Date: 20060621

File: 561-02-00102

Citation: 2006 PSLRB 76

Public Service Labour Relations Act

Before the Public Service Labour Relations Board

BETWEEN

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AND DISTRICT LODGE 147, NATIONAL ASSOCIATION OF FEDERAL CORRECTIONAL OFFICERS

Complainants

and

CORRECTIONAL SERVICE OF CANADA

Respondent

and

UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN

Intervenor

Indexed as
International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers v. Correctional Service of Canada

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION (No. 2)

Before: Dan Butler, Board Member

For the Complainant: Susan Ballantyne, counsel

For the Respondent: Richard Fader, counsel

For the Intervenor: John Mancini, counsel

Heard at Ottawa, Ontario,
March 17 and April 19, 2006.

Complaint before the Board

[1] On February 27, 2006, the International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers ("the complainants") filed a complaint with the Public Service Labour Relations Board ("the Board") against the Correctional Service of Canada ("the respondent" or "CSC") under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act (PSLRA*). The complainants allege that the respondent has committed an unfair labour practice in contravention of section 185 of the *PSLRA*. In particular, by refusing to allow its premises to be used for the distribution of certain of the complainants' mail delivered to the work addresses of certain correctional officers, the respondent violated paragraph 186(1)(*a*) of the *PSLRA*. At the hearing, the complainants also alleged that the respondent violated paragraph 186(1)(*b*) of the *PSLRA* by discriminating against an employee organization.

[2] After preliminary discussions at the opening of the hearing on March 17, 2006, the parties presented their evidence and arguments to the Board on April 19, 2006. The UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA - CSN ("UCCO-SACC-CSN"), granted status as an intervenor, also presented an oral argument. Pursuant to an understanding reached in advance with the complainants and the respondent, I issued a "barebones" ruling to the parties on May 1, 2006, as Decision No. 1, finding as follows:

. . .

> *I find that the refusal by the respondent to deliver the complainants' mail to correctional officers at their workplace can be characterized, in isolation, as interference in the formation of an employee organization within the meaning of paragraph 186(1)*(a) *of the* PSLRA. *I find, however, that this refusal does not comprise a violation of the* PSLRA *because the respondent could reasonably believe that the activity in question represents an attempt by an employee organization to persuade employees on the employer's premises, during their normal working hours, to become a member of an employee organization, an activity which, without the consent of the employer, is prohibited under subsection 188*(a) *of the* PSLRA.
>
> *I also find that the evidence in this case is not sufficient to establish that the actions of the respondent represent discrimination against an employee organization within the meaning of paragraph 186(1)*(b) *of the* PSLRA.

> *The complainants, consequently, have not established an unfair labour practice within the meaning of section 185 of the* PSLRA.
>
> *I note that the complaint also refers to an alleged violation of the* Canada Post Corporation Act. *At the hearing the complainants did not argue a violation of the* Canada Post Corporation Act *and I make no finding on this element.*
>
> . . .

As a result, the complaint was denied.

[3] This second part of the decision now reports, as agreed, the reasons for my ruling regarding the application of UCCO-SACC-CSN for intervenor status, a summary of evidence and arguments, as well as the full reasons for the final decision.

Intervenor Status

[4] On March 17, 2006, Board staff wrote to UCCO-SACC-CSN on my behalf to bring to its attention the documents which initiated this proceeding as well as the provisions of section 14 of the *Public Service Labour Relations Board Regulations, SOR/2005-79 ("the Regulations")* which provides:

> . . .
>
> ***14.*** *(1) Any person with a substantial interest in a proceeding before the Board may apply to the Board to be added as a party or an intervenor.*
>
> *(2) The Board may, after giving the parties the opportunity to make representations in respect of the application, add the person as a party or an intervenor.*
>
> . . .

[5] UCCO-SACC-CSN wrote on March 21, 2006, asking to intervene in the complaint on the grounds that any decision in this matter would necessarily affect the rights and obligations of the incumbent bargaining agent. On March 27, 2006, Board staff responded by asking UCCO-SACC-CSN to detail its supporting reasons by March 31, 2006, pursuant to subsection 15(1) of the *Regulations*:

> . . .
>
> ***15.*** *(1) The Board may, on its own initiative or at request of a party or an intervenor, request that information contained in*

> *any document filed by any other party or any other intervenor be made more complete or specific.*
>
> . . .

Board staff also asked the complainants and the respondent for their comments, if any, by April 9, 2006, regarding the request for intervenor status.

[6] On March 23, 2006, the complainants advised that they intended to object to the request for intervenor status. On March 27, 2006, the complainants followed up with a letter arguing that UCCO-SACC-CSN had no direct knowledge of the dispute, that it could not provide assistance to the Board in determining the matter, and that its presence at a hearing as an intervenor would complicate proceedings and prejudice the complainants.

[7] On March 28, 2006, UCCO-SACC-CSN submitted, as its reason for seeking to intervene, the argument that in the context of a complaint arising from an organizing campaign targeting UCCO-SACC-CSN, it would be "hazardous" for the Board to deny intervenor status to UCCO-SACC-CSN.

[8] The respondent indicated on March 31, 2006, that it had no submissions on the question.

[9] I find unhelpful the UCCO-SACC-CSN response to the Board's request under subsection 15(1) of the *Regulations*. In the letter of March 26, 2006, UCCO-SACC-CSN suggests only that the Board would face a "hazard" were it not to decide in favour of its request, given the context of the complaint. UCCO-SACC-CSN neither provided further details of the nature of the hazard nor did it offer any but the most fleeting and indirect insight into the interests that it would bring to the hearing. In particular, UCCO-SACC-CSN offered nothing that would suggest that it might have special or additional information or insights that might assist the Board.

[10] It is tempting, therefore, to dismiss the UCCO-SACC-CSN request as inadequately supported but for the fact that most reasonable observers would instinctively understand that an action arising from an organizing campaign the objective of which is to displace UCCO-SACC-CSN as the bargaining agent almost by definition touches on the substantial interests of the incumbent bargaining agent. In considering the request, I took note of the fact that UCCO-SACC-CSN was not a participant in the hearing which resulted in the Board's earlier decision in *International*

Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Workers v. Correctional Service Canada, Treasury Board and Don Graham, 2005 PSLRB 50. This first complaint involved the same principal parties and the same organizing campaign but the nature of the situation examined by the Board at the time was, I believe, different from what I must now consider in the present complaint. The pith and substance of the first decision seems to me to centre more about the right of individual employees to wear the complainants' caps and pins than a right claimed corporately by an employee organization. While the individual rights at issue were obviously connected to the interests of the complainants, the Board in the first case framed the question as one involving the freedom of individual employees to express their bargaining agent preference in the workplace. It did not find that the employer's effort to limit that freedom constituted interference in the formation of an employee organization. By contrast, the particulars of the complainants' affidavit in the present case suggest that the activity at the centre of the complaint is more forthrightly a matter of rights and interests associated with corporate employee organizations than of a claim made on behalf of individual employees. On this basis, if no other, I concluded that the most prudent approach would be to grant UCCO-SACC-CSN intervenor status so that it might, as necessary, assert and defend its substantial interests in the disposition of the complaint.

[11] My decision, therefore, accepts that UCCO-SACC-CSN has met its onus to establish a substantial interest in the proceedings, albeit through a barely minimal submission. I wish to note further, for the record, that I was not persuaded that the complainants would be prejudiced at the hearing by the presence of the intervenor, as they contended. There is little doubt that the interests of the complainants and the intervenor are not aligned but that is normally the situation where one employee organization seeks to displace another. In my view, the complainants' ability to present evidence and argue their case was unlikely to be affected by this ruling.

[12] On granting intervenor status to a third party, the Board has the discretion to determine the parameters for its participation in a hearing. In this situation, lacking any indication from the prospective intervenor that it wished to contribute evidence, with no argument before me that the primary parties could not successfully furnish the required information, and noting the concern expressed by the complainants that

the hearing not be complicated by the presence of an intervenor, I ruled to limit the intervenor's role at the hearing to the presentation of a final oral argument.

