Public Service Labour Relations Board

Commission des relations de travail dans la fonction publique

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

FOR OFFICE USE ONLY

APPLICATION FOR FILING OF A BOARD ORDER PURSUANT TO SUBSECTION 52(1) OF THE ACT

Public Service Labour Relations Act

---

1. The Canadian Federal Pilots Association (the "CFPA") hereby applies, pursuant to subsection 52(1) of the *Public Service Labour Relations Act* (the "*PSLRA*" or the "*Act*"), for the filing of a Board order in the Federal Court. The CFPA requests that the Public Service Labour Relations Board (the "Board") file a certified copy in the Federal Court of its decision in *Canadian Federal Pilots Association v. Treasury Board*, 2008 PSLRB 42, rendered on June 20, 2008.

2. Applicant information:

CANADIAN FEDERAL PILOTS ASSOCIATION
130 Slater Street, Suite 330
Ottawa, Ontario
K1P 6E2

Telephone: (613) 230-5476
Facsimile: (613) 230-2668

Attention: Daniel Slunder
National Chair

3. Name of authorized representative:

SHIELDS & HUNT

Barristers & Solicitors
68 Chamberlain Avenue
Ottawa, Ontario
K1S 1V9

Telephone: (613) 230-3232
Facsimile: (613) 230-1664
E-mail: phunt@shields-hunt.com

Attention: Phillip G. Hunt
Solicitors for the Applicant CFPA

4. Employer information:

Transport Canada
Civil Aviation
330 Sparks Street
Ottawa, Ontario
K1A 0N5

Telephone: (613) 990-1322
Facsimile: (613) 957-4208

Attention: Martin Eley
Director General

AND

Treasury Board Secretariat
400 Cooper Street
Ottawa, Ontario
K1A 0R5

Telephone: (613) 952-3000
Facsimile: (613) 952-3009

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.

21. On a practical basis, this divergence of opinion as to the proper implementation of the Board's decision has created significant labour relations difficulties, including:

(a)

Grounds on Which the Applicant Intends to Rely

22. The present Application is made pursuant to section 52 of the *Public Service Labour Relations Act* (the "*Act*"), which reads as follows:

> 52. (1) The Board must, on the request in writing of any person or organization affected by any order of the Board, file a certified copy of the order, exclusive of reasons for the order, in the Federal Court, unless, in its opinion,
>
> (a) there is no indication of failure or likelihood of failure to comply with the order; or
>
> (b) there is other good reason why the filing of the order in the Federal Court would serve no useful purpose.
>
> (2) An order of the Board becomes an order of the Federal Court when a certified copy of the order is filed in that court, and it may subsequently be enforced as such.

23. The mechanism set out in section 52 of the *Act* is a new feature that was introduced on April 1, 2005 when the *Act* came into force. The *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35, which preceded the *Act*, did not

provide any mechanism to ensure the enforcement of decisions rendered by the Public Service Staff Relations Board.

24. Consequently, the Board has looked to similar provisions found in labour legislation of other jurisdictions when interpreting section 52. In *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 159, the Board considered the jurisprudence under an equivalent provision of the *Canada Labour Code* (the "Code"), namely subsection 23(1).

25. The Board acknowledged that the Canada Industrial Relations Board ("CIRB") has developed a long-standing jurisprudence on the interpretation to be given to the criteria set out in subsection 23(1) of the *Code*. The Board cited with approval the following passage from *Seafarers International Union of Canada v. Seaspan International Ltd., North Vancouver, B.C.* (1979), 33 di 544, considered to be the leading decision with respect to the authority vested in the CIRB in applying subsection 23(1) of the *Code*:

