

Date: 20061103

Files: 166-02-33077 and 33078

Citation: 2006 PSLRB 121



*Public Service
Staff Relations Act*

Before an adjudicator

BETWEEN

NATHALIE BELLIVEAU, LOUIS PAIEMENT, CHANTAL LEVAC, JEAN THERRIEN,
FARRAH FLEURIMONT AND MARIO HOULE

Grievors

and

TREASURY BOARD
(Transport Canada)

Employer

Indexed as:

Belliveau et al. v. Treasury Board (Transport Canada)

In the matter of grievances referred to adjudication pursuant to section 92 of the
Public Service Staff Relations Act

REASONS FOR DECISION

Before: Léo-Paul Guindon, adjudicator

For the Grievors: Guylaine Bourbeau, Public Service Alliance of Canada

For the Employer: Anna Purkey, articling student

Heard at Montréal, Quebec,
April 19 and 20, 2006.
(P.S.L.R.B. Translation)

Grievances referred to adjudication

[1] On April 15, 2002, Nathalie Belliveau filed a grievance against her employer, contesting its refusal to pay her the terminable allowance provided for in Appendix "P" of her collective agreement. She requested that the terminable allowance be paid to her retroactively to the date the collective agreement concerned came into effect. The grievance was referred to adjudication before the Public Service Staff Relations Board ("the Board") on January 22, 2004, and bears file number 166-02-33077.

[2] On January 28, 2003, Louis Paiement, Chantal Levac, Jean Therrien, Farrah Fleurimond and Mario Houle filed a grievance against their employer, requesting payment of the terminable allowance for railway safety inspectors and investigators retroactively to December 1, 2001. In their grievance, they allege that the employer acted in a discriminatory manner in paying the terminable allowance to other inspectors. They request that the employer acknowledge regional differences in the application of the transportation of dangerous goods and the rail safety program. This grievance was referred to adjudication before the Board on January 22, 2004, and bears file number 166-02-33078.

[3] For the purposes of the hearing, these two cases have been grouped together, and the evidence will be common to both.

[4] On April 1, 2005, the new *Public Service Labour Relations Act (PSLRA)*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, these references to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 ("the former Act").

Summary of the evidence

[5] The collective agreement applicable to this case was entered into by the Treasury Board and the Public Service Alliance of Canada (PSAC) for the Technical Services group on November 19, 2001 (expiry date: June 21, 2003). A memorandum of understanding in respect of employees in the Technical Inspection (TI) group was appended to the collective agreement as Appendix "P". This memorandum of understanding (Exhibit F-1) provides, in part, as follows:

...

Preamble

In an effort to resolve retention problems, the Employer will provide an Allowance to incumbents of specific positions for the performance of duties in the Technical Supervision Group.

Employees in Transport Canada, Transport Safety Board, Public Works and Government Services Canada, Fisheries and Oceans, Canadian Coast Guard who are incumbents at the TI-5 through TI-8 levels in the following positions and who possess the listed qualifications shall be entitled to Terminable Allowances as listed below.

...

- Railway Inspectors and Investigators with qualifications in at least one of the following disciplines: locomotive engineer, conductor, brake person, track specialist, rail traffic controller/dispatcher, equipment/car/locomotive inspector, mechanical officer, signal maintainer and operations officer, and with extensive operational experience in the railway industry or CANAC/FRA certification.

1. On the date of signing of this memorandum of understanding, the parties agree that incumbents of above listed positions shall be eligible to receive a "Terminable Allowance" in the following amounts and subject to the following conditions.

(i) An Allowance to be paid in accordance with the following grids:

...

TERMINABLE ALLOWANCE — RAILWAY SAFETY	
Level	Monthly payments December 1, 2001 to June 1, 2003*
TI-6	\$469.16
TI-7	\$469.16
TI-8	\$469.16

****Allowance is effective on the first (1st) day of each month.***

...

[Emphasis in the original]

[6] Appendix “P” of the former collective agreement, which expired in 2000, provided for different terminable allowance amounts and set out the following eligibility criteria (Exhibit F-2) :

...

Railway Investigators and Inspectors who have had extensive operational experience in the railway industry with qualifications in at least one of the following disciplines: locomotive engineer, conductor, breakperson, track specialist, dispatcher, equipment/car/locomotive inspector, mechanical officer, signal maintainer and operations officer.

