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Files: 521-02-05 and
525-02-31
XR: 547-02-04 to 06

Citation: 2011 PSLRB 84

Public Service
Labour Relations Act

Before the Public Service
Labour Relations Board

BETWEEN

CANADIAN FEDERAL PILOTS ASSOCIATION

Applicant

and

TREASURY BOARD

Respondent

and

PUBLIC SERVICE ALLIANCE OF CANADA

Intervenor

Indexed as
Canadian Federal Pilots Association v. Treasury Board

In the matter of a request for the filing of a Board order in the Federal Court under subsection 52(1) of the *Public Service Labour Relations Act* and a request for the Board to exercise any of its powers under section 43 of the *Public Service Labour Relations Act*.

REASONS FOR DECISION

Before: Dan Butler, Board Member

For the Applicant: Phillip G. Hunt, counsel

For the Respondent: John Jaworski, counsel

For the Intervenor: Edith Bramwell, counsel

Heard at Ottawa, Ontario,
January 24 to 26 and May 6 and 30, 2011.

I. Request and application before the Board

[1] Seized of three applications filed in 2006 under section 58 of the *Public Service Labour Relations Act* ("the *Act*"), the Public Service Labour Relations Board ("the Board") ruled in 2008 that three positions in the Program and Administrative Services (PA) and Technical Services (TC) bargaining units represented by the Public Service Alliance of Canada (PSAC) were ". . . to be included in the AO [Aircraft Operations] group . . ." represented by the Canadian Federal Pilots Association (CFPA or "the applicant"); *Canadian Federal Pilots Association v. Treasury Board*, 2008 PSLRB 42.

[2] In *Public Service Alliance of Canada v. Canadian Federal Pilots Association and Canada (Attorney General)*, 2009 FCA 223, the Federal Court of Appeal dismissed applications for judicial review of the Board's decision filed by the Attorney General of Canada and by the PSAC. The Supreme Court of Canada subsequently dismissed an application for leave to appeal the Federal Court of Appeal's decision; *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, [2009] S.C.C.A. No. 387 (QL).

[3] The applicant then requested that the Board exercise its authority under subsection 52(1) of the *Act* to file a certified copy of 2008 PSLRB 42 in the Federal Court (PSLRB File No. 521-02-05). Section 52 reads as follows:

> ***52.*** *(1) The Board must, on the request in writing of any person or organization affected by any order of the Board, file a certified copy of the order, exclusive of the reasons for the order, in the Federal Court, unless, in its opinion,*
>
> > *(*a*) there is no indication of failure or likelihood of failure to comply with the order; or*
> >
> > *(*b*) there is other good reason why the filing of the order in the Federal Court would serve no useful purpose.*

[4] Specifically, the applicant requested that the Board make the following:

> . . .
>
> *(a) A declaration that the respondent Treasury Board has not complied with the Board's decision in* Federal Pilots Association v. Treasury Board*, 2008 PSLRB 42;*
>
> *(b) An Order directing the Board to file its order in* Federal Pilots Association v. Treasury Board*, 2008 PSLRB 42, in the Federal Court; and*

> *(c) An Order for such further and other relief as the Board deems appropriate in the circumstances.*
>
> . . .

[5] The applicant also applied for a review of the Board's decision under subsection 43(1) of the *Act* (PSLRB File No. 525-02-31). Subsection 43(1) reads as follows:

> ***43.*** *(1) Subject to subsection (2), the Board may review, rescind or amend any of its orders or decisions, or may re-hear any application before making an order in respect of the application.*

[6] The applicant requested the following actions:

> . . .
>
> *(a) That the Board conduct a re-hearing into this matter, for the purpose of reviewing the Board's decision in respect of PSLRB Files 547-02-4 to 547-02-06, dated June 20, 2008 and cited as 2008 PSLRB 42 (hereinafter the "Original Decision");*
>
> *(b) That the Board issue an Order amending the Original Decision to include directions on the issue of implementation; and*
>
> *(c) That the Board issue an Order for such further and other relief as the Board deems appropriate in the circumstances.*
>
> . . .

[7] The respondent in this case is the employer, the Treasury Board. In both the request and the application, the applicant identified the PSAC, the bargaining agent for the PA and TC groups, as an affected party.

[8] As a result of a pre-hearing conference, the Vice-Chairperson of the Board originally assigned to the cases consolidated the request and the application and determined that the Board would hear both at an oral hearing. The Vice-Chairperson also granted the PSAC full party status as an intervenor ("the intervenor").

