Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Rosedale Transport Limited, 2012 OHSTC 6

Date:	2012-02-08
Case No.:	2011-41
Rendered at:	Ottawa

Between:

Rosedale Transport Limited, Appellant

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* against a direction issued by a health and safety officer
Decision:	The direction is rescinded
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Brian Topping, Director, Safety, Rosedale Transport Limited

Canada

REASONS

[1] The following decision and reasons therein concern an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) by Rosedale Transport Limited (Rosedale) against a direction issued to Rosedale by Health and Safety Officer (HSO) Elizabeth Tavares-Porto on July 22, 2011.

Background

[2] The direction that is under appeal was issued by the HSO at the conclusion of the latter's hazardous occurrence investigation into a work related accident that occurred on June 23, 2011, at the appellant's place of business situated at 6845 Invader Crescent, Mississauga, Ontario. Federal jurisdiction applies as it is uncontested fact that the appellant is an interprovincial transport undertaking or common carrier. On the occasion of this occurrence, Mr. Roberto Negrete, a forklift operator employed by the appellant, sustained burn injuries to his lower right calf as a result of being splashed with a dangerous goods product named Strip Eaze liquid gel (paint stripper). At the time, Mr. Negrete was in the process of loading a trailer with the help of a forklift and more specifically, was loading a skid which was smaller than the dimensions of the forks on his forklift, thus allowing the forks to protrude beyond the actual skid measurements. During that operation, a drum containing the dangerous goods product previously mentioned was punctured and in the ensuing attempt, with the assistance of a supervisor (Shamkarran Boodhram), to stem the flow of said product by turning the drum onto its side, Mr. Negrete sustained the injury.

[3] The investigation report produced by the HSO indicates that the dangerous goods procedure of the employer had not been followed in the circumstances recounted above. More specifically, the HSO found that the document (bill of lading) that must be prepared by the billing department of the employer prior to commencing the actual loading operation, which must specify the presence and nature of the dangerous goods and to which is to be attached a yellow fluorescent dangerous goods tag, was defective. The document did not record the presence of dangerous goods among the items to be loaded nor was it accompanied by the necessary yellow "dangerous goods" tag. As a result, the loading dock supervisor and other workers were not informed of the presence of a dangerous goods product in the trailer to be loaded and Mr. Negrete entered the trailer with his forklift uninformed of the presence of that dangerous goods product. It is only once Mr. Negrete had been splashed with the product and advised the assisting supervisor of the burning pain to his lower right calf that the latter reviewed the label on the drum itself, identified its contents as a dangerous goods product and immediately put an end to the operation.

[4] For the sake of clarity, the description made in her report by the HSO of the technical operations involved in the normal task of loading/unloading a trailer needs to be repeated here. It consists in the following three steps:

- First, the driver picks up freight from a given customer and in so doing, ensures that the paperwork that must accompany said freight is in order, as all freight needs to be properly labelled.

- Second, upon returning to the terminal, which in this case is where the accident occurred, the driver will immediately bring in the paperwork to billing, where the person/employee receiving such will examine the bill of lading to ensure, among other things, that it is marked "dangerous goods", send a copy bearing the number of the trailer to be loaded/unloaded to the duty warehouse supervisor with the front of the load sheet bearing a "dangerous goods" fluorescent sticker. According to that procedure, the trailer or straight truck does not get loaded/unloaded until the paperwork is received from billing with the yellow "dangerous goods" tag attached and notification is made.

- Third, the dock associate/forklift operator receives the paperwork with the "dangerous goods" tag attached and proceeds to load or unload the trailer or straight truck with extra precautions. In this case, the loading/unloading operation proceeded without the required "dangerous goods" tag on the bill of lading.

[5] The investigating HSO analysed the causal factors of the accident/injury and found that there were three:

- First, the billing department had failed to attach the yellow "dangerous goods" tag to the paperwork to be received by the dock supervisor and dock associates.

- Second, as a consequence of the first factor, forklift operator Roberto Negrete was not made aware of the presence of dangerous goods in the trailer and as a result did not proceed with extra precautions and punctured the container of a dangerous goods product that was inside the trailer.

