



Occupational Health and Safety Tribunal Canada

Date: 2015-06-30
Case No.: 2014-49

Between:

Sersa Total Track Ltd., Appellant

Indexed as: *Sersa Total Track Ltd.*

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 confirmed.

Decision rendered by: Mr. Douglas Malanka, Appeals Officer

Language of decision: English

For the appellant: Mr. Marko Pohlmann, President, Sersa Total Track Ltd.

Citation: 2015 OHSTC 12

REASONS

[1] This decision concerns an appeal filed by Sersa Total Track Ltd. (Sersa or “employer”) on October 26 2014, under subsection 146(1) of the *Canada Labour Code* (the Code) against a direction issued by Health and Safety Officer (HSO) Marjorie Roelofsen on September 26, 2014, in connection with her finding of danger.

[2] The direction issued by HSO Roelofsen to Sersa on September 26, 2014, pursuant to paragraph 145(2)(a) of the Code reads as follows:

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)

On September 25, 2014, the undersigned health and safety officer conducted an investigation of a work refusal on the rail track located at mile 35.29 Exeter Subdivision just off Kippin Road in Kippin Ontario in the work place operated by Sersa Total Track Ltd., being an employer subject to the *Canada Labour Code*, Part II, at 58 County Rd. #5, Mallorytown, Ontario, K0E 1R0, the said work place being sometimes known as Sersa Total Track.

The said health and safety officer considers that the use or operation of a machine or thing constitutes a danger to an employee while a work:

The operation of the “power jack” which has been identified as a Nordco Model “LS-C” Auto-Lift without the use of the manufacturer installed wands, which the crew foreman has prevented employees from utilizing that are affixed to the Nordco Auto-Lift exposes worker hands and feet to being crushed while placing steel tie plates manually under an elevated rail line.

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

Issued at London, this 26th day of September, 2014.

[signed]
Marjorie Roelofsen
Health and Safety Officer
[...]

To: Marko Pohlmann, President
Sersa Total Track Ltd.
58 County Rd., #5
Mallorytown, Ontario
K0E 1R0

Background

[3] On the morning of September 25, 2014, Mr. Orry Thorpe, a machine operator employed by Sersa, refused to work because he was required to use his hands to install metal tie plates under the track rail that is being suspended by a Nordco Model LS-C Auto lift power jack rather than using the safety wands equipped on the power jack for this purpose. Mr. Thorpe feared that his hands or fingers would be crushed at some point.

[4] HSO Roelofsen investigated into Mr. Thorpe's refusal to work on September 25, 2014, and decided that the work constituted a danger for Mr. Thorpe.

[5] Mr. Thorpe informed HSO Roelofsen during her investigation that one of his co-workers had almost lost fingers the previous day and that another employee had his fingers crushed the previous year. Mr. Thorpe also stated that there have been other recent "near misses".

[6] An oral hearing was held on April 13th, 2015. The employer called Mr. Patrick Gibson, Sersa Foreman, and Mr. Mike Brisson, Employee Health and Safety Committee Representative to testify. I also requested that HSO Roelofsen and HSO Paul Danton testify since the investigation had been carried out by both HSO's. Before the hearing, I attended a site view of the work place located in Mallorytown, Ontario where I observed of the power jack in operation.

[7] HSO Danton stated that during the investigation he interviewed Mr. Butt, Track Foreman with Goderich Exeter Railway who was there overseeing the work being performed by Sersa for his company. HSO Danton said that Mr. Butt, who had 32 years of experience and appeared to be the most knowledgeable person at the site, opined that positioning rail tie plates under the suspended rail without using the safety wands provided on the power jack was unsafe. HSO Danton also testified that he spoke to five other Sersa employees over the phone who stated anonymously that it was risky work without the safety wands.

[8] HSO Roelofsen stated in her report that during her investigation Sersa was unable to provide her with written employee instructions on how tie plates were to be manually positioned under a raised track. The president and representative for the employer, Mr. Pohlmann later provided HSO Roelofsen with a copy of Sersa's written instruction entitled, "Work Procedure - Installation of Tie Plates with NORDCO Power Jack LS Series" and with a copy of Nordco's "Operation and Maintenance Manual" dated September 2004. Mr. Pohlmann asked HSO Roelofsen to be aware that the use of the safety wands on the power jack to position tie plates under the raised rail would reduce productivity.

