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

Tony Scigliano
and
International Longshore and Warehouse Union Canada
applicants

and

Tidal Transport & Trading Ltd
respondent

Decision No. 06-036
October 18, 2006

This case was decided by Appeals Officer Serge Cadieux, on the basis of the evidence on file. Written submissions were filed by the International Longshore and Warehouse Union Canada (ILWU) only.

For the applicants
Albert Le Monnier

For the Respondent
Paul J. Gallant

Health and Safety Officer
Nicholas Teoh, Transport Canada, Marine Safety Branch, Vancouver, British Columbia

Background

[1] Mr. Le Monnier has succinctly described the background to this case in his submission to the Appeals Officer. He wrote:

> On December 18, 2005 longshore gangs boarded the vessel M.V.Leo Forest berthed at Pacific Elevator in the Port of Vancouver with the task of loading logs. As customary, the topside (crane operators) requested to see the Lifting Appliances registers of Certification to ensure that the cranes had been examined and tested at the appropriate time intervals as dictated by the Tackle Regulations, Sections 20 and 24 under the Canada Shipping Act…

> Upon examining the registers, the crane operators noted that they were being provided only with the Annual Thorough Inspection Certificate, but no Quadrennial Thorough Inspection Certificate as required under the current Tackle Regulations, Section 20. This omission was the basis for the registered refusal to work under *Canada Labour Code*, Section 128, and for the purpose of the registration the name of one of the operators was given, Mr. Tony Scigliano.

[2] Health and safety officer (HSO) Nicholas Teoh was notified of the crane operators' refusals to work at 08:30hrs on December 18, 2005. He arrived aboard the ship about hour later to investigate the alleged danger.

Investigation by health and safety officer Nicholas Teoh

[3] Upon his arrival, the HSO obtained the employee's statement of refusal to work. The HSO reported the employee's concern as follows.

> The employee, according to Jim Sewell (sub business agent), considers it dangerous to work, because the document called "Register of ship's lifting appliances and items of loose gear" does not have a quadrennial stamp endorsed on the document.

[4] To clarify the employee's concern, Mr. Sewell explained to the HSO that:

> [T]he document called "Register of ship's lifting appliances and items of loose gear" has not shown that the lifting gear has undergone a quadrennial examination because of the absence of a "quadrennial stamp" on the document. With the absence of such a stamp, he feels that the gears are not inspected so creating an unsafe situation.

[5] On behalf of the employer, Mr. Paul Gallant stated to the HSO that:

> [T]he lifting gear has undergone annual thorough examination since 21st August 1998 till 21st June 2005. This is indicated in the document "Register of ship's lifting appliances and items of loose gear". Hence no danger exists.

[6] The HSO concluded his investigation by reporting the facts he established in support of his decision that danger did not exist. Those facts, noted the HSO, "were established and agreed on by all parties present." They are reported as follows:

1. The document "Register of ship's lifting appliances and items of loose gear" has indicated that the ship has undergone annual thorough examination since 21st August 1998 till 21st June 2005
2. The annual thorough examination has been endorsed by the Classification Society Nippon Kaiji Kyokai (Class NK).
3. Explanation of what "thorough examination" meant.

4. According to Class NK, as stated in the document "Register of ship's lifting appliances and items of loose gear" the term "thorough examination" means a detailed visual examination by surveyor to Nippon Kaiji Kyokai or competent person, supplemented if necessary by other means or measure in order to arrive at a reliable conclusion as to the safety of the lifting appliances or items of loose gear examined.

[7] The HSO decided that danger did not exist to the longshoremen who refused to work on the basis of the following:

> The ships (sic) gear has been thoroughly examined by the Classification Society (NKK) as indicated in the document "Register of ship's lifting appliances and items of loose gear".

Submission for the employer

[8] On August 29, 2006, Mrs. Jocelynne Paris, the Canada Appeals Office Case Management and Hearing Coordinator (CAO Coordinator), contacted Paul Gallant to secure his participation in the appeal process. She noted in her record of communications[1] with Mr. Gallant that "he has nothing to add to file" and that "he does not wish to comment or send any submissions." She explained to Mr. Gallant that the Appeals Officer assigned to the case "would render a decision and we would send him a copy". He said "fine."

Submission for the employees

[9] Mr. Le Monnier has sent a detailed written submission respecting the appeal of the absence of danger decision issued by HSO Nicholas Teoh. The submission deals with complex issues. I will summarize the submission as clearly and accurately as possible as follows.

