CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

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

Decision No.: **98-002**

Applicant: Bunge du Canada Ltée
Quebec City, Quebec
Represented by: Conrad Desnoyers

Respondent: Canadian Union of Public Employees (CUPE)
Represented by: Paul Gervais

Mis-en-cause: Jean-Marc Juteau
Safety Officer
Human Resources Development Canada

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

The hearing was held in Quebec City on March 2, 1998.

Background

The safety officer testified at the hearing of this case that an investigation had been initiated on November 21, 1997, further to the complaint lodged on November 18, 1997 by Mr. Fortier, elevator operator and co-chair of the safety and health committee at Bunge du Canada Ltée. Mr. Fortier stated that an employee had felt discomfort while cleaning inside a silo.

The investigation revealed that an employee, Jacques Dubeau, had started to clean a silo while suspended in the silo by means of a harness-type fall-arresting device. The employee complained of feeling uncomfortable, as if he were being suffocated, and was immediately taken out of the silo. The employee was not injured and suffered no after-effects.

Following a meeting with the employer's representatives, including Mr. Desnoyers, on November 27, 1997, the safety officer was informed that this practice had been followed at the

request of the employees. However, the employer informed the safety officer that as a result of the

incident the practice was banned and that he had ordered two harnesses specifically designed for such work.

Mr. Desnoyers told the safety officer that the incident had been discussed at the occupational safety and health meeting on November 19, 1997. In his opinion, the situation had been resolved at that point and there was no need for the safety officer to intervene.

However, the safety officer informed the employer that the practice of using such a fall-arresting device was unacceptable and that such a practice should no longer be allowed. A direction (ANNEX) was issued to the employer to ensure that such a practice would no longer be followed in future. According to the safety officer, the direction was intended for the employer and the employees. Its aim was to prevent any non-conforming use of the harness since the fall-arresting device had been used for purposes other than those for which it was intended.

Employer's arguments

The submission prepared by the employer clearly reveals his position in this case. According to this submission, the following events occurred:

> At a special meeting of the safety committee held on November 19, 1997, the employer admitted that fall-arresting harnesses had been used in the cleaning of silos, at the request of some of the employees. At the same meeting, the employer agreed that he would no longer use the fall-arresting harnesses in the cleaning of silos and that he would buy two harnesses specifically designed for the aforementioned work that very day. (Included is a copy of the report of the special safety meeting held on November 19, 1997, and a copy of the delivery order for the harnesses referred to above, dated November 20, 1997.)
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> On November 21, after the matter had been discussed with the safety committee members and corrective action taken, Mr. Juteau, HRDC safety officer, recorded a complaint from the same union representatives regarding a situation that had already been resolved to the satisfaction of the parties.
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> On November 27, Mr. Juteau met with the employer as a result of the complaint registered on November 21. The employer explained the entire safety situation at his work place and listed all the items discussed which had been a matter of concern for the employees and which had been the reason for the special safety meeting on November 19, 1997. The employer also indicated that he had taken all the measures to safeguard the employees and respond to their concerns, and all those in attendance at the meeting were satisfied.
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> At the meeting with Mr. Juteau, there was never any question of issuing a direction. It was agreed that a letter setting out the results of his investigation into all the complaints that he had reviewed would be issued including recommendations to the employer and the union.

Mr. Desnoyers explained that the cleaning of the silo was done sporadically and not on a regular basis as the safety officer was led to think. Furthermore, it was made clear to the safety officer that the harness concerned would never again be used as it was in the past in the cleaning of the silo. The documents setting out this decision by the employer are included in his records and the records of the safety and health committee.

Arguments by the employees

According to Mr. Gervais, the complaint was lodged on November 18, 1997, which shows that the problem had not been resolved. At the time the safety officer came to investigate the complaint, an "imminent" danger existed for the employees. With a direction, it is ensured that the employees are protected even if the employer confirms that the problem has been corrected. Mr. Gervais is of the opinion that the direction is necessary because, if Mr. Desnoyers were to leave Bunge at some point in the future, where would the guarantees of compliance be if not in the documents issued by the safety officer. If the direction is rescinded and an accident occurs, the investigation would have to be started all over again as if nothing had ever been done.

