

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Caron Transportation Systems Partnership, 2012 OHSTC 14

Date: 2012-04-24
Case No.: 2011-59
Rendered at: Ottawa

Between:

Caron Transportation Systems Partnership, Appellant

Matter: Appeal under subsection 146(1) of the *Canada Labour Code* of a direction issued by a health and safety officer.

Decision: The direction is varied.

Decision rendered by: Mr Michael Wiwchar, Appeals Officer

Language of decision: English

For the appellant: Ms Lilie MacInnis, Safety and Compliance Manager,
Caron Transportation Systems Partnership

REASONS

[1] This concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) of a direction issued by Health and Safety Officer (HSO) Dawn MacLeod on November 9, 2011.

Background

[2] On November 1, 2011, at approximately 7:10 am MST, an employee of KAL Tire, a company under contract to provide tire maintenance services to Caron Transportation Systems Partnership (Caron Transportation), was in the process of placing a jack under the rear axle of a tractor/trailer unit which was parked in the northwest corner of the yard on Caron Transportation's property.

[3] Not noticing the presence of the KAL Tire employee, a wash bay technician employed by Caron Transportation started the vehicle and drove it into the wash bay running over the KAL Tire employee. As a result, the KAL Tire employee suffered non-life threatening injuries, notably road rash to the right buttock and a bruised right ankle.

[4] HSO MacLeod arrived at the scene at approximately 10:00 pm on the day of the incident and began her investigation. HSO MacLeod was accompanied by another HSO who arrived at the scene shortly after. The HSOs were informed that the tractor/trailer unit involved in the accident, owned by Interload Services, had been moved to the wash bay by Caron Transportation's employee for cleaning. The employee was unaware that someone was under the vehicle at the time.

[5] On November 2, 2011, the HSOs attended Caron Transportation's Edmonton Terminal work place and met with the Terminal Manager, the HR Manager, and Ms MacInnis, Safety and Compliance Manager. It was confirmed during this meeting that the KAL Tire employee was not seriously injured from the incident. HSO MacLeod emphasized that although the employee only suffered minor injuries, the circumstances could nevertheless have resulted in a fatality.

[6] Upon reviewing the employer's duties under the Code with everyone present, Ms MacInnis confirmed that Caron Transportation did not have documented policies or procedures for persons being granted access to the work place. Although KAL Tire employees came to the work place at approximately the same time twice per day to see if any services were required, they were not supervised and were not required to sign in each time they attended the site.

[7] The employer also informed the HSOs that wash bay technicians were not required to have a Class 1 or Class 3 licence to move vehicles on Caron Transportation's property. HSO MacLeod advised that she had spoken with Alberta Occupational Health and Safety regarding operator licence requirements for airbrake qualifications and axle configuration yet there was nothing available to confirm such licensing requirements on an employer's premises.

[8] On November 7, 2011, HSO MacLeod drafted an Assurance of Voluntary Compliance (AVC) and also a direction comprised of four contraventions the following day. On November 9, 2011, both the direction and the AVC were forwarded to Mr Williams, the employer's representative.

[9] The direction issued on November 9, 2011, by HSO MacLeod to Caron Transportation pursuant to subsection 145(1) of the Code itemized four contraventions. The direction reads as follows:

IN THE MATTER OF THE *CANADA LABOUR CODE*
PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION THE EMPLOYER UNDER SUBSECTION 145(1)

On November 1, 2011, the undersigned health and safety officer conducted an investigation in the work place operated by CARON TRANSPORTATION SYSTEMS PARTNERSHIP, being an employer subject to the *Canada Labour Code*, Part II, at Edmonton Terminal located at 13310 – 156 Street, Edmonton Alberta, T5V, 1L3, the said work place being sometimes known as Caron Transportation Systems Partnership.

The said health and safety officer is of the opinion that the following provisions of the Canada Labour Code, Part II, have been contravened:

Contravention No. / No : 1

Paragraph 125(1)(z.14) of the *Canada Labour Code*, Part II:

The employer, Caron Transportation Systems has contracted third party services to conduct tire repair work on their fleet vehicles, whereby the contractor attends the work site twice daily to perform work. There are no documented procedures or protocols in place that identify that the employer has informed those persons granted access to the employer's work site of existing or foreseeable safety hazards.