Summary of the Evidence

[13] The complainants and the respondent agreed orally at the outset of the hearing to certain basic facts of the case. The complainants declined the opportunity to lead further evidence through direct testimony. The respondent, for its part, called two witnesses. The complainants then offered brief rebuttal testimony through a third witness. The parties tabled a total of nine exhibits which are on file at the Board and are available for examination.

[14] The following facts were agreed by the complainants and the respondent. The Board has recognized that the complainants constitute an employee organization within the meaning of the *PSLRA*. The complainants are conducting an organizing campaign to become the bargaining agent for a large nation-wide bargaining unit consisting of correctional officers employed by the respondent. This is the third complaint filed by the complainants in the course of its organizing campaign. The Board has ruled on the first complaint in the complainants' favour. The second complaint challenges the alleged refusal of the employer to implement the first decision and has not yet been scheduled for hearing by the Board. Three written statements from employees attest to the respondent's practice of allowing employees to receive personal mail at the workplace (Exhibits C-1, C-2 and C-3). Don Head, on behalf of the respondent, issued a directive to all wardens not to deliver the mailing of the complainants at issue in this hearing. The respondent instead returned the majority of the mailing to the head office of the complainants. Three letters from the respondent to the complainants illustrate the latter action (Exhibits C-4, C-5 and C-6).

[15] Diane Lacelle, the respondent's first witness, has worked in the public service since 1977, and has more than ten years of experience with CSC. She currently serves as its Director General of Labour Relations, a position classified at the EX-02 group and level. Ms. Lacelle manages 39 full-time equivalent positions at CSC headquarters and reports to the Assistant Commissioner of Human Resources.

[16] Ms. Lacelle's involvement in the matter of the complainants' mailing began when she received a contact from the Quebec region of CSC asking what should be done with boxes of envelopes addressed to correctional officers received by institutions in the

province. The Quebec region sent a sample of the letter contained in the envelopes to Ms. Lacelle by fax.

[17] The same morning, Ms. Lacelle received an email from Don Head, Senior Deputy Commissioner, asking for advice about what to do with the mailing. Ms. Lacelle understood that the same mailing received in the Quebec region had also arrived at the majority of CSC's 54 establishments across the country, in the form of bundles, in stacks or boxes, or as loose mail.

[18] Ms. Lacelle testified that, to her knowledge, no bulk-mailing of this type addressed to employees at their workplaces had previously occurred. While some personal mail from an employee organization may possibly have "gone through" in the past, this would have only occurred without, or prior to the employer knowing about it. The mailing from the complainants represented something quite new and different, and arrived in the sensitive context of a negotiation process for a new collective agreement that had already consumed almost four years.

[19] Management's main concern is that the activities of employee organizations at the workplace neither affect operations nor the employer's ability to maintain the safety and security of CSC institutions, offenders and staff. Management also wants to be seen as a neutral party which does not interfere in legitimate union activities.

[20] In respect of the complainants' mailing, management was concerned about the volume and nature of the mail that had arrived, that extra work would be required to process it, and that the complexity of its contents could distract staff receiving the mail from their daily activities during business hours. Such distractions raise security issues as interruptions can affect correctional staff's on-the-job-performance of the critical security duties assigned them. Asked whether management would remain concerned were it possible to deliver this mail outside business hours, Ms. Lacelle answered that CSC is always on business hours and that the only delivery option that did not create a concern was if delivery occurred outside of CSC's facilities on the employees' own time. Once mail reaches the mail room, it comes under the control of correctional officers and requires processing by them. It cannot be delivered without going through the mail room given security concerns about illicit substances and contraband. Ms. Lacelle also expressed her belief that a security concern would exist were the complainants simply to leave a box of mail for employees to collect at the front entrance because a security officer would still have to monitor the box and the

movement of persons around the box. If a representative of the complainants were to stand by such a box and distribute the material outside the employer's premises, the situation might be different.

[21] CSC does not have a policy respecting personal mail addressed to employees, only a policy governing mail destined for inmates.

[22] In the case at hand, Ms. Lacelle provided advice and recommendations to Mr. Head. The latter issued instructions to all wardens not to deliver the complainants' mail and to return it to the complainants (Exhibit R-2) the day after Ms. Lacelle had received the initial fax from the Quebec region.

[23] In cross-examination, Ms. Lacelle indicated that she did not know whether the previous bargaining agent, the Public Service Alliance of Canada (PSAC), had left boxes of leaflets for employees at the work site as UCCO-SACC-CSN purportedly does today. She confirmed that all correctional officers had probably received Mr. Head's directions about the mailing (Exhibit R-2) because his email to wardens asked that it be posted at their sites. The reason for Mr. Head's action, once more, was that management did not want delivery of the envelopes to disrupt operations, and management wanted staff to know that this was the reason. If an envelope was delivered to a correctional officer despite Mr. Head's direction, management did not require the recipient to return it.

[24] Pressed further about the nature of the security risk associated with delivery of the complainants' mailing, Ms. Lacelle expressed the opinion that the element of distraction on opening the envelopes was only the beginning of a possible problem. Many recipients might wish to discuss the contents with colleagues creating a "ripple effect". She noted that the contents of the mailing were quite complex, particularly regarding the outstanding pension issue and were sensitive in the context of the ongoing organizing campaign. The complexity of the content would require concentration by the reader. Whether or not the actual letter was opened by particular employees, word of its presence in the workplace would get around and become "the subject of the day". In this sense, even an employee holding an unopened letter in the workplace during business hours could be disruptive, particularly when viewed in the broader context of the ongoing and sensitive organizing campaign.

[25] Ms. Lacelle accepted the complainants' suggestion that its letter did not explicitly ask employees to read its content during working hours.

[26] Mario Charette occupies the position of Manager, Operational and Administrative Information at CSC, a position classified at the AS-06 group and level. Mr. Charette has worked in the public service for 29 years, the last 20 of which have been at CSC.

[27] Mr. Charette provided the following generic description of mail delivery at CSC institutions: The mail is delivered by Canada Post or a courier service to the mail room. There, or in an alternate room designated for this purpose, correctional officers scan the mail using X-ray equipment to check for the presence of illicit substances or contraband. If the mail is found not to be suspicious, it is sorted according to organizational units in the institution and placed in an appropriate mail box or pigeon-hole in the mail room or in the unit. Employees pick up their mail from these locations or, alternatively, an individual is assigned to distribute the mail.

[28] The complainants offered Nelson Hunter as a reply witness. Mr. Hunter has been a correctional officer for 15 years, all of which time has been spent working at Joyceville Institution near Kingston, Ontario. Mr. Hunter has recently been on leave from that workplace to participate in the complainants' organizing campaign. Mr. Hunter testified that he had seen both PSAC and UCCO-SACC-CSN written material left in boxes or in piles at various locations in the workplace, on average once or twice a month but skipping some months. These bargaining agent documents addressed a variety of subjects and were brought on the site by a bargaining agent official or by someone else on behalf of the bargaining agent. The material might be found at the visitors' security desk, in front of the supervisor's office where roll-call is taken, in staff common areas or lounges or in unit offices. Mr. Hunter confirmed that this material on occasion included pension information.

[29] In cross-examination, Mr. Hunter conceded he had never directly observed a similar practice at any institution other than Joyceville.

Summary of the Arguments

On behalf of the complainants

[30] The adjudicator's decision in *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers* 2005 PSLRB 50, a case involving the same complainants and respondent, found that it was inappropriate and illegal for the employer to discriminate against the complainants by prohibiting employees from wearing the complainants' caps and pins in the workplace.

[31] In the complainants' submission, the case before me is very similar. Here, the employer permits the delivery of any personal mail to correctional officers in their workplace without regard for its content (save for the presence of illicit substances or contraband), other than personal mail originating with the complainants. By doing so, the employer is discriminating against the complainants and interfering with the formation of an employee organization contrary to paragraph 186(1)(*a*) of the *PSLRA*.

