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Citation: 2006 PSLRB 86

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

CANADIAN FEDERAL PILOTS ASSOCIATION

Complainant

and

TREASURY BOARD

Respondent

Indexed as
Canadian Federal Pilots Association v. Treasury Board

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Georges Nadeau, Vice-Chairperson

For the Complainant: Phil Hunt, counsel
Gregory Holbrook, Canadian Federal Pilots Association

For the Respondent: Jennifer Champagne, counsel

Heard at Ottawa,
June 14 and 15, 2006 .

Complaint before the Board

[1] On April 18, 2006, the Canadian Federal Pilots Association (the bargaining agent) filed a complaint against the Treasury Board of Canada and Transport Canada, The complaint alleges pursuant to section 190 of the *Public Service Labour Relations Act*

(the *PSLRA*) that the employer has failed to comply with the duty to bargain in good faith (section 106) and with the duty to observe the terms and conditions of employment in effect on the day notice to bargain was served (section 107). The employer responded by denying these allegations.

[2] Section 106 reads as follows:

After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,

(a) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and

(b) make every reasonable effort to enter into a collective agreement.

[3] Section 107 reads as follows:

Unless the parties otherwise agree, and subject to section 132, after the notice to bargain collectively is given, each term and condition of employment applicable to the employees in the bargaining unit to which the notice relates that may be included in a collective agreement, and that is in force on the day the notice is given, is continued in force and must be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit until a collective agreement is entered into in respect of that term or condition or

(a) if the process for the resolution of a dispute is arbitration, an arbitral award is rendered; or

(b) if the process for the resolution of a dispute is conciliation, a strike could be declared or authorized without contravening subsection 194(1).

[4] At the beginning of the hearing, counsel for the complainant acknowledged that the alleged contravention of section 106 arose as a result of the violation of section 107 and would not stand on its own.

Summary of the evidence

[5] The first witness to testify on behalf of the bargaining agent was Captain Greg Holbrook. Captain Holbrook is the Chairperson of the Canadian Federal Pilots Association. He was a pilot in the military before completing a certificate in aircraft accident investigation at the University of Southern California. He joined the Transportation Safety Board of Canada in 1991 as a civil aviation inspector (CAI) and moved on to Transport Canada as a CAI in enforcement of Canadian Aviation Regulations. Captain Holbrook has been active as a bargaining agent representative in both these positions and has been the National Chairperson of the Association since

July 1, 2000.

[6] Captain Hobrook testified that he was a member of the union negotiating team in the 1997 to 1999 round, of collective bargaining, in the 2000 to 2003 round and in the current round, which began with the notice to bargain issued early December 22, 2003, and has yet to conclude.

[7] Captain Holbrook testified that in February 2006, members from the Quebec region sent to his attention documents related to hours of work. These documents indicated that the employer had gone ahead and implemented within the workplace the employer's proposal at the bargaining table. The employer had informed employees of daily changes to their normal scheduled hours of work. He indicated that the CAI's collective agreement provided for hours of work during the day, and that they did no shift work. In accordance with article 18 of the collective agreement, they are to be assigned a period of seven hours per day of work between the hours of 07:00 and 18:00. He added that it was not typical to have daily changes to the hours of work. Notice to bargain had been served on December 11, 2003, and it was the first time he became aware of the employer taking such action. He considered this a violation of the statutory freeze to the terms and conditions of employment in force once notice to bargain is served.

[8] Captain Holbrook testified that negotiations were at an impasse since July 2005. The parties had wanted to proceed to conciliation. However, problems with regard to safety and security designation had prevented this from moving ahead. The application to put in place a review panel for the designation had been delayed to attempt to find a solution. With regard to the terms and conditions of employment, negotiations had resolved a number of issues. However, four issues remained outstanding, one of which was the hours of work. This issue was so significant that it was, in fact, receiving more attention from the membership than compensation.

[9] Captain Holbrook testified that there had been a long history of threats and intimidation with regard to hours of work, which the bargaining agent had not reacted to. He indicated a conscious decision had been made not to react to threats but only to actual actions that could be documented. The bargaining agent had believed the issue of daily changes to hours of work had been resolved at the table during the previous round of negotiations, which had resulted in the collective agreement with an expiry date in July 2003. This collective agreement applies to some 350 employees.

[10] Captain Holbrook testified that the issue of flexibility with regard to the hours of work first arose during the course of the 1997-99 round of collective bargaining. The Treasury Board negotiator informed the bargaining agent that the employer fully intended to exercise the flexibility afforded to the employer by the then current language with regard to hours of work. The negotiator, after reading the language that existed at the time, indicated they could do a number of things the union members would find egregious, including scheduling individual employees for different normal working hours on a day–to–day basis. The bargaining agent was fearful that the employer was

attempting to deprive the employees of their entitlement to overtime pay. Captain Holbrook indicated that they believed that the employer intended to schedule employees outside the 07:00 to 18:00 and then call those normal hours and compensate that work at straight time rates. They also feared that the employer would do this on an irregular basis, changing hours of work on a daily basis. The employer was adamant that they had the legal right to manage and that the language of the collective agreement did not restrict their ability to schedule work at straight time rates any time, day or night. Captain Holbrook indicated that there had been an increase in overtime due to the more limited availability of simulators. The equipment was now scheduled for use on a 24–hour basis, and employees could be scheduled during the evening or night.

