Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2018-03-28
Case No.: 2015-23
2015-25
2015-26
2015-27

Between:

Swissport Canada Handling Inc.

Indexed as: *Swissport Canada Handling Inc.*

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* against four directions issued by an official delegated by the Minister of Labour
Decision:	The four directions are rescinded.
Decision rendered by:	Mr. Olivier Bellavigna-Ladoux, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Robert W. England, Miller Thomson LLP
Citation:	2018 OHSTC 3

REASONS

[1] The following reasons concern an appeal brought under subsection 146(1) of the *Canada Labour Code* (the *Code)* against four directions issued by Ms. Kim Mordaunt, in her capacity as an official delegated by the Minister of Labour (ministerial delegate), to Swissport Canada Handling Inc. (Swissport or the appellant).

Background

[2] At approximately 5:20 a.m. on August 20, 2015, a ramp agent (the employee or the ramp agent) employed by Swissport was operating a motorized baggage tractor known as a "tug" with identification number BTU952 (the tug) near gate C31, Terminal 3 at Toronto Pearson International Airport (the airport). Ramp agents' main duty is to drive back and forth between the bag rooms of the airport and the flights they are assigned to in order to load or unload luggage.

[3] While on his way to service a flight, the ramp agent entered into the main corridor of the tarmac and there was a collision between the ramp agent's tug and a fuel pump truck operated by an employee of Consolidated Aviation Fueling of Toronto ULC (Consolidated) headed in another direction. Consolidated is a provider of aviation refueling services at the airport. When the collision occurred, the ramp agent was not wearing his seatbelt and was ejected from the tug, causing him multiple injuries. Hereinafter, the collision between the tug and the fuel truck will be referred to as "the accident."

[4] Employment and Social Development Canada's (ESDC) Labour Program was notified of the accident on the same day at 7:26 a.m. and Ministerial Delegate Mordaunt arrived at the scene at 10:30 a.m. to conduct her investigation. Following her investigation, the ministerial delegate came to the conclusion that three factors contributed most significantly to the accident and the injuries sustained by the ramp agent: (1) he was not wearing his seatbelt at the time of the accident; (2) in her opinion, the Airside Vehicle Operators Permit (AVOP) directives to employees were unclear and should be clarified to ensure a consistent understanding by operators of motor vehicles as to the rights of way in the main and connecting corridors at the airport; and (3) the ramp agent's view at the intersection where the accident happened was obstructed by containers and dollies parked in an area with so-called "red hatched markings" on the ground.

[5] Following the ministerial delegate's investigation, four directions, listing a total of six contraventions to the provisions of the *Code* and the *Canada Occupational Health and Safety Regulations* (the *Regulations*), were issued to Swissport under subsection 145(1) of the *Code*.

[6] The first direction, hereinafter referred to as the "unobstructed view" direction, was issued on October 7, 2015 and reads as follows:

> IN THE MATTER OF THE *CANADA LABOUR CODE*
> PART II - OCCUPATIONAL HEALTH AND SAFETY
>
> DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)
>
> On August 20, 2015, the undersigned Official Delegated by the Minister of Labour conducted an investigation in the work place operated by

Swissport Canada Handling Inc., being an employer subject to the *Canada Labour Code*, Part II, at Terminal 3, room AH103K, Toronto Pearson lnt'l Airport, Mississauga, Ontario, L5P 1A2, the said work place being sometimes known as Swissport Ground Handling Inc.

The said Official Delegated by the Minister of Labour is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:

Paragraph 125.(1)(q) - *Canada Labour Code* Part II
Paragraph 14.25(b) - Canada Occupational Health & Safety Regulations

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

No employer shall require an operator to operate motorized materials handling equipment unless the operator
(b) has an unobstructed view of the area in which the equipment is to be operated

The employer failed to ensure that the operator of the baggage tractor BTU952 had an unobstructed view of the corridor he was about to turn on to because there were containers and dollies parked in the area with red hatched markings outside of gate C31 near Terminal 3.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention immediately.

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

Issued at North York, this 7th day of October, 2015.

Kim Mordaunt
Official Delegated by the Minister of Labour
Certificate Number: ON0375

To: Swissport Canada Handling Inc.
P.O. Box86
Toronto AMF, Ontario
L5P 1A2

[7] On November 6, 2015, the ministerial delegate issued three additional directions based on the same investigation she had conducted on August 20, 2015. The relevant part of the second direction issued under subsection 145(1) of the *Code*, hereinafter referred to as the "equipment training" direction, reads as follows:

[…]

The said Official Delegated by the Minister of Labour is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:

No. / No: 1

Paragraph 125.(1)(q) - *Canada Labour Code* Part Il
Paragraph 14.23(1) - Canada Occupational Health & Safety Regulations

> Subject to subsection (2), every employer shall ensure that every operator of motorized materials handling equipment has been instructed and trained in the procedures to be followed for:
>
> (a) its inspection
> (b) its fueling; and
> (c) its safe and proper use, in accordance with any instructions provided by the manufacturer and taking into account the conditions of the work place in which the operator will operate the materials handling equipment

The employer failed to ensure that employees have been instructed in the operation of Baggage Tractors, specifically TUG Model MA-42.