[32] The respondent argues that if it were to allow delivery of the mail in question, it would be participating in the formation of an employee organization, which is prohibited by the *PSLRA*. The complainants agree that the employer cannot participate in the formation of an employee organization, but do not accept, on the facts of the case, that this is what the employer would be doing by delivering the complainants' mail.

[33] Allowing the delivery of all personal mail to correctional officers at the workplace is "business as usual" for CSC. If there were a legal challenge to a decision by the employer permitting delivery of the complainants' mail to employees in the workplace, this "business as usual" defence would be a perfectly valid response.

[34] The prohibition against employer participation in organizing campaigns exists for the public policy purpose of ensuring that the employer stands at arm's length from employee organizations and does not "stick its nose" in attempts to organize employees. This, however, is precisely what the employer did in this case. Contrary to past practice, the employer began to review incoming personal mail and to censor it, if it originated with the complainants, by returning it to the sender. Inasmuch as the complainants' mail is therefore treated differently from any other type of personal

mail, the employer is engaging in illegal discrimination and interfering with the complainants' ability to organize.

[35] *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers*, found the wearing of the complainant's caps and pins to be a lawful activity:

. . .

> [109]. . . *I have concluded that the wearing of NAFCW (NAFCO) baseball caps and pins is a legitimate lawful activity of a duly authorized employee organization and in no way jeopardizes the safety of inmates, staff and correctional officers in their respective institutions.*

. . .

The decision also found that a representative of the employer did discriminate against the complainants in contravention of the *PSSRA* when he prohibited only the complainants' caps:

. . .

> [99] *I find that Mr. Graham has violated subsection 9(1) of the* PSSRA *by singling out the wearing of NAFCW (NAFCO) baseball caps; this is discrimination against the IAM&AW and NAFCW (NAFCO), which is an employee organization.*

. . .

[36] Applying the logic of this decision to the current complaint, it must be discriminatory and in contravention of the *PSLRA* to allow delivery of any personal mail but personal mail from the complainants. The decision, however, should be distinguished to the extent that the adjudicator made no finding of employer interference in the formation of an employee organization. In the present case, by contrast, the fact of interference is clear. An employee organization cannot organize a bargaining unit unless it is able to make contact with employees. Contact is the necessary prelude before an employee organization can attempt to persuade. The complainants would have been pleased to contact all employees at their homes if this were possible, but they are not entitled, unlike the recognized bargaining agent, to obtain the home addresses of employees. Therefore, as an alternative, they attempted to avail themselves of the employer's practice of allowing delivery of personal mail at the workplace to achieve contact. The employer then actively inserted itself into this

effort, thwarting delivery of the complainants' mail, rather than remaining neutral and adopting a "hands-off" policy.

[37] The complainants have not filed this action with the Board with the objective of ensuring that employees read their mail during working hours. Nothing in the complainants' package (Exhibits R-1 and R-3) suggests that employees take time away from their duties to read this information. The complainants expect that correctional officers would exercise the same good sense with this personal mail as they do with all other personal mail, no matter how interesting, provocative or disturbing the contents. There is also no evidence before the Board that would lead it to conclude that the complainants' mail would cause a distraction or contribute to a volatile situation. Similarly, there is no evidence that material from either the PSAC or UCCO-SACC-CSN, as described in Mr. Hunter's testimony, ever caused any distractions or volatility. The employer is correct to think about security issues, but it acted in an excessively cautious fashion to the point of prohibited interference when it concluded, for example, that the very act of holding an unopened letter from the complainants could be so sufficiently distracting as to cause a security risk.

[38] The complainants refer me to the decision of the Canada Labour Relations Board, as it was then, in *Independent Canadian Transit Union and Amalgamated Transit Union and Ottawa-Carleton Regional Transit Commission*, (1984) 7 CLRBR (NS) 137, for a summary of case law respecting union organizing activity in the workplace and employer rights. The complainants cited several passages from the decision to illustrate the principal theme of the case law; i.e, that an employer can only interfere in legitimate union activities occurring outside business hours if it has compelling and justifiable business reasons for doing so. Underlying the case law is the need to find a proper balance between respecting the freedom of employees to associate and organize, on the one hand, and the right of the employer to conduct its operations, on the other. In the present case, the complainants do not seek the right to solicit memberships during working hours. They accept, for example, that the employer could issue instructions that employees should not read personal mail during working hours. By prohibiting the delivery of the complainants' mail, however, the employer goes much further than it needs to in order to protect its interests, and has the effect of substantially interfering in union activity.

[39] The complainants also refer me to *Quan v. Treasury Board*, [1990] F.C.J. No. 104, and *Public Service Alliance of Canada and Carey Barnowski v. Canada Customs and Revenue Agency, Rob Wright and Reid Corrigal*, 2001 PSSRB 105, for support for the proposition that "union activity" should be given broad interpretation.

[40] In conclusion, the complainants ask that the Board find that treating mail from the complainants differently from all other personal mail constitutes discrimination contrary to paragraph 186(1)(*b*) of the *PSLRA*. The complainants ask further that the Board declare that preventing dissemination of the complainants' information during their organizing campaign comprises interference in the formation of an employee organization, also contrary to paragraph 186(1)(*a*) of the *PSLRA*. The complainants seek an order from the Board requiring the employer to refrain from further interference in the complainants' organizing activities. In particular, the Board should require the employer to allow delivery of the complainants' mail to employees at their workplace. Should the complainants incur additional costs in resending their information package to CSC work sites, these costs should be borne by the employer. The complainants also ask that the Board order the employer to post notices in the workplace indicating that the employer's refusal to allow delivery of the complainants' mail was contrary to the *PSLRA*. The latter remedy is necessary given that every single correctional officer received the employer's original decision and all now need to be informed that the employer breached the law with this decision.

[41] In the alternative, the complainants seek an order from the Board permitting them to leave materials for correctional officers at their workplace in the same manner as other employee organizations have been able to do.

On behalf of the respondent

[42] The fact that the employer does not have a policy respecting the delivery of personal mail to employees at the workplace is irrelevant. The case law is clear that an employee organization cannot solicit memberships at the workplace during work hours. The issue of the existence of a personal mail policy or of the employer's business reasons for restricting union activity at the workplace are only pertinent in discussing union activities which occur during non-work hours.

[43] In the circumstances of the case at hand, delivery of the complainants' mail would be tantamount to solicitation during business hours. If the adjudicator finds

this to be the case, the complaint cannot succeed. If it is solicitation, there is no need to inquire into whether the employer had legitimate business reasons for preventing delivery of the mail.

[44] In the alternative, if the adjudicator finds that delivery of the complainants' mail is not solicitation, the respondent has unique business reasons to prohibit delivery of this mail at its workplaces.

[45] The primary issue is whether the employer can be forced to deliver mail from an employee organization the sole purpose of which is to solicit memberships contrary to paragraph 188*(1)* of the *PSLRA*. Three facts are crucial: (1) The evidence is not contradicted that this was the first case where such a bulk-mail delivery was brought to the attention of management; (2) Management had to make a decision given the unique situation that it faced; (3) By the very nature of mail delivery inside a correctional institution, it must be done during work hours. Whoever is required to deliver the mail is clearly at work and consequently becomes an agent of the solicitation.

[46] The respondent argues for caution in applying the concept of "off hours" in the case law to this complaint. The reality is that CSC operates its workplaces on a "24/7" basis and there are no "off hours".

[47] An examination of the mailing shows that it was intended to solicit membership during work hours. The first page of the letter (Exhibit R-1) states that "Members of the NAFCO Steering Committee encourage you to take a few minutes to read our proposal." Nowhere does it advise recipients not to read the package during work hours. The letter continues to ". . . encourage you to fill out the provided membership card", and the pamphlet accompanying the letter includes a membership card for the complainant for this purpose.