[11] Captain Holbrook indicated that, at the time, the collective agreement language had been static for many years. The workplace practice for CAIs was that the normal scheduled hours of work were set Monday to Friday, 7.5 hours a day scheduled between 07:00 and 18:00. The bargaining agent was not going to accept or agree to anything that might expand the employer's rights under that language. Captain Holbrook pointed out that Transport Canada's flexible hours of work policy enforced at the time (Exhibit C-4, item 8) provided that, while hours of work may differ from one employee to another, it did not provide for variations in hours of work from day to day for the same employee. He indicated that the bargaining agent felt it was a reasonable policy in line with the practice in the workplace and the language of the collective agreement. The language was renewed in 1999 without change, and there was no change in the workplace practice following the renewal of the collective agreement.

[12] Captain Holbrook testified that the structure of article 18 in the collective agreement expiring in 2001 (Exhibit C-5), and, more particularly, clauses 18.01 and 18.02, existed because, initially, there was a subgroup of positions of executive pilots. These persons had constantly varying shifts and hours of work related to the operations of executive flights. This was not the case for CAIs who worked in an office environment and needed only to go out to conduct inspections of airlines. Clause 18.02 dealt specifically with the hours of work for CAIs. After the pilots were done away with, the subclause pertaining to them was removed, while clause 18.01 remained as it was.

[13] The issue of hours of work surfaced again in 2000, during a consultation meeting between the bargaining agent and Transport Canada. Captain Holbrook testified that Don Johns, a human resource officer with Transport Canada, tabled a document entitled Guidelines for the *Administration of Hours of Work and Overtime Provisions of the Aircraft Operations Group Collective Agreement and Related Matters*. The employer wanted to engage in discussions on the basis of that document. Captain Holbrook, after reviewing the document, concluded that it was an egregious interpretation not allowed by the agreement and contrary to the workplace practice followed for many years. Through the examples provided in the document, the employer was claiming the ability to schedule normal hours of work at any time. The bargaining agent had never seen normal scheduled hours of work treated in this fashion and, consequently, refused to discuss the document and turned down a subsequent offer of mediation on this matter.

Following the bargaining agent's refusal, there was no change in the workplace practices or any attempt to implement these proposed guidelines.

[14] Captain Holbrook indicated that notice to bargain was given in October 2000, as the collective agreement was expiring on January 25, 2001. During the course of negotiations that followed, there were a number of discussions pertaining to hours of work. The employer wanted to expand the window of the normal work day to 20:00. The bargaining agent rejected the expanded work day, and the issue was one of the issues dealt with by the Conciliation Board. Captain Holbrook indicated that the bargaining agent accepted the Conciliation Board report, which, among other things, suggested the renewal as is of the language pertaining to hours of work. However, the employer did not reply. In a letter dated June 28, 2002, Captain Holbrook wrote to the Regional Director, Transport Canada Civil Aviation in Moncton, Wayne Malone (Exhibit C-8). It had come to Captain Holbrook's attention that management in the Atlantic was implementing sliding and constantly changing hours of work. Captain Holbrook testified that Mr. Malone called him back indicating that this was not the case. In the first week of July 2002, rotating and selective strike action was commenced by the bargaining agent. Asked if, during the course of this action in the following months, management changed the practice with regard to hours of work, Captain Holbrook replied that at no time did management implement such a change to the normal working hours.

[15] To resolve the ongoing strike, a mediator was appointed to assist the parties. During the course of these discussions, the issue of hours of work was dealt with and new language was agreed to prior to the outstanding items being referred to an arbitrator (Exhibit C-9). Captain Holbrook testified that this language was agreed to after a commitment was given by Merlin Preuss, Director General of Civil Aviation, on behalf of the management team. This commitment was that management would not institute daily changes to normal hours of work, and that any manager who did so would be dealt with. It was following that commitment that the language appearing in the agreement that eventually was concluded was signed off on (Exhibit C-2).

[16] Captain Holbrook testified that the hours of work issue resurfaced at the first meeting of the Relationship Committee on October 14, 2003. During a discussion about joint briefings to be held on the new collective agreement, Ron Armstrong, Director General of Aircraft Services at Transport Canada, said that, as a manager, he had the right to individually interpret the collective agreement as he saw fit and was not bound by any union view of the issue. He added that he believed that he could institute daily changes to the normally scheduled hours of work. Captain Holbrook objected strenuously to this assertion and indicated that he believed that agreements made during the course of negotiations were very important. Asked if Mr. Armstrong had implemented any of these changes prior to the notice to bargain being issued on December 11, 2003, Captain Holbrook indicated that he had not.

