

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146
of the Canada Labour Code, Part II
of a direction issued by a safety officer

Applicant: Department of National Defense
Ship Repair Unit (Atlantic)
HMC Dockyard
Halifax, Nova Scotia
Represented by:
Captain (N) R.E. Chiasson

Interested Party: Dockyard Trades and Labour Council East
Ship Repair Unit (Atlantic)
Represented by:
Mr. Ken Cross
First Vice President
and
Dockyard Chargehands Association
Ship Repair Unit (Atlantic)
Represented by:
Mr. Tom Hillier
Vice President

Mis en cause: Mr. G. L. Grandy
Safety Officer
Labour Canada

Before: Mr. Serge Cadieux
Regional Safety Officer

An oral hearing was held on March 4, 1992 in Halifax, Nova Scotia. The hearing was followed by an informal inspection of HMCS Okanagan, the submarine where a refusal to work was exercised. The Regional Safety Officer, accompanied by Mr. Bruce Wolfe, the Ship Repair Safety Officer, entered Ballast Tank #4, the object of the refusal to work, for the purpose of personally establishing and evaluating the conditions of that work environment.

Background

The Ship Repair Unit, Atlantic (hereafter referred to as SRU(A)) located in the port of Halifax, Nova Scotia consists of a total working population of approximately 1500 civilian employees at the employ of the Department of National Defense. These employees are public servants and, as such, are covered by the Canada Labour Code, Part II and the pursuant Canada Occupational Safety and Health (OSH) Regulations. Nevertheless, the Unit is managed by Naval personnel on behalf of the Department of National Defense. Thus, these Naval officers are members of the Armed Forces as well as managers of civilian personnel in the SRU(A).

In the instant case, HMCS Okanagan is dry docked at the SRU(A) in order to have the civilian employees carry out a complete refit of the vessel. HMCS Okanagan is a commissioned warship, therefore a military vessel in service, with defensive and offensive capabilities. During such a refit by the SRU(A) employees, the ship is completely "gutted", except for the electrical wiring which remains undisturbed. The wiring is tested by electricians, such as Mr. Pelrine, the refusing employee in this case.

The events that resulted in the issuance of a direction to the SRU(A) are described by the safety officer in a summary that was submitted for the hearing. It states:

"On October 23, 1991 at approximately 1145 a call was received at the Nova Scotia District Office of Labour Canada, the nature of the call was a Right to Refuse. This call was received from Mr. Bruce Wolfe, Ship Repair Safety Officer, who indicated that an employee was refusing to work. Mr. Wolfe indicated that the Safety & Health Committee could not work out the misunderstanding so Labour Canada was notified and asked to respond. LAOs Glenn L. Grandy and Mark Fougere responded. Upon arrival at the Ship Repair Unit (Atlantic) Mr. Wolfe explained that Mr. William Pelrine had refused to enter #4 Main Ballast Tanks, Port and Starboard on HMCS Okanagan. The reason being that the tanks were not certified for safe entry. It was explained that the tank had three openings on the bottom and one opening on the top plus a hole was cut in the side of the tank approximately 32" x 60". The Safety Office felt because of these openings it was not a confined space and, therefore, did not require testing once a day as required. In making this decision the safety office ensured that all blanking was completed and ventilation provided for the tank. Ventilation was shut off for approximately 24 hours and then tests were conducted indicating no problems. Then ventilation was started again. ...After discussing the matter and listening to Mr. Pelrine, his main concern was that the main ballast tanks were confined spaces and not non-confined spaces as suggested by Ship Repair Safety Office. Also danger existed if he was required to enter the tank without proper testing. We all then proceeded to check the tanks (visually) to ensure we were all on the same line of thinking." (sic)

On October 25, 1991 the safety officer gave a direction to National Defense, SRU(A). The direction was given, on the basis that a condition existed in Mr. Pelrine's work place which constituted a danger, under paragraph 145(2)(a) of the Canada Labour Code, Part II.

