Public Service Labour Relations Board

Commission des relations de travail dans la fonction publique

P.S.L.R.B. File Number

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APPLICATION FOR REVIEW
PURSUANT TO SUBSECTION 43(1) OF THE ACT

Public Service Labour Relations Act

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1. The Canadian Federal Pilots Association (the "CFPA") hereby applies, pursuant to subsection 43(1) of the *Public Service Labour Relations Act* (the "*PSLRA*" or the "*Act*"), for a review of the decision dated June 20, 2008 rendered by Barry Done, sitting as a Member of the Public Service Labour Relations Board (the "Board") and cited as 2008 PSLRB 42.

2. Applicant information:

CANADIAN FEDERAL PILOTS ASSOCIATION
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Attention: Daniel Slunder
National Chair

3. Name of authorized representative:

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Attention: Phillip G. Hunt
Solicitors for the Applicant CFPA

4. Employer information:

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Attention: Merlin Preuss
Director General

AND

Treasury Board Secretariat
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Attention: Hélène Laurendeau
Assistant Secretary

Background

5. The Canadian Federal Pilots Association ("CFPA") is the certified bargaining agent for all employees of Treasury Board / Transport Canada (the "Employer") in the Aircraft Operations Group as defined in the Canada Gazette on March 27, 1999.

6. On May 25, 2006, the CFPA filed three separate applications (Board File Nos.: 566-02-004, 566-02-005 and 566-02-006), pursuant to section 58 of the Public

Service Labour Relations Act ("PSLRA"). Attached as Exhibits "A", "B" and "C" are copies of the CFPA's Applications.

7. Section 58 states:

> On application by the employer or the employee organization affected, the Board must determine every question that arises as to whether any employee or class of employees is included in a bargaining unit determined by the Board to constitute a unit appropriate for collective bargaining, or is included in any other unit.

8. The CFPA filed its applications on the basis that employees occupying the positions of Superintendent Enforcement Investigations, Superintendent Aerodrome Safety and Manager, Civil Aviation Contingency Operations were more properly included in the Aircraft Operations ("AO") occupational group, as opposed to the Program and Administrative Services ("PAS") or Technical Services ("TC") occupational groups where they had been placed by the Employer.

9. The three positions in question had historically been classified as Civil Aciation Inspectors (CAIs) and included in the AO Group. However, "shadow positions" were subsequently created and classified by the Employer after having edited the applicable Work Descriptions to delete those job requirements referencing actual piloting duties. It was submitted to the Board by the CFPA that the actual duties performed by the affected employees have remained primarily AO duties, as expressly listed in the AO Group Definition, despite the nominal changes in duties imposed by the Employer.

10. In its original applications, the CFPA made the case that a determination under section 58 that the three positions were to be included in the AO Group would not substantially alter the parties' collective bargaining responsibilities, since the

CFPA currently represents other employees engaged at Transport Canada in the AO Group.

11. In addition, the CFPA submitted that a determination under section 58 that the three positions were appropriately included in the AO Group represented by CFPA would not result in or necessitate the creation of a fragmented unit of specialized employees, but would simply cause a return to the status quo that had existed prior to the creation of the “shadow positions”.

12. The Applicant submitted that the positions which were the subject of the three applications share a community of interest with the AO Group due to the substantially similar nature of the work, the conditions of employment and the applicable knowledge and skills.

13. In reasons released June 20, 2008, the Board allowed the applications and determined that the employees in the positions in question are more properly included in the AO occupational group. Attached as Exhibit “D” is a copy of the Board’s decision.

14. The Board accepted that its duty, based on section 58 of the PSLRA, was to determine every question that arises before it as to whether a class of employees is properly included in a bargaining unit.

15. The Board also correctly cited the test to be applied when exercising its authority under section 58. The learned Member Barry Done acknowledged the Employer’s right to assign duties, classify positions and organize the public service, and recognized the Board’s role as making its determination on the basis of a comparison of the duties actually performed by the incumbents and the duties prescribed in the group definition. The Board focused on the duties performed by employees in the positions in question and determined that those duties fit best within the AO bargaining unit.

16. Both the Employer and the Public Service Alliance of Canada ("PSAC"), the bargaining agent representing employees included in the PAS and TC occupational groups, filed applications for judicial review to the Federal Court of Appeal. Both argued that the Board erred in law and exceeded its jurisdiction when it allocated employees to a bargaining unit comprising an occupational group from which, the Applicants on the review applications argued, he or she was specifically excluded. The Federal Court of Appeal dismissed both applications for judicial review on July 2, 2009.