[48] There is no evidence that the employer has ever knowingly delivered mail of a similar type in the past. Boxes of soliciting mail from the complainants showed up at the workplace designed to be disruptive and to cause ripples. Management faced a decision whether to deliver the mail which included the complainants' sign-up cards. It concluded that it could not deliver the mail because doing so would facilitate solicitation in the workplace. In this light, the respondent argues that an employer

cannot be required to do something that would contravene a prohibition contained in the *PSLRA*.

[49] In *Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File No. 144-2-296 (1992) (QL), the Board examined, *inter alia*, allegations that the employer condoned certain activities by employees at the workplace during work hours in the context of an organizing campaign. The Board found at page 7, as was appropriate, that the employer acted quickly to bring to a halt the impugned activities once it learned of them:

. . .

> *What the allegations amount to at most is that there were communications between employees in the bargaining unit, during working hours and at the workplace with the objective of gaining support for the Applicant in its effort to become the certified bargaining agent. Some of that communication may have occurred over government phone lines and through government fax machines; however, this does not in any way suggest that the employer was colluding with the Applicant to secure support for the Applicant's application for certification. On the contrary, the allegations suggest that in those instances where these workplace activities were brought to the attention of members of management, they acted promptly in seeking to bring these activities to a halt . . . .*

. . .

[50] The situation considered in *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers*, must be distinguished from the circumstances of the present complaint which are radically different. The adjudicator in the first complaint found that the wearing of hats and pins by employees shows their affiliation but does not comprise solicitation. He also had before him an employer policy that explicitly targeted only the complainants' caps and pins. The present case, by contrast, clearly involves activity which solicits membership. There is no evidence that the employer was "rooting out" mail from the complainants and only the complainants. The employer instead made the decision not to allow deliver of union sign-up cards *per se*. There is no evidence that the employer has ever allowed delivery of any other employee organization's sign-up cards. This is not a situation of "no NAFCO cards" but rather of "no cards".

[51] *Independent Canadian Transit Union* cited by the complainants stands only for the proposition that, as in *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers*, wearing bargaining agent caps and pins is not solicitation. It is thus not helpful in resolving the issue raised by the present case.

[52] The respondent argued that the decision in *Union of Bank Employees, Local 2104, (CLC) and Canadian Imperial Bank of Commerce,* (1985) 10 CLRBR (NS) 182 (QL), is more relevant given that it addresses the question of the delivery of union solicitation mail among other activities. The respondent referred me to several passages from this decision the final of which, at page 18, in its submission, captures the dilemma faced by CSC:

. . .

> *Unfortunately, the role of neutrality in which an employer finds itself was very much put in jeopardy by, in the instant case, the UBE's mailings. The mail could not be distributed to the employees without causing the employer to become intimately involved, whether it wished to or not, in the UBE's organizing campaign. The actions of the UBE put the Bank very much in a quandary. If it did not deliver the mail, it ran the risk of a complaint of the type eventually filed by the UBE. If it delivered the mail, it ran the risk of a complaint being filed that it was not staying neutral, that it was involved in the UBE's organizing campaign.*

. . .

In the same way that the Bank in this decision was not required to deliver mail and thereby bring it into violation of the *Canada Labour Code* prohibition against organizing activities during working hours, CSC cannot be found to have violated section 185 and paragraph 186(1)(*a*) of the *PSLRA* when, to do what the complainants seek, required a violation of section 188 of the *PSLRA*.

[53] The respondent argues, in the alternative, that CSC had good reason to prohibit delivery of the complainants' mail. There are no "off hours" in its "24/7" operation. The bulk mail sent by the complainants raises legitimate security concerns. Its arrival "en masse" itself created a distraction and threatened to become "the issue of the day". The content of the mail was provocative as illustrated by one of the pull-out pages of the pamphlet which states that correctional officers ". . . sit as hostages, held there by

a union which promised to work for us" (Exhibit R-3). We are not dealing here with a bank or bus company. In the unique context of a correctional facility, preventative security is important and this is exactly what motivated management. The complainants' package was designed to be disruptive and to become an event. The CSC thus had a legitimate business concern not to distribute the mailing. It must be given wider latitude than in other types of establishments to run its penitentiaries in a fashion that guarantees safety and security.

[54] For these reasons, the adjudicator should dismiss the complaint.

On behalf of the intervenor

[55] Accepting the complaint and allowing the complainants access to the employer's mail system for purposes of solicitation in the workplace would overturn 100 years of labour relations practice and case law. There is nothing wrong with the complainants' mailing (Exhibit R-1 and R-3) in and of itself, but it is designed to persuade employees to sign and return a membership card, an activity that cannot be accomplished using the employer's mail.

[56] Other unions before the complainants have managed their organizing campaigns without employer mail delivery, as is proper. They were able to find ways of securing employee home addresses or used other means to contact prospective members. Certainly, UCCO-SACC-CSN did not proceed in its campaign four years ago in the manner now claimed as appropriate by the complainants. For the complainants to prove discrimination contrary to the *PSLRA*, they must present evidence that either UCCO-SACC-CSN or PSAC before it was allowed to use the employer's mail system. It cannot because the reality is that no union proceeds in that way. Ms. Lacelle confirmed that this was the only case of this nature that she had encountered at CSC. Therefore, the complainants have not demonstrated discrimination through the evidence.

[57] The intervenor notes that, contrary to what the complainants have alleged, UCCO-SACC-CSN did not have access through official sources to the home addresses of employees. Any union knows that it has to do the legwork necessary to obtain addresses directly from employees or through other means. In this case, the complainants have failed to organize effectively. Now they ask the Board, in effect, to help them out.

[58] Regarding the evidence that UCCO-SACC-CSN and PSAC literature has been found in the workplace, it is important to note that the collective agreement recognizes certain bargaining agent information practices, as in the use of bulletin boards or the use of employer facilities to hold meetings, but this has nothing to do with solicitation, nor with discrimination. Moreover, paragraph 186(3)(*b*) of the *PSLRA* exempts from the definition of an unfair labour practice a range of activities in the workplace other than solicitation:

. . .

> *186. (3) The employer or a person does not commit an unfair labour practice under paragraph (1)*(a) *by reason only of*
>
> . . .
>
> *(b) permitting an employee organization that is a bargaining agent to use the employer's premises*
>
> . . .

[59] Unlike *Independent Canadian Transit Union* which did not involve an activity found to comprise solicitation, this case unquestionably does involve solicitation, and it focuses on a form of solicitation which would occur at the workplace during working hours. As such, *Independent Canadian Transit Union* has no application.

[60] The complaint is frivolous and should be dismissed. The alternative corrective action suggested by the complainants (i.e., allowing them to leave their mailing at a location at the workplace) is similarly frivolous and represents solicitation no more or less than the delivery of the complainants' mail through the employer's mail system.

Rebuttal argument on behalf of the complainants

[61] The complainants' mailing is, of course, solicitation but what the *PSLRA* prohibits is solicitation during working hours. Nothing in this case indicates that the complainants intended correctional officers to stop work and read the material found in the mailing. Correctional officers are perfectly capable of understanding the distinction between personal and non-personal mail and of comporting themselves accordingly during working hours.

[62] By requiring the respondent to deliver the complainant's mail, the complainants are not soliciting membership during work hours but only seeking a means to contact

employees so that they can solicit employee support later outside working hours. As mentioned earlier, the complainants have no problem with the employer directing employees not to read any personal mail during working hours.

[63] Ms. Lacelle's testimony suggests that management's decision to block delivery of the complainants' mail was not necessarily because of its contents. It is not clear from her evidence that the employer opened the mailing envelope or knew of its contents. Ms. Lacelle testified that even an unopened envelope would cause a problem.

[64] The decision in *Union of Bank Employees, Local 2104*, offered by the respondent, can be distinguished by virtue of the fact that it addressed a situation where the employer did maintain a policy prohibiting the delivery of personal mail. That is not the case here. All of the outside world can send personal mail to correctional officers at their workplace unless that mail comes from the complainants.