Contravention No. / No : 2

Paragraph 125(1)(w) of the *Canada Labour Code*, Part II and Section 12.1 of the Canada Occupational Health & Safety Regulations:

The employer has failed to ensure that contract workers working on the employer's work site use protection equipment to prevent risk of exposure to vehicle movement. On November 1, 2011, an employee of Caron Transportation Systems drove a Western Star End Dump Truck/trailer, Unit 1233, owned by Interload Services Ltd., from its parked position in the northwest corner of the yard to the wash facility on the employer's work site. A contract worker was under the vehicle at the time of the incident and received minor injuries. There was no indication that work was being conducted on Unit 1233 at the time of the incident, as there were no barricades or other warnings in place to identify that a contractor may or may not be working on that particular piece of equipment.

Contravention No. / No : 3

Paragraph 125(1)(q) of the *Canada Labour Code*, Part II and Section 14.23(1)(c) of the Canada Occupational Health & Safety Regulations:

On November 1, 2011, a wash bay technician employee of Caron Transportation Systems proceeded to move a Western Star End Dump Truck/trailer, Unit 1233, from where it was located in the northwest corner of the employer's yard to the wash bay. The vehicle was facing the south end of the yard. The employee had not inspected the area around the dump truck prior to moving it to the wash bay and was unaware that a contractor was under the vehicle. The employer has not instructed employees conducting wash bay activities on the procedures to be followed for operating the vehicles that need to be moved to the wash bays for cleaning.

Contravention No. / No : 4

Paragraph 125(1)(q) of the *Canada Labour Code*, Part II and subsection 14.24(b) of the Canada Occupational Health and Safety Regulations:

Employees employed as wash bay technicians, are required to move various Tandem, Tridem and Super B vehicles from the yard to the wash bays for cleaning. The employer does not require these employees to possess a current and valid operator's licence (Class 1, Class 3, etc, for specific axle configuration) which is not in accordance with provincial regulations and operator requirements identified by the manufacturer.

Therefore you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II to terminate the contraventions no later than November 30th, 2011.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Issued at Edmonton, this 9th day of November, 2011.

Dawn MacLeod
Health and Safety Officer
Certificate Number: ON6951

[10] The first three contraventions referred to in the direction pertain to information provided to contractors working at the employer's work place, and to movement of vehicles by Caron Transportation employees in circumstances where, unbeknownst to them, contractors were working under the vehicle. These three findings are not under appeal.

[11] On November 25, 2011, Caron Transportation filed an appeal before this Tribunal of the November 9, 2011, direction in respect to contravention no. 4 and it also made an

application for a stay. In addition to her written application for a stay, Ms MacInnis, together with Mr Pattison, Vice President of Operations, participated in a hearing that was conducted by telephone on November 30, 2011, before Appeals Officer Douglas Malanka. A second hearing was held by telephone on December 1, 2011. The stay of the direction's fourth contravention was granted by Appeals Officer Malanka on December 2, 2011, until the case is heard on its merit and a decision is rendered by an appeals officer.

Issue

[12] I must determine whether HSO MacLeod erred in issuing a direction that alleged a contravention pursuant to 125(1)(q) of the Code, and by extension paragraph 14.24(b) of the *Canada Occupational Health and Safety Regulations* (the Regulations) to Caron Transportation for allegedly violating Alberta laws regarding the operator licencing requirements for the equipment described in contravention no. 4 of the direction.

Appellant's submissions

[13] The appellant argued that section 51 of the *Alberta Traffic Safety Act*, which deals with operator's licences, applies to motor vehicle operators on highways and does not apply to its employees who operate vehicles exclusively on Caron Transportation private property. Therefore, it concluded that there is no need for these specific operators to possess a current and valid operator's licence.

[14] The appellant submitted that Caron Transportation's yard personnel never leave the employer's private property nor do they travel on a public highway with a vehicle that requires a Class 1 or Class 3 operator's licence. It is submitted that no vehicle movement on the property would ever exceed a one kilometer distance and are always driven at a low speed (around 15 kilometers per hour). The appellant added that the yards where the vehicles are operated are not accessible to the public and have signs posted at all access points stating "NOTICE Authorized Personnel Only" and "All Visitors Must Register at Shop Office". The yard gates are only open during working hours and require a key-card for after-hours access.

