



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

**UNITED FOOD AND COMMERCIAL WORKERS'
INTERNATIONAL UNION, LOCAL 175**

Applicant/Complainant

and

**HER MAJESTY IN RIGHT OF CANADA AS REPRESENTED
BY THE STAFF OF THE NON-PUBLIC FUNDS**

Respondent

RE: Application under Section 34 and
Complaint under Section 23 of the
Public Service Staff Relations Act

Before: P. Chodos, Deputy Chairperson

For the Applicant/Complainant: Georgina Watts, Counsel, and Wendy Zych, Business
Representative, United Food and Commercial
Workers' International Union, Local 175

For the Respondent: Harvey Newman, Counsel

Heard at Ottawa, Ontario,
July 2 and 3, 1996.

DECISION

The application under section 34 of the Public Service Staff Relations Act requests that the Board make a determination as to whether "the employee's (sic) presently working at the downtown mess locations in Ottawa, Ontario are members in the Applicant employee organization's bargaining unit" (paragraph 20, Schedule "A", of application). The employee organization has also filed a complaint under section 23 alleging that the respondent employer and its representatives have violated sections 8 and 9 of the Act (see paragraphs 14 to 19 of Schedule "A").

In essence, the application and complaint concern the refusal by the employer to recognize the complainant employee organization as the bargaining agent for employees currently performing work in respect of the mess locations in downtown Ottawa (ref. paragraph 14 of Schedule "A" of both the application and complaint). The applicant/complainant requests, among other things, that the Board "direct the Respondent to recognize the Applicant employee organization as the exclusive bargaining agent of the employees of the bargaining unit currently employed at the Jr. Ranks Mess" (Schedule "B", paragraph 3 of the complaint). It should be noted that pursuant to Board decisions file numbers 146-18-223 and 140-18-7, a certificate was issued dated June 18, 1987 recognizing the applicant/complainant as the exclusive bargaining agent for "all employees of the Employer in the Operational Category employed at the Canadian Forces Base, Ottawa, Ontario".

The evidence establishes the following. Prior to 1991, a building known as the Beaver Barracks was utilized by the Department of National Defence for armed forces personnel. This building contained, among other things, a Junior Ranks' Mess which employed non-unionized personnel. The Beaver Barracks facility was located on Catherine Street close to the downtown core and was intended to provide services to military personnel operating out of National Defence Headquarters. In 1991 the building was condemned and subsequently torn down; the armed forces personnel who utilized the Junior Ranks' Mess were extended membership privileges, as an alternative to the Beaver Barracks facility, in the messes which were part of CFB Ottawa. Initially CFB Ottawa consisted primarily of operations and facilities located in the north end of the city, known as CFB Rockcliffe, and another operation at the south end of the city, CFB Uplands. In addition, there were several satellite operations physically located elsewhere, including a marina on Riverside Drive and the Hylands Golf Club. The Rockcliffe and Uplands sites each had their own messes. In 1993 a

number of facilities at Rockcliffe were closed including the Junior Ranks' Mess; all the members were then allocated to the mess at the Uplands site, which had been operating for many years. According to Major Robert Webb, who testified on behalf of the employer, between 400 and 600 personnel were allocated to the Uplands Mess, which had a total membership of 1800 people.

Major Webb indicated that since 1992 the armed forces were considering replacing the Beaver Barracks mess with another downtown facility. He testified that as part of his responsibilities in the fall of 1993 he examined the possible use of existing departmental buildings to house a new Junior Ranks' Mess for Headquarters' personnel. One of the buildings of prime interest was the Stores Building behind the Drill Hall at Cartier Square in downtown Ottawa. This building came under the jurisdiction of CFB Ottawa for purposes of maintenance. Major Webb stated that, at the time that the Cartier Square facility was under consideration as a location for a new mess for Headquarters personnel, they were unaware that CFB Ottawa might be closed. In 1993 CFB Ottawa became designated as part of 7 Wing Ottawa; the parties are in agreement that this new designation had no effect on the status of the bargaining unit and indeed the collective agreement concluded by the parties and expiring on March 31, 1995 (see Exhibit 2) identified the bargaining unit as "7 Wing Ottawa".