[10] The essence of Mr. Le Monnier's argument is contained in the following extract:

> Transport Canada, Marine Safety Branch, Safety Officer, Nicholas Teoh came aboard the vessel to settle the dispute. Officer Teoh examined the certificates in question and declared that they were in order and sufficient and issued a "no danger" written decision on a standard HRSDC form with the hand written specification "*NK Register of ships lifting Appliances and items of loose gear – has been stamped annually 2000-2005"*. (Tab1)
>
> It is that statement that is at the heart of: a) the immediate initial confusion and disbelief of the decision by the operators and union representative, and b) the reason for this appeal. Because of the manner it is written, the union is of the opinion that technically it is contrary to the current Tackle Regulations and that from an overall safety position equally wrong…

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[1] This untitled document, which accompanies every appeal file, is a manuscript record of all telephone communications that the CAO Coordinator (or other members of the staff) holds with the parties at any given time.

[11] Mr. Le Monnier explained how sections 20 and 24 of the current *Tackle Regulations* came to exist and how the International Labour Organization (ILO) Conventions are used

> to establish some kind of international guidelines in regards to, amongst many other things, the inspection and testing of ship's lifting appliances to ensure an objective and reliable degree of certainty that the weight bearing components of those appliances are maintained in good order. Some of these components are not readily accessible for visual inspection by the users and must be carried out by experts while the vessel is out of service.

[12] According to Mr. Le Monnier, the ILO formulated the first of such guidelines in 1932 with Convention 32. Specifically, Convention 32 provides at paragraph 9(2)(a):

> to be thoroughly examined every four years and inspected every twelve months: derricks, goose necks, mast bands, derrick bands, eyebolts, spans, spans and any other fixed gear the dismantling of which is difficult;

[13] Since Canada was signatory to Convention 32, Mr. Le Monnier stated that it was obligated to write within its regulations a language corresponding to this guideline, hence sections 20 and 24 of the current *Tackle Regulations.* Section 20 of the *Tackle Regulations* essentially repeats the requirement for the quadrennial thorough examination and the yearly inspection of the lifting machinery. Section 24 provides for registers and certificates to be kept, in the instant case aboard the ship "Leo Forest", for the above specified examinations and inspections. Mr. Le Monnier added:

> It was these certificates and registers the operators were looking aboard the Leo Forest because <u>the current Tackle Regulations are the only regulations in this regard in effect</u>.
>
> (Emphasis added)

[14] However, in 1979, the ILO substantially upgraded Convention 32 with Convention 152 regarding inspections and certifications. This upgrade was achieved with sections 22, 23, 25 and 26 of Convention 152. As stated by Mr. Le Monnier:

> Succinctly put, the changes made the quadrennial requirement of thorough examination a yearly necessity to be carried out by an independent Classification Society or ship yard recognized by the national authority. In Convention 32 the yearly visual examination could be performed by the ship's mate whose competence could be questionable.
>
> The new requirement is much more robust. In addition, replacing the quadrennial, a requirement was introduced to ensure that the Lifting Appliance was retested and then thoroughly examined after the test every 5 years.

[15] Mr. Le Monnier is of the view that Convention 152

> is an extremely important upgrade in the level of safety for port workers because there are mechanical components to the lifting gear such as the motor, the gearing and the brake system, whose condition can be ascertained only by way of retesting.

[16] Although intense discussions took place between the Canadian Maritime Industry and Transport Canada, the final draft of the *Tackle Regulations* submitted in 1989 and which would have incorporated sections 22 to 26 of Convention 152 never translated into legislation. The primary reason for this is that Canada never adopted Convention 152. Although revived in 2005, the draft *Tackle Regulations* is still awaiting publication in Part I of the Canada Gazette. Notwithstanding this, the rest of the maritime world, including the USA and Europe, has adopted the above noted sections of Convention 152.

[17] With respect to the refusals to work on the "Leo Forest" vessel, the annual certificates shown to the HSO were based on Convention 152. Mr. Le Monnier stated that the certificates showed that the cranes had gone through a yearly thorough inspection[2] and therefore there was no need for a quadrennial certificate. In that sense, added Mr. Le Monnier, the HSO is correct but that is not what the HSO wrote in his written notification and therefore his written decision is in error.