[17] Captain Holbrook testified that he attended a regional union management consultation in Montréal in November 2005. During the course of this meeting, the regional bargaining agent representatives raised the issue of hours of work after being

told by their managers that daily changes to hours of work were allowed. Captain Holbrook indicated that the bargaining agent did not believe daily changes to hours of work were allowed. He cautioned management against taking precipitated action to implement such changes, as the parties were in a statutory freeze period. Management responded by saying they did not feel bound by that, and that persons at headquarters had told them they had the authority to do so.

[18] In March 2006, as a result of emails forwarded to his attention (Exhibit C-11), Captain Holbrook became aware that management had implemented daily changes to the normal scheduled hours of work. The emails dealt with the scheduling of normal hours of work in relation to simulation training on the Cessna Citation simulator in April 2006 in Ottawa, and provided for daily changes to the scheduled hours of work to coincide with the simulator's availability.

[19] The bargaining agent viewed this action by management in the Quebec region as a significant change to their terms and conditions of employment, and reminded members from across the country that they should maintain their normal scheduled hours of work when coming for training on the simulator.

[20] In cross–examination, Captain Holbrook was advised that Mr. Preuss would testify that he said something different than the commitment he was alleged to have made. Captain Holbrook reiterated what he believed he heard at the time, and indicated he had taken notes during the course of the meeting.

[21] In re-examination Captain Holbrook introduced the notes made shortly after the meeting (Exhibit C-12) that occurred on November 1, 2002.

[22] The second witness called by the complainant was Ron Young. Mr. Young was the negotiator retained by the CFPA, and was in attendance at the meeting on November 1, 2002. He testified that he had a clear recollection of the exchange during the meeting, and confirmed what Captain Holbrook had indicated in his testimony with regard to what Mr. Preuss had said.

[23] The first witness called by the respondent was Stephen Buckles. Mr Buckles is, since August 1998, the Director of Flight Operations, and has been employed at Transport Canada since 1985.

[24] Mr. Buckles testified that he was involved in the negotiations in 1999 that resulted in the collective agreement that expired in January 2001, and in the negotiations that led to the current agreement, which had an expiry date in January 2005.

[25] Mr. Buckles testified that prior to 1999 there was no formal policy with respect to scheduling of hours of work, and that Transport Canada managers applied the collective agreement differently throughout the organization. Counsel for the complainant objected to the introduction of this evidence, on the basis that this testimony contradicted the evidence put forward by Captain Holbrook, who maintained that a policy existed and

was applied consistently across the country. Captain Holbrook had not been challenged in cross–examination on his assertion. Counsel for the respondent replied that the rule in *Browne v. Dunn* (1894) 6 R. 67 (H.L.) did not apply in the present circumstances because Captain Holbrook had only referred to the 1982 policy on flexible hours of work and had testified to how the situation had evolved with regard to hours of work. She added that the rule in *Browne v. Dunn* should not be applied so strictly as to render any testimony almost impossible or way too lengthy. I allowed the question to be asked subject to a ruling on its admissibility.

[26] Mr. Buckles testified that prior to negotiations that resulted in the collective agreement that expired in 2001 (Exhibit C-5), there were discussions amongst Transport Canada managers. Different schools of thought existed on the interpretation of article 18, hours of work. The general consensus amongst them was that the existing language of the collective agreement allowed a manager to change or vary the hours of work to suit operational requirements. It was believed, in the extreme, that employees could be scheduled during any period of day and on any day of the week, including Saturday and Sunday. It was also held that overtime did not need to be paid until a total of 37.5 hours had been worked during the week. The general practice was that overtime was paid after 7.5 hours per day. Mr. Buckles indicated that the Treasury Board representative chastised Transport Canada management for not using the latitude given by the agreement and applying it differently. The intent was to inform the bargaining agent during negotiations that, subsequent to the conclusion of a new collective agreement, management would be applying a consistent interpretation to article 18. Mr. Buckles indicated that the message was communicated and the intent made clear. Following negotiations, Mr. Johns prepared an interpretation document intended to aid managers in applying the collective agreement consistently with respect to hours of work. The document is entitled *Guidelines for the Administration of Hours of Work* (Exhibit C-6). These guidelines adopted the view that hours of work could be scheduled outside 07:00 and 18:00 without incurring overtime, and that overtime would be paid only when work exceeded 37.5 hours a week. However, these guidelines were never used and the parties entered into negotiations shortly after.

[27] Mr. Buckles testified that, following the conclusion of the collective agreement in July 2003, he authored, in consultation with his supervisor, human resources and, to a lesser extent, the Civil Aviation Directorate, a draft policy on hours of work (Exhibit E-2). Mr. Buckles reviewed the content of the draft policy and clearly indicated that this document remained a draft and was not promulgated officially. A copy of the document had been given to Captain Holbrook during an interest–based bargaining workshop that took place at the Nav Canada Training Institute in October 2003.

