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July 8, 2009

Case name: DP World (Canada) Inc. v.
International Longshore & Warehouse Union, Local 500
Case No.: 2007-08

Decision #: OHSTC-09-027(S)

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Subject: Request for a stay of directions issued by Health and Safety Officer Philip D'Sa on April 25, 2007 - Decision #: OHSTC-09-027(S)

Mr. Roper and Ms. Terai,

Further to your submissions regarding the appellant's request as noted in the above subject, I have carefully considered the arguments presented by the parties and, I am hereby ordering a stay of the directions for the sole purpose of conducting tests under the following conditions:

1. Procedures and measures as described in items 1 to 5 are to be implemented as stipulated on page 2 of the appellant's submissions dated June 24, 2009;

2. The products to be tested include wheat, barley, peas and canola;

3. Each product will be tested individually and separately;

4. Each test will take approximately 6 to 7 hours per product;

5. The testing will be conducted during the weeks of July 6th, 13th and if necessary the 20th, 2009.

Please note that reasons for the order will be forthcoming.

Michael Wiwchar
Appeals Officer

c.c. Philip D'Sa

Case No.: 2007-08

Stay decision
Decision No.: OHSTC-09-027(S)

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

DP World (Canada) Inc.
Applicant

and

International Longshore & Warehouse Union, Local 500
Respondent

July 23, 2009

This is a decision following a request for a stay of two directions heard by Michael Wiwchar, Appeals Officer.

For the applicant
Thomas Roper, Counsel

For the respondent
Leah Terai, Counsel

INTRODUCTION

[1] This matter is in regards to a request for a stay of two directions brought under subsection 146(2) of the *Canada Labour Code* (the *Code*), Part II. One direction was issued in accordance with subsections 145(2) (a) and (b) of the *Code* to the DP World (Canada) Inc., the employer, and a second direction was issued in accordance with section 145(2.1) of the *Code* to Mr. J.T., the employee, by Health and Safety Officer (HSO) Philip D'SA on April 25, 2007, in regards to a work place operated by the employer.

[2] The following are my reasons for a decision I rendered on July 8, 2009, following submissions from the parties. In the said decision, I ordered a stay of the two directions issued by the HSO.

[3] The directions were issued following an inquiry into a refusal to work made by an employee regarding an operation aboard a ship, the M.V. Weaver Arrow at the James Richardson International Grain Terminal, Vancouver, B.C., which involved loading grain through cement loading holes in the cargo hatch cover of the vessel and the alleged danger created by the excessive dust during the process. The HSO decided that this activity constituted a danger.

[4] The direction, identified as "Direction No. PD/07/04A", issued by the HSO to the employer pursuant to subsections 145(2) (a) and (b) of the *Code* reads as follows:

> The said officer considers that the use or operation of a machine or thing/a condition in any place constitutes a danger to an employee while at work:
>
> (The excerpt below is from the original hand written segment of the direction and the wording stated below has not been verified by the HSO as completely accurate.)
>
> The process of loading grain through cement loading holes in cargo hatch cover constitutes a danger as there (sic) loading holes are not approved for grain loading. Proper documentation and procedures approved by a competent authority to be provided prior to loading.

[5] The direction, identified as "Direction No. PD/07/04B", issued by the HSO to the employee pursuant to subsection 145(2.1) of the *Code* reads as follows:

> The said officer considers that the use or operation of a machine or thing/a condition in any place constitutes a danger to an employee while at work:
>
> As per Direction PD/07/04A

[6] The Tribunal received the employer's appeal of the above directions on May 4, 2007, and the case is scheduled to be heard on September 29

and 30, 2009, in Vancouver, BC.

[7] In a letter dated June 15, 2009, the applicant applied for a stay of both directions for the purpose of conducting tests during the month of July, 2009. I requested additional arguments from the parties and received the applicant's submissions on June 24, 2009; the respondent's submissions on July 3, 2009; and the applicant's reply was received on July 7, 2009. The submissions were then carefully considered.

[8] The parties submitted arguments based on the three fold test developed by the Supreme Court of Canada in *Metropolitan Stores Ltd.*[1]. The three parts of the test are:

a) Serious issue to be tried;
b) Irreparable harm and;
c) Balance of inconvenience.

The Tribunal has added a fourth criterion to further protect the paramount objective of the *Code* to protect the health and safety of employees;

d) What in the alternative of complying with the direction did the applicant seeking the stay do to protect the health and safety of the employees or any person who could be exposed?

SUBMISSIONS OF THE PARTIES

[9] I will address the parties' submissions pertaining to the above test and I will consider the parts as they were presented to me by the parties in their submissions.

a) Serious issue to be tried

[10] The applicant submits that grain has been loaded through cement holes in hatch covers in the Port of Vancouver for at least the last 25 years without incident or any suggestion that the practice raised a safety concern. The same practice of loading also exists in other ports with which terminal operators in the Port of Vancouver must compete.