- Third, since neither the dock supervisor nor the forklift operator had been advised that a drum inside the trailer contained a dangerous goods product, when the spill caused by the puncture occurred, both men proceeded to physically handle said drum by placing it on its side to contain said spill with the result that the lower right calf of Mr. Negrete was splashed and he suffered a serious burn.

[6] As a result of the above, the HSO reached the conclusion that the employer had failed to warn its employee(s) that they would be handling what the HSO now came to describe as a "hazardous substance" and consequently took two actions for the purpose of correcting what the HSO saw as a violation and preventing this hazard from re-occurring. First a direction was issued to the employer on the basis that the employer had failed in

its obligation pursuant to paragraph 125(1)(q) of the Code to provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work. HSO Tavares-Porto found the necessary regulatory support to the above Code provision at section 10.23 of the *Canada Occupational Health and Safety Regulations* (the COHSR) which states that "where reasonably practicable, the employer shall provide automated warning and detection systems where the seriousness of any exposure to a hazardous substance so requires". It is worth noting here that while the accident suffered by Mr. Negrete and the ensuing investigation noted that a **dangerous goods** product was involved, the direction that resulted made reference to a **hazardous substance** as the term derived from the text of section 10.23 of the COHSR. This variance in terminology took on great importance in the eyes of the HSO who consequently, and once the direction had been issued, recognized that the said direction had been issued in error and therefore, as a second action, sought and obtained from Rosedale an assurance of voluntary compliance (AVC) whereby, pursuant to its general obligation under the Code to protect the health and safety at work of its employees (section 124), Rosedale agreed to develop a dangerous goods procedure that would ensure that its employees be advised when handling a dangerous goods product. The text of the investigation report is quite eloquent regarding the so-called error by the HSO and rather than attempt to explain the steps that were gone through to arrive at that conclusion, I have chosen to refer to the germane part of the investigation report *verbatim.* Thus, after offering the substance of the direction, HSO Tavares-Porto goes on to explain:

> On July 23rd 2011 the employer; namely Brian Topping, responded to the direction with an email containing a document entitled: "**dangerous goods procedure**", dated July 11, 2011. Brian further noted that all employees had been adequately trained on the revised procedures. [Emphasis added]
>
> In receipt of the employer's response containing the dangerous goods procedure and training; I was satisfied with the employer[']s measures to fulfil[l] compliance of the above direction.
>
> On August 3rd 2011, Brian Topping contacted myself via phone advising he was not supportive of the direction; specifically section 10.23 [of the COHSR] and the use of the wording "hazardous substance".
>
> Brian also indicated that it would be near impossible to implement the same procedure for a **hazardous substance** as the dangerous goods procedures, as a hazardous substance is not required by law to be identified on shipping paperwork to drivers.
>
> Technical guidance advisor; Ken Manella was consulted with on this date. The technical guidance received was that it was a case of terminology and the term **dangerous goods** was implied within section 10 of the regulations [...]. [Emphasis added]
>
> Upon further review; it was identified that section 10.23 of the Canada Occupational Health and Safety Regulation does not apply to dangerous goods products as the application of the section 10.2 indicates; "**This**

Part (Hazardous Substances) does not apply to the handling or transport of dangerous goods to which the Transport of Dangerous Goods Act, 1992 and regulations made there under apply."

Furthermore; it was also noted that section 10.23 of the Canada Occupational Health and Safety Regulations is more commonly used for the establishment of automated warning devices such as a carbon monoxide detector. [Emphasis added]

[...]

AVC dated August 24, 2011;
As a result of the error in the direction issued by the Labour Program on July 22nd 2011, in that the direction did not accurately reflect the violation in this hazard occurrence investigation; for the purpose of accurately notating the employer's compliance, the Labour Program received an assurance of voluntary compliance signed by the employer Brian Topping on August 24th 2011 under The Canada labour Code Part II, section 124: "every employer shall ensure the health and safety at work of every person employed by the employer is protected." The employer acknowledged within the AVC that they agreed to develop a dangerous goods procedure which will ensure employees are advised when handling a dangerous goods product.