[28] In response to a question on how the collective agreement was applied today with regard to the simulator, Mr. Buckles testified that they do not formally provide 12 working days notice other than through the schedule similar to the one found in Exhibit C-11. Operationally, it is difficult to project far in advance what the operational requirements will be. He indicated there is either mutual agreement to change the hours of work, or the hours are not changed and overtime is paid. He indicated that this was

the common practice for many years and as long as he has been the Director of Flight Services, (since 1998). Asked what impact the notice requirement has on the practice he referred to, Mr. Buckles replied “None”. He also indicated that he was involved in the current round of collective bargaining.

[29] In cross-examination, Mr. Buckles confirmed that, in the round of collective bargaining started in 1998 hours of work were discussed without any proposal being exchanged, and the union was objecting to the employer’s stated position. He also confirmed that no changes resulted from these discussions to clauses 18.01 and 18.02 of the collective agreement. He restated that the interpretation document (Exhibit C-6) prepared by Mr. Johns was never used. He confirmed it was prepared prior to the notice to bargain.

[30] With regard to the draft policy on hours of work marked as Exhibit E-2, Mr. Buckles confirmed it was never promulgated and was prepared prior to the notice to bargain being served. He first indicated he was not consciously aware of the notice–to–bargain date at the time he prepared the document, but, when confronted with the email exchange that occurred in October 2003 (Exhibit C-13), he acknowledged he was.

[31] Questioned as to whether the employer and the bargaining agent agreed to an implementation document relative to hours of work, Mr. Buckles indicated that an implementation document was never concluded. He also confirmed that the plan described in Exhibit C-13 to distribute 12–day notices to daily changes to hours of work prior to November 10 was never carried out. He added that, he was not aware of daily changes to hours of work occurring in his organization and the union being notified.

[32] The next witness was Jules Pilon, the Regional Manager, Commercial and Business Aviation, Quebec Region, who has been employed at Transport Canada since May 1982. Mr. Pilon described the work conducted under his responsibilities and indicated that the majority of employees work 07:30 to 15:30 or 08:00 to 16:00. Most of the work is conducted in the office, although, quite frequently, employees are required to go to the sites of carriers to conduct inspections or verifications. Aviation inspectors hold pilot licences and, in order to maintain those licences, are required to undergo regular training, which includes classroom and simulator training.

[33] Mr. Pilon testified that it was since the end of 2003 and the beginning of 2004 that he started receiving in advance the training schedules for employees under his responsibility. Prior to that, the training schedule would go directly to the employees concerned, and they would notify their managers only at the last moment. Mr. Pilon initiated this change because the new collective agreement provide for overtime to be paid after 18:00. He wanted managers under him to, through better planning, minimize the overtime being paid to employees. Mr. Pilon provided examples of prepared schedules (Exhibits E-3 to E-12) modifying normal hours of work to limit overtime paid while attending simulator training. He indicated that, in preparation for this hearing, he asked the managers under his responsibility to confirm when they had started to implement daily changes to scheduled hours of work in relation to training (Exhibits E–

13 and 14). Mr. Pilon provided the email exchange with regard to the April 2006 training that led to the complaint (Exhibit E-15 and E-16). Mr. Pilon testified that, following the signing of the last agreement in July 2003, there had been a number of discussions with regard to the application of the hours of work article and the payment of overtime. The employer had wanted to proceed in that fashion, and Mr. Pilon found examples that they were able to do so as early as the beginning of 2004.

[34] In cross-examination, Mr. Pilon confirmed that the earliest example of daily changes to the normal hours of work he could find was February 2004. He indicated he was not aware that the employer did not proceed with the plan in October 2003 to introduce hours of work that varied from day to day. He was not aware of the document presented as the draft policy (Exhibit E-2). Mr. Pilon indicated that he had done a cursory search for examples, and that there may be examples of earlier changes. Asked if he had made Captain Holbrook aware of the examples provided of daily changes to hours of work, Mr. Pilon replied that his communications were with the regional bargaining agent representative and that these representatives were dealt with in the same fashion as the other employees. Mr. Pilon referred to Exhibit E-8, where Mr. Audet, a bargaining agent representative, was among the employees being emailed. Mr. Pilon confirmed that changes to hours of work had always been acceptable if accepted by the employee. He indicated that, as a matter of policy, employees would always be asked if they agreed to a change, to look for a mutual agreement and to work in harmony. In the example put forward with regard to Mr. Audet, it was at his request that he had a schedule "*en dents de scie"*, in other words, that varied from day to day. Asked if the examples he submitted were all mutual agreement situations, Mr. Pilon said all were with mutual agreement except the examples involving Ghislain Samson and Pierre Roy which led to the complaint.