In the February 1994 federal budget it was announced that CFB Ottawa would be closed. With the proposed closure of CFB Ottawa, the administrative responsibility for providing support services for the affected armed forces personnel came under the authority of the Commandant of the Canadian Forces Support Unit. This unit had the responsibility for, among other things, the operation of the various messes. In accordance with the collective agreement, notice of closure of the Junior Ranks' Mess was given to the affected employees. The Junior Ranks' Mess at Uplands, which was the only mess for armed forces personnel of this rank in the Ottawa area, closed on February 26, 1996. A notice to that effect was posted by Mr. Greg Fontaine, the Mess Supervisor, (who is not a union member) on the doors leading to the mess. The notice also stated that "Reopen downtown 7/3/96". In fact, the Cartier Square Junior Ranks' Mess did open on March 7, 1996. Some of the operations of CFB Ottawa however did not close, including the golf course and the curling clubs located at Rockcliffe and Uplands. It is not in dispute that the employees located at these operations continued

to be members of the bargaining unit in question and are duly represented by the complainant. A memorandum of agreement "between the Staff of Non-Public Funds, 7 Wing Ottawa and the United Food and Commercial Workers' International Union with respect to the operational category" was concluded by the parties in February 1996 (subject to ratification). The "Jr. Ranks' Mess(S)" was identified as one of the various outlets to which the agreement would apply. This agreement was in effect from April 1, 1995, the expiry date of the previous agreement, until November 30, 1998. Ms. Fabienne Gaudreau, the Non-Public Funds Personnel Manager, explained that by February 14, 1996, the date this memorandum of agreement was concluded, there were still persons employed at the Junior Ranks' Mess at Uplands since that mess was not closed until the end of February. According to Ms. Gaudreau, it was for this reason that the memorandum of agreement specifically identified the Junior Ranks' Mess as one of the outlets covered by the collective agreement.

Major Webb explained that when Cartier Square was under consideration as the new home for the Junior Ranks' Mess, it was already operating as a mess for two reserve units, the Governor General's Footguards and the Cameron Highlanders. The department authorized the junior ranks' messes and the reserve messes to consolidate; as a result the Junior Ranks' Mess which opened in March 1996 services the 262 members of the reserve forces as well as 1550 regular force members, of whom approximately 800 are from National Defence Headquarters. Major Webb also stated that, while the messing dues from military personnel at National Defence Headquarters were transferred in 1993 to Uplands, CFB Ottawa was not mandated to provide administrative service, including the messes, to NDHQ. After the Junior Ranks' Mess at Uplands was closed in February 1996 the trust fund which was held on their behalf by the Non-Public Funds was transferred to the Canadian Forces central fund at NDHQ; some of the funds were apportioned to the Cartier Square mess in respect of the units who were allocated there. Mr. Webb noted that in accordance with CFAO 27-1 (Exhibit 6) every member of the Armed Forces is required to join a mess appropriate to his or her rank and that only one mess facility and one mess organization is authorized at each base for each category.

Ms. Wendy Zych, the business representative of the applicant/complainant, testified that in the negotiations leading up to the current memorandum of

understanding (Exhibit 9) the employer never took the position that the applicant/complainant did not have the right to represent employees at the remaining CFB Ottawa outlets, including the Junior Ranks' Mess. She acknowledged that the applicant/complainant had never represented employees who had worked at the Beaver Barracks operation in downtown Ottawa. The employer confirmed that it continues to recognize the applicant/complainant's right to represent employees at the other outlets formally associated with 7 Wing Ottawa such as the golf course and curling clubs. Ms. Zych also testified that three part-time employees at CFB Ottawa, Mr. George Langile, Mr. Kevin Calvert and Mr. Rob Bowbrick, were laid off; they received severance pay, and were granted recall rights in accordance with the collective agreement. They were not offered jobs at the Cartier Square Mess. Mr. Jacques McNicoll, a full time employee who worked at the Uplands Junior Ranks' Mess as a Bar Supervisor for eighteen years, was given the option of taking severance pay or exercising bumping rights in respect of a position at the Curling Club North. Mr. McNicoll testified that he was interested in working as a bar supervisor at the Junior Ranks' Mess at Cartier Square; he was in fact offered a position at Cartier Square at a higher salary than he is currently receiving at the Curling Club; however, he was advised that if he took the job at Cartier Square the collective agreement would not apply to him; he was concerned that he would not receive union protection and therefore he exercised his bumping rights rather than taking this offer (see Exhibit 4). Mr. McNicoll also testified that currently the only Junior Ranks' Mess in the Ottawa area is at the Cartier Square facility and that membership cards issued by the Uplands Mess can be used at the Cartier Square Mess.