Given that on July 23rd 2011, the employer responded via an email containing a dangerous goods procedure dated July 11, 2011, and that to date all employees have effectively received training on this procedure, Rosedale Transport Ltd has voluntarily complied with this item.

[7] The hearing of the present matter was extremely brief as the sole witness heard was the HSO who had been summoned to offer testimony at the behest of the Appeals Officer as a witness of the Appeals Officer. At the outset of HSO Tavares-Porto's testimony, she was asked by the undersigned whether she still stood by the conclusions she had reached in the actual investigation report that had been entered as an exhibit. Her affirmative answer thus made it unnecessary for the HSO to testify at length about the accident that had occurred and the details of the investigation that followed. HSO Tavares-Porto merely reiterated that the direction to Rosedale had been issued in error, that her authority under the Code, as that of any other HSO, is restricted to the issuing of directions and that she had no authority under the legislation to amend or withdraw or rescind a direction, something she would have been prepared to do if vested with said authority. She further added that the AVC received from Rosedale had simply been sought and received as a means of obtaining from the appellant a form of compliance to the general employer safety requirement stated at section 124 of the Code in the full knowledge that the direction she had issued to Rosedale had not been properly founded in law and thus could not be enforced.

Issue

[8] In light of what precedes, particularly the admission by the HSO that the direction to the employer had been issued in error since the accident that gave rise to the investigation and direction involved a dangerous goods product while the regulations

provision basing the direction concerned hazardous substances and expressly excluded the transportation and handling of dangerous goods from its application, the sole issue to be determined is simply whether the direction as issued had a proper legal basis.

Submissions of the parties

Appellant's submissions

[9] As indicated at the outset, no party has manifested any intention of challenging the present appeal and thus the only submissions that were received were those of the appellant. Furthermore, one cannot ignore the actual position adopted and stated by the HSO in her report and repeated at the hearing where the HSO was the sole witness. That being the case and there being no respondent, it is not surprising that the submissions offered by the appellant were succinct in their formulation. Rather than attempt to record those submissions in my own words, given their brevity, I have opted to reproduce them at length in this decision. At the outset of this hearing, through an opening statement, the appellant stated a position that ties in with the final arguments that were presented in writing at the conclusion of such hearing and therefore it is useful to a complete understanding of the appellant's position to record both in the present decision. In its opening statement, the appellant stated the following:

> On June 23, 2011 an unfortunate accident occurred at Rosedale Transport Limited which caused an injury to one of our associates. As a result of this accident HRSDC conducted an investigation and issued a Direction under section 145(1) for contravention of section 125(1)(q) of the CLC Part II and section 10.23 of COHSR.
>
> Rosedale Transport Limited believes that we were not in contravention of section 125(1)(q) as our employee, Mr. Negrete had received all the required information, instruction, training and supervision necessary to ensure his health and safety were protected at work.
>
> Rosedale Transport Limited was also found to be in contravention of section 10.23 of the COSHR when in actual fact this particular section of the COSHR does not relate to the circumstances surrounding the events of June 23, 2011.
>
> In addition Rosedale Transport Limited cannot comply with the Direction with regards to providing information, instruction, training and supervision with regards to handling a "Hazardous Substance". Due to the fact that Rosedale is a "Common Carrier" in most cases Rosedale will not even know if the products we are transporting are classified as Hazardous Substance.
>
> Rosedale Transport Limited believes that an AVC only would have been sufficient to resolve and prevent any further issues and request [sic] the withdrawal of the Direction issued by Elizabeth Tavares-Porto on July 22, 2011.