Decision

The issue to be decided in this case is whether the area that was the subject of the refusal to work, i.e. Ballast Tank #4, constitutes a confined space and, as such, should be tested to ensure safe entry and exit.

An important point must be made before proceeding further. During the hearing, the SRU(A) has not challenged the decision of danger made by the safety officer in this case. The employer representatives have concentrated on challenging the jurisdiction of the safety officer to issue such a direction. This challenge is made on the ground that there does not exist a legal basis to apply the Canada Labour Code, Part II given that the Canada OSH Regulations as well as the Marine OSH Regulations would not apply by virtue of their application sections. According to the employer, only the Treasury Board standards may apply in the instant case.

I have not considered the possible application of those standards for the obvious reason that the safety officer's power to issue directions originates from the Code, not from a collective agreement. Also, while SRU(A) employees may find additional protection under their respective collective agreements, it is not an issue that can be dealt with at this level.

Commander Barnes, the senior officer representing the employer, SRU(A), reading from a prepared text, stated:

"Under Sec 146(3) of the Canada Labour Code, you, as a reviewing tribunal can do only one of three permissible things - you can either vary, rescind or confirm the direction of the safety officer. In this case, I submit, you can only rescind the order because it has no legislative foundation (my underlining). It is based on the COSH Regs which do not apply to ships. A variation of the order to apply the MOSH regs is not possible. There is a limitation on the scope of the Marine Occ. Safety and Health (MOSH) Regulations. At Sec. 1.3 of those regs, it states that they apply in respect of employees employed:

- a. on ships REGISTERED in Canada
- b. on uncommissioned ships of HM in right in Canada
- c. in the loading or unloading of ships

So, if a ship is not registered but is a commissioned ship of HM in Right of Canada, the Marine Regs would not apply." (sic)

The SRU(A) is, as explained earlier, a shore based operation. In so far as the SRU(A) employees are concerned, the Code and the Canada OSH Regulations apply in their daily activities. This is consistent with the amendment made to section 7 of the Financial Administration Act. This amendment effectively made the Canada Labour Code, Part II and the pursuant Regulations applicable to the Public Service in general in the manner set out under subsection 123(2) of the Code. Hence, since the Department of National Defense is identified in Schedule I to the Public Service Staff Relations Act, the SRU(A) which is a division within the Department of National Defense is covered by the Code and the Canada OSH Regulations.

However, I agree with Commander Barnes that the Canada OSH Regulations and the Marine OSH Regulations would not apply aboard HMCS Okanagan by virtue of their application sections. In this particular case, the arguments are persuasive and require no further comment.

I am nonetheless of the opinion that the right to refuse to work follows an employee everywhere the employee is engaged in work for his/her employer which, in this case, is the SRU(A). This distinction is particularly noteworthy because the direction was not given to the Armed Forces which are excluded from the Code, but to the SRU(A), a division of the Department of National Defense which is covered by the Code.

Paragraph 128(1)(b) states:

128. (1) Subject to this section, where an employee while at work has reasonable cause to believe that

(b) a condition exists in any place that constitutes a danger to the employee

the employee may refuse to use or operate the machine or thing or to work in that place.
(my underlining)

Clearly then, Mr. Pelrine which is an employee of the SRU(A), had the right to refuse under the Code to enter Ballast Tank #4, an alleged confined space aboard HMCS Okanagan due to the fact that the said confined space had not been tested prior to his entry. In his opinion, this situation constituted a danger.

As I noted above, I entered Ballast Tank #4 to establish whether it is a confined space as alleged. There is no doubt in my mind, after having squeezed myself through its restricted opening (12" X 16") at the top of the submarine and having crawled through its inner space for approximately 20 feet, that Ballast Tank #4 is a confined space. It should be pointed out that forced ventilation was being provided inside the Tank. This, in my view, is necessary given the limited amount of natural ventilation in such areas and, as a result, the possible lack of oxygen.

