



Occupational Health and Safety Tribunal Canada

Date: 2016-07-12
Case No.: 2013-69

Between:

Canadian Pacific Railway Company, Appellant

and

Unifor Local 101-R, Respondent

Indexed as: *Canadian Pacific Railway Company v. Unifor Local 101-R*

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. Olivier Bellavigna-Ladoux

Language of decision: English

For the appellant: Mr. Nizam Hasham, Legal Counsel-Litigation and Labour, CP Rail

For the respondent : Mr. Marc Ross, National H&S Coordinator, Unifor Local 101-R

Citation: 2016 OHSTC 11

REASONS

[1] This matter concerns an appeal brought under subsection 146(1) of the *Canada Labour Code* (the Code) by the Canadian Pacific Railway Company (CP or the employer) of a direction issued on November 7, 2013 by Ms. Kelly Parkin, Health and Safety Officer (HSO) with the Labour Program of Human Resources and Skills Development Canada (now Employment and Social Development Canada).

[2] The respondent is Unifor, the certified bargaining agent of CP's mechanical employees.

Background

[3] The direction relates to the equipment used by CP to move their railway cars. For the last several decades, CP has used track mobiles which are specifically designed for that purpose to move their railcars. In April 2013, the CP made a decision to suspend the use of track mobiles which increased the use of material handling equipment to push railway cars.

[4] On June 5th 2013, following an incident that had occurred a couple of days prior at another non-federally regulated company in Alberta, which resulted in the fatality of one employee, Mr. Marc Ross, CAW local 101-R Health and Safety coordinator, sent a letter to the Minister of Labour to raise the union's concerns regarding the removal of the track mobiles.

[5] On June 6th, 2013, as a result of a complaint by Mr. Mike King, employee representative of the health and safety committee, HSO Naroo commenced his investigation at the Intermodal operation at Kleinburg (Vaughan) Ontario. HSO Naroo was informed of CP's decision to discontinue the use of the track mobiles, without any consultation with the health and safety committee. The employees were directed to use the JCB tractor and Lift King Forklift going forward and were to use a new process which was described as follows in the HSO Naroo's report :

This new process involved having an employee detach the rail car to be moved and then using the edge of the forklifts to wedge into a crevice rail car and hit the rail car in or to push it and separate it from other rail cars so it could be serviced. Another employee would also hit on the railcar while it is being hit with the forklift so that they could manually apply the handbrake to stop the rail car over the maintenance pit so that its steel wheels could be changed or serviced.

[6] After reviewing the Job Hazard Analysis from other worksites, HSO Naroo concluded that this new process carries significant risk of injury to the employees involved. HSO Naroo contacted the Manufacturers of the JCB tractor and LiftKing forklift who strongly advised against the use of these materials to push railcars as they are not designed for such purposes.

[7] Being of the view that this activity constituted a danger, HSO Naroo issued a direction to CP which reads as follows:

Section 124 – Canada Labour Code, Part II,

124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

The use of material handling equipment or other heavy equipment not specifically designed for, tested or intended for the purpose of pushing rail cars such as Lift King forklifts and JCB 535-140 tractors, constitutes a danger to the operator of the machine and others conducting or assisting with such activity.

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.

[8] On August 19, 2013, CP filed a notice of appeal of the direction issued by HSO Naroo.

[9] On October 3rd, 2013, after having been made aware of previous instances where directions were issued by other HSOs, HSO Parkin sent an e-mail to Robert Tully, Director of safety for CP to request information concerning the use of motorized materials handling equipment to move railcars at its facilities. On November 5th, 2013, a meeting was scheduled between HSO Parkin, M. Tully as well as other union and management representatives to discuss the issue. Following that meeting, HSO Parkin decided to issue a Canada-wide direction to CP. That direction reads:

On 05 November 2013, the undersigned health and safety officer conducted an investigation in the work place operated by CANADIAN PACIFIC RAILWAY COMPANY, being an employer subject to the *Canada Labour Code*, Part II, at 7550 Ogden Dale Rd SE., Calgary, Alberta, T2C 4X9, the said workplace being sometimes known as Canadian Pacific Railway-Headquarters Building.

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

Section 124- *Canada Labour Code*, Part II

In at least sixteen instances across Canada, (as identified in the attached document provided to the undersigned Health and Safety Officer on the 16 October 2013, by the employer), the employer has failed to protect the health and safety of employees, by requiring employees to use motorized materials handling equipment to push or pull railcars, despite the fact

the equipment manufacturers do not recommend that the equipment be used for this purpose.

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 15 November 2013.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, to take steps by 22 November 2014 to ensure this contravention does not continue or reoccur in all other workplaces under your control.

Issued at Calgary, this 7th day of November, 2013.