[10] At the conclusion of the hearing, the appellant provided this Appeals Officer with brief closing arguments in writing. In short, for the purpose of deciding the issue raised by the appeal, the appellant opined that since the product involved in the accident that brought about the injury to Mr. Negrete was a "dangerous goods" and thus could not be seen as covered by section 10.23 of the COSHR because the handling and transportation of such goods are expressly excepted from the application of section 10.23, in fact all of Part X of such Regulations (Hazardous Substances), by section 10.2 of those Regulations, therefore the direction requiring compliance with paragraph 125(1)(q) of the Code had defective legal basis since compliance with said provision is required by the legislation to be "as prescribed" by applicable regulations and the invoked regulations had no application and were concluded as such by the HSO. Furthermore, the appellant also put forth the position that in any event it had complied with its employer obligation to properly inform, instruct, train and supervise its employees and thus should not be the subject of any direction as it had given and complied with an AVC in this respect, something that had been recognized by the HSO. Those closing arguments were formulated as follows:

> On December 6, 2011, Brian Topping attended an appeals hearing to dispute a Direction that was issued to Rosedale Transport Limited issued on July 22, 2011 by Health and Safety Officer (HSO) Elizabeth Tavares-Porto.
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> Rosedale requested this appeals hearing as we felt that the Direction was not applicable to the circumstances surrounding the accident of June 23, 2011 and that Rosedale could not comply with the Direction issued under subsection 145(1).
>
> The Direction indicates that Rosedale had contravened Paragraph 125(1)(q) of the Canada Labour Code and Section 10.23 of the Canada Occupational Health and Safety Regulations.
>
> As indicated in the appeals hearing, the following points reflect Rosedale's position:
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> -As indicated in the HSO evidence and the shipping document provided by Cantol Industrial and Specialty Chemicals (appendix 9), the product that was being transported by Rosedale was clearly being transported under the Transportation of Dangerous Goods (TDG) Act and Regulations.
>
> -Section 10.2 of the COSH Regulations states that **Part 10 does not apply to the handling or transporting of Dangerous Goods to which the Transportation of Dangerous Goods Act 1992 and regulations thereunder apply.**
>
> -As indicated on page 34 of the HSO report you will find a copy of the front page of the written test taken by our employee, Mr. Negrete on February 21, 2011 indicating he was provided TDG training.
>
> -Due to the fact that Part 10 does not apply to this particular incident Rosedale is requesting that the Direction be rescinded.

> -Another issue raised was the definition of "**Dangerous Goods**" and "**Hazardous Substances**" and how they are different. All Dangerous Goods according to the TDG Regulations require them to display a label to indicate the hazards they represent. With Hazardous Substances Rosedale would not even know they are transporting a Hazardous Substances [sic] as in many cases no marking or labels would be visible to our employees.
>
> -Due to the lack of labelling or identification on shipments of Hazardous Substances ensuring every employee was provided with training would in my opinion be an impossible task. [Emphasis added]

Analysis

[11] Central to the issue being considered in this case is the notion or concept of "hazardous substance". This is defined at subsection 122(1) of the Code as including ("includes") "a controlled product and a chemical, biological or physical agent that, by reason of a property that the agent possesses, is hazardous to the safety or health of a person exposed to it." The use of the word "includes" in that definition suggests a non-limitative enumeration and thus, that a hazardous substance can be more than a controlled product or chemical, biological or physical agent. In short then, this definition, inserted as it is in the Interpretation section of the legislation, and the general and non-exclusive wording of such, lead one to conclude that the legislator intended the defined concept of "hazardous substance" to receive a wide and far reaching interpretation. One need only to look at Division II (Hazardous substances other than controlled products) and Division III (Controlled products) of Part X of the COSHR that deals with Hazardous Substances to be comforted in this understanding. At the same time, one has also to note that the Code and the COSHR do not offer a definition of what constitutes a "dangerous goods" product. However, the term "goods" to which is appended the qualifier "dangerous" is defined in the Canadian Oxford Dictionary[1] as follows: "movable property or merchandise. Things to be transported, as distinct from passengers; freight." This being the case then, and in light of the non-limitative nature of the definition of "hazardous substance", it is possible, in my opinion, to conclude generally that a hazardous substance may be or include a dangerous goods and inversely, a dangerous goods may be or contain a hazardous substance.

