



Occupational Health and Safety Tribunal Canada

Date: 2015-11-25
Case No.: 2014-41

Between:

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

Indexed as: *Canadian Freightways Limited*

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. Olivier Bellavigna-Ladoux, Appeals Officer

Language of decision: English

For the appellant: Mr. Tim Christensen, Manager, Safety & Compliance

Citation: 2015 OHSTC 22

REASONS

[1] This concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) by 4186397 CANADA INC., carrying on business in the Name & Style of TFI Transport 7 L.P. (hereinafter referred to as Canadian Freightways) of a direction issued by Health and Safety Officer (HSO) Melissa Morden on August 22, 2014.

Background

[2] On June 10, 2014, HSO Morden and her colleague HSO Betty Ryan conducted an inspection of the work place operated by Canadian Freightways in Victoria, British Columbia.

[3] HSO Morden noted, during her visit, that the two forklifts in operation were not equipped with a back up alarm and was informed by representatives of the employer that they had removed the back up alarms at the request of the employees who did not like the noise they made. HSO Morden also noted that members of the public as well as other employees were entering the cross-doc area where the forklifts were being operated.

[4] Being of the view that the removal of the back up alarms is a contravention to the Code and the *Canada Occupational Health and Safety Regulations* (COHSR), HSO Morden sent the appellant an assurance of voluntary compliance (AVC) form and a deadline of one month to comply.

[5] After having being informed of the employer's intention not to correct the situation and not to abide to the AVC, HSO Morden decided to issue a direction to the employer identifying a contravention to paragraph 125(1)(k) of the Code and paragraph 14.16(1)(b) of the COHSR.

[6] The direction reads:

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

[7] On September 3, 2014, Mr. Tim Christensen, Manager, Safety & Compliance filed a notice of appeal of the direction on behalf of the employer. The notice of appeal was accompanied by an application to stay the direction pending the disposition of the appeal.

[8] Initially, the Canadian Office and Professional Employees Union, Local 378 (COPE 378), a trade union representing some of the employees of Canadian Freightways had indicated their intention to participate in the appeal proceedings but later withdrew from the proceedings prior to the start of the hearing.

[9] A teleconference was held on September 18, 2014, during which I heard the parties' submissions concerning the application for a stay.

[10] I informed the appellant and the representative of COPE 378 of my decision to deny the stay application on the next day. The written reasons in support of my

decision (*Canadian Freightways Limited v. Canadian Office and Professional Employees Union*, 2014 OHSTC 20) were provided to the parties on October 6, 2014.

[11] A hearing was held by way of videoconferencing on June 1, 2015.

[12] After having heard the appellant's submissions, I decided to render orally my decision to dismiss the appeal and confirm the direction issued by HSO Morden. The following are the reasons in support of my decision.

Issue

[13] The issue I have to determine in the present appeal is whether the direction issued by HSO Morden to the employer identifying a contravention of paragraph 125(1)(k) and paragraph 14.16(1)(b) of the COHSR is well-founded.

Appellant's submissions

[14] Mr. Christensen, the employer's representative, called two witnesses to testify at the hearing on behalf of the appellant. The first witness was Mr. Jose Lecinana, forklift operator and Joint Health and Safety Committee Representative in Victoria, British Columbia. The second witness was Mr. David Dyck, forklift operator, trainer and Joint Health and Safety Committee representative in Vancouver, British Columbia.

[15] Mr. Lecinana explained that the work environment at the Victoria facility is very small with only 19 doors (delivery docks) located on each side of the warehouse, 8 on one side and 11 on the other. Forklift movements and activities occur mainly in the morning, during which he mostly works alone preparing freight for deliveries. In the first hours of the morning, only truck drivers are moving in the cross-dock area. Mr. Lecinana stated that, as a safety measure, he usually honks the horn of his forklift as he enters and exits semi-trailers when he knows other employees are present inside the warehouse.

[16] Mr. Lecinana also indicated that he uses a 360 degree of awareness technique to always assess his environment when backing up with his forklift. In his opinion, back up alarms on forklifts in operation at the Victoria facility are not effective because over time the sound they make becomes "white noise" and cannot be heard by anyone. For that reason, employees do not wish to have automatic back up alarms operating on their forklifts. Furthermore, Mr. Lecinana confirmed that no collision incident with pedestrian has ever occurred inside the facility and that the public coming in to pick-up packages is not stepping in the cross-dock area.

[17] Mr. Dyck explained that the forklift training given by the employer is very extensive and comprehensive. In support of this, he described the content of an 84 page PowerPoint presentation and video used during the training of forklifts

operators, which covers several topics including certification for forklift operation, load securement, hazard assessment and pedestrian safety.

[18] Mr. Dyck also explained that operations at the Victoria facility are not the same as at the Burnaby facility which is much bigger with a 60 delivery dock warehouse. In the smaller Victoria warehouse, he does not see the benefits of using automatic back up alarms on the forklifts. In his opinion, no real danger is caused by operating the forklifts without the automatic back up alarms if the forklift operator is at all times aware of his surroundings and frequently uses his horn when backing-up. Mr. Dyck also explained that forklift operators are trained to keep speed as low as possible when backing up. He also explained that all forklifts are equipped with strobe lights (amber or red) and are thus well visible to pedestrians.