[35] The next witness was Merlin Preuss. He has been the Director General of Civil Aviation since March 2002, and joined the public service in 1988 after a career in the Royal Canadian Air Force. Mr. Preuss indicated that on April 4, 2006, he wrote a reply to an email from Captain Holbrook complaining that the Quebec region was implementing daily changes to hours of work (Exhibit C-14). He testified that he recalled the discussion at the bargaining table where the bargaining agent thought for some reason that management would take it upon themselves to change the schedule on a day–to–day basis, 364 days a year on a 12–day cycle. He said the bargaining agent representatives did not want to have changes to the normal hours of work happen on a daily basis. Mr. Preuss found it unlikely that it would be possible to have daily changes to normal hours of work, unless one had advance notice, there would be no advantages to changing things on a day–to–day basis. In the context of good working relationship he indicated to the union good management would not condone this and would consider such changes a waste of time.

[36] In January 2005, Captain Holbrook wrote an email to Mr. Preuss bringing to his attention daily changes to hours of work in relation to training. Mr. Preuss confirmed he wrote to Michael Stephenson asking him to look into the situation (exhibit E-17). In this email Mr. Preuss stated "My statement that this type of programming was unlikely still

stands but the context was that when we knew there would be a specific program like an audit we would change". Asked if he saw anything inconsistent, Mr. Preuss indicated that management had not anticipated the work schedule associated with training. The discussion had centered on combined audits and changes in hours of work in order to get all teams working at the same time to minimize overtime.

[37] Mr. Preuss testified that a document was prepared (Exhibit E-18) following the conclusion of the last collective agreement (Exhibit C-2) to explain the changes brought to the agreement. It was an attempt on the part of the employer and the bargaining agent to work more cooperatively. He was not sure who prepared it, but the intent was that it would be used to do joint briefings. In the end the document was never agreed to and the joint briefings did not happen.

[38] Asked to explain his "Oh oh" response found in the email of October 24, 2003 (Exhibit E-1), to being advised that the draft hours of work policy (Exhibit E-2) had been circulated to employees in one region, Mr. Preuss indicated that the Aviation Services Directorate had promulgated this policy in advance of anything "we" had prepared. Mr. Preuss testified that he suspected his intention was to get the agreement of Captain Holbrook. However, he never got the agreement of Captain Holbrook and, as a result, the policy was not published.

[39] Mr. Preuss indicated that the hours of work had been the subject of discussion for a number of years. He testified that "we" could not foresee changing hours of work day–to–day, that the context was an audit and that training never came up.

[40] In cross-examination Mr. Preuss indicated that he was not involved in the planning with regard to daily changes to hours of work referred to in the first part of Exhibit C-13. With regard to the November 1, 2002, meeting he added that he saw no advantages to changing hours of work on a day–to–day basis and, in the context of good management, he would not condone that style of management. He did not take notes during that meeting.

[41] Mr. Preuss reiterated that training had not been discussed during the meeting when the issue of day–to–day changes to hours of work was discussed at the bargaining table. In response to questioning with regard to the minutes of the Relationship Committee (Exhibit E-20), Mr. Preuss indicated that it was an outstanding issue at the bargaining table in January 2006.

[42] In re-examination, Mr. Preuss indicated his role with regard to the scheduling of hours of work was more as an advisor, since he does not have line authority over the regions. He also indicated that there would be a need to have some justification to change the work schedule on a daily basis.

Summary of the arguments

[43] Counsel for the complainant started by indicating that bargaining is a critical time

in labour relations. The legislation requires good faith on the part of the parties and imposes a freeze on the terms and conditions of employment in order to ensure a level playing field. The freeze applies to each term and condition of employment that may be included in a collective agreement and that is in force on the date the notice is given.

[44] Counsel maintained that the bargaining agent has for decades protected the right not to be scheduled in the manner outlined on page 4 of Exhibit C-11 with daily variations. Captain Holbrook has testified that the right not to have varying hours of work on a day–to–day basis was important to members, and allowing the employer to impose changes on a day–to–day basis would create havoc for employees who face schedules as found in Exhibit C-11.

[45] Counsel underlined, as testified by Captain Holbrook, that management had floated out this issue during the 1997–98 round of collective bargaining and asserted their right to change hours of work. The bargaining agent opposed this assertion. It was contrary to everything that had been seen for decades in workplace practice. It was contrary to the departmental policy on flexible hours of work, it was contrary to the Treasury Board policy, and, it was inconsistent with the collective agreement and references to the normal scheduled hours of work. In the end, the language with regard to hours of work was renewed without change, and the practice of scheduling was not changed.

[46] The issue came up again at a union management consultation meeting, when the employer came up with an interpretation document (Exhibit C-6). The bargaining agent opposed this document, and the employer took no steps to implement the interpretation they were putting forward.

[47] In June 2002, Captain Holbrook opposed what appeared to be the introduction of sliding and constantly changing normal hours of work during a freeze period. He was reassured by the employer that this was not the case.

[48] Counsel indicated that the meeting on November 1, 2002, led to the new language agreed to on December 4, 2002 (Exhibit C-9). Counsel underlined two critical points with regard to this new language.

[49] First, nothing in the new language changes to grant management a unilateral right to schedule hours of work that vary from day to day as proposed in Exhibit C-11. The notion of normal scheduled hours of work is preserved as it existed in article 19 dealing with overtime and, for the first time, these words are embodied in article 18. It should take clear language to modify years of consistent practice.