[9] In view of the (then) pending departure of the Vice-Chairperson from the Board, the Chairperson reassigned the case to me shortly before the scheduled hearing.

[10] Before the cross-examination of its second witness, the applicant, on my request, clarified its "prayer for relief" regarding its application under subsection 43(1)

of the *Act*. It requested that the Board amend the order in 2008 PSLRB 42 by adding the following words:

> *The three positions presently occupied by the three incumbents best fit within the AO occupational group. This determination is based on findings that the core duties (or the pith and substance) of the positions include one or more activities expressly listed in paragraph 1 of the "Inclusions" to the AO Group definition (activities for which recent experience in piloting an aircraft is required, as deemed by Treasury Board in promulgating the AO Group Definition and Classification Standard).*

II. Summary of the evidence

[11] The applicant called two witnesses.

[12] The first witness, Dale Lahey, was the incumbent of the position of Manager, Civil Aviation Contingency Operations, in the National Operations Branch of the Civil Aviation Directorate of Transport Canada from May 2003 to November 2010. His position was the first of the three positions considered by the Board in 2008 PSLRB 42 (as PSLRB File No. 547-12-04). Mr. Lahey testified that the position was classified at the PM-06 level during his tenure. While his predecessor, Ivan Sanford, occupied the position, Mr. Lahey stated that it was classified at the AO-CAI-05 level. He indicated that he was familiar with the position as performed during Mr. Sanford's incumbency because he had worked directly for Mr. Sanford and had performed the duties of his job on an acting basis during his absences.

[13] On objection by the respondent, I admitted Mr. Sanford's position description as an exhibit (Exhibit A-1) for the limited purpose of establishing the historical context. However, I cautioned the applicant that I did not believe that an analysis of the contents of the position description or a comparison of it to another job description would assist me in my consideration of its request under subsection 52(1) of the *Act* or in my initial consideration of its application under subsection 43(1). For the latter provision, I indicated that an examination of position descriptions might assist me in a later proceeding if I found that there was a basis for reviewing 2008 PSLRB 42 or for hearing the applicant's original section 58 applications.

[14] The applicant subsequently proposed to ask Mr. Lahey how the duties of his position differed from the duties when it was occupied by Mr. Sanford. After hearing submissions from all parties, I ruled that the answer to the proposed question would

not assist me. The applicant had contended that the continuity of the job between Mr. Lahey's time and Mr. Sanford's time was relevant to its expectation at the hearing that produced 2008 PSLRB 42 that a decision in its favour would mean a return to the alleged status quo — the placement of the position in the AO group. I indicated that the applicant had not established a foundation that Mr. Lahey knew about its expectations at the time of the hearing or after. However, I left open the possibility that evidence about those expectations might otherwise be relevant, if properly established. I reiterated my previous ruling that I did not believe that a comparison of job descriptions or of job content was relevant to my decision at that stage.

[15] When the applicant proposed to put further questions to Mr. Lahey about the nature of the duties of the position at different times, the respondent and the intervenor again objected. I repeated my ruling. The applicant decided to end Mr. Lahey's examination-in-chief. There was no cross-examination.

[16] The applicant's second witness was Captain Daniel Slunder, the elected chairperson of the AO group since July 1, 2009. Captain Slunder testified that he kept in close touch with developments involving the CFPA before his election and that he was involved in an earlier round of collective negotiations for the AO group as a member of the CFPA bargaining team.

[17] Captain Slunder referred to the Aircraft Operations Group Definition as published in the *Canada Gazette* (Exhibit A-4). Item 1 in the list of inclusion statements in that definition outlines activities within the scope of the AO group, the performance of which requires "recent experience in piloting an aircraft." Captain Slunder also referred to Article 6.1 of the CFPA Constitution (Exhibit A-5), which provides that "[m]embership in the Association is open to all members of the Aircraft Operations Group as defined in the Treasury Board Classification Standard, Aircraft Operations Group . . . ."

