Date: 20051208

File: 585-03-01

Citation: 2005 PSLRB 174

Public Service Labour Relations Act

Before the Chairperson
Public Service Labour Relations Board

IN THE MATTER OF
THE *PUBLIC SERVICE LABOUR RELATIONS ACT*
and a dispute affecting the
Professional Institute of the Public Service of Canada, as bargaining agent,
and the Canadian Nuclear Safety Commission, as employer,
in respect 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

Indexed as
Professional Institute of the Public Service of Canada v. Canadian Nuclear Safety Commission

TERMS OF REFERENCE OF THE ARBITRATION BOARD

To: Brian Keller, chairperson of the arbitration board;
Larry Robins and Audrey Lizotte-Lepage, arbitration board members

For the Bargaining Agent: Walter Belyea, Professional Institute of the Public Service of Canada

For the Employer: Stephen Bird, counsel

(Decided without an oral hearing)

[1] By letter received at the Board on July 25, 2005, the Professional Institute of the Public Service of Canada (PIPSC) requested the establishment of an arbitration board in respect of all employees, regardless of pay band, at the RL-5 to RL-7 levels who are not excluded from collective bargaining by law or determination of the Board. The request was made pursuant to section 64 of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the former *Act*).

[2] With its letter received by the Board on July 25, 2005, the PIPSC provided a list of the terms and conditions of employment that it wished to have referred to the arbitration board. That letter, the terms and conditions of employment and supporting material are attached hereto as SCHEDULE I.

[3] By letter dated August 9, 2005, the Canadian Nuclear Safety Commission (the employer) provided comments on the PIPSC's list as well as its position on the terms and conditions of employment that the employer wished to have referred to the arbitration board. That reply was made with reference to the *Public Service Labour Relations Act* (the new *Act*). The employer raised preliminary objections to the referral of some of the terms and conditions which had been submitted by the PIPSC. That letter and supporting material are attached hereto as SCHEDULE II.

[4] In a letter dated September 2, 2005, the PIPSC responded to the employer's letter dated August 9, 2005. In its response, the PIPSC amended some of its proposals further to the employer's objections. The PIPSC also requested that the parties be given an opportunity to present written submissions on the preliminary objections raised by the employer. That letter is attached hereto as SCHEDULE III.

[5] By letter dated September 13, 2005, the parties were informed that the Chairperson of the Public Service Labour Relations Board intended to deal with the preliminary objections raised by the employer by way of written submissions. The employer filed its submissions on September 27, 2005. The PIPSC filed its reply on October 12, 2005. The employer filed its rebuttal on October 26, 2005. A summary of the arguments is set out below. The full submissions are on file at the Board.

Arguments of the parties

[6] The employer raised two main objections, the second objection having six sub-parts. The employer also noted its agreement with some of the PIPSC's amendments, as found in the PIPSC's preliminary response (SCHEDULE III). The PIPSC, in responding to

the objections, also raised the issue as to which Act would apply - the former *Act* or the new *Act*.

Issue: What is the Applicable Legislative Framework?

[7] The PIPSC submitted its request for a board of arbitration on July 22, 2005, under the former *Act*. The employer, however, filed its reply to the request and made its objections with reference to the new *Act*. In its written submissions, the PIPSC noted that "the Institute contends that these issues are to be dealt with under the *Public Service Staff Relations Act* as this round of bargaining preceded the coming into effect of the *PSLRA"* and cited the decision in *Federal Government Dockyard Trades and Labour Council East v. Treasury Board,* 2005 PSLRB 42 in support of its argument. In particular, it referred to paragraph 14 of that decision which sets out that:

> *[14] Although paragraph 57(1)(a) of the PSMA stands for the proposition that the request for arbitration at hand is to be dealt with pursuant to the new Act, subsection 57(2) clearly states that the terms of reference to the arbitration board shall be consistent with the provisions of the former Act. The provisions of the former Act relevant to the objection raised by the employer are those identified by the PIPSC in its reply to the employer's objection (supra).*

[8] In reply, the employer has argued that the transitional provisions are not in issue. Section 57 of the *Public Service Modernization Act* (the *PSMA*) applies with respect to "requests for arbitration" filed prior to April 1, 2005.

