Date: 20020130

File: 192-32-23

Citation: 2002 PSSRB 12

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

CANADIAN FOOD INSPECTION AGENCY

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

RE: Application under subsection 104(1) of the Public Service Staff Relations Act

Before: Yvon Tarte, Chairperson

For the Applicant: Raymond Piché, counsel

For the Respondent: Dougald Brown, counsel

Heard at Ottawa,
December 19, 20 and 21 2001.

[1] On December 18, 2001, the Canadian Food Inspection Agency (CFIA) filed an application with the Public Service Staff Relations Board (Board) pursuant to subsection 104(1) of the *Public Service Staff Relations Act* (PSSRA) for a declaration that a strike was unlawful.

[2] Subsection 104(1) of the PSSRA states:

> *104. (1) Where it is alleged by the employer that an employee organization has declared or authorized a strike of employees, the effect of which is or would be to involve the participation of an employee in a strike in contravention of section 102, the employer may apply to the Board, for a declaration that the strike is or would be unlawful and the Board, after affording an opportunity to the employee organization to be heard on the application, may make such a declaration.*

[3] Given the nature of the application, the Board scheduled a hearing in this matter on an expedited basis to give the parties an opportunity to be heard.

The application

[4] In its application, the CFIA states that it is a separate employer under the PSSRA and that, at the time of this application, it was in the process of bargaining collectively with the Professional Institute of the Public Service of Canada (PIPSC) for the Veterinary Medicine (VM) Group, for which the PIPSC is the bargaining agent.

[5] The CFIA further states that, on December 17, 2001, 116 members of the VM Group working in the Province of Quebec, in a concerted effort, refused to work when they were legally obligated to do so. At the outset of this hearing, the PIPSC recognized that the actions of the 116 VMs on the December 17, 2001 constituted a concerted work stoppage. Also at the hearing, the CFIA withdrew its allegation that the PIPSC had declared or authorized the work stoppage on December 17, 2001, asking only that the Board declare that the actions of the 116 VMs on December 17, 2001, constituted an unlawful strike.

The injunction

[6] On December 21, 2001, while this matter was being dealt with by the Board, the Federal Court of Canada issued an interim injunction, enjoining the VMs, the PIPSC and the CFIA to refrain from any further work stoppages for a period of 14 days: *Union des producteurs agricoles v. Agence canadienne d'inspection des animaux* (Federal Court,

Trial Division File T-2242-01). In decision 2001 FCT 1432, the Federal Court stated that the applicants for the injunction had made a *prima facie* case that the work stoppage of December 17, 2001, by the 116 VMs in Quebec, constituted an unlawful strike.

Arguments

For the Applicant

[7] At the time the 116 VMs refused to work on December 17, 2001, the PIPSC was in the process of bargaining collectively with the CFIA. No conciliation board report, which is a prerequisite for a lawful strike, had been issued. A very high percentage of the 116 VMs occupy designated positions and cannot, at any time, participate in a lawful strike. It is therefore very clear that what took place in Quebec on December 17, 2001 was an unlawful strike. The Board has the responsibility to ensure the application of the PSSRA according to the intent of Parliament. On December 17, 2001, the system did not work and the Board is duty-bound to declare that the strike was unlawful.

[8] The CFIA's mandate is to protect the health and safety of the Canadian public. The VMs are essential in the execution of the mandate of the CFIA. By going on strike on December 17, 2001, the VMs took the population at large as hostage. The work stoppage went beyond the realm of labour relations. Its effects were felt much more by the public and private industry than by the employer.

[9] It would be wrong to argue that a declaration that the strike was unlawful should be made only in situations of on going illegal work stoppages.

[10] Given that the parties have now agreed to a process of binding arbitration under section 61 of the PSSRA, no harm can be done by the issuance of a declaration that the strike was unlawful. In support of its position, the CFIA referred to *Treasury Board v. Windsor and District Branch of the Customs and Excise Union and Public Service Alliance of Canada* (Board file 192-2-12, January 22, 1971). The public interest in this case requires the issuance of a declaration that the strike was unlawful.

For the Respondent

[11] In order to make a declaration under subsection 104(1), the Board must find, as a threshold requirement, that the PIPSC has declared or authorized the strike. Since

the CFIA has withdrawn its allegations against the PIPSC, no such finding can be made. Consequently, the order sought cannot be issued.

[12] Furthermore, a declaration under subsection 104(1) should not be made unless there appears to be a history of unlawful strikes or it is likely that another will occur. Neither condition applies in this case.

[13] The Board's role in these cases should not be punitive. Given the fact that there is no reasonable presumption that another unlawful strike will occur, the Board should not make the declaration asked for by the CFIA.

[14] In support of its position, the PIPSC referred to *Canadian National Railway Company,* 79 di 82 (C.L.R.B.).

Reply of the Applicant

[15] Even though the CFIA amended its application by withdrawing the allegations against the PIPSC, that does not mean that the CFIA has conceded that the PIPSC was not involved in authorizing or declaring the December 17 strike.