[15] The appellant noted that the HSO referred in her report to a discussion she had with the manufacturer of the vehicle implicated in the incident. She was informed that an operator is required to possess a Class 1 driver's licence, as these vehicles are equipped with air brakes and require specific procedures to be followed prior to their operation. The appellant argued that this recommendation from the manufacturer is directed at individuals who operate their vehicles on a roadway, and that the manufacturer's opinion does not constitute a legal obligation.

[16] The appellant stated that after the direction was issued, Caron Transportation took a series of actions to ensure the safety of its employees and any persons granted access to its work place. In summary, Caron Transportation developed a new on the job training form that documents their training with a qualified supervisor in their unit. This is

followed by a yard vehicle operation training class, a competency test, and a practical road test. The appellant has assured that the employer will re-train its current employees in the manner described above and will train all new employees in the same way. Furthermore, the employer hired a third party risk management consultant to review all its job descriptions, procedures, training and hazard assessments to ensure effectiveness and that all legislative requirements are met.

Analysis

[17] In order to determine whether the fourth contravention in the HSO's direction dated November 9, 2011, to the employer was well founded, I will have to decide the nature of the obligation contained in paragraph 14.24(b) of the Regulations.

[18] For ease of reference, I will reproduce the statutory and regulatory requirements at issue, paragraph 125(1)(q) of the Code and paragraph 14.24(b) of the Regulations, which read as follows:

Canada Labour Code:

125(1) Without restricting the generality of section 124, every employer shall, in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity,

[...]

(q) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work;

Canada Occupational Health and Safety Regulations:

14.24 No employer shall require an employee to operate motorized or manual materials handling equipment unless the employee

[...]

(b) where the laws of the province in which the equipment is operated require an operator's licence, possesses an operator's licence issued by any province. [My underlining]

[19] In the present case, the applicable provincial law is the *Alberta Traffic Safety Act*. Section 51 of the *Traffic Safety Act* outlines the general requirement for a person to hold a valid operator's licence to drive a motor vehicle on a highway:

Operator's licences

51 Except as otherwise permitted under this Act, a person shall not do any of the following:

- (a) drive a motor vehicle on a highway unless that person is the holder of a subsisting operator's licence;
- (b) drive a motor vehicle on a highway unless that motor vehicle is of a class or type that is authorized to be operated under the class of operator's licence held by that person;

[20] With regard to the operation of a vehicle equipped with air brakes, Alberta's *Operator Licensing and Vehicle Control Regulation*, a regulation made under the *Traffic Safety Act*, provides at section 27 that the operator hold a Class 1 licence or one of the following equivalences:

Air brakes

27 No person shall drive a motor vehicle that is equipped with an air brake unless the person

- (a) holds a Class 1 operator's licence,
- (b) holds a Class 2, 3, 4 or 5 operator's licence that is endorsed by the Registrar to permit the operation of a motor vehicle that is equipped with an airbrake,
- (c) holds a Class 2, 3, 4 or 5 operator's licence and the motor vehicle is a Class 2 farm vehicle to which section 77(1)(b)(ii) applies, or
- (d) is learning to drive a motor vehicle that is equipped with an airbrake and the person and supervisor comply with section 31.

[21] In light of these two sections, it could be argued that the Alberta regime regulating the operation and licensing of motor vehicles should be viewed as fully restricting the unlicensed use of a vehicle equipped with air brakes, whether or not such a vehicle is operated on a highway. However, I am not convinced that this is necessarily the case. Even if section 27 of the *Operator Licensing and Vehicle Control Regulation* does not specify whether or not the possession of a Class 1 operator's licence or any equivalence is mandatory to operate a vehicle equipped with air brakes anywhere or just on a highway, this section should not be interpreted independently from section 51 of the *Traffic Safety Act*.

[22] The Alberta *Traffic Safety Act* and the regulations made under it constitute a single regime. It follows that those regulations must be interpreted pursuant to the general requirements enacted in the *Traffic Safety Act*, their enabling act. In this respect, section 27 of the *Operator Licensing and Vehicle Control Regulation* should be viewed as complementing the requirements established by paragraph 51(b) of the *Traffic Safety Act*, which prohibits any individual from driving a motor vehicle on a highway without the proper operator's licence.

