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Ontario Labour
Relations Board

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Our File Number/Numero de dossier 2150-08-HS

November 10, 2008

TO THE PARTIES LISTED ON APPENDIX "A"

Dear Sir/Madam:

**National Steel Car, v. United Steel Workers of America,
Local 7135, John Pierroz, Inspector**

I enclose herewith a copy of the Board's Decision dated November 7, 2008 in the above matter.

Sincerely,

A handwritten signature in black ink that reads "Tim R. Parker".

Tim R. Parker
Registrar

TRP/ml
Enclosure

APPENDIX "A"

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Attention: Mr. Hal Bruckner

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Attention: Mr. Steve Weller

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Attention: Deputy Director

ONTARIO LABOUR RELATIONS BOARD

2150-08-HS National Steel Car, Applicant v. United Steel Workers of America, Local 7135 and John Pierroz, Inspector, Responding Parties.

BEFORE: Harry Freedman, Vice-Chair.

DECISION OF THE BOARD; November 7, 2008

1. Inspector John Pierroz (the "Inspector") issued an order under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the "Act") in F.V. 5346072 on September 25, 2008 in which the applicant was ordered to provide some means of protection to workers who are exposed to the hazard of falling from flatbed trailers while accessing the top of the trailers to move and position chain slings and blocks when flatbed trailers are being unloaded. The Order does not specify what form or type of fall protection would address the hazard the Inspector identified.

2. The applicant filed an appeal of the Order under section 61 of the Act on October 14, 2008 (Board File No. 2151-08-HS) and at the same time filed this application under section 61(7) of the Act for suspension of the Order pending the disposition of the appeal.

3. Before dealing with the parties' submissions, I note the United Steelworkers of America, Local 7135 ("Local 7135") filed a Form A-66 Response to Appeal of Inspector's Order on October 24, 2008. That response did not indicate to which Board file it related. The Board placed that response in Board File No. 0517-08-OH, an application under section 50 of the Act made by Steve Weller and Local 7135 against the applicant. Local 7135 has not, as of this date, filed a response to this application for suspension as required by Rule 22.5 of the Board's Rules of Procedure.

4. Grantley Howell, Recording Secretary of Local 7135, wrote the Board on October 31, 2008. In that letter, in which he refers to this application in Board File No. 2150-08-HS, Mr. Howell states he is writing on behalf of Mr. Weller to clarify "a number of issues as per the Board's request in its decision of the 31st October 2008." There is no decision in this matter dated October 31, 2008. The Board, differently constituted, in a decision dated October 30, 2008 in Board File No. 0517-08-OH that was transmitted by letter dated October 31st, directed Mr. Weller and Local 7135 to clarify whether one of them is acting on behalf of the other or whether both Local 7135 and Mr. Weller are to be treated as co-applicants in that application under section 50 of the Act. The Board also wrote at paragraph 8 of that decision:

The next matter on which some clarification would be helpful may or may not be related to the question above. The Board has received a document which purports to be a "Response to Appeal of Inspector's Order" under the Act. It has been completed by Mr. Weller, purportedly on behalf of "a trade union", and the Employer is listed in it under "Other Affected Parties", and apparently served with the document on October 24, 2008. This document does not belong in this file, but it does not refer to any other Board File No., nor does it reference any particular Inspector's Order. Mr. Weller is directed to identify in writing to the Registrar by November 7, 2008, the Board File No. of the application (presumably filed by the Employer) to which his response pertains.

Mr. Howell's letter states the response he mailed to the Board on October 24th relates to the appeal from the Order in Board File No. 2150-08-HS. That response was signed by Mr. Weller. Mr. Weller in that response indicates he is a Joint Health and Safety Committee member and Health and Safety Representative. Mr. Howell's letter advises that Mr. Weller represents Local 7135 in this proceeding.

5. Although the response filed on behalf of Local 7135 in this proceeding was not on the correct form (Rule 22.5 of the Board's Rules of Procedure provides that a response to a suspension request must be made on Form A-68) the Board is prepared under Rule 40.7 to relieve against the strict application of Rule 22.5 and treat the response on Form A-66 filed by Local 7135 as its response to the applicant's request in this application for suspension of the Order.

6. The applicant manufactures railroad freight cars. It uses steel and other raw materials shipped to it by truck. On occasion, heavy or abnormally sized loads arrive on flatbed trailers because they do not fit within the space available on a closed back trailer.