Employer Objection #1: Sufficient and Serious Bargaining

[9] As noted above, the PIPSC's request for a board of arbitration was received by the Board on July 25, 2005. The PIPSC's request noted that the parties had engaged in negotiation for 13 days and had received the help of a conciliator on five occasions.

[10] Pursuant to subsection 137(2) of the new *Act*, the employer argued that the appointment of a board of arbitration should be delayed as the PIPSC has failed to bargain seriously and sufficiently and has failed to take all reasonable steps to bargain collectively in good faith. In particular, the employer cited examples where the PIPSC allegedly made illegal and improper demands, broke-off negotiations, refused to bargain and made proposals designed to be rejected and leading to impasse.

[11] The PIPSC categorically rejected all of the allegations made by the employer. The PIPSC itself cited instances where it alleged that the employer engaged in hard bargaining. The PIPSC also referred to examples which, it submitted, demonstrated a lack of effective communications between the parties.

Employer Objection #2

[12] The employer objected to several articles proposed by the PIPSC on the basis that they related to matters which were not arbitrable pursuant to sections 7 and 150 of the new *Act*, as well as section 16 of the *Nuclear Safety Control Act* (*NSCA*).

Employer Objection #2 (*i*): Articles 2(n) and 2(r)

[13] The employer submitted that the PIPSC has proposed the following definitions which seek to incorporate provisions of the *Public Service Employment Act* (the *PSEA*):

> *2(n) "lay-off" means the termination of an employee's employment because of lack of work, the discontinuance of a function or the transfer of work or a function outside the CNSC;*
>
> *2(r) "substantive position" means the position to which an employee who has been appointed or deployed under the Public Service Employment Act on an indeterminate, term or acting basis (in excess of four (4) months), but does not include any other assignments of a temporary nature*

[14] The employer objected to these definitions as they sought to incorporate provisions of the *PSEA*. Furthermore, by including article 2(n), the PIPSC is trying to limit the definition of the term "lay-off". These articles are inconsistent with section 16 of the *NSCA*, which provides:

> *16(1) The Commission may, notwithstanding any other Act of Parliament, appoint and employ such professional, scientific, technical or other officers or employees as it considers necessary for the purposes of this Act and may establish the terms and conditions of their employment, and, in consultation with the Treasury Board, fix their remuneration.*

[15] The employer also argued that these articles were inarbitrable pursuant to section 7 and paragraphs 150(1)(*c*) and (*e*) of the new *Act*, which provide:

> *7. Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal*

> *public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons in those portions of the federal public administration.*
>
> . . .
>
> *150. (1) The arbitral award may not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if*
>
> . . .
>
> *(c) the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;*
>
> . . .
>
> *(e) doing so would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service.*

[16] The PIPSC replied that it did not seek to incorporate provisions of the *PSEA*. In fact, in its reply filed on September 2, 2005 (SCHEDULE III) to the employer's preliminary objections, the PIPSC had indicated that the reference to the *PSEA* was inadvertent and had provided the following revision:

> *2(r) "substantive position" means the position to which an employee who has been appointed or deployed on an indeterminate, term or acting basis (in excess of four (4) months), but does not include any other assignments of a temporary nature*

[17] With respect to article 2(n), the PIPSC argued that the proposal merely defined an action of the employer but did not confer any substantive rights. In the PIPSC's view, merely defining the action in no way provides the union with the ability to contest a lay-off. The PIPSC noted that the term "lay-off" appears in the employer's Human Resources manual, however, the employer has never tabled a definition of the term. Accordingly, what constitutes an appropriate definition is appropriate for arbitration.

[18] Regarding article 2(r), the PIPSC submitted that the definition of "substantive position" is descriptive and allows employees and the employer to distinguish different staffing actions and their effects. The definition clarifies situations in the

workplace and in no way confers rights or compels any employer action. The PIPSC noted that the employer has never addressed the issue in negotiations or indicated how this definition differs from its practice.