[65] Preventative security is an important consideration but the right of employees to participate in the lawful activity of an employee organization is also important. This brings us back precisely to the balancing act that the case law recommends. The concerns of the complainants and the respondent can be balanced in this case by allowing delivery of the mail, but accompanied by the proviso that this mail, like other personal mail, cannot be read during working hours.

[66] The complainants referred to the presence of UCCO-SACC-CSN and PSAC literature in the workplace not only to support their argument alleging discrimination but also to underscore that there is no evidence that such mail gets "in the way" and therefore cannot constitute a security risk, as alleged by Ms. Lacelle.

Reasons

[67] The case before me is a complaint filed under paragraph 190(1)(*g*) of the *PSLRA*:

. . .

> ***190.*** *(1) The Board must examine and inquire into any complaint made to it that*
>
> . . .

> *(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.*
>
> . . .

[68] Section 185 of the *PSLRA* defines an unfair labour practice by referring to a series of prohibitions outlined in sections 186 through 188:

> . . .
>
> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*
>
> . . .

[69] The particulars of the complaint in this case direct my attention to paragraph 186(1)(*a*) of the *PSLRA*:

> . . .
>
> *In the complainant's submission, if CSC continues with this unlawful delay of the mail, it does so in contravention of paragraph 190(1)(*g*) of the* Public Service Labour Relations Act*, by further interfering with the complainant's organizing campaign, contrary to sections 185 and 186(1)(*a*) of the* Act*.*

[70] The text of paragraph 186(1)(*a*) of the *PSLRA* reads as follows:

> ***186.*** *(1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall*
>
> *(a) participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization;.*

[71] In the course of their submissions at the hearing, the complainants also alleged that the employer had violated paragraph 186(1)(*b*) of the *PSLRA*:

> . . .
>
> ***186.*** *(1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall*
>
> *. . .*
>
> *(b) discriminate against an employee organization.*

. . .

[72] Were these the only sections of the *PSLRA* implicated in this case, my task would be to determine whether the complainants have met their burden to establish, on a balance of probabilities, that the respondent committed an unfair labour practice by interfering in the formation of an employee organization or discriminating against an employee organization when it refused to deliver the complainants' mail to correctional officers at their workplace.

[73] There is, however, a further statutory consideration in this matter. Paragraph 188*(a)* of the *PSLRA* enjoins an employee organization from attempting to solicit memberships where the attempt occurs on the employer's premises during the employees' working hours. This prohibition operates unless the employer has consented to the activity:

. . .

> ***188.*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall . . . .*
>
> *(a) except with the consent of the employer, attempt, at an employee's place of employment during the employee's working hours, to persuade the employee to become, to refrain from becoming, to continue to be or to cease to be a member of an employee organization*

. . .

[74] The complainants ask the Board, as corrective action, to order the respondent to allow delivery of the complainants' mail to employees at their workplace. Alternatively, the complainants seek an order from the Board permitting them to leave materials for correctional officers at their workplace in the same manner as other employee organizations have been able to do.

[75] The respondent takes the position that delivery of the complainant's mail at the workplace would be tantamount to permitting solicitation of membership in an employee organization at the workplace during business hours. The respondent contends that it cannot be compelled to deliver an employee organization's mail to employees at the workplace during business hours where the sole purpose of the mail is to solicit membership in the employee organization. Requiring the respondent to do

so would place it squarely in violation of paragraph 188*(a)* of the *PSLRA*. For this reason, it argues that the complaint cannot succeed.

[76] If I follow the logic of the respondent's submission, I should determine first whether the complainant's mail represents an "attempt, at an employee's place of employment during the employee's working hours, to persuade the employee to become, to refrain from becoming, to continue to be or to cease to be a member of an employee organization" as contemplated by paragraph 188*(a)* of the *PSLRA*. If I determine this to be the case, and the evidence establishes that the employer has not or does not consent to this activity, the issue of whether the employer's refusal to deliver the mail offends paragraphs 186(1)(*a*) or (*b*) becomes moot. Alternatively, if the questions raised under paragraphs 186(1)(*a*) and (*b*) remain live issues, I might nevertheless find myself without the possibility of a remedy which would not violate paragraph 188*(a)* of the *PSLRA*.

[77] Though the analytical approach proposed by the respondent has merit, I prefer to assess the alleged violations of paragraphs 186(1)(*a*) and (*b*) of the *PSLRA* first in order to respond directly to the particulars of the complaint. Consideration of the application of paragraph 188*(a)* to this case will follow as a necessary and critical element in deciding the matter.

[78] I note, parenthetically, that there is no issue before me as to whether the complainant is an employee organization within the meaning of the *PSLRA*. The Board in *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers* made the necessary determination of status with respect to this complainant at paragraph 90 of the decision:

. . .

> *The IAM&AW and its component, District Lodge 147, NAFCW (NAFCO), meet the definition of an employee organization found in section 2 of the* PSSRA. *I conclude this after the introduction of its duly constituted Constitution and Bylaws (Exhibits G-2 and G-3).*

. . .

[79] I also note that there has been no suggestion that the employer consented to the delivery of the complainant's mail; quite the contrary.

Did the respondent interfere in the formation of an employee organization?

[80] The evidence offered by the parties during the hearing was not extensive. The complainants are conducting an organizing campaign the objective of which is to displace the intervenor as the certified bargaining agent for the bargaining unit composed of correctional officers employed by the respondent. On the question of employer interference in the formation of an employee organization (i.e., interference in this organizing campaign), the complainants and the respondent submitted as an agreed statement of fact that the employer did not deliver the majority of the complainants' mail, an important element of their organizing campaign, and instead returned the mail to the complainants' head office (Exhibits C-1, C-2 and C-3). With Ms. Lacelle's testimony, we learned that the authority for this action was a decision by Mr. Head, as senior deputy commissioner, communicated via email to wardens and to correctional staff on February 21, 2006 (Exhibit R-2). Ms. Lacelle presented her sense of the employer's reasons for concern when confronted by the arrival at various CSC institutions of the complainants' bulk mailing as well as her perspective concerning the intent of the employer's resulting decision. We did not hear directly from Mr. Head. According to Ms. Lacelle, the employer was primarily motivated to prevent a situation where the activities of the complainants, specifically, the delivery of its mailed package, might disrupt the employer's operations and affect its ability to maintain safety and security within CSC institutions. The employer also wanted to be seen as a neutral party in the sensitive context of the ongoing organizing campaign and did not wish to interfere with union activities.

[81] The complainants have indicated that their reason for trying to contact correctional officers through the delivery of mail at the workplace was that they, unlike the intervenor, did not have access to a listing of home addresses for employees. At the time of the mailing, the complainants apparently had succeeded in securing residential addresses for only 25% of the target population through other sources. I note here that the allegation that the intervenor did or does have comprehensive access to home addresses was challenged by the intervenor. In any event, this alleged fact does not, in and of itself, dispose of any issue.

[82] Most of the remaining evidence presented at the hearing relates either to the second issue of alleged discrimination or to whether the employer's concerns about

workplace disruption and security do in fact comprise a compelling business reason for interfering in the affairs of an employee organization.

[83] The brief evidence before me, I believe, is sufficient to establish the fact that the respondent's actions, viewed practically and in isolation, did interfere in the complainants' efforts to form an employee organization. The respondent did, by refusing to deliver the complainants' mail, frustrate the efforts of the complainants to contact employees. While perhaps not directly demonstrated by the evidence, it is nonetheless reasonable to conclude that the respondent's action did, or at least could have had a deleterious effect on the complainants' organizing campaign. It is hard to imagine why the complainants would be here before the Board seeking corrective action if this were not the case. To this extent, I find that the respondent did interfere within the context of paragraph 186(1)(a) of the *PSLRA*. Whether this interference brought the employer into a breach of the *PSLRA*, however, remains to be determined.

