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File: 125-03-104

Citation: 2004 PSSRB 43



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Applicant

and

CANADIAN NUCLEAR SAFETY COMMISSION

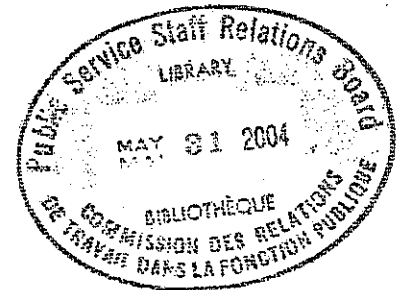
Employer

RE: Application for Review under Section 27
of the Public Service Staff Relations Act

Before: Yvon Tarte, Chairperson

For the Applicant: Dougald E. Brown, Counsel

For the Employer: Stephen Bird, Counsel



(Decision rendered without an oral hearing.)

DECISION

[1] In its decision dated March 18, 2004 (2004 PSSRB 19), in this matter, the Public Service Staff Relations Board (the Board) concluded that a bargaining unit composed of all employees at the RL-5 to 7 levels, regardless of pay band, who are not excluded from collective bargaining by law or determination of the Board, would be appropriate. On the basis of certain documentation on file at the time of the decision, the Board ordered that a representation vote be conducted.

[2] In response to the Board's direction to produce a list of all employees in the proposed bargaining unit, the Canadian Nuclear Safety Commission (CNSC) forwarded on April 2, 2004, a list containing the name of 332 employees who the employer believed met the bargaining unit definition in the March 18, 2004 decision.

[3] On April 7, 2004, the Professional Institute of the Public Service of Canada (PIPSC) requested that the Board reconsider, in part, its March 18, 2004 decision for the following reasons:

I am writing to request the Board reconsider, pursuant to s. 27 of the Act that part of the above-noted Decision dated March 18, 2004, requiring a representation vote. The bargaining unit found by the Board to be appropriate (all employees at the RL-5 to RL-7 levels regardless of pay band) differs from the bargaining unit initially proposed by the Applicant (as set out at paragraph 1 of the Decision) or the bargaining unit description proposed by the Applicant at the hearing (all employees in the TS and SE pay bands).

The Board established a terminal date of August 8, 2003. The Applicant filed membership evidence prior to the terminal date in the form of signed membership applications from employees in the bargaining unit proposed by it. The Applicant also had membership applications signed prior to the terminal date from six employees at the APP 5 to 7 levels who were not within the unit proposed by the Applicant but are within the unit determined by the Board.

Section 33 of the Board's Rules provides as follows:

"An application or intervener's application filed under this Part shall be accompanied by all or part of the documentary evidenced on which the applicant or intervener intends to rely to satisfy the Board that a majority of employees in the proposed bargaining unit wishes the applicant or intervener to represent them as their bargaining agent." (emphasis added)

Section 33 provides that the membership evidence to be filed by the Applicant is the membership evidence in respect of "the proposed bargaining unit". Section 34 of the Rules refers to a requirement to file "documentary evidence" in general prior to the terminal date. This reference to "documentary evidence" should be read in light of the specific requirement in s. 33 of the Rules to evidence relating to "the proposed bargaining unit". Simply put, ss. 33 and 34 of the Rules do not require an Applicant to file prior to the terminal date membership evidence that does not relate to the proposed bargaining unit proposed in the application. The Rules also do not preclude the Board from accepting the six additional cards in respect of a unit determined by the Board which differs from the proposed bargaining unit.

Likewise, s. 36(1)(a) of the Act refers to the Board's examination of "...[membership] evidence as is submitted to it respecting membership of the employees in the proposed bargaining unit ...". Section 36(1)(a) does not preclude the Board from now receiving additional membership evidence in respect of those employees who were not included in the Applicant's proposed bargaining unit.

Allowing this evidence to be filed at this time is procedurally fair and does not undermine the policy considerations underlying the establishment of a terminal date since all the cards were signed prior to the terminal date. The overriding labour relations objective in these circumstances is to give effect to the wishes of the majority of employees in the bargaining unit as of the terminal date fixed by the Board.

In this case, the additional membership evidence establishes that the Applicant has the necessary support of 50% plus one of the employees in the bargaining unit as ultimately determined by the Board as of the terminal date.