[50] The second point is that if the union smelled foul play, they had the benefit of Mr. Preuss' assurance to put their mind at rest. While two slightly different versions of what was said were presented in the course of the hearing, at the end of the day counsel argued that they were not that different. Mr. Preuss confirmed that he told the union he saw no advantages to daily changes to hours of work and would not condone such an

approach. Following this conversation, the bargaining agent was comforted and gave its agreement to the 12–day notice of change.

[51] Counsel indicated that the complaint was not filed solely because Mr. Preuss made a promise. The complaint had been filed because of a breach of a term and conditions that had been in effect for more than 15 years was made during the freeze period.

[52] Reviewing the language of article 18, counsel argued that a great deal in the language indicates a high level of regularity, and indicated that management never went to the bargaining table with a clear request to obtain the right to change hours of work day to day. While the employer rattled their sabers a number of times, they never proceeded with any of the proposed changes. Counsel argued that the collective agreement provides management with all the flexibility it needs.

[53] Counsel brought my attention to an email exchange presented in Exhibit C-13 which, in his view provides a lot of answers with regard to the question of the employer's motives. Counsel argued that, if one reads carefully the email exchange, one can conclude that management had a collective agreement objective in proceeding with changes to the hours of work. Counsel further argued that a fair reading of this document indicates a plan to unsettle employees before negotiations. However, this did not proceed, as management decided not to implement the plan.

[54] Counsel argued that there were five reasons in support of the complaint:

- there was a clear breach of the collective agreement;
- the issue was at the bargaining table;
- the intent was to influence ongoing negotiations at a crucial time of bargaining impasse;
- this comes against a backdrop of threats to do so;
- and it happened on a sensitive issue for members and was calculated to send a chill through the bargaining unit.

[55] Counsel brought my attention to a decision rendered by Adjudicator Quigley in a complaint involving the *Professional Institute of Public Service of Canada v. Canada Revenue Agency,* 2006 PSLRB 29.

[56] Counsel for the respondent argued that the only question before me was one to determine if there was sufficient evidence to conclude that a violation of the freeze occurred. She pointed out that the intent of the freeze is to enforce the status quo of the terms and conditions that existed just prior to the notice to bargain being served.

[57] Counsel argued that the terms and conditions in force at the time were those set out in the collective agreement. This collective agreement gave the right to the employer to change hours of work between 07:00 and 18:00 on 12 days' notice. This right as it is entrenched in clause 18.01 of the collective agreement, was in effect when the notice to

bargain was served. This right remained in force.

[58] Counsel further argued that no debate can be made that the employer may change the hours of work between the hours of 07:00 and 18:00. She claimed that ample evidence was presented showing when this right was used, which dates back to the signing of the collective agreement. Even before the signing, counsel claimed that Mr. Preuss had clearly given indications during negotiation of his intention to apply the agreement in this way.

[59] Counsel indicated that Mr. Pilon recognized there was an adjustment period following the signing of the collective agreement, and that a lot of discussion took place during that period. However, counsel argued that that does not equate to bad faith or a violation of the freeze. There is no evidence to demonstrate that the employer applied the collective agreement differently after notice to bargain was served. The employer kept on doing what it had started to do, and it is evident through the testimony of Mr. Buckles and Mr. Pilon that there was no intent to violate the freeze provisions.

[60] Counsel further argued that the approach taken by Mr. Pilon in applying the collective agreement was reasonable and in no way an attempt to influence collective bargaining. The daily changes to the schedule occurred in the case of simulator training in an effort to control expenditures. The employer has the right to direct and manage the workplace in accordance with article 9 of the collective agreement.

[61] Counsel argued that it was beyond her that the union could conclude that there had been a violation of the freeze provisions. As for the email exchange submitted as Exhibit C-13, counsel indicated that no one could interpret it, as the authors were not called to testify and no one could attest to its content. The document predates notice to bargain, and the document signed by both parties is attached to this email exchange.

[62] Referring to Exhibit C-4, the flexible hours of work policy, counsel argued that the collective agreement supersedes any employer policy, particularly when the policy predates the signing of the collective agreement.

[63] As for the notes taken by Captain Holbrook at the November 1 meeting, counsel stated that these notes only refer to the fact that Mr. Preuss was willing to prevent abuses. They in no way lead someone to conclude that the employer cannot vary hours of work in cases of audits or training. This is a negotiated right of the employer. Furthermore, the parties met in 2005 and will meet again in two weeks to attempt to achieve a collective agreement.

