23, 2005, and October 21, 2005.
- [61] According to the incident report dated September 23, 2005, a driver pulled a trailer out of the dock without consulting the foreman and without checking that the plate was pulled. The fork lift truck operator, who was entering the trailer at the same time, jumped off from his fork lift truck.
- [62] G. Bishara, Operations Manager, testified for the applicant. He stated that following this incident and to prevent any future human error, a memo was sent on September 30, 2005, to supervisors, foremen and all coordination staff to inform them that from now on, the supervisor on duty would have the responsibility to escort drivers and ensure that all the procedures were followed. However, G. Bishara declared that this memo was not given to all truck drivers because they would be advised of the new procedures by the dispatchers.
- [63] G. Bishara also stated that the *Policy and Procedure for all Trailers/Containers* was revised many times since its first publication on April 2005. He added that some of the safety policy revisions were done after discussion with supervisors following the reported incidents. He declared that the supervisors and some members of the local work place health and safety committee participated in the preparation of the last memo dated September 30, 2005. He also stated that a copy of the safety policy was given to all Consolidated Fastfrate Inc.’s truck drivers and that it was the responsibility of Consolidated Fastfrate Inc.’s health and safety coordinator and dispatch manager to advise the company’s truck drivers about the safety procedures.
- [64] According to the incident report dated October 21, 2005, a broker pulled a trailer from the short dock at door 117 while the plate was still in it and the plate fell to the ground.
- [65] G. Bishara stated that the incident investigation was not yet completed but that according to the incident report, the first testimonies revealed that the involved truck driver was not aware of Consolidated Fastfrate Inc.’s safety procedures.
- [66] In this regard, G. Bishara stated that to his knowledge, Consolidated Fastfrate Inc. had asked all companies to inform their drivers of its *Policy and Procedure for all Trailers/Containers* and sent them a copy of its safety policy.
- [67] G. Bishara added that Consolidated Fastfrate Inc. would know if a driver working for another company or a broker has been properly informed of the safety policy by

observing whether or not the driver was following the proper procedure when entering the work place.

- [68] G. Castellano opined that the situation of “early departure” constituted a danger for employees.
- [69] With regard to “trailer creep”, M. Migliazza stated that in June 2005, Consolidated Fastfrate Inc. discussed with contractors the need to identify a feasible response to the issue of ice build up. Since this time, a drainage system has been installed and gutter work is underway and will be completed shortly.
- [70] In addition, M. Migliazza stated that Consolidated Fastfrate Inc. also made arrangements to increase the snow/ice removal and the application of salt, and to have equipment and extra supplies in the yard. M. Migliazza hope that these corrective actions will address the issue of “trailer creep”.
- [71] Finally, T. Koenig, dockworker and work place health and safety committee member, introduced a petition signed by other employees of the work place. This petition confirmed the employees’ opinion that they did not want to wear a seat-belt in the dock areas. To T. Koenig’s knowledge, some of them said that they did not want to wear a seat-belt because they wanted to have the possibility of jumping out of their fork lift truck in case of an accident.

- [72] The first issue to be decided in the present case is whether or not HSO Shimono erred when she decided that the employer was not in compliance with section 124 of the *Code* by not ensuring that fork lift operators were wearing the manufacturer-supplied seat-belt/restraining device while operating the fork lift trucks in their work place dock areas.
- [73] Second, in light of the evidence concerning the “early departure” of vehicles, I must also decide whether or not the potential hazard created by the “early departure” from the loading docks at the work place in Woodbridge, Toronto, Ontario, constitutes a danger.
- [74] Third, in light of the evidence concerning “trailer creep”, I must finally decide whether or not the incidence of “trailer creep” constitutes a contravention under the *Code* and, if so, I must issue a direction.
- [75] For deciding these issues, I must consider the relevant legislation and the facts in the case.
- [76] Section 124 of the *Code* is a general duty clause which requires employers to ensure that the health and safety of their employees is protected. Section 124 reads:

124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

[77] There are three references to seat-belts made in Part XIV of the COHSR, entitled *Materials Handling*. They are found in sections 14.6 and 14.7, dealing with protection from overturning and seat-belts, and section 14.23, dealing with instruction and training.

[78] Subsection 14.6(1) and paragraph 14.6(2)(b) require that motorized materials handling equipment be equipped with rollover protection and a seat-belt where it is used in circumstances where the equipment might tip over. They read as follows:

14.6(1) Subject to subsection 14.51(2), where motorized materials handling equipment is used in circumstances where it may turn over, it shall be fitted with a rollover protection device that meets the standards set out in CSA Standard B352-M1980, *Rollover Protective Structures (ROPS) for Agricultural, Construction, Earthmoving, Forestry, Industrial, and Mining Machines*, the English version of which is dated September 1980 and the French version of which is dated April 1991, as amended from time to time, and that will prevent the operator of the motorized materials handling equipment from being trapped or crushed under the equipment if it does turn over.