[16] The general powers conferred to the Board pursuant to section 21 of the PSSRA are broad enough to empower the Board to make a declaration that the strike was unlawful under subsection 104(1) in this case.

[17] What was done in this case was illegal and should be declared as such. A strong message must be sent to all concerned that the PSSRA must be respected.

Reasons for Decision

[18] The actions of the 116 VMs who failed to report to work on December 17, 2001 clearly constituted a strike as the term is defined in section 2 of the PSSRA. It is obvious that these employees refused to work in combination, in concert or in accordance with a common understanding.

[19] Furthermore, it seems also clear that this strike was unlawful under section 102 of the PSSRA, which requires that:

> ***102.*** *(1) No employee shall participate in a strike*
>
> *(a) who is not included in a bargaining unit for which a bargaining agent has been certified by the Board;*

> *(b) who is included in a bargaining unit for which the process for resolution of a dispute is by the referral thereof to arbitration; or*
>
> *(c) who occupies a designated position.*
>
> *(1.1) No employee who is included in a bargaining unit the bargaining agent for which has elected, pursuant to subsection 61(1), to refer all terms and conditions in dispute to final and binding determination shall participate in a strike in respect of that dispute.*
>
> *(1.2) No employee who is included in a bargaining unit the bargaining agent for which has agreed to be bound as described in section 90 in respect of all terms and conditions in dispute shall participate in a strike in respect of that dispute.*
>
> *(2) No employee who is not an employee described in subsection (1) shall participate in a strike*
>
> *(a) where a collective agreement applying to the bargaining unit in which the employee is included is in force; or*
>
> *(b) where no collective agreement applying to the bargaining unit in which the employee is included is in force, unless*
>
> *(i) a conciliation board for the investigation and conciliation of a dispute in respect of that bargaining unit has been established, or a conciliation commissioner has been appointed for that purpose, and seven days have elapsed from the receipt by the Chairperson of the report of the conciliation board or conciliation commissioner, or*
>
> *(ii) the Chairperson has notified the parties pursuant to subsection 77(2) or 77.1(4) of the Chairperson's intention not to establish a conciliation board or appoint a conciliation commissioner and seven days have elapsed from the date of the notice.*
>
> *(3) No employee shall participate in a strike in the period during which the strike is deferred by an order made under subsection 102.1(1).*

[20] In this case, the CFIA and the PIPSC were, on December 17, 2001, in the process of bargaining collectively and the requirements of subparagraphs 102(2)(*b*)(i) or (ii) had not been met.

[21] As was stated by the Board in *Treasury Board v. Fort Erie and District Branch of the Customs and Excise Union and Public Service Alliance of Canada* (Board file 192-2-13, August 17, 1971), at § 23:

> *. . . It is immaterial that employees choose to describe (such action) as a stoppage, a job action or inaction, a study session, a prayer session, a collective calling in by employees that they are ill, or by any other name. . . .*

[22] Finding that the 116 VMs were involved in an unlawful strike under section 102, does not, however, inevitably and inexorably lead to the making of a declaration that a strike was unlawful under subsection 104(1).

[23] In order for a declaration to issue under subsection 104(1), the Board must be satisfied that an employee organization, as defined by the PSSRA, authorized or declared the strike. Although the applicant has satisfied the Board that the VMs in Quebec were involved in an unlawful strike on December 17, 2001, there is not sufficient evidence to lead me to conclude that they constitute an employee organization or acted on one's behalf.

[24] I would like to add that the Board has a discretionary power to issue a declaration under subsection 104(1) ". . . even though the strike that provides the occasion for the application has been terminated before the application is heard or for that matter, before the application is filed with the Board. . . .": *Windsor*, *supra*, § 33.

[25] Finally, the Board has never adopted the Ontario jurisprudence relied upon by the PIPSC. In *Windsor*, *supra*, the Board clearly set out its understanding of the informative and educational value of a declaration that a strike is unlawful pursuant to subsection 104(1) in appropriate circumstances. If the PIPSC's arguments in this case were accepted, this provision of the PSSRA would in many cases be rendered useless.

[26] Rather, subsection 104(1) provides a step in the prosecution of an employee organization, under section 106, for the violation of section 103, which prohibits such an organization from authorizing or declaring an unlawful strike.

[27] It should also be pointed out for future reference that inaction, subterfuge or ambiguous language on the part of an employee organization, that could lead its members to believe that unlawful strike action is supported, might very well convince

the Board that any such strike was authorized or declared by the employee organization.

[28] To recap, the Board believes that the actions of the 116 VMs on December 17, 2001, constituted an unlawful strike under section 102 of the PSSRA. The CFIA has not, however, established that an employee organization authorized or declared the strike. The application under subsection 104(1) to that effect must therefore be dismissed.

Yvon Tarte,
Chairperson

Ottawa, January 30, 2002