While the Canada OSH Regulations and the Marine OSH Regulations do not apply in the instant case, it is not unreasonable to allow oneself to be influenced by the interpretation of confined space developed, on a consensus basis, by employer and employee representatives during the review of this particular Regulation. This tentative "revised Confined Spaces Regulations" published in the Canada Gazette, Part I, October 12, 1991 provides the following interpretation:

""confined space" means an enclosed or partially enclosed space that

- (a) is not designed or intended for human occupancy except for the purpose of performing work,
- (b) has restricted means of access and egress, and
- (c) may become hazardous to an employee entering it due to
 - (i) its design, construction, location or atmosphere,
 - (ii) the materials or substances in it, or
 - (iii) any other condition relating to it;"

Clearly, Ballast Tank #4 of HMCS Okanagan fits the above description. Furthermore, the same concepts are found in many provincial occupational safety and health legislation. The International Labour Organization (ILO) also adheres to these general principles. The safety officer therefore made the right decision in categorizing Ballast Tank #4 as a confined space. It is also widely acknowledged that entry into a confined space can be a life threatening operation unless special precautions are taken.

Given that Ballast Tank #4 is a confined space and that the Canada OSH Regulations and the Marine OSH Regulations do not apply in the instant case, the question to be answered is whether the safety officer was authorized under the Code to issue the direction that was given to the SRU(A).

In a refusal to work situation, the safety officer must decide if danger exists. In accordance with subsection 129(4) of the Code,

"Where a safety officer decides that the use or operation of a machine or thing constitutes a danger to an employee or that a condition exists in a place that constitutes a danger to an employee, the officer shall give such direction under subsection 145(2) as the officer considers appropriate..."

Clearly then, the safety officer has no discretion in a situation of danger. There is a mandatory requirement on the safety officer to issue directions whenever he/she detects a situation of danger. Furthermore, because of this obligation, the drafters of the legislation have incorporated in this provision sufficient discretion to allow the safety officer to reference whichever standard he/she deems proper under the circumstances to protect from the danger. This discretion is achieved through the use of the expression "as the officer considers appropriate".

In accordance with paragraph 145(2)(a) of the Code, safety officer G.L. Grandy has chosen to clarify the requirement "to take measures for guarding the source of danger or to protect any person from the danger" by specifying which standard had to be followed to resolve the problem. The direction given to the SRU(A) describes the danger and the measures to be taken in the following terms:

"Number 4 Main Ballast, Port and Starboard, HMCS Okanagan were incorrectly classed as Non-Confined Spaces. In accordance with the Canada Occupational Safety & Health Regulations, Confined Spaces, the above noted tanks are considered to be confined spaces and must be tested in accordance with Section 11.2(1)." (sic)

Evidently, the above direction misled the employer in believing that all the requirements of the Canada OSH Regulations applied aboard HMCS Okanagan. This is not the case. Firstly, the direction is given to the SRU(A), not to the Armed Forces. Secondly, if the SRU(A) requires one of its employees to enter a confined space aboard HMCS Okanagan which, in this case, is a third party premise, it must ensure the protection of its employees regardless if the work place is not under its control. In this case, that amounts, in part, to ensuring that the confined space is tested prior to an employee entering the said confined space.

In order to remedy this situation, I hereby vary the direction given on the 25th day of October 1991 by safety officer G.L. Grandy to National Defense, Ship Repair Unit (Atlantic) by replacing the second paragraph of the direction by the following paragraph:

"Number 4 Main Ballast, Port and Starboard, HMCS Okanagan are confined spaces. Where a person is about to enter into a confined space, the employer shall appoint a qualified person to verify by tests, in a manner consistent with the procedure outlined in subsection 11.2(1) of Part XI, Confined Spaces, of the Canada Occupational Safety and Health Regulations, that the confined space is safe to enter."

Decision issued in Ottawa this 12th day of March, 1992

Serge Cadieux
Regional Safety Officer