[18] Captain Slunder testified that the proceedings under section 58 of the *Act* that resulted in 2008 PSLRB 42 were a "hot topic" for members of the AO group for some time before the Board's hearing in 2007. Those members were very concerned that the employer was converting positions previously in the AO group into PM (Program Administration) and TI (Technical Inspection) positions in the PA and TC groups. According to Captain Slunder, his colleague members shared a strong conviction that, for safety purposes, such positions must be retained in the AO group and filled by

pilots. Captain Slunder indicated that his own awareness of the section 58 applications was assisted by his direct contact with an AO group member whom he supervised and who was the treasurer of the CFPA. After 2008 PSLRB 42 was issued, and before his election as CFPA Chairperson, Captain Slunder stated that he followed very closely the judicial review applications that sought to overturn 2008 PSLRB 42, attended the hearing for those applications in the Federal Court of Appeal and then followed developments involving the subsequent leave to appeal application to the Supreme Court. When he became CFPA Chairperson, Captain Slunder testified that he learned more about the history and context of the matter during a month-long turn over period spent with the outgoing chairperson, Captain Greg Holbrook.

[19] When the Board issued 2008 PSLRB 42, Captain Slunder expected that it would result in the "reinstatement of the status quo" — that the affected positions would revert to being staffed by pilots in the AO group and that the incumbents of the PM and TI positions would be reassigned to duties that were "more commensurate with their qualifications."

[20] According to Captain Slunder, neither expected result occurred. The only action taken by Transport Canada was to divert the PSAC membership dues checked off from the pay of the incumbents of the affected PM and TI positions to the CFPA. Captain Slunder outlined his efforts to resolve that situation, including holding discussions with the Treasury Board and with senior officials of Transport Canada and its minister. Finally, he received a copy of a letter from the Treasury Board to the Board in May 2010 that stated the respondent's belief that it had properly implemented 2008 PSLRB 42, attaching an "interpretation document" arguing that point (Exhibit A-6). The "Summary" section of the document read as follows:

. . .

> *While the CFPA believes that the decision issued by the PSLRB orders the Employer to reclassify the three positions under review, clearly the language in the decisions do not support that intent. . . the Employer's only responsibility in this matter was to ensure that the union dues were redirected to the CFPA and inform employees that they would now be represented by a different bargaining agent. We understand that both of those measures have already been addressed.*

. . .

[21] Captain Slunder clarified that the CFPA never took the position that the employer was obligated by 2008 PSLRB 42 to reclassify the positions. He repeated his expectation, and the expectation of the CFPA, which was that pilots in the AO group would be placed in the roles at issue.

[22] Captain Slunder confirmed that the incumbents of the three PM and TI positions are not members of the CFPA. The CFPA received membership application forms from two of the incumbents (Exhibit A-7) but rejected them on the grounds that its constitution limits membership to occupants of AO-group positions and that a person cannot be a member of the AO group without being a qualified pilot. Captain Slunder noted that the collective agreement for the AO group, which expired January 25, 2011 (later admitted as Exhibit R-1), does not provide pay rates or working conditions for the PM and TI positions. He described himself as being "at a loss" with respect to knowing how to negotiate for the incumbent of the PM position, the only incumbent remaining, in bargaining a replacement agreement. He referred to his several recent efforts to bring his concerns about negotiating for the PM position, about representing Mr. Lahey, who was interested in receiving compensation at the AO-CAI-05 rate of pay, and about an ongoing Transport Canada organizational review (which raises the possibility of other AO group positions converting to other classifications) to the attention of either the Treasury Board or departmental officials. His efforts are documented in an email exchange with the lead Treasury Board negotiator (Exhibit A-8), a letter to Treasury Board President Stockwell Day (Exhibit A-9), and email exchanges with the deputy minister of Transport Canada and other departmental representatives (Exhibits A-10 to A-12).

[23] Asked in cross-examination to clarify his knowledge of, and his role in, the original application under section 58 of the *Act*, Captain Slunder testified that he did not see a copy of the application before it was filed, was not involved in instructing counsel, did not otherwise provide advice about the matter and did not attend the Board's hearings in 2007. Once he became CFPA Chairperson, he had conversations "in snippets" about the matter with his predecessor, Captain Holbrook, and looked through the file that he had kept.

[24] Captain Slunder confirmed that the CFPA did not take any action following the Board's decision in 2008 PSLRB 42 to amend its constitution to allow employees who were not pilots to become members. As for the three individuals who worked in the

positions that were the subject of the decision, Captain Slunder outlined that they were not invited to the CFPA's 2010 annual general meeting and that they were not included in the ratification process for its most recent collective agreement (Exhibit R-1). That agreement, concluded after 2008 PSLRB 42 was issued, does not include pay rates for the three positions. No attempt was made during negotiations to negotiate those rates of pay.