17. Applications for leave to appeal to the Supreme Court of Canada were dismissed on January 14, 2010.

18. Notwithstanding the dismissal of the review applications and the subsequent leave to appeal applications, there remains a fundamental difference between the parties regarding the Board's decision.

19. The CFPA maintains that, as submitted in its original applications before the PSLRB, a decision assigning the positions to the AO occupational group should simply and necessarily cause a return to the status quo as existed prior to the and creation and classification of shadow positions.

20. The Employer, on the other hand, is of the view that the CFPA effectively seeks to have the positions reclassified, and maintains that its responsibility in this matter is limited to ensuring that union dues are now redirected to the CFPA, and to informing employees that they are now represented by a different bargaining agent. Attached as Exhibit "E" is a copy of the Treasury Board's February 16, 2010 analysis of the Board's decision.

Grounds on Which the Applicant Intends to Rely

21. The Board has an independent power to review and amend its own decisions, as set out in subsection 43(1) of the *Act*:

> 43. (1) Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.

22. The provision, which came into force on April 1, 2005, is identical to section 27 of the *Public Service Staff Relations Act*. Both the former Public Service Staff Relations Board and the current Board have, through their jurisprudence, interpreted those provisions and developed intervention criteria. *Danyluk et al. v. United Food and Commercial Workers Union, Local 832,* 2005 PSLRB 179, clearly sets out the criteria developed by the Board:

> ...The former Board has long been of the view, based on the wording of s. 27 of the *PSSRA*, that the purpose of s. 27 was not to allow an unsuccessful party to re-argue the merits of its case. Rather, the purpose was to enable the Board to reconsider a decision either in light of changed circumstances or to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing or where there was some other compelling reason for review. Furthermore, the Board's jurisprudence has held that any new evidence or arguments raised by a party in a request for review must have a material and determining effect. I am in agreement with the position adopted by the former Board regarding the interpretation to be given to s. 27 of the *PSSRA* and I see no reason why the same interpretation should not be applied to the present *Act*...

23. The criteria were reiterated as follows in *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39:

> A review of the jurisprudence shows the following guidelines or criteria for reconsidering a decision of the PSLRB (see *Quigley, Danyluk, Czmola and Public Service Alliance of Canada*). The reconsideration must:
>
> - not be a relitigation of the merits of the case;
> - be based on a material change in circumstances;
> - consider only new evidence or arguments that could not reasonably have been presented at the original hearing;
> - ensure that the new evidence or argument have a material and determining effect on the outcome of the complaint;
> - ensure that there is a compelling reason for reconsideration; and
> - be used "… judiciously, infrequently and carefully …" (*Czmola*).

24. At no time during the initial proceedings was the Board given any indication by the parties that there would be such a great divergence of approach regarding the implementation of a successful application. As is clear from the original application, the Applicant CFPA was of the view that a determination under section 58 that the three positions were appropriately included in the AO Group would simply cause a return to the status quo, when the incumbents in the positions were pilots or, in the language of the AO Group Definition, persons having "recent experience in piloting an aircraft".

25. For its part, the Employer has steadfastly refused to implement a return to the status quo as it existed prior to the creation of the shadow positions and the classification action carried out in respect of those positions. After having exhausted all avenues of appeal, the Employer now maintains that its responsibility is effectively limited to redirecting union dues

26. Had the CFPA been made aware of the fact that its submissions with respect to the implementation of a successful decision would be wholly disregarded by the Employer, it would have made arguments with respect to the proper implementation of its decision to the learned Member. Given the CFPA's stated positionb that a determination that the affected positions were better suited to the AO occupational group would simply result in a return to the status quo, a position that was not disputed by the responding parties, any arguments in respect of this issue could not reasonably have been presented at the original hearing.

Order Requested

27. The CFPA applies pursuant to subsection 43(1) of the *PSLRA* for a review of the Board's decision in respect of PSLRB Files 547-02-4 to 547-02-6, dated June 20, 2008 and cited as 2008 PSLRB 42 (hereinafter the "Original Decision").

28. The Applicant requests that the Board conduct a re-hearing into this matter and make the following determination:

(a) An Order amending the Original Decision to include directions on the issue of implementation; and

(b) An Order for such further and other relief as the Board deems appropriate in the circumstances.

I, the undersigned, duly authorized representative of the Applicant, hereby file this Application pursuant to subsection 43(1) of the Act.

_____ Date: _____

Phillip G. Hunt
SHIELDS & HUNT
Solicitors for the Applicant CFPA