Apart from the admissibility of this additional membership evidence, we have been unable to reconcile the Board's finding that 166 cards do not amount to 50% plus one of the RL-5 to RL-7 unit determined by the Board. The Employer filed a list of all employees as of the terminal date which includes by our count a total of 324 non-excluded employees in RL-5 to RL-7 positions in the APP, SE and TS pay bands. The 166 cards filed as of the terminal date therefore represent a clear majority. Moreover, the Employer's list also includes 10 coop students and three term employees with less than three months' service, thus reducing the total of employees in the RL-5 to RL-7 unit to 311 employees.

On both of these grounds, we request the Board reconsider the requirement for a vote, with its attendant expense and delay, and certify the Applicant without a vote.

[4] On April 8, 2004, the parties were advised that the representation vote in this matter would be suspended pending a decision on this application.

[5] The CNSC responded to this application on April 23, 2004. The employer put forth the following arguments and positions.

[6] First, the request for review does not meet the threshold test established by the Board for the reconsideration of its decisions. Section 27 reviews should be limited to situations where there are changed circumstances or to permit a party to present new evidence or arguments that could not reasonably have been presented at the original hearing.

[7] Second, the representation vote ordered in this case was premised not only on the percentage of membership cards signed and submitted but also on principles of fairness and transparency for all employees of the certified bargaining unit, many of whom were not included in the bargaining agent's request for certification. Because of the passage of time, the bargaining unit composition has changed. Also, co-op students and term employees should be included in the bargaining unit and be given an opportunity to participate in a representation vote.

[8] Third, should the Board determine that the threshold test for reconsideration has been met, the CNSC submitted its own request that the original decision be reconsidered to allow the single, all-inclusive bargaining unit it sought at the hearing.

[9] The applicant's reply was submitted on April 29, 2004. The PIPSC argued that the six additional membership cards tendered with its application should be accepted on the basis of its previous arguments. The Board's requirement for certification without a vote had therefore been met.

[10] In addition, PIPSC advised the Board that 16 employees, whose names were included in the employer's Attachment Three, used by the Board to establish the appropriate bargaining unit, are in fact in positions that should be excluded from collective bargaining. The PIPSC accepts that these 16 positions are "managerial or confidential" in nature. They should therefore be excluded from the proposed bargaining unit, reducing its numbers from 332 to 316. Accordingly, the Board could certify the applicant without representation vote, even if the six additional membership cards were not counted.

[11] The applicant believes that the employer's request for reconsideration of the Board's refusal to certify a single all-inclusive bargaining unit is premised on a mischaracterization of the original decision. The Board was correct in its finding that there was no interest shown by employees at the RL-1 to RL-4 levels.

Reasons for decision

[12] The Board accepts the six additional cards submitted by the applicant. It is clear that those cards were not tendered at the original hearing or as part of the original application for certification because they were not necessary to support the bargaining unit configuration the PIPSC had proposed. Given its decision to seek only the certification of a TS-SF bargaining unit (see original decision, paragraph 5), the applicant herein was justified in not submitting, with its original application, the six additional cards.

[13] It would therefore be inappropriate to exclude relevant acceptable memberships evidence that precedes the terminal date on the basis that it was available and could have been tendered earlier on. The PIPSC was not seeking certification for these employees and had no reason or obligation to file the cards in support of its original application.

[14] The addition of these six membership cards to the 166 already submitted provides the PIPSC with the necessary support (50% plus one) that is required for certification without a vote. As mentioned in the original decision (paragraph 60), the Board must certify a bargaining unit under section 35 of the *Public Service Staff Relations Act* where it is satisfied that 50% plus one of the employees in the bargaining unit wish the employee organization that has made the application to represent them.

[15] I therefore need not deal with the issue of exclusions and will leave it to the parties to address the question of managerial or confidential exclusions in a timely manner.

[16] Given what precedes, the Board's order, in its original decision, that a representation vote be held, is hereby rescinded.

[17] The Board confirms its decision that an appropriate bargaining unit in this case would be composed of all employees, regardless of pay band, at the RL-5 to 7 levels who are not excluded from collective bargaining by law or determination of the Board.

[18] In view of the majority support for collective bargaining and certification as evidenced by the 172 signed membership cards submitted, the Board hereby certifies the PIPSC as the bargaining agent for the bargaining unit referred to in the preceding paragraph. A bargaining unit certificate will be issued accordingly.

**Yvon Tarte,
Chairperson**

Ottawa, May 26, 2004.