Employer Objection #2 (*ii*): Article 10.09(a)

[19] Article 10.09(a) stipulates:

> *10.09(a) An employee who performs duty officer duties will be compensated for each full week of assignment at the rate of fifteen (15) hours at straight-time rates. Any portion thereof shall be pro-rated. For the purposes of this Article, a full week shall consist of seven (7) consecutive days beginning 00:00 hours Monday and ending at 24:00 hours Sunday.*

[20] The employer objected to the inclusion in the proposal of a requirement of the period of time that an employee will be required to perform "duty officer" functions on the ground that this matter falls within its exclusive jurisdiction. The employer submitted that, to the extent the proposal deals with compensation for the performance of "duty officer" functions, it is arbitrable; however, in the employer's view, the clause seeks "to establish the days upon which the 'Duty officer' functions can be assigned. In that regard, subsection 150(1)*(e)* precludes the reference of such proposals to arbitration". In summary, the employer was of the view that the proposal refers to the work week of employees and deals with the organization of the public service or the assignment of duties of positions and/or persons employed in the public service, contrary to sections 7 and 150(1)*(e)* of the new *Act*.

[21] The PIPSC submitted that the article in dispute between the parties refers to the point at which overtime begins. As the proposal solely concerns the trigger point for the entitlement to a benefit, it should be referred to arbitration.

Employer Objection #2 (*iii*): Article 13.12

[22] The employer objected to the inclusion of Article 13.12, which states:

> *13.12 Where the employee requests, the Employer shall grant the employee unused vacation leave credits prior to termination of employment.*

[23] The employer's objection is based on paragraphs 7 and 150(1)*(e)* of the new *Act*. In the employer's view, the effect of this clause is to grant an employee the right to

determine when to provide the employee's services in the situation described by the article in question. It submitted that proposal deals with scheduling as it requires the employer to grant vacation leave upon an employee's request, with no retained discretion or consideration of operational requirements. The employer submitted that the proposal deals squarely with the organization of the public service or the assignment of duties of positions and/or persons employed in the public service, and is thus precluded from being referred to an arbitration board pursuant to sections 7 and 150(1)*(e)* of the new *Act*.

[24] The PIPSC, however, submitted that the proposal deals with the entitlement to unused vacation credits prior to termination. It argued that the pre-1993 *Act* spelled out "leave entitlements" and "other terms and conditions related thereto". Accordingly, under the expanded scope of the 1993 *Act*, whether an employee receives unused vacation leave credits is an arbitrable matter.

Employer Objection #2 (*iv*): Article 17.05

[25] The PIPSC proposed the following wording for Article 17.05:

> *17.05 For leaves in excess of six (6) months (excluding maternity/parental and sick leave), the Employer may, at its option, appoint or deploy another person, on an indeterminate basis, to the position that was occupied by the employee. Upon the employee's return, the Employer will use best efforts to provide comparable employment.*

[26] The employer objected to this wording as the proposal affects staffing, a matter within the employer's exclusive jurisdiction. This proposal would prevent the employer from taking action to staff a position on an indeterminate basis for a fixed period of time, and would require it to provide preferences in selections to alternate positions. Accordingly, it should not be referred to arbitration as it is contrary to section 7 and paragraphs 150 (1)*(a)*, *(c)* and *(e)* of the new *Act* and contrary to subsection 16(1) of the *NSCA*.

[27] The PIPSC submitted that the matter should be referred to arbitration as the provision only addresses "best efforts" to provide "comparable employment" after return from an authorized leave in excess of six months - an entitlement which employees already enjoy on appointment.

Employer Objection #2 (*v*): Article 25.03

[28] Article 25.03 provides that:

> *25.03 There shall be two (2) levels in the formal grievance procedure. These levels shall be as follows:*
>
> *(a) First Level: Director/Manager;*
>
> *(b) Final Level: Vice-President or Authorized representative*
>
> *A final level reply shall include a written statement of the reasons for the decision.*

[29] The employer objected to this proposal primarily because, in its view, the proposal purports to dictate the way the employer classifies positions with respect to grievance related duties, which, being a management and classification functions, is precluded by section 7 and paragraph 150(1)*(e)* of the new *Act*.

[30] The PIPSC replied that the real issue is whether there are two or more steps in the grievance process. The employer had been proposing a three or four step process. The PIPSC indicated that the proposal could be amended to strike out the phrase "Vice-President or Authorized representative" and to refer the remaining clause to arbitration. The employer indicated that it did not find the amended proposal acceptable.