No. /No: 2

Paragraph 125.(l)(q) - *Canada Labour Code* Part II,
Sub-section 14.23(3) - Canada Occupational Health & Safety Regulations

> An employer shall ensure that every operator of manual materials handling equipment receives on-the-job training by a qualified person on the procedures to be followed for
>
> (a) its inspection; and
> (b) its safe and proper use, in accordance with any instructions of the manufacturer and taking into account the conditions of the work p]ace in which the operator will operate the manual materials handling equipment and the operator's physical capabilities.

The employer failed to ensure that employees received on-the-job training for baggage tractors, specifically TUG Model MA-42.

[…]

[8] The relevant part of the third direction issued under subsection 145(1) of the *Code*, hereinafter referred to as the "repair" direction, reads as follows:

[…]

The said Official Delegated by the Minister of Labour is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:

No. / No: 1

Paragraph 125.(1)(k) - *Canada Labour Code* Part Il
Paragraph 14.29(1) - Canada Occupational Health & Safety Regulations

> Motorized or manual materials handling equipment that creates a safety or health hazard owing to a defect in the materials handling equipment shall be taken out of service until it has been repaired or modified by a qualified person.

The employer failed to ensure that the seatbelts were in working condition on TUG BTU951 while it was still ln service.

No. / No: 2

Paragraph 125.(l)(k) - *Canada Labour Code* Part II.
Paragraph 14.29(2) - Canada Occupational Health & Safety Regulations

> Subject to subsection (3), any repair, modification or replacement of a part of any motorized or manual materials handling equipment shall at least maintain the safety factor of the materials handling equipment or part.

The employer failed to ensure that seatbelts are maintained when modifying equipment.

[…]

[9] The relevant part of the fourth and final direction issued under subsection 145(1) of the *Code*, hereinafter referred to as the "education" direction, reads as follows:

> […]
>
> The said Official Delegated by the Minister of Labour is of the opinion that the following provision of the *Canada Labour Code*, Part II, has been contravened:
>
> Paragraph 125.(1)(z.03) - *Canada Labour Code* Part Il
> Paragraph 19.6(2)(b) - Canada Occupational Health & Safety Regulations
>
> > The employer shall provide education to an employee shortly before the employee is assigned a new activity or exposed to a new hazard
>
> **The employer failed to ensure that an employee was provided education prior to being permitted to drive materials handling equipment, specifically baggage tractors manufactured by TUG.**
>
> […]

[10] Also on November 6, 2015, Swissport filed an appeal of the first direction that had been issued on October 7, 2015 pursuant to subsection 146(1) of the *Code*. Swissport raised two grounds: first, it is Swissport's belief that the unobstructed view direction is not specific enough to understand on what basis the ministerial delegate found a breach of subsection 14.25(b) of the *Regulations***;** and second, there was not, in any event, a failure at any time on Swissport's part to comply with subsection 14.25(b) of the *Regulations*.

[11] On December 4, 2015, Swissport filed three additional appeals pursuant to subsection 146(1) of the *Code* to challenge the remaining three directions issued by Ministerial Delegate Mordaunt.

[12] Swissport is appealing the first contravention stated in the equipment training direction referring to a breach of subsection 14.23(1) of the *Regulations* because, in its opinion, the ministerial delegate failed to specify what deficiencies in the employee's training gave rise to her findings, given that the employee had received the required training and, if it were demonstrated that the employee had not received the required training, Swissport claims to have taken all reasonable precautions to ensure that the employee had received the required training.

[13] Moreover, with respect to the second contravention stated in the equipment training direction which refers to a breach of subsection 14.23(3) of the *Regulations*, Swissport also submits as follows: the ministerial delegate failed to specify what deficiencies in the employee's training gave rise to her findings; the employee had received the required on-the-job training by a qualified person; and, if it were demonstrated that the employee had not received such training, Swissport claims to have taken all reasonable precautions to ensure the employee had received appropriate on-the-job training by a qualified person.

[14] The repair direction also lists two contraventions of the *Regulations*: the first one under subsection 14.29(1), and the second one under subsection 14.29(2). The first contravention is appealed on the grounds that the seatbelts on the tug were in working order and, even if there were issues in this regard, Swissport was diligent in ensuring that they were in working condition. The second contravention is appealed on the grounds that the direction is vague and meaningless, that all repairs, modifications and replacement of parts on the tug were carried out in a manner that maintained the safety of the tug and that, in any event, Swissport took all reasonable precautions to ensure that such safety was maintained.

[15] Finally, the fourth and last direction issued by Ministerial Delegate Mordaunt to Swissport in this case is appealed because Swissport denies that any of its employees who were required to drive a tug on or about August 20, 2015 had failed to receive the education required by paragraph 19.6(2)(b) of the *Regulations*, and that, even if they did, Swissport claims to have been diligent in ensuring all the employees driving tugs had received such education.

[16] During a teleconference held on June 8, 2016, the undersigned decided that cases 2015-23, 2015-25, 2015-26 and 2015-27 would be heard together.