[11] The respondent submits that they do not agree with the applicant's assertion suggesting the procedure is safe because it has been done without incident for the past 25 years. The Union has regularly refused to load grain where loading pipe has been inserted into a cement hole.

[12] The applicant replied that the only question under this part of the test is whether the employer's appeal is vexatious or frivolous. Since there is

[1] Manitoba (A.G.) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110, Docket 19609

no suggestion by the respondent that this application is vexatious or frivolous then this is a serious issue to be tried.

b) Irreparable harm

[13] The applicant submits that irreparable harm will be suffered if the employer cannot conduct tests by an independent expert to assess the safety risks involved in this method of loading the grain. If tests are not conducted there is no way to obtain the documentation requested by the HSO in his direction to the employer.

[14] The respondent submits that the harm that could potentially be suffered by employees, should an explosion occur, is clearly irreparable. There is also an immediate danger of a grain loading pipe being pulled down onto the deck of the ship and the dock below arising from the fact that tides and actions of other ships passing alongside the moored vessel can result in the movement of the vessel.

[15] The respondent submits that if the ship starts to pull away from the dock, the crew of the ship must man the mooring line winches to hold the vessel in. Where the crew is not diligent in monitoring and the vessel drifts from the dock the pipe would fall. Accordingly, the harm potentially suffered by the employees is clearly irreparable. Also, the applicant has not shown why the testing could not be conducted outside Canada such as Washington State.

[16] The applicant replied that, in the context of this case, irreparable harm will be suffered if testing that is required to be conducted is not permitted because the employer will be unable to properly prepare its case for the appeal hearing.

[17] Also, the applicant replied that the Union's submission is hypothetical because it asserts that employees may not do the job they are employed to do diligently and that may result in the loading pipe falling.

c) Balance of inconvenience

[18] The applicant submits that the balance of inconvenience favours granting a stay application to permit these further testing procedures. According to the applicant this method of loading has been utilized in the Port of Vancouver for in excess of 25 years without incident. Also, the "Phase One Report", authored by a consultant hired to do testing for the employer, Genesis Engineering Inc., concluded that, based on the testing that was conducted in Vancouver, Washington, USA, that their findings determined that there was no danger of a grain dust explosion.

[19] The respondent submits that the balance of inconvenience favours the Union. In the *Metropolitan Stores* decision the Court noted that the fact that an injunction or stay is being sought against a public authority exercising his statutory power is a matter to be considered when one comes to the balance of inconvenience. Furthermore, it is argued that this matter deals with a statutory provision that has the purpose of protecting the employees and the maintenance of a safe work place.

[20] They do not accept the tests already conducted prove the safety of pouring grain through cement holes. The tests that the employer has provided focused only on the possibility of an explosion. It is submitted that it is irrefutable that grain dust is explosive in confined spaces and this should be taken in account in deciding to suspend the operation of a legitimate order made by a highly trained safety officer.

[21] The respondent submits, in response to the assertion made by the applicant that the method of loading grain regarding this matter has been utilized in the Port of Vancouver for in excess of 25 years without incident, that the HSO's report states that the chief officer informed him during the investigation that the vessel implicated in this matter has never loaded grain through these openings in any port.

[22] The applicant replied that the safety of employees will in no way be compromised. The testing that has already been conducted has concluded that loading grain via cement holes is safe. This method of loading has been ongoing in the Port of Vancouver and the Port of Prince Rupert for many years without incident and without any suggestion that it posed a safety risk.

d) Proposed measures to protect the health and safety of the employees and persons

[23] The applicant submits that in consultation with Genesis Engineering Inc., and the grain terminals, the following are the procedures that will be implemented during the further test phase:

> 1) The FFD (free find dust) present in the grain product will be obtained in advance of the test by the terminal, and the corresponding maximum dust concentration within the ship's hold will be estimated by Genesis Engineering to prove it is safe. To accomplish this test, four hundred tonnes of grain product will be dropped into a terminal holding bin where a composite sample will be taken. The sample will then be screened and the dust less than100 microns weighed. If the resulting FFD number is less than a critical value, the grain can be released for ship loading via a cement hole. A maximum dust concentration within the ship's hold that is well below the scientifically and industry accepted value of 25% of the LEL (Lower Explosive Limit) will be chosen by the consultant to provide a very large margin of safety.