Employer Objection #2 (*vi*): Article 39.07 (a), (b) and (c)

[31] The employer's original objection pertained to paragraphs (a), (b) and (c) of Article 39.07. The PIPSC, however, subsequently withdrew paragraphs (b) and (c) from its proposal. Paragraph 39.07 (a) sets out that:

> *Where an employee's position is reclassified to a level with a lower maximum rate of pay, the position shall be deemed to have retained for all purposes the former classification. In respect to the pay of the employee, this may be cited as Salary Protection Status and subject to (c) below, shall apply for a period of three (3) years from the effective date of the reclassification or until the employee is appointed to a position at the same level as the employee's former classification.*

[32] The employer submitted that that proposal purported to freeze a reclassified employee's previous level "for all purposes". If the proposal related to pay, it would be arbitrable; however, other classification issues are not. The employer argued that, to

the extent the proposal exceeds wage related issues, it cannot be referred to arbitration.

[33] The PIPSC countered that the clause is arbitrable as it addresses the issue of what employees should be paid for a fixed period of time should they be reclassified. However, the PIPSC suggested, if the Board is convinced that "for all purposes" exceeds wage related issues, that these words be struck out. The employer subsequently agreed that its concerns would be addressed by the deletion of "for all purposes" from the proposed wording.

Other Matters

[34] The employer had objected to some of the wording included in articles 10.08, 10.09(a) and 12.02, as found in SCHEDULE I. The PIPSC proposed alternate wording in SCHEDULE III with respect to these provisions. In its written submissions filed on September 27, 2005, the employer requested that the alternate wording with respect to these articles be provided in the terms of reference to the board of arbitration.

[35] The employer further noted that, in the PIPSC's initial proposal (SCHEDULE I), it had requested that the salary increase be effective June 1, 2004. The employer had objected, indicating that the effective date should be June 14, 2004. The PIPSC amended its proposal to reflect this change in SCHEDULE III.

Reasons

The Applicable Legislative Framework

[36] In this case, the PIPSC's request for a referral to arbitration is dated July 22, 2005 and was received by the Board on July 25, 2005. The PIPSC has submitted that the date the parties commenced bargaining is the crucial date for determining which Act applies, while the employer has submitted that the date the parties commenced bargaining is immaterial to the issue.

[37] In fact, subsection 57(1) of the *PSMA* sets out that "[t]he following rules apply to requests for arbitration made before the day on which s.136 of the new Act comes into force and for which no arbitral award had been made before that day". Thus, the transitional provisions are not relevant as the request was clearly made after the coming into force of the new *Act*. Accordingly, as the request was made after April 1, 2005, the new *Act* provides the applicable legislative framework.

Objection #1: Sufficient and Serious Bargaining

[38] Having reviewed the submissions of the parties, I am of the view that the parties have bargained seriously and sufficiently. As noted by the PIPSC in its request for a board of arbitration (SCHEDULE I), the parties have engaged in 13 days of negotiation and have had the help of a conciliator for five days. Given their positions, no further bargaining is likely to succeed. The primary goal of collective bargaining is to achieve a collective agreement in a timely fashion. When negotiation sessions resemble a pit bull with a bone more closely than an exchange of give and take, nothing can be gained by leaving the parties to continue in those circumstances. It is an appropriate time to move on to the next step. Accordingly, the employer's objection is dismissed and the matter will now be referred to the arbitration board.

Objection #2 (*i*): Articles 2(n) and 2(r)

[39] While only a definition, the subject of the definition - "lay-off" - is clearly a matter which is not arbitrable. The use of this term is not incidental to the definition, but it is in fact the very purpose of the definition. In trying to define the term, one is trying to set the "standard" of what constitutes a lay-off, contrary to paragraph 150(1)(*c*) of the new *Act*.

[40] Similarly, the term "substantive position" is integrally related to the "standards, procedures or processes governing appointment", which is expressly prohibited by paragraph 150(1)*(c)* of the new *Act*. The use of this term is not incidental to the definition, but constitutes its very purpose.

[41] For these reasons, both of these definitions will be excluded from the terms of reference for arbitration.

Objection #2 (*ii*): Article 10.09(a)

[42] I do not agree with the employer's submission that article 10.09 seeks to establish the "days upon which 'duty officer' functions can be assigned". This is an article related to compensation and, as conceded by the employer, nothing in the new *Act* would prevent the arbitration of how a duty officer is to be compensated or defining when overtime begins. Accordingly, article 10.09 will be referred to arbitration.

