



Human Resources
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Développement des
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travail

Canada Appeals Office on Occupational Health and Safety • Bureau d'appel canadien en santé et sécurité au

**CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY**

Oceanex (1977) Inc.
applicant

and

International Longshoremen's Association
Local 1953
union

and

Larry McCarthy
health and safety officer

Decision No. 01-021
September 4 , 2001

This case was heard by Michèle Beauchamp, appeals officer, in St. John's Newfoundland, on May 8, 2001.

Appearances

For the applicant:

Thomas O'Reilly, Counsel, Cox Hanson O'Reilly Matheson
Glenn Etchegary, Terminal Manager
John Majchrowicz, Vice-President Operations

For the union:

John Williams, President, International Longshoremen's, LSPU, Local 1953

[1] This case concerns an appeal made pursuant to subsection 146(1) of the *Canada Labour Code*, Part II, by counsel Thomas O'Reilly on behalf of Oceanex (1997) Inc., of a direction (in appendix) issued on November 3, 2000 by Larry McCarthy, health and safety officer, Labour Program, Human Resources Development Canada.

[2] Following an investigation into the accidental death, on September 28, 2000, of Mr. John Butt, an Oceanex employee working as a checker in the port of St. John's, Newfoundland, health and safety officer McCarthy issued to the employer, on November 3, 2000, the following direction under subsection 145(1):

The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, is being contravened:

1. Paragraph 125(p) of the *Canada Labour Code*, Part II, and paragraph 14.50(3) of the *Canada Occupational Health and Safety Regulations* (COHSR)

Stored materials are obstructing and encroaching on traffic lanes

2. Paragraph 125(p) of the *Canada Labour Code*, Part II, and paragraph 14.50(3) of the *Canada Occupational Health and Safety Regulations* (COHSR)

Stored materials are impeding the operation of motorized materials handling equipment

3. Paragraph 125(p) of the *Canada Labour Code*, Part II, and paragraph 14.50(3) of the *Canada Occupational Health and Safety Regulations* (COHSR)

Stored materials (shipping containers) that encroach on traffic lanes are causing a risk to the health and safety of employees

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than November 17th, 2000.

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

[3] At the hearing, health and safety officer McCarthy explained the circumstances surrounding the accident, his investigation and the issuance of his direction, through a condensed report that he gave and read to the parties. His main observations are given in the following paragraphs.

[4] At the time of the accident, Mr. Dave Brennan, a lift operator, had been moving reefer containers from the west end to the east end of the yard terminal. The type of toplift equipment that he was driving had to be operated in reverse when carrying containers and he was backing down the yard carrying a forty foot reefer through the traffic corridor.

[5] The traveling area was bottlenecked in front of Mr. Butt's shack because transport trucks had parked in front of it and containers were lying on the grounds on the opposite side in a single line. Consequently, Mr. Brennan moved closer to the containers to give himself more room on the truck. When he got to the end of the first container on the row, it scraped the last three or four feet. The second container on that row was protruding out of line by approximately 2 feet. The container that Mr. Brennan was carrying struck the one protruding and it moved east approximately 8 feet, hitting up against the next container before stopping.

[6] After being sure that there were no damages and straightening up his toplift to clear the containers, Mr. Brennan continued backing to the ship drop off area. On his way back, to avoid hitting the protruding containers again, he decided to move the first container furthest east back to the block stow area and then proceeded to the second container. When he lifted the second container and started pushing it back, he saw Mr. Butt fall out from between the containers.

[7] A few minutes before, Mr. Butt had been overheard by another employee confirming container numbers on the radio in his shack. He had then walked to Mr. Gosling's trailer at the other side of the yard to make a personal phone call, after which he had been seen heading back to his own checker shack. According to health and safety officer McCarthy's investigation, it appeared that, at the time of the accident, Mr. Butt had been walking between the containers to go back to his shack and had stop to wait for Mr. Brennan's toplift to pass. He had no time to get out from between the containers when the container on his right was hit.

[8] Health and safety officer McCarthy testified that Mr. Butt knew that he was not to walk between containers unless he was performing his duties as checker, and if he had been performing work related business between the stacks of containers at the time, the lift operators would have been aware of his presence. The employer's policy was at the time of the accident (and still is) that checkers must notify operators by radio, on a reserved channel, when they have to go into the terminal yard to locate containers, and the operators are to avoid working in that area while the checkers do so.