> 2) Loading through cement holes is slow in nature (200 tph or less). The loading speed is reduced because the air in the hold must be released, thereby slowing down the pour. The air is released through another port which also lowers the level of dust in the hold. The other opening on hatch cover and coamings will be kept open, so that the hold is not pressurized.
>
> 3) The ship will be grounded and non-conductive material will be placed between the loading spout and the entrance to the grain feeder hole and secured such that due allowance for movement is given for change of ships draft and tide, but chafing of the spout against the inner wall of the feeder hole due to vibration during loading may be eliminated.
>
> 4) Fog nozzle hoses will be placed next to the hatch and will be on stanby for the ships (sic) crew.
>
> 5) Fogging nozzles may be attached close to the opening of the loading spout to reduce dust levels if found necessary.

It is submitted by the employer's consultant that the above procedures will further ensure that testing will occur in a safe environment. It is anticipated that the testing will take approximately 6 to 7 hours per product; each product will be tested individually and separately.

[24] The respondent submits that the steps outlined by the applicant do not provide adequate safeguards. The steps do not eliminate a potential of ignition and do not adequately address the potential movement of the vessel and the consequential danger of the grain loading pipe being pulled down onto the deck of the ship and the dock below.

[25] The respondent submits, that although it is the opinion of the Genesis Engineering Inc. that proposed precautionary measures will further enhance the safety of the testing program, the opinion does not state that the proposed procedures are adequate or could be improved upon.

[26] In regards to the respondent's argument that the steps outlined do not provide adequate safeguards because they do not eliminate the potential of the grain loading pipe being pulled down onto the deck of the ship and the dock, the applicant replied that this is a hypothetical circumstance and that it could only arise if employees were not diligent in the performance of their work; any assessment of risk, or balance of inconvenience, must be made on the basis that individuals will perform their work as instructed.

[27] Genesis Engineering Inc. assures that the measures that the applicant proposes to put in place will further enhance the safety of the testing program because the testing program to date has already demonstrated that it is safe to load grain via a cement hole. The

added measures are enhancing the safety of an already safe procedure.

ANALYSIS

[28] As stated previously, I will apply the three part test developed by the Supreme Court of Canada, with the addition of a fourth part regarding the measures to protect the health and safety of employees and persons.

[29] Regarding the first part of the test, I find that the applicant justifiably exercised his right to make an appeal. The submissions from both parties demonstrated to me that the practice of loading grain on vessels through cement holes has health and safety ramifications for employees. Therefore, I agree with the applicant that there is a serious issue to be tried.

[30] I will now address the second part of the test. The HSO directed the employer to obtain the proper documentation from an approved authority before loading grain following his investigation of the work refusal. In order to provide the requested documentation and procedures, the employer requested a stay of the directions to conduct tests during the month of July, 2009.

[31] Should the stay not be granted to permit the employer to conduct the necessary expert testing, I believe that the employer will suffer irreparable harm. It will be very difficult for the employer to comply with the directions issued by the HSO thus the employer will not have the opportunity to present factual findings from the tests which are relevant to its appeal.

[32] The purpose of conducting these tests is to obtain an independent expert assessment pertaining to the possible safety risks that this particular method of loading grain poses as directed by the HSO.

[33] Consequently, the information that will be collected from the tests is not only pertinent to the central issue of the employer's appeal but will also enable the employer to comply with the HSO's directions. To not allow the collection of the information from the tests would preclude the employer from properly preparing for the hearing of the appeal.

[34] The rules of natural justice require that the decision maker provide the parties an opportunity to prepare and present evidence relevant to their case.

[35] For that reason, I believe that the employer should be given the opportunity to conduct the tests in order to provide the required expert

documentation and procedures pertaining to whether or not the method of loading grain through cement holes is safe.

[36] Before dealing with the third part of the test I will address the measures proposed by the employer to protect the health and safety of employees and persons.

[37] I am satisfied that the additional measures taken by the employer during the tests, as stated in paragraph 23 and from his submissions dated June 24, 2009, will ensure the health and safety of employees and persons exposed to the alleged danger.

[38] Concerning the third part of the test, I find that the harm to the employees alleged by the respondent, if a stay was to be granted, is speculative. I agree with the applicant's submission that the Union cannot make their case regarding irreparable harm based on speculation and hypothetical situations as established in the recent ruling of the Federal Court of Appeal, in *ILWU, Canada v. Canada (Attorney General)*[2].

[39] I am mindful and take seriously the fact that an experienced HSO has found the condition under the circumstances previously described to be a danger.

[40] Nevertheless, taking into account the protective measures that the employer will implement combined with the speculative nature of the harm to employees as put forth by the respondent, I am convinced that the balance of inconvenience leans on the side of the employer.

DECISION

[41] As stated in my order dated July 8, 2009, a stay of the directions is ordered in accordance with the conditions stated there within.

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Michael Wiwchar
Appeals Officer

[2] International Longshore and Warehouse Union, Canada v. Canada (Attorney General), 2008 FCA 3