[17] The hearing was held in Toronto, Ontario between March 21 and March 23, 2017 and concluded on April 19, 2017. Ministerial Delegate Mordaunt was called by the undersigned to testify at the hearing in order to clarify her investigation report, which did not include a narrative summary of her findings and of the rationale underpinning the directions. The following witnesses were called by Swissport and provided evidence in support of its position in this appeal: Mr. Alan Brown, Deputy Ramp Manager, Mr. Kevin Riley, Mr. Paul Gorr and Mr. Sukhvinder ("Sunny") Gill, who are all trainers or training supervisors at Swissport.

Issue

[18] Are the four directions issued by Ministerial Delegate Mordaunt under subsection 145(1) of the *Code* well founded?

Appellant's Submissions

[19] First, the appellant takes issue with Ministerial Delegate Mordaunt's statements with respect to a generalized culture of non-compliance with health and safety obligations at the airport, the non-compliance by workers in general with respect to usage of seatbelts and a generalized lack of understanding and confusion by workers with respect to rights of way for vehicles on the tarmac of the airport. These general statements are, according to the appellant, legally irrelevant to the four directions issued and appealed before me since generalized observations are not evidence upon which directions from a ministerial delegate should be issued under the *Code*.

[20] The appellant also contends that a direction by a ministerial delegate must not be based on conjecture, and that it should be specific enough for an employer to understand what needs to be done in order to ensure compliance with the *Code* and the *Regulations*.

[21] Even though an appeals officer held in *Montreal Gateways Terminals Partnership*, 2015 OHSTC 16 that a direction is valid and not void for absence of specificity if the statutory or regulatory provision on which the contravention is founded is clearly identified, the appellant prefers the approach adopted in *1260269 Ontario Inc. (Sky Harbour Aircraft Refinishing v. Tracy Chambers)* (October 4, 2006) Decision No. 06-032, in which it was held that a direction should be specific regarding remedial measures.

Unobstructed View Direction

[22] It is the position of the appellant that the obligations imposed under paragraph 125(1)(q) of the *Code* and subsection 14.25(b) of the *Regulations* only apply to a work place controlled by an employer. In this regard, the appellant notes that the area where the accident occurred is not a work place or part thereof controlled by the employer, and that as was held in *Canada Post Corporation v. Canadian Union of Postal Workers,* 2014 OHSTC 22, some obligations under subsection 125(1) can only be complied with at a work place that is under the control of an employer:

> [95] The wording at the beginning of subsection 125(1) indicates to me that the legislator drafted the section in this way in order to ensure that the employer be bound to the fullest extent possible by the obligations under the Code and its Regulations. Some paragraphs under subsection 125(1) refer to obligations which can only be carried out at a work place that is under the control of the employer. Conversely, other paragraphs confer an obligation on any employer whether or not they control the work place, as long as they control the work activity.

[23] Based on this interpretation of subsection 125(1) of the *Code*, the appellant submits that the control necessary for an employer to be imposed an obligation under paragraph 125(1)(q) of the *Code* does not extend to a work place to which the employer does not have exclusive access and over which the employer does not have authority or control.

[24] If the undersigned was to decide that paragraph 125(1)(q) of the *Code* and subsection 14.25(b) of the *Regulations* are applicable, the appellant argues that the evidence included in

Ministerial Delegate Mordaunt's report regarding the fact that the employee had an obstructed view of the area in which he was operating the tug is insufficient to meet the test of an appropriate direction.

[25] The appellant supports this argument with the following four points:

- Ministerial Delegate Mordaunt is not an accident reconstruction expert and has no apparent training that would allow her to express an opinion on that subject;

- Ministerial Delegate Mordaunt did not get assistance from an accident reconstruction expert to assist her in making a determination that vehicles parked within the hatch marks were in fact obstructing the ramp agent's view;

- Ministerial Delegate Mordaunt made plain that, in her view, the equipment parked within the hatch marks "may have contributed to the obstruction" which is no more than a conjecture; and

- Whether or not the employee had an obstructed view depends upon the right of way.

[26] The appellant further submits that, as a matter of fact, the evidence is clear that the containers located within a portion of the red hatched area did not obstruct the ramp agent's view. On this issue, the appellant relies specifically on Mr. Alan Brown's testimony when he stated as much, after a careful examination of photographs taken at the scene of the accident included in the ministerial delegate's report. According to the appellant, Mr. Brown's testimony in this regard should be given considerable weight given his role as a deputy ramp supervisor for Swissport at the airport and his experience in accident reconstruction work as a former police officer.

[27] It is also the appellant's position that concluding that the ramp agent's view was obstructed would be a determination of which driver, i.e. the ramp agent or the fuel pump truck operator, had the right of way, while the ministerial delegate made it clear throughout her investigation and during her testimony that she remained uncertain as to which driver had the right of way.