Decision

The issue to be resolved in this case is as follows: At the time of the safety officer's investigation, was there a danger to the employees that warranted a direction to the employer from the safety officer in order to protect the employees?

When an incident that may jeopardize the health and safety of one or more employees arises in the work place, the employer must carry out an investigation, as set out in subsection 15.4(1) of Part XV (Hazardous Occurrence Investigation, Recording and Reporting) of the Canada Occupational Safety and Health Regulations (hereinafter referred to as the Regulations). This provision states the following:

> 15.4(1) Where an employer becomes aware of an accident, occupational disease or other hazardous occurrence affecting any of his employees in the course of employment, the employer shall, without delay,
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> a) appoint a qualified person to carry out an investigation of the hazardous occurrence;
> b) notify the safety and health committee or the safety and health representative, if either exists, of the hazardous occurrence and of the name of the person appointed to investigate it; and
> c) take necessary measures to prevent a recurrence of the hazardous occurrence.

Mr. Desnoyers told us that as soon as the incident on November 18, 1997 was brought to the employer's attention a special meeting of the safety and health committee was held the next day, November 19, 1997. In attendance at the meeting were Mr. Jean Fortier, employee member of the

safety and health committee, Mr. Richard Lortie, Vice-President of the Canadian Union of Public Employees, Mr. Fernand Roy, employer member of the safety and health committee, and Mr. Conrad Desnoyers, Director of Administrative Services and Human Resources at Bunge du Canada Limitée. The incident that occurred in the silo was discussed. The report of this meeting reads as follows:

> [Translation]
>
> Further to the discussions with the union representatives, the employer agrees as follows:
>
> a) in future we will not be using the fall-arresting harnesses for cleaning silos; we will be buying this very day two harnesses specifically designed for the aforementioned work…
>
> The union and management representatives were satisfied with the measures recommended by the employer.

A delivery order for the harness purchase, dated November 20, 1997, was included in the file. In addition, according to the report of the safety and health meeting on Tuesday, November 25, 1997, they received the two harnesses and the ladder required for cleaning the silos on November 21.

In light of the above, I am convinced that the hazardous situation that existed when the incident occurred in the silo no longer existed at the time of the safety officer's investigation. In order to warrant the direction issued under paragraph 145(2)(a) of the Code, a hazardous situation has to exist at the time of the officer's investigation. Past decisions on this matter are clear. Moreover, I had the opportunity to deal with the concept of danger in *Air Canada v. Canadian Union of Public Employees*, unreported decision No. 94-007, where I stated as follows:

> In order to answer these questions, I must consult the definition of the word "danger" in subsection 122(1) of the Code and apply this definition in light of the case law. "Danger" is defined as follows:
>
> "danger" means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto <u>before the hazard or condition can be corrected</u>. (underlining added)
>
> The courts have had many opportunities to interpret the scope of the term "danger". From this case law two extremely important points have emerged that have guided me in my decision.
>
> The first point is that the danger must be immediate. Thus, the expression "before the hazard or condition can be corrected" has been associated with the concept of "imminent danger" that existed before the Code was amended in 1984. In ***<u>Pratt</u>***, the Vice-Chairman of the Canada Labour Relations Board, Hugh R. Jamieson, wrote:

> ...Parliament removed the word "imminent" from the concept of danger...but replaced it with a definition that has virtually the same meaning.
>
> The second point that I take from a large number of decisions is that the employee's exposure to the hazard or situation must be such that the likelihood of injury is obvious. Accordingly, the danger must be more than hypothetical, or there must be more than a small probability of its becoming a reality. The danger must be immediate and real, and no doubt must remain regarding its imminence. It must be sufficiently serious to justify, in the case under consideration, discontinuation of use of the seats for flight attendants.