7. The distance from the flatbed trailer to the ground is no more than 57 inches or 144.8 centimetres. The applicant states that its employees are instructed not to access the top of the trailers to attach chain slings or blocking unless absolutely necessary and to use the fall prevention system available on the vehicle carrying the load. The employees use portable trailer access ladders that have railings to get onto a flatbed trailer.

8. The applicant points out that the flatbed trailers all have fall prevention systems. Those fall prevention systems are, according to the applicant, mandated by section 12.10(1)(a) of the *Canada Occupational Health and Safety Regulations* (SOR/86-304) issued under the *Canada Labour Code*, R.S., 1985, c. L-2. Section 12.10(1)(a) provides in part:

1) Subject to subsection (1.1), every employer shall provide a fall-protection system to any person...who works

- a) on a vehicle, at a height of more than 2.4 m above the nearest permanent safe level or above any moving parts of machinery or any other surface or thing that could cause injury to a person on contact;

Subsection 12.10(1.1) establishes an exemption from the requirement to have a fall arrest system on a vehicle "where an employee is required to work on a vehicle on which it is not reasonably practicable to provide a fall-protection system". In that circumstance, the employer, among other things, must, pursuant to section 12.10(1.1)(a) of that regulation:

- i) perform a job safety analysis to eliminate or minimize the need for the employee to climb onto the vehicle or its load, and
- ii) provide every employee who is likely to climb onto the vehicle or its load with training and instruction on the safe method of climbing onto and working on the vehicle or its load;

9. The applicant points out the Inspector relied on section 45(a) of the *Industrial Establishments Regulation*, R. R. O. 1990, Reg. 851 under the Act as the basis for the Order. Section 45 of that regulation, which is in the division headed *Material Handling* provides:

Material, articles or things,

- (a) required to be lifted, carried or moved, shall be lifted, carried or moved in such a way and with such precautions and safeguards, including protective clothing, guards or other precautions as will ensure that the lifting, carrying or moving of the material, articles or things does not endanger the safety of any worker;
- (b) shall be transported, placed or stored so that the material, articles or things,
 - (i) will not tip, collapse or fall, and
 - (ii) can be removed or withdrawn without endangering the safety of any worker; and
- (c) to be removed from a storage area, pile or rack, shall be removed in a manner that will not endanger the safety of any worker.

The applicant contends section 45 of Regulation 851 has no application to fall arrest systems on vehicles specifically, and no application generally to the hazard of a worker falling. The applicant refers to two other areas of the Industrial Establishments Regulation relating to fall hazards: section 13 (guarding) and section 85 (fall arrest).

10. Section 13 deals with guardrails and does not appear to have any application to the matter at hand. Indeed, section 13 specifically exempts loading docks from the requirement to have guardrails at an opening. Section 85 deals specifically with a fall hazard. Section 85 requires a fall arrest system must be used "Where a worker is exposed to the hazard of falling and the surface to which he or she might fall is more than three metres below the position where he or she is situated..." The applicant points out the fall hazard to which a worker may be exposed when working on a flatbed trailer at its premises is, at the most, less than half the distance for which a fall arrest system is mandated by section 85.

11. The applicant asserts the Order was issued after the Joint Health and Safety Committee at the applicant's establishment recommended a fall arrest system for employees unloading steel when working on flatbed trailers. The applicant considered the recommendation but did not accept it, advising the Committee the current system in place is adequate. The Committee disagreed and complained to the Ministry. The Inspector investigated and issued the Order.

12. The applicant contends the Order will not enhance worker safety. It argues that section 13 of Regulation 851 specifically provides that no guardrails are necessary on loading docks. It submits that the flatbed trailer is, for purposes of a fall hazard, analogous to a loading dock. It claims that the only way to comply with the Order is to construct a loading dock from which flatbed trailers can be unloaded. More importantly, it points out the Inspector did not indicate what kind of fall arrest system ought to be used. It says the Order is vague and therefore cannot be complied with.

13. Local 7135 and the Inspector oppose the suspension request. Local 7135 agrees with the Inspector's submissions.

14. The Inspector submits the applicant acknowledges there is a fall hazard as the applicant instructs employees not to access the flatbed trailers unless it is absolutely necessary and to use the fall prevention system available on the vehicle. The Inspector submits the height from which a worker may fall is not material to the fall hazard a worker faces because, according to the Inspector, "there have been worker fatalities from falls as low as two to three feet off the ground."