[84] The current case thus differs significantly from the "caps and pins" situation examined in *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers*. There, the Board did not find that the employer interfered in the formation of an employee organization when it attempted to prohibit the wearing of the complainants' baseball caps and/or pins. I believe that the distinction between the two situations is quite real and important. Realistically, wearing caps and pins was part of an organizing campaign but the underlying question in the "caps and pins" case was the freedom of individual employees to express their preferred bargaining agent affiliation in the workplace. The adjudicator found nothing in this expression of affiliation that brought employees into necessary conflict with the employer's legitimate and fundamental business interests nor, I believe, anything sufficient to support the conclusion that the wearing of caps and pins was a serious and active attempt to solicit membership in an employee organization at the workplace during working hours. In the current case, by contrast, the heart of the matter is not the freedom of employees to express their bargaining agent preference but rather the ability of an employee organization to conduct its organizing campaign using a certain contact strategy on the employer's premises and arguably during business hours. The nature of the activity prohibited by the employer in the earlier case ultimately made it difficult or impossible for the complainants to demonstrate interference within the meaning of paragraph 186(1)(*a*) of the *PSLRA*. In

this case, the nature of the activity prohibited by the employer brings us squarely to the issue of interference.

[85] I pause here to confirm that the evidence in this case does show that the mailing in question was an attempt to solicit membership in an employee organization. Examination of the contents of the mailing leaves no doubt about its essential character and objective (Exhibits R-1 and R-3). In rebuttal argument, the complainants admitted ". . . of course it's solicitation." There is, thus, no basis for debate on this point.

[86] The complainants' defence is that the mailing was not solicitation of memberships *during working hours* [emphasis added]. I will return to this issue later.

[87] In summary, my answer to the first question, "did the respondent interfere in the formation of an employee organization?", is in the affirmative.

Did the respondent discriminate against the complainant as an employee organization?

[88] In the "caps and pins" decision, the Board found that the employer did discriminate against an employee organization when it prohibited employees from wearing the complainants' caps and pins, but not those of other employee organizations. The complainants argue that there is analogous discrimination in this case. What does the evidence reveal?

[89] The complainants and the respondent agree that the employer has no policy concerning personal employee mail and has maintained a practice of allowing the delivery of personal mail to employees at the workplace. Three employees at different CSC institutions attested to the fact that they routinely receive personal mail at the workplace (Exhibits C-1, C-2 and C-3). Mr. Charette outlined the process by which personal mail is typically received, screened and delivered in the respondent's establishments.

[90] Mr. Hunter's reply evidence introduces a different element. He testifies that, at Joyceville Institution, employees routinely have access to written information concerning a range of subjects from the incumbent bargaining agent, UCCO-SACC-CSN, as they did previously from the PSAC. This material is left on the employer's premises by a bargaining agent official or by someone else on behalf of the bargaining agent. Employees find the material variously at the visitors' security desk, in front of the roll-

call supervisor's office, in staff common areas and lounges, or in unit offices. Mr. Hunter's evidence was qualified in cross-examination only to the extent that the witness conceded having no direct personal knowledge of the situation in other correctional facilities.

[91] At first glance, then, it appears that the employer's decision to refuse delivery of the personal mail originating from the complainants is, at the very least, a departure from "business as usual", both generically with respect to personal mail broadly defined, and perhaps also specifically with respect to bargaining agent material. But does the evidence show that this departure from "business as usual" constitutes discrimination against the complainant as an employee organization?

[92] Based on her ten years' of experience at CSC, Ms. Lacelle testified that the arrival of bulk mailings from the complainants was an unprecedented situation. Because the situation was novel and because the employer did not have a policy regarding employee personal mail, the employer found itself having to make a decision without the benefit of any previous experience. In cross-examination, Ms. Lacelle acknowledged that she could not confirm that there had never been any other situation where mail from an employee organization had been delivered at an institution, although she stipulated that some ". . . may have gone through before we came to know about it."

[93] The respondent argues that there is no evidence before me to show that it has ever knowingly delivered mail of a similar type. There is no discrimination because, unlike the "caps and pins" case, the respondent did not centre the complainants' mailing out for unique prohibition while allowing delivery of the same type of mail originating from other employee organizations. When confronted for the first time with the dilemma of whether to deliver personal mail of the bulk and type sent by the complainants, it declined to do so not because it was the complainants' mail, as opposed to another employee organization's mail, but because it was mail of a type soliciting union membership at the workplace during business hours. The inference to be drawn from the respondent's argument is that it would have reacted in the exact same fashion were the same type of mailing to have arrived at the workplace from an employee organization other than complainants. There was, therefore, no discrimination.

[94] Two pieces of the puzzle are, in my view, important here: first, none of the three exhibits submitted to establish the practice of delivery of personal mail (Exhibits C-1, C-2 and C-3) makes any mention of personal mail from employee organizations. Second, Mr. Hunter's evidence about UCCO-SACC-CSN and PSAC material in the workplace describes this material only in the most general of terms. I have no basis in his evidence or elsewhere for finding that any of this material from other employee organizations is, or was of a similar nature to that of the complainants' mailing. Without such evidence, Ms. Lacelle's testimony that this was a new and unique situation for the respondent stands uncontradicted. It also leaves me no reason *per se* to discount the assertion that the respondent would make the same decision about similar material from a different employee organization. The "caps and pins" element of an exclusive prohibition visited upon one employee organization, and only that employee organization, is not established to my satisfaction in the evidence of this case.

[95] While I did not receive detailed submissions on this point, it may also be the case that the union material mentioned in Mr. Hunter's testimony is of the type excluded from the prohibitions of the *PSLRA* by virtue of paragraph 186(3)(*b*), as argued by the respondent.

[96] My analysis to this point addresses the possibility of discrimination as between employee organizations. The wording of paragraph 186(1)(*b*) of the *PSLRA*, however, does not necessarily limit the scope of prohibited discrimination in this way. The possibility exists under paragraph 186(1)(*b*) of the *PSLRA* that an employer can be found to have discriminated against an employee organization vis-à-vis a comparator group or entity that is not also an employee organization; the population of employees excluded from union representation is a possible example. In the complainants' case, there is an element that suggests that the employer discriminated vis-à-vis all "others" who send personal mail to correctional officers at their workplaces. Does paragraph 186(1)(*b*) of the *PSLRA* contemplate the possibility of such a comparator?

[97] I believe that the general objectives of section 186 of the *PSLRA* are to ensure that the employer does not involve itself in the internal affairs of employee organizations, to level the labour relations playing field and to keep management and the bargaining agent separate when it comes to certain lawful union activities. In this context, the evil addressed in the prohibition against discrimination should relate to

the regulation of labour relations within the overarching purpose of the *PSLRA*. More specifically, I believe that paragraph 186(1)(*b*) of the *PSLRA* should be interpreted with the aim of determining whether an employer expresses an anti-union animus through the different treatment of an employee organization. To assess this possibility, a wider range of possible comparators might legitimately come under scrutiny in a complaint under paragraph 186(1)(*b*) of the *PSLRA*. The concern throughout is to deny the employer the ability to sway, influence or intimidate employees in matters concerning their unionization or representation.

[98] If I accept, for this purpose, that all "others" who send personal mail to CSC workplaces is a possible comparator within the meaning of paragraph 186(1)(*b*) of the *PSLRA*, the complainants' burden in this regard is to demonstrate that the respondent's different treatment of the complainants' mail, as opposed to all other personal mail, reveals an anti-union animus. The only evidence before me of the employer's intentions is Ms. Lacelle's testimony concerning the potentially disruptive impact of the complainants' mail, particularly in the sensitive context of an organizing campaign. While there may be some question of whether the respondent's concern to avoid disruptions is well-founded (see below), no evidence suggests that this concern masks an underlying anti-union bias, either against any employee organization or one employee organization in particular. To this extent, I do not believe that the complainants have succeeded in meeting their burden of proof.