[25] On consent, I admitted as an exhibit a December 2008 memorandum of understanding between the applicant, the respondent and the intervenor that addressed the check off of union dues and working conditions for the three employees as well their representation pending the outcome of the then-outstanding applications for judicial review of the Board's decision (Exhibit R-2). The memorandum provided for their continued representation by the intervenor in the interim. Captain Slunder indicated that two of the employees subsequently approached the CFPA to discuss filing grievances to secure the appropriate AO rate of pay for their work but that they did not proceed to do so. He also confirmed that the intervenor had sent checked-off union dues to the CFPA (Exhibit R-3).

[26] With respect to the possibility of amending the CFPA's constitution, Captain Slunder explained that he had not taken any steps to that end with his executive or membership because he had concentrated on pursuing the request and application in this case as a means of clarifying the situation. In the interim, he stated that the CFPA would assist the incumbents of the three positions if they had a need for representation. Informal discussions were held with Transport Canada as a result of contacts from one of the incumbents, but the CFPA did not receive anything from that person to trigger more formal action. He stated that the situation was difficult and complicated because the incumbent was never an AO-CAI but that the CFPA "would do everything it could to the best of its ability," even though the incumbent was not covered by the CFPA's constitution.

[27] Captain Slunder confirmed that the CFPA recently served notice to bargain for a new collective agreement but that its submission did not include anything about the TI and PM positions. He understood that his notice to bargain did not cover the three positions at issue.

[28] Captain Slunder acknowledged that he instructed the CFPA's counsel to file for leave to cross-appeal the Federal Court of Appeal's decision to the Supreme Court

(Exhibit R-5) after the intervenor filed for leave to appeal. He further acknowledged seeing the CFPA's subsequent memorandum of argument (Exhibit R-6), as well as the document filed by the intervenor, but professed no detailed familiarity with the submissions. He testified that the object of the action was to ensure that the CFPA had a foot in the door if the Supreme Court granted leave and also to secure clarification in light of the CFPA's concerns about statements made in the dissenting opinion in 2009 FCA 223.

[29] Asked further about the CFPA's litigation before the Board and the Federal Court of Appeal, Captain Slunder reiterated that he expected that the decisions would result in the return of the three positions to the AO group and that the positions would be staffed with pilots — what he understood had been the status quo. He stated that he did not want TI- and PM-classified positions in his group and that he believed that the positions, but not the incumbents, should fall under the AO classification standard. He was not content that the positions should remain in the AO group while still classified TI and PM. He reiterated that the CFPA had no control over classification.

[30] Captain Slunder maintained that the bargaining certificate held by the CFPA covered only AO positions. Asked whether 2008 PSLRB 42 varied the certificate, he replied that he had not received a new certificate and that his efforts to clarify the situation with the Treasury Board had not been successful. He expressed the opinion that the CFPA does not hold a bargaining certificate for the TI and PM positions and maintained that he did not know how the CFPA could become the certified bargaining agent for those positions in the wake of 2008 PSLRB 42. He said that the CFPA has returned to the Board to secure clarification.

III. Summary of the arguments

A. For the applicant

[31] For the application under subsection 43(1) of the *Act* to succeed, the case law is clear that the applicant must show that one of the following three situations applies: (1) there are changed circumstances; (2) there is new evidence or arguments that could not reasonably have been presented at the original hearing; or (3) there are other compelling reasons for reviewing the Board's decision; *Czmola v. Treasury Board (Solicitor General - Correctional Service Canada)*, 2003 PSSRB 93, at para 11, *Danyluk et*

al. v. United Food and Commercial Workers Union, Local No. 832, 2005 PSLRB 179, at para 14, and *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39, at para 29.

[32] The case law stipulates that subsection 43(1) of the *Act* should be used sparingly and that it is not intended to provide a means by which an unsuccessful litigant may retry a lost case. In this case, the applicant was the successful litigant. It has returned to the Board because there are new facts that could not have been known at the hearing as well as subsequent developments that comprise compelling reasons to review 2008 PSLRB 42.

[33] In its original three applications to the Board under section 58 of the *Act*, the applicant clearly specified that the relief sought was a return to the status quo; that is, that the three positions should be filled by persons having recent experience piloting aircraft. The Board in 2008 PSLRB 42 approached the case from that understanding. A careful reading of its decision shows that there was no notice, suggestion or any other indication from either the respondent or the intervenor at the hearing that a successful result for the applicant would involve anything other than a return to that status quo. The plain and obvious consequence of 2008 PSLRB 42 was that the respondent should have ensured that the three positions were staffed by employees with the required piloting experience described in the AO Group Definition.