[9] Health and safety officer McCarthy explained that his decision to issue the direction was based on what he considered to be conflicting statements from management and employees on whether or not checkers have to walk between containers from time to time and as to who ensures operating space, i.e. passageways and traffic lanes, are maintained, given the frequent changes in traffic lanes and block stow areas.

[10] Health and safety officer was aware of the employer's written policy and it was confirmed to him that if checkers did have to go between containers to check on numbers, they knew that they had to previously notify lift operators so that they would stop work in that area.

[11] Health and safety officer McCarthy recognized that the employer had procedures in place for the facility at the time of the accident and that they appeared to be working. He knew that the employer made some changes to them following the accident in order to avoid another similar accident. However, he was of the opinion that issuing a direction would serve to further improve the existing procedures and practices.

[12] Health and safety officer McCarthy admitted that he had taken no measurements of the scene of the accident when questioned by counsel O'Reilly. Although, as noted in his report, there appeared to be no marking on the ground to indicate maneuvering areas and traffic lanes, he declared that there were lines marked for containers as well as lines for trucks in front on Mr. Butt's checker shack.

[13] Mr. Etchegary, Terminal Manager, acknowledged that checkers did on occasions have to go into the containers stack in the course of their duties. However, they have to previously contact the lift operators on a reserved radio frequency so that they will stop operations in the area.

[14] As to who ensures operating space, i.e. passageways and traffic lanes, are maintained, Mr. Etchegary testified in the detailed statement given to and included in health and safety officer McCarthy's report that Oceanex had established with the assistance of an independent consultant and implemented a traffic flow plan for the terminal. This plan had been explained to all employees, it is strictly enforced, and it is monitored by management and the terminal security.

[15] According to Mr. Etchegary, the traffic flow plan is configured to take into account empty and full containers and traffic flow arrangements are known by truck companies coming to the yard. It is the operators' responsibility to properly place the containers, to be aware of their surroundings and to report to management any condition that is or may cause an unsafe operating practice so that it can be immediately remedied.

[16] Finally, Mr. Etchegary explained that 53 feet containers are stacked on the side of the row and 40 to 48 feet containers are positioned in the middle. He argued that at the time of the accident, there was no bottleneck in the area, the block tow area layout was normal and no stored material obstructed or encroached on the traffic lanes.

[17] In his closing statement, counsel O'Reilly held that the items issued in health and safety officer McCarthy's direction were not factually based.

[18] Referring to item one of the direction -- stored materials are obstructing and encroaching on traffic lanes --, counsel O'Reilly argued that stored materials would encroach or obstruct traffic lines only if the minimum side clearance of 150 mm required by paragraph 14.45(1)(b) of the COHSR for passageways regularly traveled by motorized or manual materials handling equipment is not met. In the present case, as demonstrated by the yard plan established by the employer following the accident and submitted at the hearing, the actual distance between the bumped container and the parked tractor/trailor was 60.5 feet, which is far in excess of the regulatory requirement.

[19] Regarding item two of the direction -- stored materials are impeding the operation of motorized materials handling equipment --, counsel O'Reilly, referring again to the yard plan, declared that on the day of the accident, the terminal layout was configured as it would normally be, there was ample space available for equipment to travel back and forth and there was no evidence to suggest that a bottleneck was being created.

[20] As to item three of the direction -- containers that encroached on traffic lanes cause a risk to the health and safety of employees--, counsel O'Reilly argued that the employer had implemented throughout the terminal a very aggressive occupational health and safety program since late 1999. The program was reviewed by the Labour Program without any exceptions being noted, a copy of it was given to employees in February 2000, and a four-hour orientation program was established in April 2000.

[21] Counsel O'Reilly held that the markings on the terminal surface to show block stow areas amply serve as traffic flow guide for operators and pedestrians and that placing lines on the terminal surface the entire length of the block stow area, although done by the employer since the accident, will not eliminate nor reduce the possibility of further similar accidents. If there had been encroachment in the traffic lanes at the time of the accident -- and counsel O'Reilly does not acknowledge that there was --, it would have had nothing to do with the accident itself, which resulted from a confluence of human errors.