[10] On November 13, 2013 CP filed a notice of appeal of the direction issued by HSO Parkin and also applied for a stay the direction, which was denied by Appeals Officer Jean-Pierre Aubre on November 28th, 2013(*Canadian Pacific Railway Company v. Unifor Local 101-R*, 2013 OHSTC 35).

[11] Both appeals were joined for the purposes of a hearing that was scheduled to take place on November 2nd to November 4th, 2015 in Calgary, Alberta.

[12] At the outset of the hearing, I was informed by Counsel for the employer, M. Nizam Hasham that the parties wished to take the first hearing day in order to meet to try to settle the matter. I therefore adjourned for the day to allow the parties such an opportunity.

[13] The hearing resumed on the next day, at which point I was informed by Counsel for the employer of the employer's desire to withdraw the appeal of HSO Naroo's direction (case 2013-46). Counsel also informed me that the appellant continues to maintain its appeal of the direction issued by HSO Parkin (case 2013-69) but that the parties had come to an agreement with regards to the parameters governing the use of material handling equipment.

Issue

[14] I have to determine the following issue:

Whether HSO Parkin was correct in finding a contravention of section 124 of the Code on the sole basis that the material handling equipment used by the employees to push railway cars is not recommended by the manufacturers.

Submissions of the parties

A) Appellant's submissions

[15] The appellant called only one witness, Mr. Ritchie Castonguay, president of HITE Services Inc. (HITE). Mr. Castonguay was qualified as an expert in rigging and attachments for heavy duty materials handling equipment.

[16] Mr. Castonguay testified that his company has built, designed and installed equipment on hi-rail vehicles, pick-up trucks, loaders, excavators and backhoes as well as custom gear for the mining and forestry industry. In addition, his company is often mandated to design, engineer and secure pieces of equipment to ensure that they are operated safely. In doing so, the company follows standard operating procedures established by the industry.

[17] Mr. Castonguay stated that it is feasible to modify material handling equipment in such a way as to render them safe to be used to move rail cars. Specifically, adequate wheels, braking systems and coupler mechanisms and devices can be added to the equipment to add proper safety related functionalities to them.

[18] Mr. Castonguay noted that in many cases, manufacturers do not recommend their products for certain applications or use to avoid legal liability arising out of the use of their products.

[19] The appellant argues that HSO Parkin's direction should be rescinded for the following reasons. First, the appellant submits that HSO Parkin did not conduct a workplace investigation to the actual work sites or locations of CP Rail prior to issuing her direction and had therefore no actual knowledge of activities carried out by the employees at specific work locations.

[20] In support of this argument, the appellant referred to paragraph 20 of the decision of the Federal Court in *Duplessis v. Canada (Attorney General)*, 2006 FC 482, in which the Federal Court considered the incidence of the failure on the part of an HSO to view a worksite. That paragraph reads :

This error may have been linked to the failure of the HSO in the first instance to view the site which, in my view, is critical in determining the question of any "existing" hazard or "current" activity as well as the question of any "potential" hazard or "future" activity, as provided for in the current definition of "danger". The appeals officer hearing the matter *de novo* could have remedied the situation by viewing the workplace himself as he was empowered to do under section 145.1(2) of the Code.

[21] Second, the appellant submits that the direction issued by HSO Parkin is different than the one she initially drafted. HSO Parkin testified that changes were

made to her draft direction after consultation with the technical team in Ottawa, at which point she decided to issue a general duty contravention direction.

[22] Third, the appellant contends that HSO Parkin has noted that, although the wording of her direction differs from HSO Naroo's, the intent was the same. HSO Parkin has further indicated that the purpose of her direction was for the employer to evaluate all the information available to define the parameters, rating control and capacity of materials handling equipment. She also expects the employer to increase mechanical inspections and provide training, education of employees on the use of material handling equipment. During her testimony, HSO Parkin did acknowledge that where appropriate measures are taken, materials handling equipment can be used to move railcars despite the manufacturer not recommending the equipment to be used for such purposes. Consequently, the appellant contends that her direction should be replaced with Officer's Naroo direction to better reflect her intention.

[23] Fourth, the appellant argues that HSO Parkin's direction is overly broad and ambiguous since it requires the employer to secure a recommendation from a manufacturer in order to comply with the general duty obligation set out in section 124 of Code. The direction leads to the absurd conclusion that if CP were able to secure the recommendation of a manufacturer to use its equipment to push railcars, there would be no accidents and the employees' health and safety would be protected.

[24] Finally, the appellant argues that it is now faced with two conflicting directions since HSO Naroo's direction allows for the use of equipment, although not recommended by the manufacturer, that is designed, tested and intended for the purpose of moving railcars. It therefore requests that I consider the protocol established between the employer and the union which sets out minimum requirements for the use of materials handling equipment and replace the wording used in HSO Parkin's direction with the one found in HSO Naroo's direction to ensure a consistent standard concerning the equipment to be used to push railway cars at all of the CP's facilities.