[28] Concerning the issue of the right of way, the appellant also points out that Ministerial Delegate Mordaunt was advised on September 16, 2015 by two Greater Toronto Airports Authority (GTAA) officials that the ramp agent was the one who had the right of way at the location of the accident, and that this is also what an entry into her activity log reflects. It is Swissport's submission that this evidence does not support the ministerial delegate's conclusion that the ramp agent's view was obstructed and that this was a contributing factor to the accident. Indeed, as the driver who had the right of way, the ramp agent could reasonably have expected that the driver of the fuel pump truck would yield to him, which would have avoided the accident. For this reason, the appellant argues that the unobstructed view direction is based on mere conjecture and the after-the-fact erroneous reliance on the Consolidated employee's view that he had the right of way.

[29] According to Swissport, the fact that the driver of the fuel pump truck was an experienced driver of lengthy service and the employee had just received his AVOP licence is not an objective justification to come to a decision about who had the right of way at the time of the accident. As such, the appellant argues that the ministerial delegate erroneously relied upon the evidence provided by the driver of the fuel pump truck to conclude that the ramp agent had an obstructed view and that this issue was a contributing factor to the accident. Swissport submits that, as a whole, the evidence indicates that it was the failure of the Consolidated driver to yield that resulted in the accident.

Equipment Training Direction

[30] With respect to the second direction, the appellant indicates that subsections 14.23(1) and 14.23(3) differ from one another in two significant respects. First, subsection 14.23(1) refers to "*motorized* materials handling equipment" while subsection 14.23(3) refers to "*manual* materials handling equipment." Second, only subsection 14.23(3), the provision that applies to manual materials handling equipment, requires on-the-job training.

[31] The phrase "materials handling equipment" is defined at section 14.1 of the *Regulations:*

> **14.1** In this Part,
>
> ***materials handling equipment*** means equipment, including its supporting structures, auxiliary equipment and rigging devices, used to transport, lift, move or position persons, materials, goods or things and includes mobile equipment used to lift, hoist or position persons, but does not include an elevating device that is permanently installed in a building; (*appareil de manutention*)

[32] The appellant points out that Part XIV of the *Regulations* makes a distinction between "motorized" and "manual" materials handling equipment, and that it is clear that the only piece of equipment at issue in the equipment training direction is the tug, which Ministerial Delegate Mordaunt admitted to be motorized materials handling equipment during her cross-examination.

[33] The appellant therefore alleges that the second part of the direction is without foundation since there was no manual materials handling equipment involved in this case, and that as to the first part of the direction concerning the training for operators of motorized materials handling equipment, the evidence shows that the training received by the employee was substantially the same as suggested by the tug's manufacturer and even modified to meet the needs of the work place, as required by the *Regulations.*

[34] The evidence referred to by the appellant concerning the first part of the direction consists mainly of Mr. Paul Gorr's testimony in which the latter stated he had provided training to the ramp agent on the tug as part of the ramp specific course titled RA04 - CCT/BCT/PDT, Baggage/Cargo Cart/Pallet Dolly. Mr. Gorr is a training supervisor at Swissport. The appellant also relies on the evidence of Messrs. Riley and Brown who both testified to the on-the-job training provided to the ramp agent on all materials handling equipment operated by Swissport.

Repair Direction

[35] Regarding the repair direction, the appellant submits that Ministerial Delegate Mordaunt did not identify any evidence to support her contention that the tug had a defect requiring that it be taken out of service until it had been repaired or modified by a qualified person or that there had ever been any repair, modification or replacement of a part of the tug.

[36] The appellant then submits that all Swissport employees are trained to wear seatbelts and not use any equipment that is damaged or unsafe, that there is no evidence of any safety defect relating to the seatbelt on the tug and that if such defect existed, it would have been reported and repairs made.

[37] The work orders produced by Swissport clearly identify, according to the appellant, the preventative maintenance and repair work performed on the tug: none of that work was in connection with the seatbelt, and the inspection of the tug by an independent third party shows that the seatbelt was in good operating condition at the time of the accident; it had only been tucked in the curtain frame to keep it out of the way.

[38] The appellant concludes its submissions regarding the repair direction by noting that the ministerial delegate even failed to examine the seatbelt to verify if it was operative or not. Accordingly, Swissport submits that the repair direction is not based on the evidence and, thus, without foundation.

Education Direction

[39] The appellant concludes from the ministerial delegate's testimony that the education direction was issued because she was never satisfied that Swissport employees had received the training required by the AVOP. However, Swissport asserts that this is not the case and that, therefore, there is no factual foundation underpinning the issuance of this direction.

[40] First, the appellant suggests that paragraph 125(1)(*z.03*) of the *Code* has nothing to do with an obligation to provide education to an employee before that employee is assigned at a new activity or is exposed to a new hazard contained at paragraph 19.6(2)(b) of the *Regulations*. Paragraph 125(1)(*z.03*) of the *Code* pertains to the obligation to develop, implement and monitor, in consultation with the policy committee, or, if there is no policy committee, with the work place committee, a program for the prevention of hazards in the work place. The appellant considers there is no evidence to substantiate any failure on the part of Swissport to have developed a program for the prevention of hazards in the work place in consultation with its work place committee.

[41] The appellant further submits that the evidence clearly shows the ramp agent had received detailed training before being assigned the task of driving a tug. That training consisted of an orientation training which included safe operation of a vehicle, his on-the-job training during which he had the opportunity to learn how to safely operate the tug by observation and discussion, and the classroom and practical training required to obtain an AVOP licence. In Swissport's view, the uncontroverted evidence is that the training provided to the ramp agent met the regulatory requirements.