Obviously, the employer, in cooperation with the employees, took the necessary measures to ensure that there would be no recurrence. I must attach a great deal of importance to the special safety and health committee meeting held following the incident since this type of intervention by the employer and the union constitutes the very foundation of the internal responsibility framework advocated in the legislation, which provides for, among other things, the right of employees to take part in identifying and resolving problems relating to their work place. This is one of the fundamental reasons why safety and health committees were created. The employer and the employees discharged their responsibility in this matter by taking the necessary measures following the incident. The situation was corrected to the satisfaction of all the members of the safety and health committee.

In my opinion, that safety officer was right in thinking that a danger existed at the time of the incident that occurred in the silo. In point of fact, the safety - and even the life - of Mr. Dubeau was in serious jeopardy on November 18, 1997. However, the safety officer erred in concluding that the same danger existed at the time of his investigation on November 27, 1997. The incident was a thing of the past and concrete measures had been taken to put a safety procedure in place. For these reasons, I will have to rescind the direction.

However, I must admit that I remain perplexed about these events. While I have been informed of the procedure used to lower an employee into a silo so that it can be cleaned, I have not been told of the precautions taken to protect him before going in and while in this type of space, which I believe is a confined space governed by Part XI (Confined Spaces) of the Regulations. Since I have not been apprised of these circumstances, my decision will pertain only to the use of harnesses to raise and lower an employee in the silo concerned. I must also say that the employer's argument that the employees were the ones who asked to use the harness procedure is weak in my opinion. The employer is responsible for the procedures used in the work place that he controls and cannot circumvent them by pointing a finger at the employees. In the final analysis, the employer is the one accountable if an employee is seriously injured at work and he has not taken reasonable and necessary measures under the circumstances to protect the employee. Since I do not have the authority under section 146 of the Code to rule on these aspects of the safety officer's investigation, I will limit myself to the circumstances that gave rise to the directions.

For all the reasons given above, I **RESCIND** the direction issued under paragraph 145(2)(a) of the Code on November 28, 1997 by safety officer Jean-Marc Juteau to Bunge du Canada Ltée.

Issued on March 18, 1998.

Serge Cadieux
Regional Safety Officer

ANNEX

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

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)

On November 27, 1997, the undersigned safety officer conducted an inquiry in the work place operated by BUNGE DU CANADA LTEE, being an employer subject to the Canada Labour Code, Part II, at 300 DALHOUSIE STREET, QUEBEC CITY, QUEBEC, the said work place being sometimes known as the Silos de la Bunge.

The said safety officer considers that a condition in the work place constitutes a danger to an employee while at work:

Use of a fall-arresting device for purposes other than those for which it is intended, specifically, for cleaning silos rather than using equipment designed for that purpose, may cause breathing problems.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the Canada Labour Code, Part II, to take measures for guarding the source of danger immediately.

Issued at Sainte-Foy, this 28th day of November 1997.

[signed]
Jean-Marc Juteau
Safety Officer
1850

To: BUNGE DU CANADA LTEE
300 DALHOUSIE STREET
QUEBEC CITY, QUEBEC
G1K 8M8

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Decision No.: **98-002**

Applicant: Bunge du Canada Ltée
Quebec City, Quebec

Respondent: Canadian Union of Public Employees (CUPE)

KEYWORDS:

Harness, fall-arresting device, silo.

PROVISIONS:

Code: 145(2)(a)
Reg: 15.4(1)

SUMMARY:

A safety officer issued a direction to an employer for a hazardous occurrence that had arisen ten days earlier. An employee felt suffocated by a harness while suspended in a silo to clean it. The employer, in consultation with the safety and health committee, agreed to no longer use the fall-arresting device and purchased appropriate equipment to do the work. The safety officer nevertheless issued a direction for danger because the harness had been used for purposes other than those for which it was intended. On review, the regional safety officer found that at the time of the safety officer's investigation the situation had been resolved and that there was no longer any danger. He **RESCINDED** the direction.