...

[7] Patrick Robin, negotiator for PSAC, testified that the purpose of the changes made to the eligibility criteria by adding “and with extensive operational experience in the railway industry or CANAC/FRA certification” to the wording of the former collective agreement were to broaden the number of employees who could receive the terminable allowance. As well, Dan Sherritt, negotiator for the employer, stated that the purpose of this terminable allowance was to resolve problems in recruiting and retaining employees for railway safety inspector and investigator positions. These problems arise from the fact that the railway industry pays higher wages than the federal public service for similar positions. There are no problems in recruiting or retaining employees for transportation of dangerous goods inspector positions.

[8] Ms. Belliveau has acquired extensive experience in the railway industry since 1984. Her resumé indicates that she performed the duties of a railway safety inspector (TI-06) in Montréal from September 1991 to January 1997 (Exhibit F-4). She then performed the duties of a transportation of dangerous goods inspector (TI-06) until September 2004. She was next assigned to Ottawa as a transportation of dangerous goods inspector (TI-06), a position she occupied until September 2005. She was subsequently promoted to the position of Chief, Enforcement, PM-06 group and level, at the Transportation of Dangerous Goods Directorate in Ottawa.

[9] In 2001, Ms. Belliveau's railway safety inspector card was not renewed, even though she had taken the Transport Canada course on enforcement of the *Railway Safety Act*. She testified that the employer refused to pay her the terminable allowance,

even though she had all the skills and experience set out in Appendix “P” of the collective agreement and enforced Quebec’s *Regulation respecting rail safety* for railways falling under Quebec jurisdiction (Exhibit F-6). According to Ms. Belliveau, inspectors working in Quebec have always been responsible for railway safety as part of their positions as transportation of dangerous goods inspectors. The work description for regional transportation of dangerous goods technical inspectors (Exhibit F-5) specifies that the employee shall consult, apply and explain a series of statutes, including the *Railway Safety Act* and the *Transportation of Dangerous Goods Act*.

[10] According to Ms. Belliveau’s testimony and an exchange of email messages (Exhibit F-7) between herself and inspectors working in Ontario (whom, for the purposes of the present decision, I will identify using their initials only), D.H. and C.T. received the terminable allowance. At the time, these inspectors held a double designation as railway safety inspectors and transportation of dangerous goods inspectors. According to the email messages, C.T. mainly performed transportation of dangerous goods inspections, and briefly performed mechanical checks of railway cars (in accordance with the *Railway Safety Act*). J.S. B. did not have a railway safety inspector card, but performed mechanical checks of railway tank cars, as did D.H. and C.T.

[11] In Quebec, W.C. took the railway safety course and was assigned to a railway safety inspector position in 2005. He then performed railway safety inspections in addition to his duties as a transportation of dangerous goods inspector until 2006. At that time, his railway safety inspector card was withdrawn and his duties changed. He exclusively performed checks of transportation of dangerous goods railway cars. M.P., who worked as a railway safety inspector, was transferred to transportation of dangerous goods. Since he supervised W.C., who was receiving the terminable allowance, he, too, continued to receive the terminable allowance. At the time of the hearing, M.P. still held a railway safety inspector card, even though he no longer performed these duties.

[12] Mr. Paiement has been a transportation of dangerous goods inspector since 1986 and has taken workplace training in railway safety. In his testimony, he stated that he notes on a computerized report (TRAIN) any mechanical defects he finds during his inspections. This information allows railway technical inspectors (a designation for railway safety inspectors) to issue notices calling for corrective action

or notices of violation under the *Railway Safety Act*. Although Mr. Paiement took this course, a railway safety inspector card was not issued to him.

[13] Before the 1997 position reclassification, the SDB-622 “condensed position” description indicated a “railway safety — dangerous goods” inspector designation, and covered responsibilities under the *Railway Safety Act* and the *Transportation of Dangerous Goods Act* (Exhibit F-8). At that time, the objective was to reduce the number of passenger service positions. According to Mr. Paiement, the updated 1999 generic work description for the SDB-622 position (Exhibit F-5) included the same elements as the “condensed position” description.