[99] For the reasons outlined above, I find that the respondent did not discriminate against an employee organization within the meaning of paragraph 186(1)(*b*) of the *PSLRA* by refusing delivery of the complainants' mail.

Is the respondent's interference in the formation of an employee organization a violation of the *PSLRA*?

[100] The statutory scheme of the *PSLRA* leads me at this point to consider the meaning and impact of the prohibition expressed in paragraph 188*(a)* of the *Act*:

. . .

> ***188.*** *No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall*
>
> *(a) except with the consent of the employer, attempt, at an employee's place of employment* ***during the employee's***

> ***working hours**, to persuade the employee to become, to refrain from becoming, to continue to be or to cease to be a member of an employee organization;*
>
> [Emphasis added]

. . .

[101] The respondent offers paragraph 188*(a)* of the *PSLRA* as its defence to a possible violation of subsection 186(1) of the *PSLRA*. Is this defence possible? Where there is an alleged conflict between the right to form an employee organization free from employer interference (the subject matter of paragraph 186(1)(*a*) of the *PSLRA*) and the right of the employer to be free of solicitation during business hours (the subject of paragraph 188*(a)* of the *PSLRA*), how is the conflict resolved?

[102] The Canada Labour Relations Board (CLRB), as it was then, faced a broadly analogous situation in *Time Air Inc.*, (1989) 77 di 55. In this case, the employer argued that the section of the *Canada Labour Code* (*CLC*) that precludes solicitation of membership on the employer's premises during working hours provided a defence against the allegation that it had violated the *CLC* prohibition against interfering in the formation of a trade union or in the representation of employees by a trade union. The CLRB found reasons in leading case law to accept (albeit tacitly) the force of such a defence. The decision cites, for example, an Ontario Labour Relations Board finding in yet another case setting comparable provisions of a labour statute against each other:

. . .

> *Section 53 of the* Act *should be used by an employer as a shield and not as a sword. Its purpose is to afford an employer an answer to the charge that he has interfered with a person's rights under section 3 of the* Act *by preventing that person from attempting at the place at which an employee works to persuade another employee during his working hours to become or refrain from becoming or continuing to be a member of a trade union. …*"

. . .

[103] According to *Time Air Inc.*, employing the defence depends on demonstrating that the union activity in question *is* solicitation. To make this determination, the CLRB referred to the test used in *Union of Bank Employees, Local 2104*, which focuses on the intent of the union activity:

. . .

> *. . . the use of the word 'attempt' can lead us to no other conclusion but that there must be an intention on the part of the party alleged to have violated the section to have done what is prohibited by that section. No intention would be required were the word `attempt' not included in that subsection; the word, however, is there and it must be given its meaning. Therefore, for the Board to find a violation of section 185(d), it must be shown that it was the UBE's intention to attempt to persuade employees, during their working hours, to become a member of a trade union.*

. . .

In the circumstances of *Time Air Inc.*, the CLRB found that membership solicitation was not the intent of the union activity during working hours thus precluding the employer from invoking the "shield".

[104] While the facts examined in the current complaint depart in some respects from those reviewed in *Time Air Inc.*, the underlying question of statutory interpretation is not, in my view, materially different. I find no principled reason in this case to preclude the employer from seeking to invoke a defence based on paragraph 188*(a)* of the *PSLRA*. The same test concerning intent is relevant. Here, however, an important element of the question of intent has already been demonstrated, at least as it relates to solicitation. Earlier in this decision, I determined that the purpose of the material in the complainants' mailing was to solicit employees to become members of an employee organization. The complainants concede this to be true. The complainants nevertheless argue that they did not intend that employees read their mail during their working hours. This, in the complainants' submission, places the situation outside the ambit of paragraph 188*(a)*.

[105] The proposition that workplace union activity outside business hours should be treated differently than activities occurring during working hours has been widely canvassed and supported in labour arbitration decisions. The complainants referred me, for example, to the Canada Labour Relations Board decision in *Independent Canadian Transit Union*. The case summary states:

> *The Board reaffirmed its past policy that only with compelling and justifiable business reasons can an employer prohibit the lawful right of employees to solicit membership in the trade union of their choice among fellow employees,*

> *even if that right is exercised on the employer's premises during non-working hours.*

[106] Later in the decision, the CLRB cites with approval the following two general principles which should be observed when attempting to balance the rights of employers and employees with respect to organizing activities:

> *(a) No-solicitation or no-distribution rules which prohibit union solicitation on company property by employees during their non-working time are presumptively an unreasonable impediment to self-organization and are therefore invalid; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline;*
>
> *(b) No-solicitation or no-distribution rules which prohibit union solicitation by employees during working time are presumptively valid as to their promulgation, in the absence of evidence that the rule was adopted for a discriminatory purpose or applied unfairly. . . .*

[107] Many other decisions follow the same path. The presumption underlining much of the case law is to permit organizing activities on the employer's premises *outside* working hours unless there are very special circumstances or compelling business reasons justifying employer interference. The presumption is that activities *during* working hours whose purpose is to solicit membership in an employee organization are not permitted.

[108] A first step in determining whether or not the complainants' solicitation occurred, or was intended to occur *outside* as opposed to *during* working hours is to understand the meaning of "working hours" in the context of this case. The wording of paragraph 188*(a)* of the *PSLRA* refers to "the employee's working hours" and not, for example, "business hours at the employer's establishment." Should this be interpreted to mean that the prohibition against soliciting membership must be applied on an individual employee basis in respect of each employee's work schedule? Could, for example, an employee organization legally convene a meeting on the employer's premises for the purpose of soliciting memberships during what, for that establishment, are business hours as long as all of the attending employees and any employee representatives of the employee organization are outside their own personal hours of work?

[109] There is support in the case law for a liberal approach to employee rights in deciding these types of issues as, for example, in findings that protect the right of employees to participate in workplace solicitation during paid meal breaks or other pauses. I think, however, there is need for caution in applying these precedents to the circumstances of this case. In an operation that runs on a "24/7" basis with rotating shift schedules, finding that the concept of "the employee's working hours" operates strictly on an individual employee-by-employee basis could result in a situation where two employees undertake the same activity side-by-side at the same time, one lawfully because it is outside his/her personal work hours, the other unlawfully because it is within his/her schedule. I am concerned that this interpretation does not reflect the intent of paragraph 188*(a)* of the *PSLRA*. At minimum, it does suggest that care is needed to apply the expression "employee's working hours" in a reasonable and practical fashion according to the context of the workplace and the situation of employees.

[110] The complainants contend that their mailing was an attempt to contact employees at their workplace but not to persuade them during their working hours to become members. In this sense, the complainants are arguing that there is a distinction to be made between the act of contacting employees at the workplace during work hours and the attempt to persuade them outside work hours. The complainants suggest that the parties can rely on the good judgment of correctional officers either not to open personal mail delivered at the workplace during their working hours or, if they do open the mail, to deal with it in a fashion which does not interfere with their duties. In the alternative, the complainants express support for the possibility that the employer explicitly direct employees not to read any personal mail during their working hours, including the complainants' mailing.

[111] How do we confirm that the complainants only intended to attempt to persuade employees to become members outside their working hours? Who bears the burden of proof?

[112] I believe that it falls to the employer to establish that the solicitation intended by the mailing did occur or could have occurred during the working hours of employees or, in the alternative, that the employer could have reasonably believed this to be a possibility. As a practical matter, it is very difficult to determine this issue with the limited evidence before me. It is, for example, virtually impossible with the

available evidence to predict how correctional officers would react on receiving the complainants' mail during their work hours. Would they in fact wait until their breaks or until after their work hours to read and/or act on the complainants' mail?