Analysis

[42] Subsection 146.1(1) of the Code sets out the authority of an appeals officer when an HSO's direction is appealed. I may vary, rescind or confirm the direction:

> **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;

[43] It is settled law that these proceedings are in the nature of a *de novo* hearing. Thus, I am not limited to reviewing the evidence examined by Ministerial Delegate Mordaunt. I can consider in my inquiry any relevant evidence submitted by Swissport, regardless of whether this evidence was or could have been available to the ministerial delegate when she conducted her investigation. This evidence must, however, pertain to the circumstances existing at the time of the issuance of the directions, not to circumstances as they exist at the time of my inquiry.

[44] While the directions were issued as a result of a motor vehicle collision that caused serious injury to a Swissport employee, it bears emphasizing that my role here is not to determine the contributory factors to the accident *per se*, but to decide whether Swissport was in compliance with its obligations under the Code at the time of the accident. In order to ascertain if the directions are well founded in law and in fact, I will address each contravention in turn.

Unobstructed View Direction

[45] The unobstructed view direction was based on paragraph 125(1)(*q*) which refers to specific obligations set out in the "prescribed manner", that is, through the *Regulations*. This paragraph reads as follows:

> **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;

[46] In turn, the relevant provision of the *Regulations* which was contravened by Swissport according to Ministerial Delegate Mordaunt is subsection 14.25(b). This provision reads as follows:

> **14.25** No employer shall require an operator to operate motorized materials handling equipment unless the operator
>
> […]

> **(**b**)** has an unobstructed view of the area in which the equipment is to be operated.

[47] Therefore, for this direction to be well founded, the evidence must demonstrate that Swissport required the ramp agent who operated the tug (who, it is not disputed, was an "operator" of "motorized materials handling equipment") to perform his duties in an area where his view was obstructed. Given the ministerial delegate's conclusion, a key factual issue is whether the containers and dollies that were, as was acknowledged by Swissport, parked in the area with red hatched markings outside of gate C31 of the airport actually obstructed the view of the corridor where the ramp agent was about to turn immediately before the accident. To the extent that the evidence before me shows that it was not the case, then there would simply be no factual basis to confirm this direction.

[48] In this regard, I note that in her testimony at the hearing, Ministerial Delegate Mordaunt did not unequivocally or conclusively state that the equipment left in the area with red hatched markings on the ground obstructed the view of the ramp agent. Her evidence was that she was concerned that the equipment parked in that area "*may* have contributed" to the ramp agent's having an obstructed view of his intended path of travel. When examined by the undersigned, she further testified that "unless they were going slowly", the ramp agent and the Consolidated driver would not "likely" have been able to see each other. In cross-examination, she reiterated her view that the equipment in the red hatched area "may" have obstructed the view of the ramp agent.

[49] Clearly, Ministerial Delegate Mordaunt's evidence on this issue merely raises the possibility that the ramp agent did not have an unobstructed view of the area in which he was operating the tug at the time of the accident. She seems to have assumed that the presence of the equipment in the red hatched area was a contributing factor to the accident, but she did not appear convinced that this was actually the case.

[50] In my opinion, one cannot conclude from her evidence that Swissport failed to ensure that the ramp agent had an unobstructed view of the area where he was operating motorized materials handling equipment. At best, Ms. Mordaunt's evidence suggests that the presence of equipment within a portion of the red hatched marked area was a concern of hers (as the airport's rules prohibit leaving materials in areas with red hatched markings on the ground), but a concern of or a hypothesis by a ministerial delegate is insufficient to support a finding that Swissport contravened subsection 14.25(b) of the *Regulations*. Cogent evidence that an employer failed to ensure that its employee had an unobstructed view of the area where motorized materials handling equipment was operated is necessary.

[51] There is no such evidence in this case. In fact, the evidence before me convincingly establishes that, quite to the contrary, the ramp agent's view was *not* obstructed by the equipment, mainly containers, left in the area with red hatched markings. This is clear from the photographs of the scene of the accident included in the ministerial delegate's report and the testimony of Mr. Brown at the hearing.

[52] In particular, after having carefully examined the photographs, the location of the traffic lanes and corridors at issue in this appeal, and the rules of the roads governing traffic on such corridors and lanes and, finally, having factored in the location and dimension of the containers

and other equipment left on the ground, Mr. Brown indicated that the ramp agent's view was not obstructed at the time of the accident. His evidence clearly showed that for a distance of at least 30 feet before the site of the accident, the ramp agent would have been able to see the Consolidated truck and that the Consolidated truck's driver would have been able to see him, despite the presence of containers in the area. According to his testimony, the containers shown on the pictures did not therefore cause a view obstruction for anyone involved.

[53] Mr. Brown was also able to demonstrate, on the basis of his analysis of the collision scene using pictures and considering the line of sight at the scene, combined with the low maximum speed of the tug (25 km/h), that any partial view obstruction due to containers protruding in the red hatched area was not a factor contributing to the accident. I find that Mr. Brown's evidence on this issue was compelling. I also find that this evidence rebuts Ministerial Delegate's Mordaunt's statements and apparent assumptions underpinning her conclusion that Swissport failed to ensure the ramp agent had an unobstructed view of the corridor onto which he was about to turn immediately before the accident.