[14] Walter Carlston, Director, Operations and Equipment, who works in Ottawa, testified that the purpose of the terminable allowance provided for in Appendix “P” of the collective agreement is to resolve problems in recruiting and retaining employees for railway safety inspector positions. These problems arise from the fact that the railway industry pays wages approximately 25 percent higher than those of the federal public service for similar positions. Transport Canada regional directors determine their needs for railway safety inspectors and transportation of dangerous goods inspectors. These requests are forwarded to Luc Bourdon, Director General, Rail Safety, who recommends the appointment of individuals who meet the experience and training criteria for railway safety inspector positions to the Minister of Transport, who designates railway safety inspectors. Staffing requests for transportation of dangerous goods inspectors are forwarded to the Director General, Transportation of Dangerous Goods, who processes these requests in a similar manner.

[15] In certain cases, depending on regional needs, individuals may hold both railway safety investigator and transportation of dangerous goods investigator designations. All employees may take training in enforcement of the *Railway Safety Act*, but only those designated by the Minister as railway safety inspectors and assigned by the employer to specific duties receive the terminable allowance.

[16] Mr. Bourdon corroborated Mr. Carlston’s testimony with regard to the system used by the employer to determine its needs for railway safety inspector positions, as well as the process of appointment by the Minister. Mr. Bourdon received the present grievances, but dismissed them because the grievors did not have railway safety duties, but were assigned only to transportation of dangerous goods inspector positions. He acknowledged that, as part of their investigations, the grievors may note

certain mechanical defects and notify passengers or railway safety inspectors of them. He noted, however, that transportation of dangerous goods inspectors are not authorized to enforce the *Railway Safety Act* and may not issue, notices under this statute since they are not appointed to do so by the Minister.

[17] Mr. Bourdon added that, according to Appendix “P” to the collective agreement, the terminable allowance is payable only to railway safety inspectors and investigators who are assigned to railway safety. Those assigned to the transportation of dangerous goods are not eligible to receive the terminable allowance.

Summary of the arguments

For the grievors

[18] The grievors perform the duties of transportation of dangerous goods inspectors as set out in their work description (Exhibit F-5).

[19] As part of their duties as set out in their work description (point “8” of Exhibit F-5), the grievors are also required to consult, enforce and explain the *Railway Safety Act*. When they work in Quebec, they are also required to enforce Quebec's *Regulation respecting rail safety* (Exhibit F-6). The grievors therefore claim that they perform the duties and have the responsibilities of railway safety inspectors and investigators, and have the skills and experience that make them eligible to receive the terminable allowance in accordance with the criteria set out in Appendix “P” of the collective agreement.

[20] The employer did not establish problems in recruiting and retaining employees for railway safety inspector positions. The employer did not adduce a railway safety inspector work description in evidence.

[21] By setting different regional criteria for railway safety inspector and transportation of dangerous goods inspector positions, the employer has deprived certain railway safety inspectors of the terminable allowance.

[22] The grievors meet all the criteria set out in Appendix “P” of the collective agreement and are, therefore, eligible to receive the terminable allowance. The grievors consider that the grievances should be allowed and that the grievance adjudicator must direct the employer to pay the grievors the terminable allowance to which they are entitled.

For the employer

[23] The wording of Appendix “P” to the collective agreement is clear and requires no extrinsic evidence to clarify its extent. This principle was followed in *Martin v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-25920 (1995) (QL). The onus is on the grievors to establish that the wording is ambiguous (*Reid v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-02-12631 (1982) (QL); *White v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-11959 (1982) (QL); and *Gagnon v. Staff of the Non-Public Funds, Canadian Forces*, PSSRB File Nos. 166-18-17832 to 17834 (1989) (QL).

[24] The evidence has established that the grievors are designated as inspectors pursuant to the *Transportation of Dangerous Goods Act*, not the *Railway Safety Act*. Appendix “P” of the collective agreement provides that only railway safety inspectors are eligible to receive the terminable allowance. The employer pays the terminable allowance to individuals assigned to those duties, not to individuals with the duties of transportation of dangerous goods inspectors.

[25] The employer has determined its needs by administrative region, and in certain regions, the same individuals are designated as both railway safety inspectors and transportation of dangerous goods inspectors. The terminable allowance is paid to these individuals because they meet the eligibility criteria set out in Appendix “P” to the collective agreement, in that they are railway safety inspectors.

Rebuttal for the grievors

[26] According to the grievors, the preamble to Appendix “P” of the collective agreement provides that railway safety inspectors are eligible to receive the terminable allowance and need not be designated inspectors pursuant to the *Railway Safety Act*.