[19] The appellant argues that the employer has implemented measures that are very effective in controlling and mitigating the hazards to pedestrians as there has been no injuries in the work place related to a collision with a forklift. He points out that Canadian Freightways has a very extensive fork-lift training program as well as policies and procedures in place to protect their employees from hazards that were identified in the job inventory and hazard analysis conducted for all the positions that require access to the dock area.

[20] The appellant considers that subsection 14.16(2) of the COHSR is more applicable to the situation at the Victoria warehouse. In his opinion, that subsection does allow for the use of other methods of warning pedestrians by an employer other than the use of a back up alarm. According to him, the back up alarms do not provide adequate warning. He submits that the employer's current practices are of a significantly higher standard than the minimum requirements of Part II of the Code and the COHSR.

[21] The appellant contends that given the small size of the Victoria warehouse (120 feet long by 60 feet wide) and the fact that this warehouse is well lit with a low pedestrian traffic, the procedures in place, such as the use of the honk and the strobe lights, which serves as a visual warning device, in addition to the forklift operators being at all times aware of their surroundings is much more effective than the use of the back up alarms, which, as demonstrated by the testimonies of the employees, creates a "white noise".

Analysis

[22] The question I need to determine to resolve this appeal is whether the employer has contravened paragraph 125(1)(k) of the Code and paragraph 14.16(1)(b) of the COHSR.

[23] Paragraph 125(1)(k) of the Code reads:

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,

[...]

(k) ensure that the vehicles and mobile equipment used by the employees in the course of their employment meet prescribed standards;

[24] The prescribed standards are provided at paragraph 14.16(1)(b) of the COHSR which reads:

14.16 (1) Motorized materials handling equipment that is used in an area occupied by employees and that travels

[...]

(b) in reverse **shall**, subject to subsection 14.51(1), be fitted with a horn or other similar audible warning device that automatically operates while it travels in reverse.

[Emphasis added]

[25] The evidence in this case is to the effect that the employer has removed the automatic back up alarms from the two forklifts that are in operation at its Victoria warehouse at the request of the employees who did not like the noise they made. As these two forklifts operate in areas where other employees and member of the public are present, HSO Morden concluded that the employer was in contravention of paragraph 14.16(1)(b) of the COHSR.

[26] After having heard the submissions of the employer in this case, I am also of the view that the employer is in contravention of paragraph 14.16(1)(b) of the COHSR. A plain reading of this paragraph indicates that all motorized materials handling equipment that are used in an area occupied by employees and that travel in reverse are required to be fitted with an audible warning device.

[27] The employer does not contest the HSO's conclusion that truck drivers and other employees frequently enter the area where the two forklifts are being operated. Consequently, as per the COHSR, the two forklifts in operation at that facility "shall" be fitted with an automatic audible warning device. In my view, the wording used in the COHSR is quite clear. The removal of the back up alarms without replacing them with another similar automatic audible warning device is thus a contravention to paragraph 14.16(1)(b) of the COHSR.

[28] I will now consider the appellant's argument regarding the application of subsection 14.16(2) of the COHSR to the circumstances at the Victoria warehouse. That subsection provides for certain situations where other visible, audible or tactile warning devices or methods can be used to provide warning:

14.16(2) Where an audible warning device referred to in subsection (1) cannot be clearly heard above the noise of the motorized materials handling equipment and any surrounding noise, does not allow enough time for a person to avoid the danger in question or does not otherwise provide adequate warning, other visual, audible or tactile warning devices or methods shall be used so that adequate warning is provided.

[29] The employer essentially argues that the use of the visual strobe light which automatically flashes when the forklift travels in reverse along with additional safety procedures such as, the honking of the horn and the 360 degree awareness technique is more effective than the back up alarms which only creates a “white noise” according to the two experienced forklift operators who testified at the hearing.

[30] However, in my opinion, the fact that the forklift operators considers the sound produced by these alarms as “white noise” doesn’t justify their removal as they are intended to provide warning to other employees working nearby. I find important to point out that the purpose of an automatic audible warning device on material handling equipment is to provide warning to other employees that may occupy the area where such equipment is used that the equipment is travelling in reverse.

[31] I was not convinced by the employer’s submissions that any of the situations enumerated at subsection 14.16(2) of the COHSR apply to the Victoria warehouse. More specifically, it was not demonstrated that the sound of the back up alarms cannot be heard clearly above the noise produced by operating the forklift and any surrounding noise, nor was it demonstrated to me that in the circumstances of the Victoria warehouse the use of the back up alarms does not provide adequate warning. Accordingly, I find that subsection 14.16(2) of the COHSR is not applicable to the warehouse in Victoria.

Decision

[32] For these reasons, the appeal is dismissed and the direction issued to Canadian Freightways by HSO Morden on August 22, 2014 is confirmed.

Olivier Bellavigna-Ladoux
Appeals Officer