B) Respondent's submissions

[25] The respondent submits that it disagrees with the appellant's contention that the direction issued by HSO Parkin should be rescinded. Contrarily to the appellant's argument, the respondent submits that HSO Parkin did acquire an "informed" opinion before issuing her direction. She requested and reviewed multiple documents from the employer such as, the equipment list in CP Rail's country wide operation, email correspondence between the employer and the equipment suppliers and risk assessments from various locations. In addition, HSO Parkin did attend the offices of the employer to inquire further into the information that she had received from the employer.

[26] According to the respondent, there was no need for HSO Parkin to attend an actual workplace as the facts underlying the issue of the use of material handling equipment were not in dispute between the parties. Similarly, there was also no practical need for HSO Parkin to visit each and every one of the 16 worksites in order to arrive at an informed decision.

[27] The respondent submits that HSO Parkin's concerns, during her investigation, regarding the use of material handling equipment to push railway cars are fully justified in light of the testimony of the appellant's expert witness, which the respondent states clearly illustrates that they are some safety issues involved with the operation of such equipment to push railway cars.

[28] For the foregoing reasons, the respondent maintains that the direction issued by HSO Parkin should be confirmed. In the alternative, given HSO Parkin's testimony to the effect that her intent was similar to that of HSO Naroo, the respondent has proposed some wording for a variance of the direction which consists of an amalgam of the wordings used in both directions.

C) Reply

[29] The appellant notes that contrarily to what has been argued by the respondent, the employer does not believe that HSO Parkin was required to inspect every single worksite prior to issuing her direction. The employer was just surprised that a Canada-wide direction was issued without any visual inspection of a single worksite. Additionally, the employer was also concerned by the fact that HSO Parkin had consulted with her technical advisor and took his recommendation to vary the direction notwithstanding the fact that neither of them had viewed the operation of material handling equipment at CP's facilities.

[30] While the appellant agrees that HSO Parkin has made multiple requests to the employer to receive information on material handling equipment, the appellant submits that she failed to give the employer an opportunity to provide a corrective action plan and chose to issue a direction 48 hours after the receipt of the requested information.

[31] Finally, the appellant submits that it is in agreement with the proposed wording for a varied direction as suggested by the respondent.

Analysis

[32] As previously noted, two cases were joined for the purposes of this hearing given the similarities of the facts raised in both appeals. The appellant withdrew its appeal in case 2013-46, which concerns a direction issued by HSO Naroo under subsection 145(2) of the Code. This decision therefore only concerns the direction issued by HSO Parkin. In its written submissions, the appellant argued both that the direction should be rescinded and varied.

[33] I have reviewed the legal arguments put forth by the appellant to support its request to rescind the direction and did not find them compelling. The appellant is essentially raising concerns with HSO Parkin's investigation. As I explained to the parties, hearings under part II of the Code are held on a de novo basis and as such, any deficiencies in the investigation conducted by the HSO may be cured by the hearing before the appeals officer (*Campbell Brothers Movers Ltd.*, 2011 OHSTC 26)

[34] I will now address the employer's request that I vary the wording of the direction issued by HSO Parkin to provide the same level of flexibility as the direction issued by HSO Naroo.

[35] There is no question that the Code grants me the power to vary a direction in any manner I see fit after having inquired into the circumstances of a case. The powers of an appeals officer are set out as follows at subsection 146.1(1) of the Code:

146.1(1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may

- (a) vary, rescind or confirm the decision or direction; and
- (b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

[36] Based on her investigation report as well as her testimony at the hearing, it is quite clear that HSO Parkin has some concerns regarding CP's decision to cease the use of track mobiles and only use material handling equipment, not specifically designed for that purpose, to push railway cars. According to her testimony, each manufacturer contacted during her investigation has confirmed that they would not recommend their equipment to move railway cars. In addition, HSO Parkin was concerned that no mitigation measures were taken by CP to try to minimize the hazards associated with the use of material handling equipment. She identified those hazards as being among others:

- That there was a risk of in-service failure of the equipment that could result in injury to employees;
- That CP made no adjustments in the inspection schedules for the equipment in question;
- That CP did not put in place a method for the use of each specific type of equipment;
- That there was no positive control in terms of braking.

[37] During her cross-examination by the employer, she indicated that her intent in issuing the national scope direction was to ensure that the employer would take measures to ensure the safety of all the employees when they use the material handling equipment. Those measures could include an increase in mechanical

inspections, additional training to the employees as well as the establishment of parameters governing the use of the equipment following an assessment of the risks involved.