Reasons

[27] The preamble to Appendix “P” of the collective agreement provides that the employer shall pay a terminable allowance to the incumbents of certain positions in the Technical Inspection group. Pursuant to paragraph 2 of this preamble, some Transport Canada employees who are incumbents of certain TI-5 to TI-8 group and level positions are eligible to receive the terminable allowance. However, this eligibility is limited to incumbents of positions listed in Appendix “P” of the collective agreement who have the qualifications set out therein. Pursuant to paragraph 6 of the preamble,

railway safety inspectors and investigators are incumbents of positions eligible to receive the terminable allowance. This paragraph also sets out the skills in certain disciplines, as well as the experience or certification, that incumbents must have.

[28] The parties also agreed on the amounts of the terminable allowance to be paid if the conditions set out in article 1 of Appendix “P” of the collective agreement are met. Paragraph 1(i) provides that the terminable allowance shall be paid “in accordance with the following grid” entitled “Terminable Allowance — Railway Safety.” This grid indicates that a monthly amount of \$469.16 is payable to incumbents of TI-06 to TI-08 positions from December 1, 2001, to June 1, 2003.

[29] Thus, although the preamble to Appendix “P” of the collective agreement makes incumbents of railway safety inspector and investigator positions eligible to receive a terminable allowance, this allowance is paid only to employees assigned to the railway safety positions indicated in the grid. There is no provision for payment of the terminable allowance to employees assigned to transportation of dangerous goods positions.

[30] Considered independently from paragraph 1(i), the preamble might suggest that the parties' intent was to make all railway safety inspectors and investigators with the requisite skills, experience and/or CANAC/FRA certification eligible for the terminable allowance. According to that interpretation, transportation of dangerous goods inspectors, as well as railway safety inspectors, would be eligible for the terminable allowance.

[31] However, that interpretation cannot be upheld when we link the considerations set out in the preamble with those set out in article 1 and, specifically, paragraph 1(i), of Appendix “P” of the collective agreement. The principle that a collective agreement must be considered as a whole and that its clauses must be interpreted in relation to each other must be applied to the present case.

[32] Article 1 of Appendix “P” clearly and specifically provides that the parties agreed on a “Terminable Allowance — Railway Safety” to be paid in accordance with the grid set out in paragraph 1(i). I cannot extend payment of the terminable allowance to transportation of dangerous goods inspectors without adding to the wording of the collective agreement. If the parties had wished the terminable allowance to be paid to transportation of dangerous goods inspectors as well, they would have so specified,

either by making the grid set out in paragraph 1(i) applicable to all railway safety inspectors and investigators, or by including an additional grid specifically referring to a “Terminable Allowance — Transportation of Dangerous Goods.”

[33] According to the principles of interpretation found in the third edition of *Collective Agreement Arbitration in Canada* by Palmer and Palmer, extrinsic evidence may be used to interpret the terms of a collective agreement only if the wording is ambiguous. This principle is also found at paragraph 4:2250 of the third edition of *Canadian Labour Arbitration* by Brown and Beatty. Consequently, since the wording of the collective agreement is clear with regard to who may receive the terminable allowance, I need not seek to determine the parties’ intent on the basis of the testimony of the negotiators who acted for the bargaining agent or for the employer during the most recent round of bargaining.

[34] Furthermore, section 7 of both the former *Act* and the new *Act* provides that this legislation is not to be construed as affecting the employer’s right or authority to determine the organization of the federal public service, or to assign duties to and to classify positions. The employer has the right to assign to railway safety inspectors and investigators the duties and responsibilities that will meet the needs it identifies. The *Act* gives me no authority over these matters, whether they are determined at the regional level or otherwise. The *Act* provides no recourse for public servants with regard to assignment of duties and responsibilities to railway safety inspectors and investigators. Nor does the *Act* give me the right to express an opinion on the employer’s decisions to assign duties for enforcing the *Railway Safety Act* or the *Transportation of Dangerous Goods Act* to separate positions or to a single position. The bargaining agent’s arguments on this point do not allow me to consider the present grievances.

[35] For these reasons, after considering all the evidence and evaluating the submissions, I make the following order:

(The Order appears on the next page)

Order

[36] The grievances are dismissed.

November 3, 2006.

**Léo-Paul Guindon,
adjudicator**