14.6(2) Subject to subsection 14.51(1), all motorized materials handling equipment used in circumstances described in subsection (1) shall be fitted with

...

(c) seat-belts;

[79] Section 14.7 requires for its part that motorized materials handling equipment be equipped with a seat-belt when it is used under conditions where the seat-belt is likely to contribute to the safety of the operator or passengers. Section 14.7 reads:

14.7 Where motorized materials handling equipment is used under conditions where a seat-belt or shoulder-type strap restraining device is likely to contribute to the safety of the operator or passengers, the materials handling equipment shall be equipped with such a belt or device.

[80] As section 14.7 is separate from section 14.6, which deals with rollover protection, it seems reasonable to conclude that section 14.7 applies to all circumstances other than the ones described in section 14.6

[81] In the case of section 14.23, paragraph 14.23(1)(c) requires that operators of motorized materials handling equipment be instructed and trained in the procedures to be followed for the safe and proper use of the motorized materials handling equipment. The training and instruction is to be in accordance with the instructions of the manufacturer and take into account the conditions of the work place in which the operator will operate the motorized materials handling equipment. Paragraph 14.23(1)(c) reads:

14.23(1) 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

...

(a) 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.]

[82] HSO Shimono interpreted the above to mean that the instruction and training provided by employers to motorized materials handling equipment operators must conform to the instructions provided by Toyota, the manufacturer of the fork lift trucks. In accordance with the evidence, Toyota's operating manual warns operators on pages 33 and 34 to always wear the seat-belt when driving the truck as the truck can tip over if operated improperly.

[83] For his part, M. Migliazza interpreted sections 14.7 and 14.23 to mean that seat-belts are unnecessary where the risk of tip over is not present at the work place as long as employees follow the rules. His evidence, confirmed by the work place health and safety committees, was that the risk of tip over did not exist at the dock areas of the work places at Consolidated Fastfrate Inc. because:

- the docks at Consolidated Fastfrate Inc. have smooth surfaces;
- loads are rarely lifted above 6 inches and, when they are, which is estimated at being less than 5% of the time, they are lifted to no more than 6 feet;
- lift trucks normally operate at about 6 km per hour, just a bit faster than walking speed, and not above 10 km per hour.

[84] The concern I have with M. Migliazza's position and that of the health and safety committees is that, without the seat-belt, there is no safety margin for human error should, for example, an employee inadvertently exceed the normal speed and be involved in a collision or unexpectedly experience a wet or slippery floor. With regard to the latter, the same work place health and safety committees agreed that the use of the seat-belts was indicated where the floor is slippery or wet.

[85] Moreover, as confirmed by the evidence, "trailer creep" and "early departure" are potential hazards associated with this type of operation. "Trailer creep", which can occur as a result of the momentum caused when an operator enters a trailer too quickly and stops rapidly, can cause gaps. Worse, a fork lift truck could fall to the ground and potentially tip over if a truck driver prematurely left the dock without authorization in the same type of accident that required the involvement of HSO Shimono. While M. Migliazza and Consolidated Fastfrate Inc. argue that the risk of a tip over in their operation is low, the consequences of a tip over to an operator not wearing a seat-belt could be severe.

[86] In my opinion, the absence of a safety factor to address human error is irreconcilable with the purpose clause of the *Code*, section 122.1, which is to prevent accidents and injury to employees. It reads:

122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

- [87] Therefore, I conclude that a seat-belt is likely to contribute to the safety of the operator and that section 14.7 of the COHSR applies. I further conclude from section 14.23 that Consolidated Fastfrate Inc.'s operators at Woodbridge, Toronto, must comply with Toyota's warning that the seat-belt must be worn at all times when operating the fork lift trucks.
- [88] I would agree with M. Migliazza on the importance of the Internal Responsibility System and of the involvement of health and safety committees. However, employer and employees must consider all safety factors and cannot decide to ignore the law unless they can demonstrate that compliance with it will be more hazardous than not. This was not the case here.
- [89] I am further compelled to comment on the views expressed by employees through T. Koenig that it is safer not to wear a seat-belt in the event of an accident because the driver can jump off the fork lift truck before it crashes to the ground. Not only is this view contrary to Toyota's operating manual but it also places fork lift operators at perilous risk.
- [90] For all of the above reasons, I am dismissing M. Migliazza's application that the direction by HSO Shimonon be rescinded and I confirm the direction.
- [91] The second issue in this case was whether or not the incidents of "early departure" that were occurring at the work place constitute a potential hazard that could reasonably be expected to cause an injury or illness to a person such that it constitutes a danger under the *Code*.
- [92] Danger is defined in subsection 122(1) of the *Code* as follows:
"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.
- [93] To decide if a danger exists, I must determine the circumstances in which the potential hazard of "early departure" at Consolidated Fastfrate Inc. could reasonably be expected to cause injury to any person exposed thereto and determine that the circumstances will occur as a reasonable possibility.
- [94] According to the evidence, a serious accident of "early departure" occurred and caused an injury to a fork lift truck operator on July 10, 2003, when a driver began to remove the