[34] The interim memorandum of understanding (Exhibit R-2) signed by the parties pending judicial review of 2008 PSLRB 42 clearly indicates that both the respondent and the intervenor expected consequences if the Federal Court upheld the decision, namely, that there would be an impact on the individuals in the three positions, that their terms and conditions of employment would change and that there would be a disruption in the workplace. Those consequences would have flowed from staffing the three positions with employees with recent piloting experience. The memorandum — a practical interim solution — indicates that the respondent and the intervenor understood those consequences and that they were seeking through the memorandum to forestall a return to the status quo.

[35] It was not until the Supreme Court denied leave to appeal 2009 FCA 223 that the respondent revealed in its letter of May 10, 2010 (Exhibit A-6) a new theory. It claimed that the applicant interpreted 2008 PSLRB 42 as requiring the reclassification of the three positions to the AO group. It wrote further as follows:

. . .

> *While the CFPA believes that the decision issued by the PSLRB orders the Employer to reclassify the three positions under review, clearly the language in the decisions do not support that intent. . . . the Employer's only responsibility in this matter was to ensure that the union dues were redirected to the CFPA and inform employees that they would now be represented by a different bargaining agent. . . .*

. . .

[36] The applicant did not know, and could not have known, at the original hearing about the theory developed by the respondent in the face of the court decisions. Having made clear its expectation that a successful result at adjudication was a return to the status quo, the applicant had no way of anticipating that the respondent would instead adopt the position that 2008 PSLRB 42 only required it to remit union dues to the applicant and to inform the incumbents of the three positions about their new bargaining agent affiliation. That development meets the second criterion in the case law justifying a review under subsection 43(1) of the *Act* — the existence of a fact that could not reasonably have been anticipated at the original hearing.

[37] There are also other compelling reasons for reviewing the Board's decision — the third criterion. The evidence given by Captain Slunder and Mr. Lahey identified the difficulties that have resulted from the respondent's interpretation of the order in 2008 PSLRB 42. Those difficulties include the bar to membership in the CFPA for individuals without recent piloting experience, the absence in the AO collective agreement of rates of pay for, and the inapplicability of certain of its allowances to, TI and PM positions, and the question of who represents the incumbents of the TI and PM positions in the current round of collective bargaining. If it is the applicant, how would it negotiate provisions for the TI and PM positions? In short, the respondent's approach to implementing 2008 PSLRB 42 has created a mess.

[38] The applicant is not asking the Board to conclude that 2008 PSLRB 42 was wrong. Instead, the problem is that the decision was not sufficiently explicit that its proper result was the allocation of the three positions to the AO group, for which the applicant is the bargaining agent. It left it open to the respondent to advance an interpretation of the order that tried to salvage victory from defeat.

[39] The terms "AO group" and "AO bargaining unit" were used interchangeably in 2008 PSLRB 42. The decision found that the three positions were historically included in the AO group and that there was no evidence that their allocation to the AO group would not provide for satisfactory bargaining agent representation. There was also no evidence that the three positions lacked a community of interest with the AO group.

[40] The Board in 2008 PSLRB 42 determined as fact that each of the three positions involve one or more of the core activities described in subparagraphs 1(*a*) to (*f*) of the "Inclusions" statement of the AO Group Definition (Exhibit A-4); see 2008 PSLRB 42, at para 12, 17 and 18 for the first position, at para 29 for the second position, and at para 38 and 39 for the third position. Those core functions are sufficiently safety sensitive that recent piloting experience is required. It follows from the Board's findings of fact that the positions should be staffed only by persons with that experience. As Captain Slunder testified, the problem for the applicant is a staffing issue, not a classification issue, contrary to what the respondent stated in its letter May 10, 2010 (Exhibit A-6).

[41] There is no dispute that the incumbents of the TI and PM positions were not pilots. There is no dispute that the three positions continue to be staffed improperly. The respondent has refused to accept the natural consequence of 2008 PSLRB 42, which was to remove the (then) three incumbents and to replace them with persons meeting the recent piloting experience requirement that goes with the allocation of the positions to the AO group.