[18] Mr. Le Monnier closed his argumentation by stating:

> The Union also contends that if the Safety Officer accepts documentation based on Convention 152, he also should require all documentations including the 5 year retesting and the thorough examination certificate, which the vessel was in possession of, but for some obscure reasons chose not to show it to the workers and to the Safety Officer.
>
> Because of the discrepancy explained above, we respectfully ask the Appeal Officer to amend TLC 18/12/2005 to reflect that the yearly certificate must include the words "thorough examination" and that if such certification is based on Convention 152 it must also include the 5 year interval certificate of retesting and thorough examination in the interest of worker's safety.

Decision

[19] The issue to be decided in the instant case is whether danger, as defined in the *Canada Labour Code*, Part II (the *Code*), existed for the crane operators of the Leo Forest ship. To decide this issue, I must refer to section 122.1 [definition of danger] and subsection 129(7) [appeal] of the *Canada Labour Code*, Part II.

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[2] Mr. Le Monnier has used the expression "thorough inspection" whereas the HSO used the expression "thorough examination" in his Report on Refusal to Work, under the heading Facts Established by the Safety Officer.

[20] The term danger is defined in section 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;

[21] The right to appeal the HSO's decision that the danger does not exist is found at subsection 129(7) of the Code. It provides:

> (7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.
>
> (Emphasis added)

[22] At the conclusion of his investigation, the HSO declared that danger did not exist to the crane operators on the basis of the following facts:

1. The document "Register of ship's lifting appliances and items of loose gear" has indicated that the ship has undergone annual thorough examination since 21st August 1998 till 21st June 2005
2. The annual thorough examination has been endorsed by the Classification Society Nippon Kaiji Kyokai (Class NK).
3. Explanation of what "thorough examination" meant.
4. According to Class NK, as stated in the document "Register of ship's lifting appliances and items of loose gear" the term "thorough examination" means a detailed visual examination by surveyor to Nippon Kaiji Kyokai or competent person, supplemented if necessary by other means or measure in order to arrive at a reliable conclusion as to the safety of the lifting appliances or items of loose gear examined.

[23] Mr. Sewell suggested that, with the absence of the quadrennial stamp on the certificate shown to the crane operators, "he feels that the gears are not inspected so creating an unsafe situation."

[24] The quadrennial stamp, which in my opinion is primarily a question of format, confirms that a thorough examination has been conducted every four years. It is required under the current *Tackle Regulations* and can be enforced under the *Canada Shipping Act* by Mr. Teoh while acting under that legislation as a Steamship Inspector. Technically speaking, it cannot be enforced by Mr. Teoh while acting as a HSO under the *Canada Labour Code*. When acting as a HSO investigating a refusal to work under the *Code*, Mr. Teoh is required to carry out a factual investigation and decide on the basis of the facts collected whether the danger exists. That determination is a question of substance, which supersedes questions of format.

[25] The register shown to the HSO confirmed, by the presence of the annual stamps, that a competent person had conducted a thorough examination of the gear in question every year for the last five years, as noted on the HSO's decision. Hence, the HSO as well as the other parties present were given confirmation, through the ship's register, that the requirements of the current *Tackle Regulations*, with respect to the thorough examination of the lifting appliances, had been exceeded. Those Regulations only require the equipment in question "to <u>be thoroughly examined every four year</u>s and inspected every twelve months…"

(Emphasis added)

[26] In view of the above definition of danger, the crane operators cannot reasonably expect to be injured by operating the lifting appliances, given that the equipment meets and exceeds the requirements of the law. On this basis I am satisfied, like the HSO before me, that danger, as defined in the Code, does not exist to the crane operators.

[27] Notwithstanding the above, Mr. Le Monnier insists that fact #1 above, which was hand written[3] in the HSO's decision, is a reference to Convention 152 which is incomplete because it should also "reflect that the yearly certificate must include the words "thorough examination" and that if such certification is based on Convention 152 it must also include the 5 year interval certificate of retesting and thorough examination…" Mr. Le Monnier feels that the requirements of the current *Tackle Regulations* are "based on a very archaic convention dating back to 1932." Nonetheless, I believe that the requirement of the current *Tackle Regulations* respecting the frequency of the thorough examination represents the law to be complied with.

[28] Mr. Le Monnier asserts that the more recent Convention 152 would significantly provide greater safety to port workers. He explains that the HSO was referencing this Convention because he accepted, through the yearly stamps, that a thorough examination was being conducted on a yearly basis. This is a requirement of Convention 152, which upgraded Convention 32 since "the changes made the quadrennial requirement of thorough examination a yearly necessity to be carried out by an independent Classification Society or ship yard recognized by the national authority…"

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[3] The actual hand written comment in the HSO's decision reads: "NK Register of ships lifting appliances and items of loose gear – Has been stamped annually 2000-2005."

