

CANADA LABOUR CODE,
PART II,
OCCUPATIONAL HEALTH AND SAFETY

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

Applicant: International Longshore and Warehouse Union
Vancouver Local 500
Represented by: Mr. Robert Peebles, Business Agent
Mr. Al LeMonnier, Business Agent
Mr. Howie Stohl, Safety Chair

Respondent: BCR Marine Ltd.
Represented by: Mr. Eric Skowronek , Manager,
Health and Safety, BCMEA
Mr. Richard Meyer, Manager,
Safety, BCR Marine

Mis-en-cause: Capt. Dennis G. Burt
Safety Officer
Marine Safety
Transport Canada

Before: Douglas Malanka
Regional Safety Officer
Human Resources Development Canada

Background:

On February 21, 2000, safety officer Dennis Burt attended berth number 1, a work place of BCR Marine Ltd. in Vancouver North (B.C.), following a refusal to work made under the *Canada Labour Code*, Part II (hereto referred to as Part II or the Code). Mr. Hart Schomek, ship unloader operator, refused work because the wind speed anemometer fitted on the ship unloader had been partially disconnected, therefore rendering the equipment unsafe.

After meeting with the employer, the employee and the union business agent, safety officer Burt decided that there was no danger. However, he decided to issue a direction under Part II to the terminal operators (see attached). The direction, issued on a S.I.7¹, specified that the audible alarm portion of the anemometer system would suffice until a replacement system was put into use

¹ A S.I.7 form is used by Transport Canada Marine safety officers in the course of their duties under the authority of the *Canada Shipping Act*.

and that the operator was to be guided in his operations by the Vancouver Wharves Operators Manual and the Red Dog Mines Manual.

On February 24, Robert Peebles requested a review of this direction by a Regional Safety Officer, pursuant to subsection 146(1) of the *Canada Labour Code*, Part II. He later confirmed during a teleconference held on April 13, 2000 with Serge Cadieux, Regional Safety Officer, and Captain Mike Goshal, Manager, Cargo Services, Marine Safety, Transport Canada, that he considered the S.I.7 to be a direction issued under Part II.

The review hearing was held in Vancouver on August 25, 2000.

Safety Officer:

Safety officer Burt provided the Office of the Regional Safety Officer with a copy of his report prior to the hearing. The report is not reproduced here and forms part of the file. I retain the following from his report and testimony at the hearing.

On February 21, 2000, safety officer Burt investigated Mr. Hart Schomek's refusal to work. He was informed that while a new and more accurate anemometer system was being installed on the ship unloader, the current double range system had been partially disabled and only its lower level still remained fully functional. Consequently, an alarm would sound if the wind reached up to 30 miles per hour, but the equipment would not automatically cease to operate as it would normally do if the wind exceeded 30 miles per hour.

After discussions with both sides, safety officer Burt concluded that the operator knew the capabilities of the wind gauge well enough to be able to make an educated decision as to whether to cease the operation or not given the wind speed, and that the operator could be guided in this by the Vancouver Wharves Operators Manual and the Red Dog Mines Manual. He also determined that the weather forecast predicted windy conditions for the following day and that everyone agreed to monitor these conditions in case the winds reached speed of 25 miles per hour or more.

During the hearing, safety officer Burt confirmed that he had decided that there was no danger under Part II at the time of his investigation of the refusal to work. He directed that the operation could carry on provided that the wind speed did not go over 30 miles per hour, as communicated in the S.I.7.

Safety officer Burt also confirmed during the hearing that the S.I.7 in question did constitute a direction under Part II of the Code. The S.I.7, issued to terminal operators, reads as follows:

The audible alarm anemometer on the ship unloader shall suffice until the replacement system is put into use.

The unloader operator shall be guided by the Vancouver Wharves Red Dog Manual for wind speeds and safe operations.

Applicant:

Mr. Peebles provided a copy of the union's summation at the hearing. The summation is not reproduced here and forms part of the file. I retain the following from the summation and from his testimony and that of Messrs. LeMonnier and Stohl at the hearing.

Mr. Peebles declared that the union felt aggrieved by the direction issued by safety officer Burt because the situation constituted a danger. The applicant contended that safety officer Burt issued a direction to the effect that the audible alarm anemometer would suffice until a replacement system was put into use. He insisted that the safety device was necessary and its absence was a contravention of the Code and a danger.

Mr. LeMonnier contended that nothing in Part II of the *Canada Labour Code* indicates that the *Canada Shipping Act* should not be referred to in situations like this one. He declared that the direction issued by safety officer Burt was in violation of section 9 of the *Safe Working Practices Regulations* under the *Canada Shipping Act*. In his opinion, safety officer Burt did not clearly specify at the time of the refusal to work that there was no danger and the S.I.7 order constituted a direction under the Code.

Mr. Stohl, who attended the work refusal investigation of safety officer Burt, testified that he did not understand at the time that safety officer Burt had decided that there was no danger. He said that the work resumed only because safety officer Burt had issued his direction using a S.I.7 form.

The union opined that a direction was issued because the anemometer system had been rendered inoperative, which was in contravention to section 9 of the *Safe Working Practices Regulations* and constituted a danger.