15. The Inspector argues deference should be given to his findings until an appeal is heard at which time oral evidence can be presented from the people most closely affected by the risk of the fall hazard.

16. The Inspector submits the applicant could comply with the order by "installing a properly designed loading dock". The Inspector did not direct the applicant to do so, but, according to the Inspector, left it to the applicant to determine how to best comply with the Order.

17. The Inspector urges the Board not to address the constitutional issue raised by the applicant in this suspension request when it argues its compliance with the *Canada Occupational Health and Safety Regulations* dealing with fall protection on trailers displaces the requirement under the Act.

18. The Board discussed its approach to determining whether to grant an application to suspend the operation of an inspector's order in *R. J. Dungey and Sons Ltd.*, [1999] OLRB Rep. Jan./Feb. 82 at 87:

...although the inspector's order is under appeal there is, in my opinion, a rebuttable presumption that an inspector's order is authorized by the OHSA and is correct. An inspector has the statutory duty to administer and enforce the OHSA. An inspector's decision and order are part of that statutory administration and enforcement framework and as such should not be suspended prior to the hearing on the merits of the appeal unless an appellant demonstrates compelling grounds for the Board to do so.

The test a party must satisfy in order to obtain suspension of an order issued by an inspector emphasizes that worker safety is the predominant consideration. In *Upper Grand District School Board*, [2000] OLRB Rep. Nov./Dec. 1253 the Board wrote at page 1256:

I accept that in assessing whether to suspend the operation of an inspector's order, the paramount consideration is whether a suspension would place the health and safety of workers in jeopardy. That is so even if the appellant does establish a strong *prima facie* case for success on the appeal and also establishes that it would be prejudiced by the order under appeal. Worker safety has the highest priority in assessing whether to suspend the operation of an inspector's order issued under the Act. Nevertheless, in my view, where worker safety is not likely to be jeopardized by the suspension of an order, it is still incumbent upon the appellant to satisfy the Board that its appeal has considerable merit in order to obtain a suspension of the order under appeal.

19. The test used by the Board for determining whether to suspend an Inspector's order pending an appeal involves three distinct but related factors. In *R. J. Dungey and Sons Ltd.*, *supra*, the Board wrote at page 86, paragraph 13:

Adjudicators previously and the Board more recently adopted an approach that tries to balance the different interests of the parties affected by an order. That balancing of interests requires the Board to consider many factors including principally the following three factors:

- (i) whether the suspension of the order would endanger worker safety,
- (ii) the degree of prejudice to the employer, and
- (iii) whether there is a strong *prima facie* case for a successful appeal of the order.

See also *Loblaw Companies East*, [2003] OLRB Rep. Sept./Oct. 856; *The Crown In Right of Ontario (Ministry of Correctional Services)*, [2002] OLRB Rep. March/April 146; *Upper Grand District School Board, supra*; *Regional Municipality of Hamilton-Wentworth*, [1998] OLRB Rep. July/Aug. 709; *Carmeuse Lime (Beachville) Limited*, [2004] OLRB Rep. March/April 257.

20. The Inspector does not suggest there is no fall prevention system available on the flatbed trailers that workers access from time to time at the applicant's establishment. The applicant contends it instructs workers not to access those trailers unless absolutely necessary and when doing so, instructs them to use the fall prevention systems available for use on those trailers. The Inspector asserts that "neither precaution will prevent workers from facing this danger *in all situations*." [emphasis added] and therefore the Order should not be suspended. In my view the test is not, as the Inspector suggests, ensuring there is never a risk in all situations, but rather whether suspension of an order under appeal would endanger worker safety.

21. It seems to me, based on the submissions made by the parties, there are procedures and equipment in place that deal with the fall hazard faced by workers who access flatbed trailers when unloading them. Suspending the Order which requires, as the Inspector acknowledges, the applicant to either install a loading dock for flatbed trailers, or take other measures as yet undetermined, does not, in my view, endanger worker safety because there are measures in place that do provide some protection from falling from a flatbed trailer. Additional measures contemplated by the Inspector may further enhance worker safety but suspending their implementation pending the disposition of the appeal on its merits does not put worker safety at risk.