Objection #2 (*iii*): Article 13.12

[43] It would appear from the PIPSC's submissions that this article is meant only to address the issue of cashing-out vacation credits. The employer's objection, however, indicates that it is of the impression that the article purports to require the scheduling of vacation leave. There is nothing in either section 7 or paragraph 150(1)*(e)* of the new *Act* which would preclude an arbitration board from rendering a decision on scheduling issues. This proposal does not impinge on the employer's authority with respect to the "organization of the public service". This phrase cannot be taken to include scheduling. "Organization" in this sense is referring to organization at a higher level, such as the creation of departments or divisions. Neither does the proposal affect the employer's authority with respect to the assignment of duties. The employer expressed its concern that the proposal does not specify that it is subject to "operational requirements". However, this is a matter for the arbitration board, when rendering its decision on what would be an appropriate award on this issue, having heard the submissions of both parties. Accordingly, article 13.12 will be referred to arbitration.

Objection #2 (*iv*): Article 17.05

[44] I find that, in essence, this proposal deals with staffing processes, which is prohibited by paragraph 150(1)*(c)* of the new *Act*. Accordingly, this article will not be referred to the arbitration board.

Objection #2 (*v*): Article 25.03

[45] Any question as to who will carry out duties is an issue which is precluded from arbitration, by virtue of section 7 and paragraph 150(1)*(e)* of the new *Act*. The number of levels in a grievance process, however, is not precluded from referral under the new *Act.* Accordingly, I will refer to the arbitration board the issue of the number of levels in the grievance process.

Objection #2 (*vi*): Article 39.07 (a), (b) and (c)

[46] Based on the agreement of the parties, paragraphs (b) and (c) of article 39.07 will not be referred to arbitration. With respect to paragraph (a), I am of the view that the proposal, as originally worded, is broad enough to encompass issues of classification, which would be precluded by paragraph 150(1)*(e)* of the new *Act*.

Accordingly I will refer article 39.07(a) to arbitration; however, the phrase "for all purposes" will be struck out.

Other Matters

[47] Finally, in light of the agreement reached by the parties, I will refer the wording of articles 10.08, 10.09(a) and 12.02 as it is found in SCHEDULE III, and not SCHEDULE I, to the arbitration board. Furthermore, I will refer to the arbitration board the monetary proposal with the revised effective date as found in SCHEDULE III, and not SCHEDULE I, as agreed by both parties.

Order

[48] Accordingly, pursuant to section 144 of the new *Act,* the matters in dispute on which the arbitration board shall render an arbitral award in this dispute are those set out as outstanding in SCHEDULE I and SCHEDULE II attached hereto, with the following exceptions:

- reference to articles 2(n) and 2(r) will be removed from SCHEDULE I;
- articles 10.08, 10.09(a) and 12.02 listed in SCHEDULE I will be replaced by the amended version of those articles found in SCHEDULE III;
- reference to article 17.05 will be removed from SCHEDULE I;
- reference to article 25.03 will be removed from SCHEDULE I and replaced by the referral of the issue of the number of levels in the grievance process;
- article 39.07 (a) will be referred as amended below:

  > *Where an employee's position is reclassified to a level with a lower maximum rate of pay, the position shall be deemed to have retained the former classification. In respect to the pay of the employee, this may be cited as Salary Protection Status and subject to (c) below, shall apply for a period of three (3) years from the effective date of the reclassification or until the employee is appointed to a position at the same level as the employee's former classification.*

- reference to paragraphs (b) and (c) of article 39.07 will be removed from SCHEDULE I ; and

- the monetary proposal listed in SCHEDULE I will be replaced by the amended version of the monetary proposal, and its modified effective date, found in SCHEDULE III.

[49] Should any jurisdictional question arise during the course of the hearing as to the inclusion of a matter in these terms of reference, that question must be submitted forthwith to me because the Chairperson of the Public Service Labour Relations Board is, according to the provisions of subsection 144(1) of the *Act*, the only person authorized to make such a determination.

December 8, 2005.

Yvon Tarte,
Chairperson
Public Service Labour Relations Board