[29] I agree with Mr. Le Monnier that Convention 152 does provide greater protection to port workers. Although not specifically required by law, Convention 152 was, in my opinion, adhered to by the vessel "Leo Forest" given the substance of the Statement of Fact (see Appendix) for that vessel included in the HSO Report on Refusal to Work.

[30] That Statement of Fact[4] was submitted with the HSO Report on Refusal to Work. It is an official document that carries the seal of the classification society Nippon Kaiji Kyokai (Class NK) and is signed by Mr. N. Sumi, Surveyor, Class NK, Vancouver. Although not mentioned in the HSO actual decision, this Statement of Fact was provided[5] to the refusing employee and to Mr. Le Monnier, who did not object to it or comment on its nature. I am satisfied that the parties were given a fair opportunity to comment the Statement of Fact and I will give it the weight it deserves.

[31] The Statement of Fact is clear and uncontradicted evidence, on file, that supports the finding by the HSO that the danger feared by the crane operators does not exist. Furthermore, it is also evidence of compliance with Convention 152 since it asserts that the crane was tested in 2003 and will be retested in 2008, five years after its last test, as recommended by Convention 152. Although Convention 152 has not been ratified by Canada and therefore has not resulted in new legislation, it has become an industry standard complied with worldwide. Evidently, the HSO understood this very well since his comment respecting the lifting appliances includes the minimum legal requirement of the *Tackle Regulations* and the additional voluntary requirements of Convention 152.

[32] For all the above reasons, I am convinced that the equipment to be used by the crane operators aboard the vessel "Leo Forest" is safe and that danger, as defined in the Code, does not exist. The decision of the HSO is confirmed.

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Serge Cadieux
Appeals Officer

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[4] Accompanying the Statement of Fact is the Register of Ship's Cargo Handling, Machinery and Gear, which confirms that a test certificate had been issued on August 10, 2003.

[5] In a letter from the CAO Coordinator to Mr. Tony Scigliano, dated February 9, 2006 indicating that a copy of all documents on file from the Appeals Office were enclosed, particularly document D-5, which is the HSO Report on Refusal to Work.

Appendix

Statement of Fact

Ship's Name : M.S. "LEO FOREST"
IMO No. : 9166211
Port of Registry : Panama

1. According to latest Convention, ILO Convention No.152, Recommendation No.160 and the Rules for Cargo Handling Appliances of NIPPON KAIJI KYOKAI (Class NK), the Quadrennial Thorough Examination is no longer required for Cranes.
2. Instead as per Class NK requirement, the crane should be tested every five (5) years.
3. The crane load test of the subject vessel was done in August 10, 2003 at Hiroshima, Japan as per certificate attached in Cargo Gear Booklet. The due date of next load test is Aug. 9, 2008.
4. No Signature and Stamps should be put at Part I of the Cargo Gear Booklet.

N. Sumi
Surveyor, Class NK, Vancouver

Summary of Appeals Officer's Decision

Decision No.: 06-036

Appellant: Tony Scigliano and International Longshore and Warehouse Union

Respondent: Tidal Transport & Trading Ltd.

Key Words: Crane certification, Quadrennial Thorough Inspection, no danger, confirmed

Provisions: *Canada Labour Code*, 129(7)

Summary:

Mr. Al Lemonier a crane lift operator at Pacific Elevator in the Port of Vancouver utilized his right to refuse to work on December 18th, 2005. A ship came into port and upon reception of the mandatory papers of lift registration certification to ensure the cranes had been examined; Mr. Lemonier noticed that the ship had not received a stamp of certification from the Quadrennial Thorough Inspection as stated under the Tackle Regulations, section 20 and 24 of the Canada Shipping Act. Since 1998 the ship in question has received and documentation was provided stating its annual certification from a thorough visual inspection it receives every year. The crane operator felt that due to the fact that the papers did not have an official quadrennial stamp, a danger existed. Health and safety officer Nicholas Teoh found that the yearly thorough inspection was sufficient enough to prove the safety and functionality of the lifts and loose gear. The Appeals Officer confirmed the decision of the HSO saying that while other countries have adapted the process to require a quadrennial inspection Canada did not enforce it, and thus having completed the yearly visual inspections a danger did not exist as the term danger is defined under the *Canada Labour Code*, part II.