ARGUMENT

Counsel for the applicant/complainant noted that it was not trying to expand its jurisdiction, but rather was seeking to preserve what it already had. Ms. Watts submitted that, had a new mess opened at Cartier Square and Uplands remained in operation, the bargaining agent would not be here today. However, the reality of this case is that the Cartier Square facility replaced the Uplands Base mess. She noted that in the past when the client base of the messes increased, as it did in 1991 for Rockcliffe with the closure of the Beaver Barracks, no questions were raised to the effect that the increase in clientele affected the bargaining rights of the certified bargaining agent. In the current circumstances there was simply a physical relocation

of the operation and a transfer of management responsibility from the Commander of CFB Ottawa to the Commandant of the Canadian Forces Support Unit. Ms. Watts submitted that this change of management does not void a union certification; indeed, the employer itself implicitly accepted this by continuing to recognize the applicant/complainant's right to represent employees at the curling club and golf course among other facilities.

Counsel also noted that in the memorandum of settlement dated February 14, 1996 the parties specifically modified clause 13.01 to recognize the reduction in outlets as a result of these closures; however the agreement continued to refer to the Junior Ranks' Mess. She noted that this memorandum of settlement was signed by the parties less than three weeks prior to the closure of the Junior Ranks' Mess and its reopening at Cartier Square. Counsel submitted that the applicant/complainant was not certified on the basis of geographical location but rather in terms of the services provided.

Counsel for the applicant/complainant referred to the Board's decision in Retail Clerks Union, Local 1973, of the United Food and Commercial Workers International Union, and Staff of Non-Public Funds, (Board file: 146-18-176) wherein the Board relied on the well known Usarco Ltd. case [1967] O.L.R.B. Rep. Sept. 526. Ms. Watts maintained that the four factors cited in the Usarco case, that is, community of interest, centralization of management authority, economic factors, and source of work, all apply as much today as they did when the bargaining agent was certified in 1987. Accordingly, counsel requested that the employer be directed to comply with the provisions of the collective agreement and compensate all employees who had been affected by its refusal to comply with the agreement.

Counsel for the respondent conceded that there is a violation of the Act by the employer if it is concluded that the Junior Ranks' Mess continues to exist as part of the bargaining unit. Mr. Newman also acknowledged that the change of jurisdiction from the Base Commander to the Commandant of Canadian Forces Support Unit had no effect on the bargaining unit. He noted that the employer still continues to recognize the applicant/complainant as the certified bargaining agent for those outlets falling under CFB Ottawa which have not been closed. Mr. Newman maintained that the issue is whether the applicant/complainant has established that

there was no closure but rather merely a change of location to Cartier Square. It is the respondent's contention that the mess was not moved but rather was closed, thereby rendering the former mess non-existent.

Counsel for the respondent noted that within a short time after the closure of the Beaver Barracks steps were taken to re-establish the downtown mess in 1992. What actually occurred, in effect, in 1996 was the re-establishment of the Beaver Barracks location at Cartier Square. However, due to intervening circumstances, that is the closure of CFB Ottawa, the new mess took in CFB Ottawa armed forces personnel as well as the NDHQ personnel. According to Mr. Newman, there was no reincarnation of CFB Ottawa but rather a new mess which had been planned for years prior to the closure of CFB Ottawa. Mr. Newman observed that the new memorandum of agreement, which had effect as of March 31, 1995, made reference to the Junior Ranks' Mess for the sole purpose of providing retroactivity of benefits for employees of that mess. Mr. Newman submitted that the sign posted by the supervisor indicating relocation of the mess was for the purpose of advising members that they would have another mess to go to; it had no implications under the Public Service Staff Relations Act. In conclusion, counsel for the respondent argued that there was no change of physical location; accordingly, the applicant/complainant has not met the onus of showing that the new mess at Cartier Square is in reality the Junior Ranks' Mess at CFB Ottawa.

REASONS FOR DECISION

The relevant provisions of the Act provide as follows:

8.(1) No person who is employed in a managerial or confidential capacity, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.

(2) Subject to subsection (3), no person shall

(a) refuse to employ, or continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;

(b) impose any condition on an appointment or in a contract of employment, or propose the imposition of any condition on an appointment or in a contract of employment, that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Act; or

(c) seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee

(i) to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective agreement, to continue to be a member of an employee organization, or

(ii) to refrain from exercising any other right under this Act.