[22] Counsel O'Reilly maintained that health and safety officer McCarthy's investigation was flawed because he did not take any measurements of the scene of the accident, he did not appreciate accurately the factual situation and he failed to understand that at the

time of the accident, Mr. Butt was not engaged in work as such but had been walking back to his shack, after making a personal phone call, by going through the row of containers.

[23] Finally, referring to the decision rendered by the Federal Court, Trial Division, following an appeal of Regional Safety Officer Serge Cadieux in the Vancouver Wharves Ltd. case (Court File No. T-1125-97), Counsel O'Reilly noted that it was within the appeals officer's mandate to review all the evidence and conclude that the health and safety officer's direction resulted from a misunderstanding and a lack of appreciation of all the facts surrounding the accident. He stressed that the measures implemented by the employer since the accident, for example the use of strobe lights by checkers when they go into the container rows and the painting of a line on the terminal surface to outline the container stow area, do not represent an admission by the employer that its operational practices and procedures are inadequate or unsafe.

[24] For his part, Mr. John Williams, President of the Union Local 1953, confirmed that health and safety officer McCarthy had not taken any measurements on the site of the accident. He stated that there were no painted lines for parked truck trailers at the time of the accident, but that this has been remedied since. Mr. Williams added that unfortunately, if the lift operator had been informed of Mr. Butt's whereabouts, this tragic accident would have been avoided.

[25] Pursuant to subsection 146.1(1) of the *Canada Labour Code*, Part II, when a direction is appealed, the appeals officer inquires summarily into the circumstances of and the reasons for the direction, and may vary, rescind or confirm the direction. He/she then provides a written decision with reasons, as required by subsection 146.1(2).

[26] These provisions read:

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, and
- (b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

146.1(2) The appeals officer shall provide a written decision, with reasons, and a copy of any direction to the employer, employee or trade union concerned, and the employer shall, without delay, give a copy of it to the work place committee or health and safety representative.

[27] To decide whether or not I should confirm, vary or rescind the four items forming the direction issued by health and safety officer McCarthy, I must examine the provisions of

Part II of the *Canada Labour Code* (the Code) and of the *Canada Occupational Health and Safety Regulations* (the COHSR) quoted in the direction. The Code provision reads:

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,

(p) ensure, in the prescribed manner, that employees have safe entry to, exit from and occupancy of the work place;

[28] Item 1 of the direction requires that materials be stored in the manner prescribed by paragraph 14.50(3)(b) of Part XIV of the COHSR, Materials Handling, which reads:

14.50(3) All materials, goods or things shall be stored in a manner so that

(b) there is no obstruction or encroachment of passageways, traffic lanes or exits;

[29] The containers involved in the accident were protruding from the row of containers by maybe about 2 feet, as stated by Mr. Brennan during health and safety officer McCarthy's investigation. Nonetheless, the detailed plan established by the employer following the accident clearly demonstrates that there were at least 60 feet between the bumped container and the parked tractor/trailor.

[30] Given that the toplift was being operated in a normal manner at the time of the accident; given that there was a passageway of 60 feet between the bumped container and the parked tractor/trailor to operate the toplift; given the prescribed minimum side clearance of 150 mm required by paragraph 14.45(1)(b) of the COHSR for passageways regularly traveled by motorized handling equipment being operated in a normal manner – and, I might add, I find this minimum side clearance somewhat “narrow” considering the size of the loads being handled nowadays in terminals –; given that health and safety officer McCarthy did not take any measurements while investigating the accident and could not demonstrate how the containers were encroaching on traffic lanes, I see no evidence that the containers were obstructing or encroaching on Mr. Brennan's toplift passageway. I therefore RESCIND item 1 of the direction.

[31] Item 2 of the direction requires that materials be stored in the manner prescribed by paragraph 14.50(3)(c) of Part XIV of the COHSR, Materials Handling, which reads:

14.50(3) All materials, goods or things shall be stored in a manner so that

(c) the safe operation of motorized or manual materials handling equipment is not impeded;

[32] I received no evidence indicating that the safe operation of Mr. Brennan's toplift was impeded by the containers. On the contrary, it was established that the minimum side clearance of 150 mm prescribed by paragraph 14.45(1)(b) of the COHSR to ensure the safe operation of materials handling equipment in passageways where they regularly travel was considerably more than exceeded. I therefore RESCIND item 2 of the direction.