[113] Among the evidence which *is* available, we have the actual contents of the complainants' mailing. As the respondent indicated, there is certainly nothing in the mailing to buttress the proposition that the "attempt to persuade" would only happen outside working hours. The complainants do not, for example, alert recipients in the mailing that they should only consider the contents and sign the enclosed membership application card outside their hours of work. As the respondent pointed out, the first page of the mailing (Exhibit R-1) simply states:

> *. . . Members of the NAFCO Steering Committee encourage you to take a few minutes to read our proposal.*

And then:

> *Once you have read the enclosed information, we encourage you to fill out the provided membership card.*

[114] There was no other evidence offered at the hearing that would situate the complainants' mailing as part of a broader organizing strategy where the actual solicitation of membership occurs outside working hours; e.g., representatives of the complainants on site to approach colleagues on their breaks, or before or after their shifts, to discuss the mailing; a roster of off-hour meetings at, or proximate to the workplace where membership solicitation would occur; representatives present near the entrance to the work site to encourage employees to sign up as they arrived before their shifts, or left afterwards. While it is not the complainants' onus to prove that solicitation could only have occurred outside working hours, I do note with interest that there is no evidence which casts in doubt the probability that delivery of the mail could trigger solicitation (or become the "item of the day") in the workplace *during* working hours.

[115] The respondent's testimony is that management did have knowledge of the contents of the mailing when it made its decision to prevent delivery. Ms. Lacelle testified that she received the contents via fax from the Quebec region. The evidence also suggests that correctional staff would have scanned the mailing when it arrived for the presence of illicit substances or contraband, though not necessarily opened it. (I note that the complainants have not asked me to find that there was anything

improper in how the respondent came to know about the contents of the complainants' mailing. The complainants do not suggest, for example, that there was a breach of privacy in opening personal mail of employees that might conceivably figure into an evaluation of the propriety or legality of the employer's actions.)

[116] The respondent, following Ms. Lacelle's evidence, was aware of the sensitive context in which the complainants' organizing campaign was conducted, in the midst of a lengthy collective bargaining process. She testified that CSC management wished to remain neutral in the eyes of employees.

[117] Given the nature of the mailing and the employer's awareness of the sensitive context of the ongoing organizing campaign, I am persuaded, on the balance of probabilities, that the respondent could have reasonably believed that the mailing constituted an attempt by the complainants to solicit memberships during working hours. Consider the clear example of a union organizer approaching an employee during working hours to persuade him or her to sign a card. While the employee in these circumstances might indeed demonstrate "good judgment" and walk away from the solicitation, the action of the organizer still constitutes a violation of paragraph 188(a) of the *PSLRA*. And so it is in this case. The employer could have concluded that the complainants' mailing opened the possibility of membership solicitation in the workplace during working hours, an activity prohibited by paragraph 188(a) of the *PSLRA*. The employer was neither obliged to leave it to the good judgment of employees to walk away from the solicitation until working hours were over nor to advise employees in advance not to read the mailing during working hours. The employer, in short, did not need to weigh the probability that the act of contacting employees could be temporally separated from the act of soliciting employees. The reasonable probability of solicitation during working hours was sufficient to justify the employer's response.

[118] As a corollary, I cannot find sufficient basis in the evidence to support the complainants' contention that there was intent only to persuade employees to become members outside their working hours or that, regardless of intent, that it is more probable than not that the solicitation intended by the complainants' mailing would be confined to times outside the working hours of employees.

[119] Can the evidence take us any further? The respondent's evidence outlines the concern of CSC that the complainants' mailing could prove disruptive in the workplace

and/or affect the employer's ability to maintain safety and security, whether for employees, inmates or the public. The respondent advances the proposition that the complainants' information package, by its nature and complexity, and indeed by its very existence, posed a potentially real challenge to the employer's legitimate and fundamental business interests. In the respondent's submission, these concerns acquire particular force in an environment where security issues are omnipresent throughout the "24/7" operating schedule. Unlike some other settings examined in the case law, the concept of "outside working hours" is more problematic when applied to an around-the-clock correctional establishment. What *is* clear is that the delivery of mail after it arrives in the mailroom does involve the time and effort of employees during their working hours. This could place such employees in the position of being agents of the solicitation intended by the complainants' mail, or perhaps of participating in the formation of an employee organization contrary to paragraph 186(1)(*a*).

[120] The respondent has condoned the practice of delivering personal mail in the past but I have neither heard a persuasive argument that it is compelled to continue to do so in all cases, nor that it must do so if the employer has reason to believe that there are real security implications. On the one hand, it might well be possible to discount the respondent's concerns about possible disruptions or security implications, but there is no evidence that the concerns were not genuinely held by the employer or that there were different motives behind the employer's actions that might impugn the employer's decision. On the other hand, the respondent did not tender concrete evidence to demonstrate that disruptions and security risks would probably occur. As the complainants also pointed out, there is no evidence before me that any of the other bargaining agent material present in the workplace from time to time has caused the type of disruption foreseen in Ms. Lacelle's testimony.

[121] The importance of this last line of evidence, or lack thereof, is perhaps debatable. Evidence of this type seems more relevant to the question of whether the employer had compelling business reasons to intervene than to the specific defence concerning solicitation during work hours based on paragraph 188*(a)* of the *PSLRA*. If we remove the element of membership solicitation from the analysis in this case, however, the compelling business reasons test does become part of the defence potentially available to the respondent. The right of unions to pursue their legitimate activities in the workplace during working hours has merited quite considerable

protection in the case law but is not unlimited. Collective agreements frequently place parameters around what is or is not permitted. Furthermore, the interests of the employer in maintaining its operations, particularly where there are safety and security concerns, is a factor that must be considered.

[122] All of this being said, I do not believe that there is sufficient evidence before me to support a finding that the employer had compelling business reasons to intervene to block delivery of the complainants' mail, assuming for this purpose that the mail did not constitute solicitation of membership. I have no reason to doubt Ms. Lacelle's testimony that management was concerned about the possible disruptive effect of the mailing. I also do not wish to gainsay the importance of the security concerns expressed by the respondent in the context of the CSC workplace. I find, however, that the evidence presented in this regard was largely speculative in nature and does not provide a strong enough basis to establish that there would, more likely than not, be disruptions or a security impact were the mail to be delivered. I can only observe that the statement of the respondent's concerns about these effects was genuine and has not been contradicted.

[123] My finding on this point does not undercut the main conclusion: Considering the evidence and arguments before me, I have found that the respondent could reasonably believe that delivering the complainants' mail opened the probability of workplace solicitation during working hours. The respondent, therefore, could reasonably believe that allowing delivery of the complainants' mail would result in a probable contravention of paragraph 188*(a)* of the *PSLRA*. In this sense, the respondent's decision to refuse delivery of the mail was a lawful action to prevent an activity (an attempt by an employee organization to persuade employees on the employer's premises, during their normal working hours, to become a member of an employee organization) which, without the consent of the employer, is prohibited under paragraph 188*(a)* of the *PSLRA*.

[124] Given that delivery did not proceed, there is obviously no requirement to rule that the respondent violated the prohibition of paragraph 188*(a)* of the *PSLRA*. The importance of the finding instead relates back to my earlier determination that the employer, by refusing delivery of the complainants' mail, interfered in the formation of an employee organization within the meaning of paragraph 186(1)(*a*) of the *PSLRA*. Discussion of the application of paragraph 188*(a)* of the *PSLRA* to the circumstances of

this case leads to the conclusion that the respondent's action does not, on balance, constitute a violation of the *PSLRA*. In view of the possible or probable contravention of paragraph 188*(a)* of the *PSLRA* that could have occurred had the respondent delivered the complainants' mail, the respondent's decision to refuse delivery should not be overturned.

[125] As indicated at the outset, this ruling leads me to deny the complaint.

[126] Given that I have denied the complaint, there is no need to consider the complainants' alternate suggestion that the respondent proceed to deliver the mail with the direction that employees may not read it, or any other personal mail, during work hours.

[127] In view of the foregoing, I made the following order in Decision No. 1 dated May 1, 2006:

Order

[128] The complaint is denied.

June 21, 2006.

Dan Butler,
Board Member