[42] With respect to the applicant's request that the Board file its order in the Federal Court, the respondent's letter of May 10, 2010 (Exhibit A-6) comprises a clear indication that it does not intend to comply with 2008 PSLRB 42. Contempt is a matter for the Federal Court, not for the Board. The applicant should not be required to prove contempt twice, first before the Board and then before the Federal Court.

[43] Applications under subsections 43(1) and 52(1) of the *Act* can work in conjunction; see *Bremsak v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 159, at para 19 and 20. Through its proposed amendment to the order, the applicant wants the Board to give greater meaning and authority to 2008 PSLRB 42. By issuing a review decision under subsection 43(1) that accepts the applicant's position, the Board will provide direction for an effective solution in the workplace that takes the parties back to the status quo. While the applicant would prefer not to need the

additional remedy under subsection 52(1), it asks the Board to grant its application under that provision so that it can address compliance issues as necessary before the Federal Court based on the filed order.

[44] In response to questions that I posed, the applicant argued that the Board has the authority to add its words to the order in 2008 PSLRB 42 and that those words describe clearly the necessary consequences of the decision. The proposed words involve the assignment of duties, but the respondent will be at liberty to exercise its authority, as recognized under section 7 of the *Act*, to staff the three positions as it sees fit. The applicant will be able to address any actions by the respondent that disregard the Board's decision based on the filing of that decision in the Federal Court.

B. <u>For the respondent</u>

[45] The respondent referred me to the following decisions as the relevant case law defining the Board's approach to applying section 43 of the *Act* and section 27 of the former *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 ("the *PSSRA*"), an analogous provision: *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 125-02-41 (19851218), at para 5; *Czmola*, para 14; *Danyluk et al.*, at para 14; *Laferrière v. Hogan and Baillargé*, 2008 PSLRB 48, at para 17 and 18; *Bouchard v. Public Service Alliance of Canada*, 2009 PSLRB 31; *Chaudhry*, at para 29; *Beaulne v. Public Service Alliance of Canada*, 2009 PSLRB 105; and *Treasury Board v. Melançon et al.*, 2011 PSLRB 52, at para 19 to 21.

[46] According to the respondent, the applicant has neither raised new evidence nor advanced new arguments in its request that the Board review 2008 PSLRB 42. Its case today is exactly the same case decided by the Federal Court of Appeal in 2009 FCA 223.

[47] The Board in 2008 PSLRB 42 understood that the dispute before it concerned a change to the duties and responsibilities of the three positions, the essence of which was ". . . that the requirement to hold a current pilot's license was deleted as well as the need for recent experience piloting an aircraft"; paragraph 3. It stated clearly at paragraphs 6 and 7 that its role under section 58 of the *Act* was only to determine the bargaining unit to which the positions should be allocated in light of the changed duties and responsibilities. The Board explicitly recognized that it had no authority

over the assignment of duties, the classification of positions or the organization of the public service — all unfettered rights of the respondent.

[48] Based on its analysis of the job descriptions against the AO, PA and TC group definitions, the Board found that it was "too simplistic an approach" to determine bargaining unit allocation based on the fact that none of the job descriptions required the incumbent to hold a pilot's license or to have had recent experience as a pilot. Its analysis of the best fit in the circumstances found that the positions should be assigned to the AO group. The Board wrote as follows at paragraph 31:

> ***31.*** *I have no doubt that recent experience as a pilot and the possession of a current pilot's licence would enhance the performance of the duties or, to quote Mr. Gagnon, "it would help". However, the exclusions section, which would exclude all positions from the AO group where a pilot's licence and experience are not mandatory, is not the prevailing or determining factor. Paramount in my analysis is the application of the "best fit" rule. While many groups might be "a" fit, only one group can be a "best fit," and that is the AO group.*

[49] It is very apparent that there was no mystery at the time of the hearing that the job descriptions did not require piloting experience. The applicant took no issue with that fact. Seized with applications under section 58 of the *Act*, the Board was not asked to determine whether pilots should be placed in the positions, only whether the positions should be placed in the AO bargaining unit.

[50] The Board in 2008 PSLRB 42 never stated that its decision meant a return to the status quo. On that point, what the applicant originally asked the Board to do and what the Board actually decided were completely different. The applicant only surmises that a return to the status quo was the intended result, without any supporting evidence.