[64] Counsel relied on the following decisions in support of her arguments: *Treasury Board v. Canadian Air Traffic Control Association,*[1982] 2 F.C. 80; *Canadian Association of Professional Radio Operators v. Treasury Board* (1990), PSSRB File No. 148–2–173 (QL); *Public Service Alliance of Canada v. National Capital Commission,* [1996] F.C.J. No. 57 (QL); *Public Service Alliance of Canada v. National Capital Commission,* [1996] S.C.C.A.. No. 99 (QL); *Public Service Alliance of Canada v.*

National Capital Commission (1995), PSSRB File Nos. 148–29–218 and 161–29–761(QL); *Public Service Alliance of Canada v. Treasury Board* [1983] 49 N.R. 349; *Professional Institute of the Public Service of Canada v. Treasury Board* (1991), PSSRB File No. 148–2–189 (QL); *UCCO–SACC–CSN v. Treasury Board,* 2004 PSSRB 38; *Canadian Air Traffic Association v. Treasury Board* (1989), PSSRB File No. 148–2–149 (QL); and *UCCO–SACC–CSN v. Treasury Board,* 2004 PSSRB 38.

[65] In conclusion, counsel argued that there was no evidence before this Board to conclude that there had been a violation of the freeze provisions. The right to schedule employees' hours of work is conferred on the employer in the collective agreement. The employer started implementing these rights following the signing of the collective agreement on July 30, 2003. There is no evidence that the employer acted in bad faith.

[66] In reply, counsel for the complainant argued that there was ample evidence of the past practice. He added that there were attempts to get the union's support for the employer's approach, that there were years of threats and years of inaction on this matter, that in Exhibit C–13 the employer admitted the bargaining agent would have a legitimate case if they did not proceed with implementation prior to the notice to bargain, that there was no consensus on the interpretation of article 18, and that there were different views about implementation. Counsel further added that, while there may be some evidence that the employer started to implement changes in February 2004 (Exhibit E-3), the evidence is that the bargaining agent became aware in April 2006 when two members refused to provide their agreement to the proposed schedule for their April training.

[67] Counsel expressed discomfort at the fact the counsel for the respondent had raised the fact that the parties had agreed to proceed to mediation meetings in two weeks. He indicated that he was of the opinion that this had nothing to do with the complaint. He requested the restoration of a level playing field.

Reasons

[68] The difficult relationship that exists between the parties is somewhat put in evidence by the direction given to the parties by Arbitrator Adams in the decision he rendered in March 2003 (Exhibit C-10) to establish an ongoing committee of senior representatives, called the Relationship Committee. It is also evident that, despite some efforts to put this committee in place, little was accomplished in terms of resolving or avoiding some of the ongoing issues and, more particularly, issues surrounding the application of the collective agreement. Some factors contribute to making this relationship more difficult, and this case is an expression of those difficulties.

[69] In light of the admission by the complainant that the violation of article 106 arises out of the violation of article 107 and would not stand on its own, this decision will firstly deal with the allegation that the employer contravened section 107, often referred to as the freeze provisions applicable to terms and conditions of employment once a notice to

bargain is served.

[70] Justice LeDain, in *Treasury Board v. Canadian Air Traffic Control Association,*[1982] 2 F.C. 80, wrote with regard to the freeze provisions that:

[…]

The purpose of section 51 of the Public Service Staff Relations Act is to maintain the status quo in respect of terms and conditions of employment while the parties are attempting to negotiate an agreement. It is a particular version of a provision generally found in labour relations legislation is designed to promote orderly and fair collective bargaining. There must be some firm and stable frame of reference from which bargaining can proceed. The provision should not be given a narrowly technical construction that would defeat its purpose.

Section 51 is directed to "any term or condition of employment applicable to the employees in the bargaining unit" at a given point and time. The term or condition must be one that may be embodied in a collective agreement, not necessarily one that is embodied in a collective agreement. And it must be "in force" at the time notice to bargain collectively was given.

[…]

[71] The provisions of article 107 of the current *Public Service Labour Relations Act* are, for all intents and purposes, identical to the provisions found in section 51 of the *Public Service Staff Relations Act*.

[72] The jurisprudence referred to by the parties has not altered the purpose of the freeze provisions. When complaints have been dismissed, they were dismissed on the basis that the complainant either failed to establish that a term and condition of employment was in force at the time notice to bargain was served, or failed to establish that an actual breach of the terms occurred because the employer's action was specifically permitted under the particular term continued in force. In the *PIPSC v. CRA* case, the telework arrangements that were in force at the time the notice to bargain was given very specifically provided for the possibility for the employer to terminate these arrangements with reasonable notice.

[73] The issue in the present case with regard to the flexibility afforded to the employer to schedule hours of work was not something new to the parties. The evidence revealed that this issue had found it way into negotiations as early the 1998–99 round of collective bargaining. During the course of those negotiations, the employer had asserted its right to schedule hours of work as it saw fit, while the union opposed this interpretation. Following that round, which concluded in December 1999, guidelines (Exhibit C-6) were prepared in August 2000 for the purpose, as stated in the document, of ensuring consistency and optimizing the flexibility inherent in the agreement. These guidelines were presented to the bargaining agent at consultation in the summer of

2000. The bargaining agent reacted negatively, and the employer did not proceed to implement them.

[74] The issue arose again during the following round of negotiations. In the summer of 2002, Captain Holbrook, on behalf of the bargaining agent, wrote to Transport Canada's Regional Director for the Atlantic enquiring about the introduction of hours of work on a sliding and constantly changing basis. The Director reassured him that this was not the case. Hours of work were, however, the subject of discussions at the bargaining table and during mediation sessions. The employer had submitted proposals, and an agreement was finally reached on new wording for article 18 on December 4, 2002. The circumstances that led to that agreement are relevant to the issue before me.