Respondent:

Mr. Skowronek presented a copy of the employer's summation at the hearing. The summation is not reproduced here and forms part of the file. I retain the following from the summation and his testimony at the hearing.

Mr. Skowronek questioned the jurisdiction of the Regional Safety Officer to review the S.I.7 direction issued by safety officer Burt to terminal operators. He contended that since the decision made by safety officer Burt was clearly a decision of no danger, the issue should therefore have been referred to the Canada Industrial Relations Board and the direction issued following that decision should also have been referred to the Board, as stated in subsection 146(5) of the Code.

Mr. Skowronek also referred to the Decision 95-016 made by Bertrand Southières, Regional Safety Officer, who stated that he had no authority to interpret another Act than the *Canada Labour Code*, Part II.

Decision:

Issues:

There are two issues in this case. The first is whether I have jurisdiction to hear the case, since there was some confusion as to whether safety officer Burt had decided that a danger existed under the Code or not. If it was determined that safety officer Burt had decided that a danger under the Code existed, the second issue is whether an S.I.7 form constituted a valid direction under Part II.

Applicable legislation:

Part II of the Code clearly identifies what actions a safety officer must undertake following an investigation of a refusal to work.

If the safety officer decides that there is a danger, the Code states:

129(4) Where a safety officer decides that the use or operation of a machine or thing constitutes a danger to an employee or 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, and an employee may continue to refuse to use or operate the machine or thing or to work in that place until the direction is complied with or until it is varied or rescinded under this Part.

The Code also states, once the safety officer has decided that a danger exists and consequently issued a direction under subsection 145(2), by whom the direction thus issued will be reviewed:

146(1) Any employer, employee or trade union that considers himself or itself aggrieved by any direction issued by a safety officer under this Part may, within fourteen days of the date of the direction, request that the direction be reviewed by a regional safety officer for the region in which the place, machine or thing in respect of which the direction was issued is situated. (my emphasis)

If, however, the safety officer decides that there is no danger, the Code states:

129(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board [the Canada

Industrial Relations Board], and thereupon the safety officer shall refer the decision to the Board. (my emphasis)

If, following his decision of no danger, the safety officer nevertheless decides to issue a direction under subsection 145(1) for a contravention to the Code, the Code establishes, in subsection 146(5), the following exception to the review process is given by subsection 146(1):

146(5) Subsection (1) does not apply in respect of a direction of a safety officer that is based on a decision [of no danger] of the officer that has been referred to the Board pursuant to subsection 129(5).

Summations:

The employer clearly understood that safety officer Burt had decided that no danger existed with respect to the wind speed anemometer system.

Unfortunately, as revealed during the hearing, that was not so evident to the union representatives. They felt that the fact that a S.I.7 had been issued was an indication that there was a danger and they did not recall safety officer Burt deciding that there was no danger.

Safety officer Burt declared during the hearing that there was no doubt in his mind that there was no danger and that the S.I.7 was a direction issued under subsection 145(1) of the Code.

Decision:

Given safety officer Burt's declaration, I HEREBY FIND that I have no jurisdiction to review the direction that safety officer Burt issued on February 21, 2000. Subsection 129(5) specifies that the decision of no danger may only be appealed in this case to the Canada Industrial Relations Board, including any direction issued in connection with that decision.

Decision rendered on November 8, 2000.

Douglas Malanka
Regional Safety Officer

Comments:

Having heard the circumstances surrounding the refusal to work, I make the following observations out of concern that the health and safety of employees may have been compromised as a result of employees not being clear that safety officer Burt had decided that the modified anemometer device did not constitute a danger. The Code provides that the employee who exercised the right to refuse may appeal a safety officer's decision of no danger to the Canada Industrial Relations Board within 7 days of receiving notice of the decision. My observations are as follows:

- (i) Part II safety officers should clearly communicate their decision regarding danger to all parties involved in the matter and inform them of their rights and recourses under the Code;
- (ii) The use of an S.I.7 form to issue a direction under Part II may have contributed to the confusion on the part of employees. The S.I.7 form appears to lack the information that is legally necessary to ascertain a clear understanding of the purpose of the direction, of the authority under which it is issued and of the party to whom the direction is issued.

APPENDIX

Van Wharves Ship Unloader
VWF 1 N. Vancouver
21.02.2000

To: The Terminal Operators:-

The audible alarm anemometer on the ship unloader shall suffice until the replacement system is put into use.

The unloader operator shall be guided by the Vancouver Wharves/Red Dog Manual for wind speeds and safe operations.

Denis Burt
Senior Surveyor

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: International Longshore and Warehouse Union

Respondent: BCR Marine Ltd.

KEY WORDS

Refusal to work, absence of danger, direction, Regional Safety Officer, Canada Industrial Relations Board

PROVISIONS

Code : 129(4), 129(5), 145(1), 146(1), 146(5)

Regulations : N/A.

SUMMARY

A safety officer employed by Transport Canada Marine investigated a refusal to work at BCR Marine, in Vancouver, B.-C. He decided that there was no danger for the employee but issued a direction by way of a S.I.7. A S.I.7 is a form used in connection with the *Canada Shipping Act*. The regional safety officer held that he has no jurisdiction to review the direction since it had been issued in connection with the safety officer's decision of no danger.