(3) No person shall be deemed to have contravened subsection (2) by reason of any act or thing done or omitted in relation to a person employed, or proposed to be employed, in a managerial or confidential capacity.

9.(1) Except in accordance with this Act or any regulation, collective agreement or arbitral award, no person who occupies a managerial or confidential position, whether or not the person acts on behalf of the employer, shall discriminate against an employee organization.

(2) Nothing in subsection (1) shall be construed to prevent a person who occupies a managerial or confidential position from receiving representations from, or holding discussions with, the representatives of any employee organization.

23.(1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed

(a) to observe any prohibition contained in section 8, 9 or 10;

(b) to give effect to any provision of an arbitral award;

(c) to give effect to a decision of an adjudicator with respect to a grievance; or

(d) to comply with any regulation respecting grievances made by the Board pursuant to section 100.

(2) *Where, under subsection (1), the Board determines that the employer, an employee organization or a person has failed in any manner described in that subsection, the Board may make an order directing the employer, employee organization or person to observe the prohibition, give effect to the provision or decision or comply with the regulation, as the case may be, or take such action as may be required in that behalf within such specified period as the Board may consider appropriate.*

(3) *An order under subsection (2) directed to a person shall*

(a) *where that person has acted or purported to act on behalf of the employer, be directed as well*

(i) *in the case of a separate employer, to the chief executive officer thereof, and*

(ii) *in any other case, to the Secretary of the Treasury Board; and*

(b) *where that person has acted or purported to act on behalf of an employee organization, be directed as well to the chief officer of that employee organization.*

34. *Where, at any time following the determination by the Board of a group of employees to constitute a unit appropriate for collective bargaining, any question arises as to whether any employee or class of employees is or is not included therein or is included in any other unit, the Board shall, on application by the employer or any employee organization affected, determine the question.*

The parties are essentially in agreement that the determination of this case turns on the narrow question of whether the Cartier Square Junior Ranks' Mess is in effect the continuation of the Junior Ranks' Mess operation at Uplands, or rather, as the respondent contends, is a new facility replacing the non-unionized Beaver Barracks operations. Upon careful consideration of the evidence it is my view that the applicant/complainant's contention must prevail.

The respondent's case is based largely on its submission that the Department of National Defence intended all along to replace the Beaver Barracks facility with a new downtown location, and that the opening of the Cartier Square facility was the culmination and manifestation of that intention. However, a consideration of a

number of significant facts militates in favour of the applicant/complainant's position:

- 1) the Beaver Barracks had effectively ceased to operate in 1991, five years prior to the opening of the Cartier Square facility;
- 2) the Beaver Barracks armed forces personnel were allocated to the unionized facilities at CFB Ottawa (7 Wing) and from 1993 onward the facility at Uplands was the only Junior Ranks' Mess in the Ottawa area;
- 3) there was a very close proximity in time between the closure of the Junior Ranks' Mess at Uplands on February 26, 1996 and the commencement of operations of the Junior Ranks' Mess at Cartier Square on March 7, 1996;
- 4) the Cartier Square facility serves the same armed forces personnel, with the addition of the reserve forces;
- 5) it should also be noted that (see employer's Exhibit 8) for years the parties considered that the Junior Ranks' Mess at Uplands was part of the bargaining unit description and specifically recognized that operation as such in several successive collective agreements, including the most recent memorandum of understanding entered into in February of this year.

In light of these facts, the logical conclusion is that the Junior Ranks' Mess simply physically relocated from Uplands to Cartier Square in March, 1996. Indeed, logic, common sense, and good labour relations all suggest that the Junior Ranks' Mess at Cartier Square should be considered as part of the current bargaining unit description. As Mr. Newman concedes, since I have so found, it follows that the Cartier Square facility falls within the bargaining unit represented by the applicant/complainant. Accordingly, the Board upholds the application under section 34 of the Act and determines that the employees of the respondent in the operational category working at the Junior Ranks' Mess at Cartier Square are and remain part of the bargaining unit for which the applicant/complainant is the certified bargaining agent. The parties have advised me that, if I conclude that the Junior Ranks Mess remains part of the bargaining unit in question, the matter of remedy be left to them to address and resolve. Accordingly, I am reserving on the

complaint in the expectation that the parties will be able to implement my determination under section 34 of the Act.

**P. Chodos,
Deputy Chairperson.**

OTTAWA, August 28, 1996.