[9] HSO Roelofsen included numerous attachments in her Investigation and Decision Report which included: Nordco You Tube videos on the use of the Nordco Model LS-C Auto lift power jack; pictures of the power jack used by Sersa; a picture of the safety wands on Sersa's power jack; copy of section 1, Safety, of Nordco's Auto Lift Operation and Maintenance Manual dated September 2004; a Nordco Brochure entitled, Auto Lift –

Rail Lifter; and a copy of Sersa's Work Procedure Installation of Tie Plates with Nordco Power Jack LS Series signed by Mr. Gibson on September 25, 2014, the day of Mr. Thorpe's refusal to work.

Appellant's Evidence

[10] Mr. Gibson testified that Mr. Thorpe had been employed at Sersa for a year and he had never heard Mr. Thorpe express a safety concern with the work. Mr. Mike Brisson also testified on behalf of Sersa to the effect that accidents do occur when employees do not follow procedures.

[11] The employer representative Mr. Pohlmann, submitted a copy of Nordco's "Operation and Maintenance Manual" dated December 2012 and referred me to item 5 in section 2-15 of the Manual entitled, "Operations - Machine Setup" and to Item 12 in section 2-17 of the Manual entitled, "Operations - Machine Operation Setup". Mr. Pohlmann pointed out that both references state that the power jack can be operated using the safety wand (plate pusher) or the operator control boxes located on each side of the power jack. Item 5 at 2-15 and item 12 at section 2-17, read as follows:

5. Push the cycle start button (on the plate pusher or on the remote operator control boxes.) The machine will begin the cycle of lifting the rails.

12. While standing clear of machine parts, press CYCLE START button on Remote Operator Control Box (on machine or on remote plate pusher). Machine will perform a lift sequence.

[12] Mr. Pohlmann also submitted a copy of Sersa's revised, "Work Procedure - Installation of Tie Plates with NORDCO Power Jack LS Series". The revised document is similar to the original version and the only difference is that the revised version is labelled as a draft and it includes 3 captioned photographs demonstrating how the tie plates are to be held when positioning the tie plates under the raise rail. The three photos are captioned as follows:

Step 1 - Place the Tie Plate on the Tie

Step 2 - Start Pushing the Tie Plate with your Thumps [sic] underneath the Rail

Step 3 - Stop Pushing the Tie Plate when the shoulder of the plate is flush with the base of the rail

[13] Mr. Pohlmann submitted that manually placing the tie plates in accordance with Sersa's "Work Procedure - Installation of Tie Plates with NORDCO Power Jack LS Series" is preferable to using safety wands because it is necessary for employees to bend down and pick up tie plates off the ground and position them on the ties in a kneeling position. Mr. Pohlmann reiterated that using the safety wands increases time to do the work and reduces productivity.

[14] Mr. Pohlmann submitted a Sersa document at the hearing entitled, “Job Safety Analysis (JSA) NORDCO Power Jack LS Series” that had been reviewed by Sersa’s joint health and safety committee. Mr. Pohlmann referred me to three items on page 3 of the JSA under the section entitled, Pinch points. The three items read as follows:

Stay away from rotating or moving parts of the machine.

When installing tie plates make sure that the rail is lifted at least 2 inches above the rail to allow to slide the plate underneath the rail.

In dual operation: Communicate with your co-worker before extending the jack on your side. Make sure that he is clear of the work area.

Issue

[15] The issue in this appeal is whether the direction issued by HSO Roelofsen was well founded. Specifically, I must determine whether requiring its employees to position metal tie plates under rail elevated by the Nordco Model LS Series Auto Lift power jack with their hands, as opposed to using the safety wands equipped on both sides of the power jack, constitutes a danger for employees of having their hands, fingers and feet crushed.

Appellant’s submissions

[16] In his submissions, Mr. Pohlmann held that the proposed work procedure developed by Sersa enables employees to safely position the metal rail track ties manually under an elevated track rail without using the safety wands equipped on the power jack. Mr. Pohlmann emphasized that Sersa’s draft procedure requires employees to mount the track tie plates flush on the tie and to keep their hands at the end of the tie plates farthest from the elevated rail.