22. There is significant prejudice to the applicant if it were required to undertake the installation of a loading dock pending the hearing of the appeal. If the applicant is successful, a new loading dock would have been unnecessary. More importantly, if the applicant undertook some other measures to comply with the Order it is by no means certain the Inspector would find those other measures adequate.

23. Any order issued under the Act by an inspector should be clear as to what the person against whom the order is issued is required to do or refrain from doing to achieve compliance with the order. See *Tembec Industries Inc.*, [2005] OLRB Rep. Nov./Dec. 863 at 868-69; reconsideration dismissed, decision dated December 29, 2005, unreported, Q.L. cite [2005] OHSAD No. 223.

24. The failure to comply with an inspector's order under the Act is a violation of the Act. Section 66(1)(b) of the Act provides:

Every person who contravenes or fails to comply with,

(b) an order or requirement of an inspector...;

is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than twelve months, or to both.

Since the applicant is a corporation, the financial penalty it faces in not complying with an inspector's order can be far greater. Section 66(2) provides:

(2) If a corporation is convicted of an offence under subsection (1), the maximum fine that may be imposed upon the corporation is \$500,000 and not as provided therein.

25. The Inspector argues it is not up to him to advise the applicant how it must comply with the Order. He contends the lack of specificity was intentional as it is up to the employer to devise suitable solutions to safety problems that take into account a variety of factors that are within the knowledge or control of the employer, such as costs, impact on production, worker response, and collective agreement obligations, to identify but a few.

26. While I accept it is not up to the Inspector to provide advice to an employer on compliance it seems to me an inspector's order ought to be clear as to what is required in order to achieve compliance with the order. In this case, the Inspector directed the employer to "provide *some* means of protection to these workers while they are exposed to this hazard." [emphasis added] The hazard to which the Inspector was referring was the hazard of falling from the flatbed trailer. The Inspector did not indicate why the system used by the applicant did not provide adequate protection from that hazard. Had the Inspector indicated why the current fall arrest system the applicant had in place was not adequate, then the applicant might have been in a better position to take steps, short of building a loading dock for flatbed trailers, to provide some means of protection from the hazard of falling. Moreover, the Inspector did not address the adequacy or inadequacy of the fall arrest equipment the applicant contends are available on all flatbed trailers. It seems to me, given the applicant's assertion, which is not disputed, that the fall arrest equipment available for use by workers on flatbed trailers complies with the *Canada Occupational Health and Safety Regulations*, the applicant does provide some means of protection to workers.

27. Finally, I am persuaded the applicant's legal argument with respect to the inapplicability of the material handling regulation to the hazard of falling from flatbed trailers has considerable merit. The Inspector relied on a provision in the Industrial Establishments Regulation that addresses the manner in which workers are to handle, carry, move and store materials and equipment. There is another section of that Regulation relating specifically to fall hazards. The Inspector in his submissions contends section 25(1)(h) of the Act also provided the authority to make the Order. The Inspector also suggests that if the Order is suspended, another order could be issued based on section 25(1)(h).

28. While section 25(1)(h) of the Act requires an employer to take every precaution reasonable in the circumstances for the protection of a worker, it seems to me where a regulation under the Act deals with a specific hazard, such as the hazard of falling addressed by section 85 in the Industrial Establishment Regulation, compliance with that section of the Regulation might well be construed as complying with section 25(1)(h) if the precaution in issue relates to a fall hazard.

29. In any event, whether the Inspector issues another order if the Order under appeal is suspended is not material to the disposition of this application. If another order is issued relying specifically on section 25(1)(h) of the Act to address the fall hazard on flatbed trailers being unloaded at the applicant's premises, the applicant can respond in the way it sees fit.

30. The applicant has persuaded me that suspending the Order will not endanger the safety of workers unloading flatbed trailers. I am also satisfied the applicant has a good case on the merits of the appeal. Finally, in light of the uncertainty of whether doing something other than building a loading dock for flatbed trailers complies with the Order, the potential consequences of being found in violation of the Order and the detrimental consequences the applicant faces should it have to undertake construction of a loading dock before the appeal is heard, I am satisfied the applicant will be prejudiced if the Order is not suspended pending the disposition of the appeal.

31. In the result the Board, pursuant to section 61(7) of the Act, suspends the operation of the Order pending the disposition of the appeal in Board File No. 2151-08-OH.

"Harry Freedman"
for the Board