[54] Therefore, I completely accept Mr. Brown's evidence on the absence of any meaningful view obstruction and conclude that the unobstructed view direction was issued without an appropriate factual foundation. It must be rescinded on that basis alone.

[55] I also accept Swissport's argument that this direction was predicated upon Ministerial Delegate Mordaunt's apparent belief that it was the Consolidated driver who had the right of way at the time and place of the accident. However, the evidence indicates that she was told by airport officials during her investigation that it was the ramp agent who had the right of way. In fact, the totality of the evidence before me establishes that there was no confusion on the issue of the right of way. According to the airport rules explained to all operators of motor vehicles, the right of way where two main corridors intersect (the relevant location in this case) belongs to the vehicle on the right side, which was the tug operated by the ramp agent when the accident occurred.

[56] Accordingly, the ramp agent could reasonably expect that the Consolidated driver would yield to him. The fact that the latter did not appears to constitute the main cause of the accident. This fact also undermines the ministerial delegate's speculation that the ramp agent not having an unobstructed view of the area was a contributing factor to the accident.

[57] In view of my conclusion that the unobstructed view direction is not supported by the facts and evidence, it is not necessary, in order to resolve this appeal, to consider Swissport's argument that the regulatory obligation at issue was not applicable in this situation because an obligation of this nature can only apply when an employer controls both the work place and the activity to be performed by its employees. Swissport claimed that, in this case, it only had control over the activity performed by the ramp agent. However, I will make a few comments on this issue.

[58] It is true that the evidence makes it clear that the Greater Toronto Airports Authority (GTAA) controlled the work place. Indeed, the red hatched areas are under the control of the GTAA and there is no evidence that the containers left in those areas were placed there by Swissport or that Swissport was somehow responsible for their removal. Consequently, if the removal of containers potentially encroaching the view of motor vehicle operators was necessary (i.e., if enforcement was required), it should logically be the GTAA's responsibility.

[59] While I see some merit to Swissport's position in this regard given that it clearly did not have the ability to control any obstruction caused by equipment left in the red hatched areas by another corporate entity, I note that the decision of the appeals officers in *Canada Post Corporation v. Canadian Union of Postal Workers*, 2014 OHSTC 22 relied upon by Swissport as the authority supporting its position has been overturned by the Federal Court of Appeal (see *Canadian Union of Postal Workers v. Canada Post Corporation*, 2017 FCA 153). This decision is currently being challenged by the Canada Post Corporation through an application for leave to appeal before the Supreme Court of Canada. In the circumstances, and until this issue is definitely settled by the courts, it is prudent to refrain from making any pronouncements based upon the appeals officer's interpretation that the obligations in some paragraphs under subsection 125(1) of the *Code* can only be carried out at a work place that is under the control of an employer.

Equipment Training Direction

[60] The equipment training direction lists two contraventions. Both contraventions are breaches of provisions of the *Regulations* prescribing the manner in which an employer is to provide its employees with the information, instruction, training and supervision necessary to ensure their health and safety under paragraph 125(1)(q) of the *Code*.

[61] The relevant provisions of the *Regulations* read as follows:

> **14.23 (1)** Subject to subsection (2), every employer shall ensure that every operator of motorized materials handling equipment has been instructed and trained in the procedures to be followed for
>
> **(a)** its inspection;
> **(b)** its fueling; and
> **(c)** its safe and proper use, in accordance with any instructions provided by the manufacturer and taking into account the conditions of the work place in which the operator will operate the materials handling equipment.
>
> […]
>
> **(3)** An employer shall ensure that every operator of manual materials handling equipment receives on-the-job training by a qualified person on the procedures to be followed for
>
> **(a)** its inspection; and
> **(b)** its safe and proper use, in accordance with any instructions of the manufacturer and taking into account the conditions of the work place in which the operator will operate the manual materials handling equipment and the operator's physical capabilities.

[62] As noted above, subsection 14.23(1) governs training for the use of *motorized* materials handling equipment whereas subsection 14.23(3) governs training for the operation of *manual* materials handling equipment. A key fact that was established by Swissport's evidence is that *only* motorized materials handling equipment, namely a particular model of a tug (TUG Model MA-42, according to the direction) is at issue in this case. Ministerial Delegate Mordaunt even conceded in cross-examination that the tug is a piece of motorized materials handling equipment.

[63] Given that there was no manual materials handling equipment involved, either directly or indirectly, in the accident and the lack of evidence that the ramp agent was, at any time, an operator of manual materials handling equipment requiring on-the-job training on such equipment, there was no legal and factual basis for the ministerial delegate to conclude that Swissport contravened subsection 14.23(3) of the *Regulations*. Accordingly, since it is based on a clear misapprehension of the facts and of the applicability of subsection 14.23(3), the second component of the equipment training direction must be rescinded.