[23] This interpretation appears consistent with other provincial legislation dealing with motor vehicle operator's licence requirements. Subsection 32(1) of the Ontario *Highway Traffic Act*, under the title "Driver's licence", states:

32(1) No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act. [My underlining]

Subsection 1(1) of the Ontario act defines a highway as follows:

1(1) In this Act,
[...]
“highway” includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof; [My underlining]

[24] Similarly, New Brunswick's *Motor Vehicle Act*, at subsection 78(1), states:

78(1) No person, except a person expressly exempted or authorized under this Act, shall drive any motor vehicle or farm tractor upon a highway in the Province unless the person has a valid licence issued under the provisions of this Act. [My underlining]

The New Brunswick statute, at section 1, defines a highway as follows:

1 In this Act
[...]
“highway” means the entire width between the boundary lines of every street, road, lane, alley, park, parking lot, drive-in theatre, school yard, picnic site, beach, winter road across ice or place when any part thereof is used by the general public for the passage or parking of vehicles, and includes the bridges thereon and, unless the context indicates otherwise or unless the reference is contained in a provision that is in conflict with a provision of the *New Brunswick Highway Corporation Act*, a highway under the administration and control of the New Brunswick Highway Corporation or a project company; [My underlining]

[25] Section 60.2 of the Quebec *Highway Safety Code*, which can be found under Title II “Licences To Drive Road Vehicles”, specifically states that the licencing requirements apply to publicly accessible highways:

60.2 The provisions of this Title apply on public highways, on highways under the administration of or maintained by the Ministère des Ressources naturelles et de la Faune, on private roads open to public vehicular traffic and on land occupied by shopping centres or other land where public traffic is allowed.

[26] Such as is the case with the Alberta *Traffic Safety Act*, nowhere in any of these provincial laws is there a specific mention of any type of restriction for operating a vehicle without a licence outside of a public highway or a private road or property with

public access. Consequently, it follows that I must now determine if Caron Transportation's premises fall within the statutory definition of a highway.

[27] In the same manner as in the three provincial laws mentioned above, the Alberta *Traffic Safety Act's* definition of a highway is characterized by having a dimension of public accessibility. Paragraph 1(1)(p) of the *Traffic Safety Act* defines a highway as follows:

1(1) In this Act,

[...]

- (p) "highway" means any thoroughfare, street, road, trail, avenue, parkway, driveway, viaduct, lane, alley, square, bridge, causeway, trestleway or other place or any part of any of them, whether publicly or privately owned, that the public is ordinarily entitled or permitted to use for the passage or parking of vehicles and includes
- (i) a sidewalk, including a boulevard adjacent to the sidewalk,
 - (ii) if a ditch lies adjacent to and parallel with the roadway, the ditch, and
 - (iii) if a highway right of way is contained between fences or between a fence and one side of the roadway, all the land between the fences, or all the land between the fence and the edge of the roadway, as the case may be, but does not include a place declared by regulation not to be a highway;

[28] As mentioned above, the appellant stated in its submissions that the yard area on Caron Transportation's premises where the Class 1 or Class 3 vehicles are operated is not accessible to the public. The yard is fully gated and is only open during working hours. After-hours access requires a key-card. All access points to the yard have signs stating "NOTICE Authorized Personnel Only". Moreover, the appellant stated that every person visiting Caron Transportation's premises must first register at the shop office. The shop office, which is publicly accessible, is located outside of the gated yard and has its own parking area and public road access.

[29] Furthermore, it should be noted that the HSO stated in her report that even Alberta's Transportation Safety Services was unable to provide a definitive answer as to whether the licence requirements for operating a Class 1 vehicle apply regardless of the fact that the vehicle is operated on a company's private property.

[30] In light of these facts, it is clear that the public accessibility dimension that characterizes the statutory definition of a highway under the Alberta *Traffic Safety Act* is not applicable to the yard area on Caron Transportation's private property. Thus, the requirements under section 51 of the *Traffic Safety Act* to hold an operator's licence to drive a vehicle equipped with air brakes on a highway do not extend to the action of moving such a vehicle on private property for the purpose of maintenance or cleaning, provided that the property is not accessible to the public.

[31] Therefore, I find that Caron Transportation did not contravene Alberta laws regarding operator licences for the operation of equipment as identified in contravention

no. 4 in the direction and as a result, the employer did not contravene paragraph 125(1)(q) of the Code and paragraph 14.24(b) of the Regulations.

[32] As for the question of the HSO's reference to the manufacturer's recommendations regarding the requirements for operating their vehicles, I agree with the appellant that such recommendations do not generate any type of legal obligation on Caron Transportation's part.