trailer from the dock while the fork lift operator was still loading the vehicle. The fork lift operator was on injury status for several months.

- [95] In response to the accident, Consolidated Fastfrate Inc. reviewed its dock operations, made amendments to its procedures and informed staff of the changes. Notwithstanding its efforts, incidents continued to reoccur which prompted Consolidated Fastfrate Inc. to further review its dock operations and procedures. Instead of dealing with the situation proactively, Consolidated Fastfrate Inc. chose to deal with it reactively.
- [96] In his testimony, manager G. Bishara further confirmed that Consolidated Fastfrate Inc. relied on other companies who operate at the work place to inform their drivers of Consolidated Fastfrate Inc.'s revised departure procedures.
- [97] At the hearing, employees reported two more recent incidents of "early departure" at the Consolidated Fastfrate Inc. work place in Woodbridge, Toronto. G. Bishara was unable to explain what had occurred in the last incident as he had not yet fully investigated the matter.
- [98] In light of the serious accident on July 10, 2003, and the failure of Consolidated Fastfrate Inc. to proactively revise and inform, instruct and enforce its changed procedures, as evidenced by the two recent re-occurrences of "early departure", I am satisfied that a danger exists.
- [99] As I am authorized by paragraph 146.1(1)(b) to issue any direction that I consider appropriate under subsection 145(2), I hereby direct Consolidated Fastfrate Inc. pursuant to paragraph 145(2)(a) of the *Code*, as written in the attached direction, to immediately take measures to correct the hazard that constitutes the danger.
- [100] In this regard, I was persuaded at the hearing by the credible evidence of G. Bishara that Consolidated Fastfrate Inc. was taking measures to address this serious matter and was continuing to pursue options with its employees through the health and safety committee. On that basis, I am not issuing a direction pursuant to subsection 145(2)(b) of the *Code* because it would have the effect of closing the operation. However, given the seriousness of the situation, I would expect that HSO Shimono or another health and safety officer will verify Consolidated Fastfrate Inc.'s compliance with the direction and take whatever action she deems necessary to ensure that the danger is nullified.
- [101] As to the reported incidents of "trailer creep" that have occurred since July 10, 2003, I believe that they also demonstrate that the potential condition of trailers sliding out from the dock has materialized during the past two winters. I do not accept M. Migliazza's view that an incident does not become an incident unless someone is in position to be injured. This sliding out constituted a violation of paragraph 14.37(2) of the COHSR, which requires the employer to ensure that vehicles are secured against accidental movement. Paragraph 14.37(2) reads:

14.37(2) Where motorized or manual materials handling equipment is required to enter or exit a vehicle other than a railway car to load or unload materials, goods or things to or from the vehicle, the vehicle shall be

immobilized and secured against accidental movement, by means additional to the vehicle's braking system.

- [102] The evidence at the hearing was that the slide out was caused by ice, which formed when water fell from the roof and froze on the ground. Further evidence was that measures were being taken to repair the rain gutter on the roof, to hire a contractor to plow the dock area during snow fall and to spread salt. In this regard, Consolidated Fastfrate Inc. had purchased a "Bob Cat" so that it could ensure rapid response. M. Migliazza stated that, "hopefully" everything would be in place by this winter so that the hazard is nullified. While the state of being "hopeful" shows good intent, it is insufficient to prove that the contravention to paragraph 14.37(2) has been corrected.
- [103] To ensure that the matter is finally resolved through the use of wheel chocks or any other methods additional to the vehicle's braking system, I hereby direct Consolidated Fastfrate Inc, pursuant to paragraph 145(1)(b) of the *Code* and as written in the attached direction, to comply with paragraph 14.37(2) of the COHSR immediately and ensure that all vehicles be immobilized and secured against accidental movement.
- [104] As with the previous direction, I further expect that HSO Shimono or another health and safety officer will monitor compliance and take whatever action she deems necessary to ensure compliance with the direction.