[64] Turning to the first component, the contravention to subsection 14.23(1) of the *Regulations*, there is no question that this is an applicable provision in the circumstances of this appeal given the type of materials handling equipment at issue. However, the question before me is whether the evidence demonstrates that Swissport failed to comply with it.

[65] In this regard, it is clear from her testimony at the hearing that Ministerial Delegate Mordaunt predicated her direction on the provision of inadequate training with respect to the operation of the tug primarily on her belief that Swissport was in contravention of the *Regulations* for having failed to provide the tug manufacturer's manual, or any relevant portion of it, to the ramp agent. She emphasized that she had to contact the manufacturer to obtain a complete copy of this manual.

[66] Thus, she interpreted subsection 14.23(1) of the *Regulations* to mean that there is an obligation on employers to provide the actual manufacturer's operating manual, or excerpts from it, to their employees as part of their training on the safe and proper use of motorized materials handling equipment. However, in my opinion, this is not what this provision entails.

[67] By its plain terms, subsection 14.23(1) requires employers to ensure that an operator of motorized materials handling equipment has been instructed and trained in the procedures to be followed for the safe and proper use of such equipment "in accordance with any instructions provided by the manufacturer and taking into account the condition of the work place" in which the operator will perform the work activity. Thus, in order to conclude that this provision had been contravened, cogent evidence that the training and instructions at issue were not in line with the instructions provided by the manufacturer is necessary. While it may be useful, the provision of a manufacturer's operating manual to employees is not mandatory. What matters is that the training be consistent or in keeping with any instructions provided by the manufacturer of materials handling equipment.

[68] In this regard, Ministerial Delegate Mordaunt acknowledged during her cross-examination that she did not compare, at any time during her investigation, the training provided by Swissport to the ramp agent with respect to the inspection, fueling and safe operation of the tug against the provisions of the manufacturer's manual for this piece of materials handling equipment. Therefore, she never examined whether the training provided by Swissport was in accordance with the instructions provided by the manufacturer as required by subsection 14.23(1) of the *Regulations*. I find that this fact alone casts serious doubt on the merits of the equipment training direction.

[69] What is more, the evidence provided by Swissport's witnesses at the hearing was unanimous and compelling: the training received by the ramp agent was substantially the same as

that suggested by the manufacturer of the tug and was adapted, as required by the *Regulations*, to meet the needs of the workplace. In particular, Mr. Gorr stated that there are two generic courses dealing with the safe operation of a vehicle such as a tug and described the detailed contents of such courses. He further indicated that after having completed these courses, the ramp agent had clear instructions with respect to the requirements of Swissport and the manufacturers with respect to the fueling, pre-use inspection and safe operations of all vehicles operated by Swissport, including a tug.

[70] Mr. Gorr also confirmed that the requirements and elements covered in Swissport's training courses and materials were substantially identical to the tug manufacturer's instructions. He added that his comparative analysis of the documents revealed that not only were the instructions and training provided by Swissport consistent with the instructions provided by the manufacturer, but that they were also adjusted to take into account the specific conditions of the work place where the equipment is operated. He provided numerous examples, including training on human and external factors awareness, safe driving, headsets and hand signals, chocks and cones, load restraints, and baggage sortation. Mr. Riley convincingly corroborated Mr. Gorr's statements and explanations on those important points.

[71] On the basis of this evidence, I am persuaded that Swissport complied with the obligation set out in subsection 14.23(1) of the *Regulations* and, therefore, find that the first component of the equipment training direction must also be rescinded.

Repair Direction

[72] Paragraph 125(1)(*k*) of the *Code* imposes upon an employer certain obligations with respect to the safety of vehicles and mobile equipment used by their employees. Specifically, an employer shall:

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

[73] In this case, the relevant "prescribed standards" are set out at section 14.29 of the *Regulations*, which notably provides the following:

> **14.29 (1)** Motorized or manual materials handling equipment that creates a health or safety hazard owing to a defect in the materials handling equipment shall be taken out of service until it has been repaired or modified by a qualified person.
>
> **(2)** Subject to subsection (3), any repair, modification or replacement of a part of any motorized or manual materials handling equipment shall at least maintain the safety factor of the materials handling equipment or part.

[74] Ministerial Delegate Mordaunt concluded that Swissport contravened subsection 14.29(1) by failing to ensure that the "seatbelts were in working conditions on the tug while it was still in

service." She also found that Swissport contravened subsection 14.29(2) by failing to ensure that "the seatbelts are maintained when modifying equipment."

[75] However, her findings are not supported by the evidence before me. Quite to the contrary, the evidence makes it clear that there was no factual basis for Ministerial Delegate Mordaunt to issue the repair direction.

[76] First, Ms. Mordaunt did not provide any evidence that, at any time, she examined the seatbelt of the tug in order to see if, as a matter of fact, it was inoperative or if it required repairs or modification by a qualified person. Moreover, at the hearing, she did not testify that the tug had a defect requiring that it be taken out of service until it had been repaired or modified by a qualified person. She appears to have assumed that the seatbelt was defective because it looks to have been wedged into the frame of the tug on some pictures taken shortly after the accident.