[38] The employer submits that the intent of the HSO is not reflected in the wording she used in her direction. The direction makes a link between the recommendation of the manufacturer and CP's duty to protect their employees' health and safety. There is no evidence that such a recommendation would in fact prevent accidents or protect employees' health and safety. The contravention identified by HSO Parkin reads as follows:

In at least sixteen instances across Canada, as identified in the attached document provided to the undersigned Health and Safety Officer on the 16 October 2013, by the employer), the employer has failed to protect the health and safety of employees, by requiring employees to use motorized materials handling equipment to push or pull railcars, despite the fact the equipment manufacturers do not recommend that the equipment be used for this purpose. [Underlining added]

[39] Conversely, the employer considers that the wording used by HSO Naroo in his direction identifying a danger more accurately reflects the issue and is more consistent with the evidence. The relevant part of HSO Naroo's direction reads as follows:

The use of material handling equipment or heavy equipment not specifically designed for, tested or intended for the purpose of pushing rail cars such as Lift King forklifts and JCB 535-140 tractors, constitutes a danger to the operator of the machine and the others conducting or assisting with such activity. [Underlining added]

[40] For the reasons that follow, I have decided to grant the employer's request to vary the direction issued by HSO Parkin.

[41] First, I agree with the employer's position that the wording used by HSO Parkin could lead to an absurd conclusion that only a manufacturer's recommendation on the use of the material handling equipment could ensure the health and safety of the employees. I am also of the view that as worded, the direction is very restrictive and does not properly convey HSO's Parkin's intentions as expressed during her testimony at the hearing.

[42] It is also reasonable to conclude based on her testimony at the hearing that she is of the view that where appropriate measures are taken to eliminate or reduce the risks, material handling equipment can be used to push railway cars regardless of the manufacturer's recommendation if measures are taken to eliminate or reduce the risks.

[43] Moreover, I was presented with the expert testimony of Mr. Castonguay to the effect that while a manufacturer might not recommend its product for certain use, the mobile equipment can be modified to serve that purpose. Indeed, there are pieces of equipment that can be designed, engineered and attached to the material handling equipment so as to ensure its safe operation in the moving of railway cars. The equipment would follow company procedure as well as provincial and federal standards.

[44] Mr. Castonguay testified that, in his opinion, mobile equipment utilized in the movement of railcars must be fitted with :

- 1) A rail industry approved coupling device; and
- 2) Hi-rail or steel wheels that unquestionably provide the best tractive effort in various conditions for both pushing and stopping railcars.

[45] The mobile equipment must also be equipped with an air compressor, air coupling and brake controls installation, which would enable the use of rail car brakes for additional stopping effort, along with ongoing positive control of the movement of railcars.

[46] I am therefore convinced that contrarily to what is implied by the direction of HSO Parkin, there are other ways to ensure the health and safety of CP's employees while moving railway cars with material handling equipment other than securing the manufacturer's recommendation.

[47] Accordingly, I will vary the direction as requested to incorporate some of the wording used by HSO Naroo, in an effort to more accurately identify the contravention of the Code as well as to allow a certain amount of flexibility to the employer. Doing so, in my opinion, will ensure a consistent approach at all of the employer's facilities.

Decision

[48] Based on all the above, the direction issued by HSO Parkin on November 7th 2013, is varied as appended to this decision.

Olivier Bellavigna-Ladoux
Appeals Officer

APPENDIX

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

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1) **AS VARIED BY APPEALS OFFICER OLIVIER BELLAVIGNA-LADOUX** **ON JULY 12, 2016**

On 05 November 2013, the undersigned health and safety officer conducted an investigation in the work place operated by CANADIAN PACIFIC RAILWAY COMPANY, being an employer subject to the *Canada Labour Code*, Part II, at 7550 Ogden Dale Rd SE., Calgary, Alberta, T2C 4X9, the said workplace being sometimes known as Canadian Pacific Railway-Headquarters Building.

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

Section 124- *Canada Labour Code*, Part II

In at least sixteen instances across Canada, (as identified in the document provided to the undersigned Health and Safety Officer on the 16 October 2013, by the employer), the employer has failed to protect the health and safety of employees, by requiring employees to use motorized materials handling equipment **or other heavy equipment not specifically designed for, tested or intended for the purpose of pushing or pulling railcars.**

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 15 November 2013.

Further, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, to take steps by 22 November 2014 to ensure this contravention does not continue or reoccur in all other workplaces under your control.

Issued at Calgary, this 7th day of November, 2013.

Kelly Parkin
Health and Safety Officer
Certificate Number: ON2705

To: CANADIAN PACIFIC RAILWAY COMPANY
7550 Ogden Dale Rd SE.
Calgary, Alberta
T2C 4X9