Douglas Malanka
Appeals Officer

**In the Matter of the *Canada Labour Code*
Part II – Occupational Health and Safety**

Direction to the Employer Under Paragraph 145(2)(a)

On June 23, 2005 and on October 24, 2005, appeals officer Douglas Malanka conducted a hearing and examined submitted written documents concerning an appeal made by Consolidated Fastfrate Inc., being an employer subject to the *Canada Labour Code*, Part II, at 9701 Highway # 50, in Woodbridge, Ontario, L4H 2G4, the said work place being sometimes known as Consolidated Fastfrate Inc.

The undersigned appeals officer is of the opinion that the following activity in the work place constitutes a danger to the fork lift truck operators while they are required to enter or to exit a vehicle on the work place dock areas:

Since July 10, 2003, non-authorized movement, *i.e.* early departure, of trailers still occurs at the same time that a fork lift truck operator is required to enter or exit the trailer, which can cause injuries to an employee at work.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to immediately correct the hazardous activity that constitutes the danger.

You are also HEREBY DIRECTED, pursuant to subsection 145(5) of the *Canada Labour Code*, Part II, to post, without delay, a copy of this direction in a conspicuous place in the work place and to give a copy to the work place health and safety committee.

Issued at Ottawa, this 28th day of November, 2005.

Douglas Malanka
Appeals Officer
Id No 03237

To: Consolidated Fastfrate Inc.
9701 Highway #50
Woodbridge, Ontario
L4H 2G4

**In the Matter of the *Canada Labour Code*
Part II – Occupational Health and Safety**

Direction to the Employer Under Subsection 145(1)(b)

On June 23, 2005 and on October 24, 2005, appeals officer Douglas Malanka conducted a hearing and examined submitted written documents concerning an appeal made by Consolidated Fastfrate Inc., being an employer subject to the *Canada Labour Code*, Part II, at 9701 Highway # 50, in Woodbridge, Ontario, L4H 2G4, the said work place being sometimes known as Consolidated Fastfrate Inc.

The undersigned appeals officer is of the opinion that the following provision is being contravened in the work place dock areas:

14.37(2) of the *Canada Occupational Health and Safety Regulations*:

Where motorized or manual materials handling equipment is required to enter or exit a vehicle other than a railway car to load or unload materials, goods or things to or from the vehicle, the vehicle shall be immobilized and secured against accidental movement, by means additional to the vehicle's braking system.

During the winter time, trailers are not immobilized and secured against accidental movement while a fork lift truck operator is required to enter or exit the trailer.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, to take steps immediately to ensure that the contravention does not continue or reoccur.

You are also HEREBY DIRECTED, pursuant to subsection 145(5) of the *Canada Labour Code*, Part II, to post, without delay, a copy of this direction in a conspicuous place in the work place and to give a copy to the work place health and safety committee.

Issued at Ottawa, this 28th day of November, 2005.

Douglas Malanka
Appeals Officer
Id No 03237
275 Slater Street, Ottawa, Ontario

To: Consolidated Fastfrate Inc.
9701 Highway #50
Woodbridge, Ontario
L4H 2G4

Summary of Appeals Officer's Decision

Decision No.: 05-047

Applicant: Consolidated Fastfrate Inc.

Respondent: Teamsters Canada, Local Union 938

Keywords: Notice of contravention, direction, not insuring that fork lift operators were wearing seat belt/restraining device while working and no means to avoid trailers moving from docks while being loaded or unloaded

Provisions: *Canada Labour Code* – 124, 145(1), 145(2)(a) and (b), 146(1)

Summary:

Following an accident investigation, a health and safety officer issued a direction under subsection 145(1) of the *Canada Labour Code*, Part II, to Consolidated Fastfrate Inc. The direction referred to a contravention to section 124 of the Code for failing to ensure that the fork lift operators were wearing the manufacturer-supplied seat-belt/restraining device while operating their fork lift trucks. Consolidated Fastfrate Inc. appealed the direction pursuant to subsection 146(1) of the Code.

Following his inquiry, the Appeals Officer confirmed the health and safety officer's direction. In addition, the Appeals Officer issued two directions, the first one under paragraph 145(2)(a), ordering the employer to immediately take measures to correct non-authorized trailer movements when fork lift truck operators are loading or unloading them, and the second one under subsection 145(1), requesting the employer to immediately take steps to ensure that trailers are immobilized and secured against accidental movement.