> The major intent of these provisions is to allow and equip the Board to use its officers, administrative processes and authority to adopt an accommodative approach to the resolution of labour relations problems and to give greater meaning and authority to Board decisions. All of this is intended to be in furtherance of the objectives of Part V expressed by the Preamble as they apply to the multitude of circumstances and competing interests that arise in the dynamic circumstances of labour relations.
>
> Let us now turn now specifically to the new provisions of section 123 [now 23]. Filing of Board orders on the written request of a person or organization affected by a Board order or decision is mandatory unless in the opinion of the Board one of two circumstances prevail. The first is that there is no indication of failure or likelihood of failure to comply with the order or decision. The reason for this circumstance is at least threefold. It places the question of non-compliance in the forum that made the decision, namely the Board. By doing this, Parliament accepts that the Board is the best authority to interpret the meaning of its decision and order. It also allows the Board through its officers, or directly, to seek resolution of the difference in an accommodative fashion before resort is had to judicial proceedings. Perhaps a more

subtle, but equally realistic reason, is to allow the Board to review its order under sections 119 and 121 to amend any order or decision to account for partial compliance or events related to the intent of its remedial order that occur subsequent to its issuance. This recognizes the Board's practice of communicating the thrust of its decision to parties and encouraging their participation in its implementation before the step of issuing a formal order is made. This practice is intended to encourage the constructive settlement of disputes as mandated in the Preamble. The criteria of likelihood of failure directs the parties to the active role to be played by the Board and points to the intent of the provision as not being merely a substitute for the procedures dictated by the Court in its decisions.

The second circumstance when the Board may not file an order is very broad: there are other good reasons why the filing of an order or decision in the Federal Court of Canada would serve no useful purpose. Here we come to the centre of the Board's accommodative role and the *Code's* non-punitive approach to the resolution of labour relations problems. The discretion in the Board to ascertain the criteria implicit in this circumstance, like those on the exercise of discretion under section 194 to give consent to prosecute, must be exercised to further the objectives and purposes of the *Code* in any given circumstances ... In short, the focus is not strict adherence to principles requiring obedience in an ordered society to orders of the courts. Rather it is recognized that the Board must act as a flexible instrument in the often shifting labour relations climate where further proceedings on its decisions can be futile or contrary to the evolved circumstances. The Board is to be sensitive and responsive to the parties' social, economic and political positions in their labour relations environment and have as its primary goal constructive accommodation. The last or another ounce of retribution in strict compliance with a Board order may not in some exceptional circumstances further future good relations, particularly where other Board recourse or intervention can achieve the same results in another manner.

…

26. The Board in *Bremsak* concurred with the approach adopted by the CIRB and held that to determine whether the decision in question should be filed in the Federal Court for enforcement purposes, the Board must answer the following two questions:

(1) Has the respondent complied with the Board's decision?

(2) If not, is there a good reason why filing the decision in question in the Federal Court would serve no useful purpose?

27. In *Veillette v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 174 the Board, also citing *Seafarers,* held that, with respect to the issue of compliance, there were at least three circumstances in which the Board might exercise its authority to intervene:

(1) to determine the willingness of a party to comply with the order, since the Board was the best authority to interpret the meaning of its order;

(2) to seek the resolution of the difference in an accommodative fashion before resorting to judicial proceedings; and

(3) to allow for the possibility of amending any order or decision to account for partial compliance or any subsequent event.

28. The Applicant CFPA maintains that a determination under section 58 that the three positions were appropriately included in the AO Group ought 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".

29. 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.

30. The Employer has not complied with the Board's order and has no intention of complying with it. Furthermore, there is no good reason to conclude that filing decision 2008 PSLRB 42 would serve no useful purpose.

31. The CFPA submits that, given the parties' divergent views, the Board is in the best position to establish the framework for maintaining compliance with its governing legislation, the proper application of its order and to encourage the resolution of differences between the parties with respect to the compliance related concerns.

Order Requested

32. The CFPA applies, pursuant to subsection 52(1) of the *PSLRA,* to have the Board file a certified copy in the Federal Court of its decision in *Canadian Federal Pilots Association v. Treasury Board*, 2008 PSLRB 42, rendered on June 20, 2008.

33. The Applicant requests that the Board order the following:

(a) A declaration that the respondent Treasury Board has not complied with the Board's decision in *Canadian Federal Pilots Association*, 2008 PSLRB 42;

(b) An Order directing the Board to file its order in *Canadian Federal Pilots Association*, 2008 PSLRB 42, in the Federal Court; and

(c) 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 52(1) of the *Act*.

_____ Date: _____

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