Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Date: 2014-10-06
Case No.: 2014-41

Between:

4186397 Canada Inc. c.o.b. in the Name and Style of
TFI Transport 7 L.P. (Canadian Freightways Limited), Applicant

and

Canadian Office and Professional Employees Union, Local 378, Respondent

Indexed as: *Canadian Freightways Limited* v. *Canadian Office and Professional Employees Union*

Matter:	Application under subsection 146(2) of the *Canada Labour Code* of a stay of a direction issued by a health and safety officer
Decision:	The stay of the direction is denied
Decision rendered by:	Mr. Olivier Bellavigna-Ladoux, Appeals Officer
Language of decision:	English
For the Applicant:	Mr. Tim Christensen, Manager, Safety & Compliance, Canadian Freightways
For the Respondent:	Mr. Steve Milne, Workers Compensation Board/Occupational Health and Safety Coordinator, COPE 378
Citation:	2014 OHSTC 20

REASONS

[1] These reasons concern an application brought under subsection 146(2) of the *Canada Labour Code* (the Code) for a stay of a direction issued by Health and Safety Officer (HSO) Melissa Morden on August 22, 2014. The applicant, Canadian Freightways Limited ("the applicant" or "the employer"), is an interprovincial transportation company in Western Canada.

Background

[2] On June 10, 2014, HSO Morden and her colleague HSO Betty Ryan conducted an inspection, in the presence of two of the applicant's representatives, of the applicant's terminal at the Port of Victoria in Victoria, British Columbia. They saw members of the public coming to the cross-dock of the applicant's terminal to pick up packages, as well as employees entering this area. This was not during peak traffic hours.

[3] During this investigation, the HSOs noted the lack of back-up alarms on the forklifts. Representatives of the applicant stated that they removed the back-up alarms at the request of their employees. The applicant employs a strobe light at all times when a forklift is in use in addition to honks to signal the entering and exiting of a forklift from a shipping container. Moreover, forklift operators are required to be completely aware of their surroundings at all times in order to avoid complacency.

[4] The employer believes that its current practices are of a significantly higher standard than the minimum requirements of Part II of the Code and the *Canada Occupational Health & Safety Regulations*. The HSO sent the applicant an assurance of voluntary compliance (AVC) form and a deadline of one month to comply with her finding of contravention concerning audible back-up alarms for its forklifts. The employer declined the opportunity to comply and instead decided it would appeal any direction requiring the company to re-install back-up alarms on its forklifts.

[5] HSO Morden then issued the following direction:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II – OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)
>
> On June 10, 2014, the undersigned health and safety officer conducted an inspection in the work place operated by 4186397 CANADA INC., carrying on Business in the Name & Style of TFI Transport 7 L.P., being an employer subject to the *Canada Labour Code*, Part II, at 2952 Ed Nixon Terrace, Victoria, British Columbia, V9B 0B2, the said work place being sometimes known as Canadian Freightways Limited.
>
> The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:
>
> **Contravention 1**

Paragraph 125.(1)(k) of the Canada Labour Code Part II, (Part II), Section 14.16(1)(b) of the Canada Occupational Health & Safety Regulations (COHSR).

The employer failed to ensure that forklifts are fitted with a horn or similar audible warning device that automatically operates when travelling in reverse.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(*a*) of the *Canada Labour Code*, Part II, to terminate the contravention no later than September 8, 2014.

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 Vancouver, BC, this 22nd day of August, 2014.

[signed]
Melissa Morden
Health and Safety Officer
[…]

To: 4186397 CANADA INC., carrying on Business in the Name & Style of TFI Transport 7 L.P.
2952 Ed Nixon Terrace
Victoria, British Columbia
V9B 0B2

[6] HSO Morden noted that the applicant's operations in Dawson Creek, BC, also received an identical direction from another HSO.

[7] The direction under consideration in this stay concerns the applicant's Victoria terminal only and the two forklifts that employees operate there. The applicant employs one manager, nine staff in the terminal, and one office clerk in Victoria.

[8] The applicant filed a notice of an appeal accompanied by an application for a stay on September 3, 2014. A teleconference was held on September 18, 2014, during which both parties presented their submissions on the application

[9] On September 19, 2014, I rendered my decision not to grant the application for a stay and the Occupational Health and Safety Tribunal Canada so informed the parties on the same day. The following are the reasons in support of my decision.

Analysis

[1] The authority of an appeals officer to grant a stay is derived from subsection 146(2) of the Code, which reads as follows:

> Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction

[10] In exercising their discretion under subsection 146(2), appeals officers apply the following three part test. The elements of this test are as follows:

1) The applicant must satisfy the appeals officer that there is a serious question to be tried as opposed to a frivolous or vexatious claim.

2) The applicant must demonstrate that he or she would suffer significant harm if the direction is not stayed.

3) The applicant must demonstrate that should a stay be granted, measures will be put in place to protect the health and safety of employees or any person granted access to the work place.

Is the question to be tried serious as opposed to frivolous or vexatious?

[11] Both parties agreed that the question to be tried at the time of the appeal is serious. They submitted that a HSO's direction to cease a contravention of the Code is always a serious question.

[12] I agree with the parties and find that the applicant satisfied the first element of the test.

Would the applicant suffer significant harm if the direction is not stayed?

[13] The applicant stated that new forklift operation training would have to take place. Currently, drivers receive specific training for their specific model of forklift, which includes 360-degree awareness training. After installing back-up alarms on forklifts, the employer would have to train forklift drivers on how to test the audible beeper as well as help all of its employees adjust to the significant change to the work environment.

[14] There would also be discussions with the Health and Safety Committee and the Policy Committee to review and update training manuals, policies, and update any needs or hazards due to the reintroduction of back-up alarms.

[15] It was significant to the employer that requiring it to change any element of its safety practices in Victoria would therefore result in a change to its safety practices across the whole of its operations because of a uniform safety policy at all of Canadian Freightways' terminals.

[16] In the end, the applicant indicated that its best estimate as to the time it would need in order to update its training manuals, policies, ordering and install the alarms, and train forklift operators and other staff in the company would be two weeks.

[17] The respondent, Canadian Office and Professional Employees Union, Local 378, submitted it was unable to comment on the feasibility of complying with the HSO's direction and did not exactly understand the kind of training the employer would have to provide before forklift drivers could safely operate the machines again.

[18] In my view, Canadian Freightways' internal policy to ensure all of its terminals operate with the same safety measures is immaterial to the matter at hand. The direction that I am asked to stay only applies to the company's operations in Victoria.

[19] I find that the applicant was not able to concretely demonstrate the hardship the employer would face if compelled to comply with the HSO's direction pending a hearing on the merits of the appeal. Its suggestions of significant harm fail to reach the threshold required for a stay. Given that a stay allows an employer to continue a potentially unsafe work practice - and therefore potentially endangering its employees - an applicant must convince an appeals officer that it will experience a clearly exacting level of harm.

[20] The applicant did not provide information on the logistics and impact of compliance on its operations. Specifically, it was unable to provide information as to the availability of the backup alarms to install or an estimate as to the cost the company would incur. Moreover, the applicant's estimation of a two-week timeframe in order to comply with the direction was based on conjecture.

[21] I therefore find that the second element of the test has not been met. Given my finding that the employer has not established that it would suffer significant harm if the stay is denied, I do not need to consider the third element of the test.

Decision

[22] For the reasons set out above, the application for a stay of the direction issued by HSO Morden on August 22, 2014, is denied.

Olivier Bellavigna-Ladoux
Appeals Officer