

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

Appellant: Maritime Employers Association
176422 Canada Inc
Contrecoeur Terminal, Port of Montreal
Represented by:
André Lachaine
Director
Occupational Safety and Health

Interested Party: Jean-François Gervais
Employee, Contrecoeur Terminal
Represented by:
Claude Héту
CUPE union advisor

Mis-en-cause: André Galiay
Safety Officer
Ship Safety, Transport Canada

Before: Serge Cadieux
Regional Safety Officer
Labour Canada

The oral evidence was heard at Montreal, Quebec, on April 14, 1992.

Context

On October 2, 1991, Jean-François Gervais, an employee with 176422 Canada Inc of the Contrecoeur Terminal, Port of Montreal, refused to operate the ship's crane on the *Lady Franklin*. The operation consisted of loading containers of dangerous goods, that is, explosives, onto the ship. Mr Gervais' reason for refusing was that he did not have the skills and training needed to perform this work safely. Safety officer André Galiay, appointed in accordance with the Canada Labour Code, Part II, investigated this matter. He concluded from his investigation that "there was a risk to the safety of employees assigned to unload dangerous goods using the ship's crane without the operator's previously having the necessary training" [TRANSLATION].

On October 15, 1991, the safety officer issued a direction to the employer in accordance with paragraph 145(2)(a) of the Code, in which he directs the employer to:

[TRANSLATION]

"take immediate measures as agreed upon in the presence of all parties not to assign JF Gervais or any other employee to operations involving the ship's crane before giving them the necessary training."

In order to fully appreciate the circumstances, it seems appropriate to cite the written statement of Raymond Perreault, foreman of the Contrecoeur Terminal, who was present where the refusal occurred. This statement reads as follows:

"Starting with JF Gervais, I asked him to go and operate the ship's crane in order to load containers of explosives. He knew what was in these containers. He told me he was not going to operate the crane because he was not a loader operator. I then asked all the other men if they wanted to operate the ship's crane.

R Tessier - No. I'm going to operate the 925. Martin Dulude - No. Claude Desrosiers - I've never done that before. R Grand (?) - I've never done that before. R. Dansereau - No. Following this collective refusal I met with my supervisor, and it was decided to assign JF Gervais to the ship's crane. I saw JF Gervais again with Claude Desrosiers and Martin Dulude, who were telling him he had been ordered to go and operate the ship's crane. He told me that he hadn't touched it for at least 5 years, and that if I wanted him to go he would need an instructor. It was understood that if he refused this order, there would be consequences. All of this took place very calmly. After meeting with my supervisor again it was decided that he would be accompanied by a ship's crane operator. Mr Gervais boarded the ship and we started loading."

[SIC]

Decision

I must determine whether, under the circumstances, the direction given to the employer was justified. I am of the view that the safety officer overstepped his authority in issuing a direction, in accordance with paragraph 145(2)(a) of the Code to 176422 Canada Inc, Contrecoeur Terminal, for the following reasons.

It is obvious that the employer failed to meet its obligations on several occasions in this affair. It required one of its employees to act as a qualified crane operator and load dangerous goods onto a ship. It even asked four other employees to operate the crane, knowing that none of the employees had the knowledge, training or experience necessary to perform the work safely. It also threatened Mr Gervais with dismissal if he did not obey his supervisor's order, despite the fact that he was exercising his right to refuse.

Mr Lachaine informed us that he does not dispute Mr Gervais' motives in refusing to load the *Lady Franklin*. In fact, I believe that Mr Gervais was completely justified in refusing such a task, knowing that he would be endangering his own safety and that of his colleagues if he agreed to operate the ship's crane. I have no sympathy for an employer who so casually and indifferently scorns the rules of occupational safety and health.

However, I must concentrate on the reasons behind my decision in this case. The guiding principle I used is found in the decision rendered by the Federal Court of Appeal in Bonfa vs the Department of Employment and Immigration, which indicates that:

"These considerations were unrelated to the questions which the regional safety officer had to answer, and in particular to the first of these questions as to whether at the time the safety officer did his investigation the respondent's workplace presented such dangers that employees were justified in not working there until the situation was corrected. The fact that before the safety officer did his investigation the respondent may have had legitimate grounds for refusing to do the work assigned to him cannot affect the answer to be given to this question;..."

According to this decision, which touches on the arguments presented by Mr Lachaine at the hearing, the safety officer must decide whether, at the time of the investigation, it is dangerous for an employee to work at the place in question. If the officer decides that it is dangerous to work in the place, the officer must direct the employer to take steps to guard the source of the danger or to protect any person from the danger. However, if the danger no longer exists or is under control, it would be impossible for the officer, at that time, to issue such a direction. Therefore, the danger must be real and present at the time the officer conducts the investigation, just as it should be at the time the employee exercised his or her right to refuse.

In this case, the employee refused to operate the ship's crane. Disregarding all shilly-shallying at the time, Mr Gervais did not have to operate the crane in question. It was a seaman on board who did this. Although we do not know this seaman's qualifications as a crane operator, the fact remains that at the time of the safety officer's investigation, the containers of dangerous goods had been loaded onto the *Lady Franklin*. Moreover, it appears that at the time of his investigation, the ship had left the Port.

The safety officer also testified that, although Mr Gervais was no longer exposed to the danger, there could be a danger in future for employees loading containers of dangerous goods when they have not been trained as crane operators. It is indisputable that Mr Galiay's thinking on this point is laudable and entirely to his credit. However, before issuing such a direction, the safety officer must observe at the place itself such a dangerous situation. It is only at this precise moment that the officer can issue a direction to the employer, in accordance with subsection 145(2) of the Code, to take measures to protect its employees.

However, although a dangerous situation does not exist, the officer also has the authority to correct a situation if he/she feels that there is a contravention to this Part. The authority granted me in accordance with section 146 of the Code does not authorize me to issue a new direction to the employer. I can only modify, rescind or confirm the safety officer's direction. This direction, when modified or confirmed, remains the property of the officer who issued the direction.

For all the reasons mentioned above, I hereby rescind the direction issued by safety officer André Galiay to 176422 Canada Inc of the Contrecoeur Terminal on October 15, 1991.

Decision issued at Ottawa this seventh day of May 1992.

Serge Cadieux
Regional Safety Officer