[75] In reviewing the testimony provided by Captain Holbrook and Mr. Preuss, I have come to the conclusion that the bargaining agent is well founded in claiming that an understanding had been achieved at the bargaining table on November 1, 2002, that the employer did not intend to implement day–to–day changes to the normal scheduled hours of work. Although the circumstances surrounding the scheduling of employees for simulator training was not discussed specifically, the parties did canvass a number of circumstances. The proposed wording that allowed the employer to change an employee's normal scheduled hours of work with 12 days' notice would allow teams working on audits to be present at the same time. Mr. Preuss told the bargaining agent that he could not foresee reasons to implement daily changes to hours of work. Mr. Preuss went further, by indicating that it would be bad management to implement daily changes and that he would not condone such action. It is unfortunate that Mr. Preuss did not consider that daily changes could occur as a result of the simulator training schedule before making his statements at the bargaining table. The bargaining agent accepted the proposed language with the understanding that it would not lead to daily changes to hours of work. The ambiguity had been resolved.

[76] Despite the discussions that had taken place during negotiations, following the conclusion of the collective agreement (Exhibit C-2) the employer maintained that it had the flexibility to incorporate daily changes to the normal scheduled hours of work. This resulted in the development of a policy document (Exhibit E-2) that never went beyond the stage of a draft, as the union objected to its content. Notice to bargain was served on December 11, 2003, without a policy being issued or an agreement reached that would have modified the understanding reached during negotiations.

[77] The evidence also leads me to conclude that the practice in the field did not change until sometime at the end of 2003 / early 2004, when the employer in the Quebec region obtained in advance the schedules of simulator training that would allow it to schedule hours of work 20 days in advance. As confirmed in the testimony of Mr. Pilon, until April 2006 the changes were, in any event, mutually agreed to by the employees concerned. In April 2006, the employer imposed daily changes to the normal scheduled hours of work of employees Mr. Roy and Mr. Samson (exhibits E-15 and E-16). That is when the complaint was filed by the bargaining agent.

[78] I have come to the conclusion that the employer breached the freeze provisions, when it purported to impose daily changes to the normal scheduled hours of work of employees Pierre Roy and Mr. Samson. The term and condition of employment in force at the time notice to bargain was served on December 11, 2003, was that the employer would not impose daily changes to normal scheduled hours of work. Not only had a representative of the employer given assurances at the bargaining table that they would not proceed in that fashion, the employer did not pursue the implementation of a policy (Exhibit E-2) that specifically purported to implement that change when the bargaining agent objected.

[79] Even if article 18 of the collective agreement could be read to allow the imposition of daily changes to normal schedules hours of work by the employer with 12–days notice, the fact remains that the employer representative clearly lead the bargaining agent to believe that the employer would not proceed in that fashion. The bargaining agent relied on that promise when they agreed to the changes to article 18. These facts and the fact that the employer did not pursue a policy implementing that interpretation leads me to conclude that we are faced with a term and condition in force that at minimum could be included in a collective agreement. This situation is different then the one found in *UCCO-SACC-CSN v. Treasury Board* where the estoppel argument was based on a past practice and the adjudicator found that no detrimental reliance occurred. In the current a promise was made and relied upon.

[80] With regard to the allegation that the employer failed in its duty to bargain in good faith, I have come to the conclusion that, although I have concluded a breach of section 107 has occurred, this does not establish in itself that the employer has failed to bargain in good faith. No evidence was tendered that could lead me to conclude that this breach had any effect on negotiations. Furthermore, other than the breach of 107, no evidence was tendered to convince me that the employer's action undermined the bargaining agent's ability to negotiate or establish that the employer negotiated in bad faith by either refusing to conclude a collective agreement or taking such a position that an agreement would be impossible. The parties were already at an impasse with regard to hours of work and the delays encountered in negotiations after July 2005 are the results of difficulties in arriving at an agreement on the designation of positions for safety and security in the event of a strike, a necessary step prior to obtaining the establishment of a conciliation board. The evidence does not support an allegation that a breach of section 106 has occurred.

[81] For all of the above reasons, the Board makes the following order:

Order

[82] The complaint is upheld to the extent that follows:

[83] I declare that the employer, through persons acting on its behalf, failed to abide by the provisions of section 107 of the *PSLRA* by not observing a term and condition of

employment that was in force at the time notice to bargain collectively was given.

[84] I order that the employer and persons acting on its behalf cease to impose daily changes to the normal hours of work of employees during the period contemplated by section 107.

[85] I dismiss the complaint alleging a contravention of section 106 of the *PSLRA*.

July 12, 2006.

Georges Nadeau,
Vice-Chairperson