[33] Nevertheless, it should be noted that the appellant stated in its submissions that if it was deemed necessary, Caron Transportation would be willing to make a demand on all its employees operating a vehicle equipped with air brakes and who only hold a Class 5 licence. They would be required to get a "Q" endorsement from Alberta Transportation's Registrar which allows the operation of such equipment without having to hold a Class 1 or Class 3 operator's licence. The endorsement can be obtained after taking a 6 hour theory class on air brakes, a 1 hour practical and a 25 question quiz. However, since the provision regarding the licence endorsement is also enacted in section 27 of the *Alberta Operator Licensing and Vehicle Control Regulation*, I maintain the same reasoning for the "Q" endorsement as I did for the Class 1 licence, and therefore conclude that there is no such obligation on employer's part.

[34] In spite of this, given how small of a burden this would be for the company and its yard personnel, I strongly suggest that Caron Transportation make it a policy that all of its employees be required to have a "Q" endorsement for operating any vehicle equipped with air brakes. In my view, such a measure would fall precisely within the general spirit of the Code under section 122.1, that is, to prevent accidents and injuries in the course of employment.

Decision

[35] For these reasons and pursuant to my authority under paragraph 146.1(1)(a) of the Code, I hereby vary the direction issued by HSO MacLeod dated November 9, 2011, by removing contravention no. 4 as per the direction appended to this decision.

Michael Wiwchar
Appeals Officer



APPENDIX

IN THE MATTER OF THE CANADA LABOUR CODE PART II – OCCUPATIONAL HEALTH AND SAFETY

DIRECTION THE EMPLOYER UNDER SUBSECTION 145(1)

On November 1, 2011, Health and Safety Officer Dawn MacLeod conducted an investigation in the work place operated by CARON TRANSPORTATION SYSTEMS PARTNERSHIP, being an employer subject to the *Canada Labour Code*, Part II, at Edmonton Terminal located at 13310 – 156 Street, Edmonton Alberta, T5V, 1L3, the said work place being sometimes known as Caron Transportation Systems Partnership.

The said health and safety officer is of the opinion that the following provisions of the *Canada Labour Code*, Part II, have been contravened:

Contravention No. / No : 1

Paragraph 125(1)(z.14) of the *Canada Labour Code*, Part II:

The employer, Caron Transportation Systems has contracted third party services to conduct tire repair work on their fleet vehicles, whereby the contractor attends the work site twice daily to perform work. There are no documented procedures or protocols in place that identify that the employer has informed those persons granted access to the employer's work site of existing or foreseeable safety hazards.

Contravention No. / No : 2

Paragraph 125(1)(w) of the *Canada Labour Code*, Part II and Section 12.1 of the *Canada Occupational Health & Safety Regulations*:

The employer has failed to ensure that contract workers working on the employer's work site use protection equipment to prevent risk of exposure to vehicle movement. On November 1, 2011, an employee of Caron Transportation Systems drove a Western Star End Dump Truck/trailer, Unit 1233, owned by Interload Services Ltd., from its parked position in the northwest corner of the yard to the wash facility on the employer's work site. A contract worker was under the vehicle at the time of the incident and received minor injuries. There was no indication that work was being conducted on Unit 1233 at the time of the incident, as there were no barricades or other warnings in place to identify that a contractor may or may not be working on that particular piece of equipment.

Contravention No. / No : 3

Paragraph 125(1)(q) of the *Canada Labour Code*, Part II and Section 14.23(1)(c) of the *Canada Occupational Health & Safety Regulations*:

On November 1, 2011, a wash bay technician employee of Caron Transportation Systems proceeded to move a Western Star End Dump Truck/trailer, Unit 1233, from where it was located in the northwest corner of the employer's yard to the wash bay. The vehicle was facing the south end of the yard. The employee had not inspected the area around the dump truck prior to moving it to the wash bay and was unaware that a contractor was under the vehicle. The employer has not instructed employees conducting wash bay activities on the procedures to be followed for operating the vehicles that need to be moved to the wash bays for cleaning.

Therefore you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II to terminate the contraventions no later than November 30th, 2011.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by the health and safety officer, to take steps to ensure that the contravention does not continue or reoccur.

Varied in Ottawa, Ontario , this 24th day of April, 2012.

Michael Wiwchar
Appeals Officer