[33] Item 3 of the direction requires that materials be stored in the manner prescribed by paragraph 14.50(3)(f) of Part XIV of the COHSR, Materials Handling, which reads:

14.50(3) All materials, goods or things shall be stored in a manner so that
(f) there is no risk to the health or safety of any employee.

[34] Health and safety officer McCarthy states under this item that stored materials encroaching on traffic lanes were causing a risk to the health or safety of employees. However, as explained in the above paragraphs 30 and 32, he has failed to establish that at the time of his investigation, stored materials were encroaching on traffic lanes and the safe operation of the materials handling equipment was impeded. How should the containers have been stored so as not to represent a risk to the health and safety of employees ? They were evidently stored in a well defined and known block stow area, along one side of which is a clearly identified crosswalk for pedestrians. True, the tragic accident that health and safety officer McCarthy had investigated when he issued his direction was indeed indicative that there was some kind of risk to the health and safety of at least one employee. However, I believe that that risk did not come from the manner in which the containers were stored, but from the fact that the employee did not inform, as he would have normally done, the lift operators of his whereabouts so that they would stop operations in the area until he was safely out of their way. I therefore rescind item 3 of the direction.

[35] Given that I have rescinded items one, two and three of the direction, I also RESCIND the last part of health and safety officer McCarthy's direction, whereby he directs the employer, pursuant to paragraph 145(1)(b) of the *Canada Labour Code*, Part II, within the time specified by him, to take steps to ensure that the contravention does not continue or reoccur.

Michèle Beauchamp
Appeals Officer

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

DIRECTION TO EMPLOYER UNDER SUBSECTION 145(1)

On September 28th, 2000, the undersigned health and safety officer conducted an investigation in the work place operated by OCEANEX (1977) INC., being an employer subject to the *Canada Labour Code*, Part II, at 432 WATER STREET, SUITE 320, FINGER PIER' ST. JOHN'S, NFLD, the said work place being sometimes known as Oceanex.

The said health and safety officer is of the opinion that the following provision of the *Canada Labour Code*, Part II, is being contravened:

1. Paragraph 125(p) of the *Canada Labour Code*, Part II, and paragraph 14.50(3) of the *Canada Occupational Health and Safety Regulations* (COHSR)

Stored materials are obstructing and encroaching on traffic lanes

2. Paragraph 125(p) of the *Canada Labour Code*, Part II, and paragraph 14.50(3) of the *Canada Occupational Health and Safety Regulations* (COHSR)

Stored materials are impeding the operation of motorized materials handling equipment

3. Paragraph 125(p) of the *Canada Labour Code*, Part II, and paragraph 14.50(3) of the *Canada Occupational Health and Safety Regulations* (COHSR)

Stored materials (shipping containers) that encroach on traffic lanes are causing a risk to the health and safety of employees

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(1)(a) of the *Canada Labour Code*, Part II, to terminate the contravention no later than November 17th, 2000.

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

Issued at St. John's, this 3rd day of November 2000.

Larry McCarthy
Health and Safety Officer

To: OCEANEX (1977) INC.
OCEANEX LIMITED
432 WATER STREET, SUITE 320
FINGER PIER
ST. JOHN'S, NFLD,
A1C 5V3

SUMMARY OF THE APPEALS OFFICER'S DECISION

Decision No.: 01-021

Applicant: Oceanex (1977) Inc.

Union: International Longshoremen's Association, Local 1953

KEY WORDS: motorized materials handling equipment, stored materials, traffic lanes, risk to the health and safety of employees

PROVISIONS:

Code: 125(1)(p)

Regulation: 14.45(1)(b), 14.50(3)(b), (c), (f)

SUMMARY:

Following the investigation, on September 28, 2000, of a fatal accident at Oceanex (1977) Inc. the health and safety officer issued on November 3, 2000 a direction stating that (1) stored materials were obstructing and encroaching on traffic lanes, (2) were impeding the operation of motorized materials handling equipment and (3) were causing a risk to the health and safety of employees. He further directed the employer to take steps to ensure that the contraventions would not continue or reoccur. Upon her inquiry, the appeals officer rescinded all items of the direction.