[12] This however is of no impact to the matter at hand and the accident that occurred in the present case since for all intents and purposes, the factual circumstances of the occurrence bring the matter within the realm of **transportation and handling** of dangerous goods, whether said dangerous goods presented or not the characteristics of a hazardous substance. It is important to note here that this is not questioned by the appellant who has adopted all through the position that the accident occurred within the execution of activities or tasks of a "common carrier", in other words as part of the transportation and handling of such goods. It is no less important to underline the fact that this view is shared by HSO Tavares-Porto who conducted the investigation into this occurrence and therefore the common view of the appellant and the HSO is that in this

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[1] Fifth Edition, 2002, Oxford University Press Inc., New York.

case, the dangerous goods involved come within the application of the *Transportation of Dangerous Goods Act, 1992*[2] and the regulations made thereunder. I have heard no argument nor was any evidence submitted that would lead the undersigned to disagree with this conclusion. Furthermore, I share the opinion expressed by both the HSO and the appellant that the text of the Application section of Part X of the COSHR is explicit in excluding the occurrence and situation of this case from the application to the appellant of section 10.23 of said regulations on hazardous substances. Section 10.2 of Part X of the COSHR, under title Hazardous substances—Application, reads as follows: "This Part does not apply to the handling or transportation of dangerous goods to which the *Transportation of Dangerous Goods Act, 1992* and regulations made thereunder apply". In my opinion, the immediate consequence of this is that the basis on which the direction under appeal was issued is defective and therefore, since I am of the view that the said direction lacked proper legal foundation, I find myself in agreement with the HSO that said direction was improperly issued or, to use the words of HSO Tavares-Porto, was issued in error.

[13] Given the specific circumstances of this case, I also share the view expressed by HSO Tavares-Porto at the hearing to the effect that in her search for corrective action by the appellant to the situation revealed by her investigation, she could or should have invoked the general safeguard obligation of the employer towards its employees at work and issued her direction pursuant to section 124 as the legal foundation to such. The HSO did testify at the hearing that she had formed that opinion once she had become aware of the impact of section 10.2 of the COSHR on the direction she had issued. However, she could not herself take such corrective step *vis-à-vis* that direction because under Part II of the Code, the authority granted to health and safety officers is restricted to the issuance of directions and thus she could not, she lacked authority to either amend or rescind the direction already issued in this case. I share that opinion regarding the limited authority of health and safety officers under the Code. At the same time, as an Appeals Officer, through the operation of section 146.1 of the Code, I am vested with the authority to issue new directions and vary, rescind or confirm directions previously issued by health and safety officers, should I find the need for the corrective action that could be brought through the issuance of such direction.

[14] In the present case however, I share the view expressed by the HSO at the hearing and in her investigation report as well as by the appellant before me that the AVC freely given and acted upon by the latter has achieved the protection to the employees of the appellant that could have been sought and obtained through compliance with a section 124 direction such as mentioned above. I am therefore of the view that there is no longer a need for my intervention through the issuance of such direction or the amending of the direction previously issued by HSO Tavares-Porto.

[15] My conclusion thus is twofold. First, as regards the direction issued to the appellant on July 22, 2011, by HSO Tavares-Porto, I find that its legal foundation was

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[2] S.C. 1992, c. 34

defective in that, in addition to being based on paragraph 125(1)(q) of the Code, it lacked the required regulatory supporting provision where the provision invoked, section 10.23 of the COSHR, explicitly excluded the transportation or handling of dangerous goods from the application of COSHR, as discussed above. Second, since the purpose sought by the HSO was achieved through the freely given and acted upon AVC subscribed by the appellant, a fact recognized by HSO Tavares-Porto, there is no longer a need for intervention in this regard by the undersigned through the issuance of a new, or the varying of the existing direction.

Decision

[16] Therefore**,** considering all of the above, the appeal by Rosedale Transport Limited is granted and the direction issued by HSO Tavares-Porto to the appellant on July 22, 2011, is rescinded.

Jean-Pierre Aubre
Appeals Officer