[77] However, the evidence is clear that the seatbelt was not wedged into the frame but was, instead, only stuck underneath a metallic panel and was operative. This was confirmed by Mr. Brown who stated that the seatbelt was not defective. The inspection of the tug by an independent third party also indicates that the seatbelt was in good operating condition. In short, there is no evidence of any safety defect relating to the seatbelt on the tug. It appears that someone had simply tucked one end of the seatbelt underneath a metallic panel to keep it out of the way. The fact the seatbelt was out of position does not mean that it was defective and necessitated repairs.

[78] Since the seatbelt on the tug was never rendered inoperative or necessitated repairs or modification according to the evidence, it is not possible for the undersigned to concur with Ministerial Delegate Mordaunt's conclusion that Swissport failed to ensure that the seatbelts were in working conditions while it was still in service. In fact, the uncontroverted evidence is that Swissport employees are trained to wear seatbelts and not to use any equipment that is damaged.

[79] Thus, I accept Swissport's submissions that Ministerial Delegate Mordaunt's conclusion that it did not comply with subsection 14.29(1) of the *Regulations* is not based on the evidence and, rather, rests in large part on an ill-advised assumption on the part of the ministerial delegate that the ramp agent was not wearing the seatbelt because it was defective. For this reason, the first part of the repair direction must be rescinded.

[80] Second, the foregoing analysis also establishes that there is no evidence of any repair, modification or replacement of any part of the tug that would have triggered the employer's obligation to ensure that any such repair, modification or replacement maintain the "safety factor of the materials handling equipment or part" referred to in subsection 14.29(2) of the *Regulations*.

[81] Accordingly, I find that the repair direction must be rescinded in its entirety.

Education Direction

[82] Paragraph 125(1)(*z.03*) of the *Code* provides that an employer shall:

> **(*z.03*)** develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters;

[83] In turn, paragraph 19.6(2)(b) of the *Regulations* provides precise information on the type of "education of employees in health and safety matters" that an employer is required to deliver. This provision reads as follows:

> **19.6(2)** The employer shall provide education to an employee
>
> […]
>
> **(b)** shortly before the employee is assigned a new activity or exposed to a new hazard.

[84] Ministerial Delegate Mordaunt concluded that Swissport contravened this provision by failing to ensure that the ramp agent was provided with education prior to being permitted to drive materials handling equipment, that is, specifically, the tug. With respect, I find that this conclusion is not borne out by the evidence and is, therefore, incorrect.

[85] The evidence is clear and undisputed that the ramp agent received both the training required under the AVOP rules and Swissport's specific training for all the vehicles that may be operated by its employees, including the tug. By and large, the evidence given by the four Swissport witnesses at the hearing, some of whom were personally involved as the individual trainers of the ramp agent, indicates that he received comprehensive and detailed education and training with respect to the health and safety matters related to the operation of a tug at the airport. Such education and training were provided shortly prior to the ramp agent being assigned the task of driving a tug.

[86] In summary and according to the evidence, that training program consisted of:

- Orientation training the generic components of which included education on the safe operation of a vehicle;
- On-the-job training between May and August of 2015 when, while paired with a more seasoned employee, the ramp agent had the opportunity to learn about the safe operation, by observation and discussion, of the tug; and
- Detailed training in order to obtain his AVOP licence, which included both classroom sessions and practical training on the tarmac, in accordance with the GTAA AVOP requirements; all these steps taking place prior to the exposure of the ramp agent to the hazard at issue in this appeal.

[87] That the education provided by Swissport to the ramp agent amply met its regulatory obligations was clearly demonstrated in the testimony of Messrs. Gorr, Riley and Gill. I note in particular Mr. Riley's statement that the tug is a pretty basic vehicle to operate and that the ramp agent was fully trained in its safe use and operation at the time of the accident. His testimony in this regard was corroborated by the other witnesses.

[88] Mr. Riley also testified that on August 12, 2015, he was the one who administered the AVOP practical test for the ramp agent. He included all of the items of the test on a detailed practice exam form, which was adduced as evidence at the hearing. Mr. Riley wrote an annotation on the form stating "Great Test." The ramp agent was educated and evaluated on and, ultimately, demonstrated a clear understanding of specific criteria that included the following:

- "Pre-trip safety check completed";
- "Wears seatbelt";
- "Maintains watch for…other vehicles…";
- "Right of way observed for … other vehicles";
- "Exercises caution around corners, buildings"; and
- "Knowledge [demonstrated] of Right of way within vehicle corridors …Red hatched markings on apron …Pre-trip inspection/deficiency reporting."

[89] In view of the foregoing, there is no doubt that Swissport provided the ramp agent with the appropriate and required education prior to assigning him the task of operating motorized materials handling equipment such as the tug. In the absence of any factual and evidentiary underpinning Ministerial Delegate Mordaunt's conclusion that Swissport contravened paragraph 19.6(2)(b) of the *Regulations*, the education direction cannot stand and must be rescinded.

Decision

[90] For the reasons set out above, the directions issued by Ministerial Delegate Mordaunt on October 7, 2015 and November 6, 2015 are rescinded.

Olivier Bellavigna-Ladoux
Appeals Officer