[17] Mr. Pohlmann reiterated that Nordco’s Operation Manual confirms that the power jack can be operated with the control buttons on the safety wand and with the control buttons on the control boxes mounted on each side of the power jack and this confirms that the use of the safety wand for positioning track ties under the suspended rail is optional.

[18] Mr. Pohlmann stated that Sersa’s management reviewed the proposed “Work Procedure - Installation of Tie Plates with NORDCO Power Jack LS Series” with its health and safety committee and the committee agreed that the proposed procedure is safe without using the safety wands.

Analysis

[19] My role as appeals officer is to determine whether the direction issued by HSO Roelofsen was well founded. Subsection 146.1(1) of the Code authorizes me to vary, rescind or confirm the direction after inquiringly summarily into the circumstances. In

order to do so I must determine whether the operation of the power jack without the use of the manufacturer installed wands constitutes a danger within the meaning of the Code.

[20] The term “danger” is defined in subsection 122(1) of the Code:

“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] Based on this definition, it is my task to determine whether operating the power jack in the manner directed by the employer, which does not involve the use of the installed wands, can reasonably be expected to cause injury to the employees operating it. It is my understanding that the employer has implemented an alternative work procedure for operating this machine that requires employees to use their hands to manually position tie plates instead of using the wands which are meant to serve the same purpose. In my opinion, the evidence in this case does not support Sersa’s assertion that their proposed procedures for manually positioning metal tie plates under suspended rails are safe and that the use of the safety wands is unnecessary.

[22] Specifically, Mr. Thorpe informed HSO Roelofsen during her investigation of his refusal to work that one of his co-workers almost lost fingers doing the same work the previous day, that another employee had his fingers crushed the previous year and that there have been other recent “near miss” accidents. This claim was unchallenged. In my opinion, this clearly illustrates the high likelihood that operating the machine in this manner can lead to injury. Furthermore, in my view, the use of the safety wands protects employees from the pinch point hazards created when tie plates are manoeuvred by hand under rails that are momentarily suspended by the power jack. The pinch point hazard is not eliminated by Sersa’s alternative procedure.

[23] I was not persuaded by Mr. Pohlmann’s principal argument that Sersa should not be required to use the safety wands because the Nordco Operations Manual does not specify that safety wands must be used and that sections in the Operations Manual state that remote control boxes located on each side of the power jack can be used in place of the wands. My review of the evidence establishes that the Nordco Operations Manual identifies the safety wands as a key feature of the equipment. Furthermore, the Nordco videos referenced by HSO Roelofsen in her investigation and decision report shows the safety wand being used in all situations.

[24] Moreover, the Nordco Operations Manual dated December 2014, and the Sersa JSA both suggest that the work of manually positioning tie plates under suspended rail is carried out in all weather conditions, at night, and under noisy and dusty working conditions. In my opinion, it is unrealistic for Sersa to believe that the pinch point hazards

caused by positioning tie plates by hand under suspended rail can be mitigated by a procedure whose execution demands a high degree of mental and physical discipline under the working conditions that are not consistent with such an expectation, especially given Sersa's overriding preoccupation with productivity.

[25] Finally, the instructions in Nordco Operations Manual and Sersa's JSA state that employees are to communicate with their partner in a dual operation (where employees work on both sides of the power jack) prior to extending the jack. Mr. Pohlmann did not explain how communications could be effectively accomplished as the work of manually positioning tie plates under suspended rail requires employees on each side of the power jack to be in a kneeling position.

[26] Based on the above, I am persuaded that there is a reasonable possibility for employees to be injured when they manually position tie plates. I do not share the employer's position that his procedure is equally as safe as using the installed wands. In fact, in my opinion the best way to prevent employees from injuring or dismembering their hands while operating the power jack machine is to use the wands which are installed for that purpose. Therefore I conclude that operating the power jack machine without the use of the installed wands constitutes a danger to the employees.

Decision

[27] For these reasons, I confirm the direction that HSO Roelofsen issued to Sersa Total Track Ltd. on September 26, 2014.

Douglas Malanka
Appeals Officer