[51] In 2009 FCA 223, the Federal Court of Appeal rejected the argument that ". . . save in exceptional circumstances, bargaining units should be co-extensive with occupational groups created by the employer"; paragraphs 3 and 4. It also rejected the argument that recent experience flying an aircraft continued to be required under the new job descriptions; paragraph 24. It wrote as follows:

. . .

> *[24] . . . The Board did not find that the new descriptions of the three positions impliedly required that the incumbents*

> *possess a pilot's licence and recent flying experience. Indeed, two of the incumbents were not so qualified to fly an aircraft. The Board went no further than saying [*at paragraph 31*] that the possession of piloting qualifications for position 2 would "enhance the performance of the duties or, to quote [a witness] 'it would help'."*
>
> *[25] Indeed, the central thrust of the Board's reasons is that, even though the re-classified positions were excluded from the AO group as a result of the elimination of duties for which piloting qualifications were "mandatory", they could still be allocated to the AO bargaining unit because the principal duties of the positions in dispute were similar to those of the AO occupational group.*
>
> . . .

[52] The Federal Court of Appeal understood that the Board's decision might result in labour relations problems but indicated that that possibility did not mean that the findings in 2008 PSLRB 42 were unreasonable. The Court commented as follows:

> . . .
>
> *[72] I appreciate that combining different occupational groups in a single bargaining unit may pose problems for both the bargaining agent and the employer. . . .*
>
> *[73] In any event . . . the parties in the present case can always return to the Board for a bargaining unit review if serious problems arise from including the three positions in the AO group's bargaining unit.*
>
> . . .

[53] Both the Board and the Federal Court of Appeal understood that the applicant sought to reclassify the positions and to have them staffed with persons with recent piloting experience. Neither the Board nor the Federal Court of Appeal agreed to do so. The applicant clearly understood that outcome, as explicitly acknowledged in its application to the Supreme Court for leave to appeal (Exhibit R-6), in which it stated the following:

> . . .
>
> *4. The Board's decision was affirmed by a majority decision of the Federal Court of Appeal. However, in reaching its decision, the majority rejected the CFPA's argument that the reclassification of the three positions did not operate to eliminate the requirement that the incumbents possess a*

> *valid pilot's licence and have recent experience in piloting an aircraft. . . .*
>
> . . .

The Supreme Court denied the leave request.

[54] Through its letter of May 10, 2010 (Exhibit A-6), the respondent made it clear to the applicant that it would not require recent piloting experience in staffing the three positions. It cited both 2008 PSLRB 42 and 2009 FCA 223 to support its position. Despite those decisions, the applicant continues to disagree. Its resulting application under subsection 43(1) of the *Act* raises exactly the same issue that has already been determined by both the Board and the Federal Court of Appeal. Its position is not novel, and there are no new facts or arguments.

[55] Captain Slunder testified that he expected that the status quo would be restored after the Federal Court of Appeal issued its decision. He could not have had that expectation on reading 2009 FCA 223. He also testified that the applicant sought leave to appeal from the Supreme Court Canada, in part because it had concerns about statements made in the dissenting opinion in 2009 FCA 223. However, the source of the applicant's problem was the majority decision because it explicitly rejected the applicant's argument about the requirement to staff the positions with persons having recent piloting experience. In sum, Captain Slunder was unable to identify a source for his expectation that the status quo would be restored after the Federal Court of Appeal's decision. Nonetheless, the applicant cites in this case the subsequent failure of the respondent to act in accordance with that expectation as a circumstance not known at the time of the original hearing that justifies a review of the Board's decision. Nothing in the evidence supports that contention. On the issue of returning to the status quo, nothing has changed since the original hearing that was not addressed, or that could not have been addressed, at the original hearing.

[56] With respect to the alleged labour relations difficulties resulting from 2008 PSLRB 42, the Federal Court of Appeal acknowledged that such problems might occur but essentially told the parties to work them out. The Board must also have considered those problems when it rendered its decision. As such, they do not provide a compelling reason to revisit the Board's decision.

[57] The applicant has satisfied none of the tests established in the case law for a review under subsection 43(1) of the *Act*. The Board may not order the remedy that the

applicant requests because it seeks, in effect, to reclassify the three positions to the AO group and to require the respondent to staff those positions with persons with recent piloting experience. The respondent's exclusive rights to classify positions and assign duties are established by the *Financial Administration Act*, R.S.C., 1985, c. F-11, and are protected under section 7 of the *Act*, and have been repeatedly recognized in the case law; see, for example, *Brochu v. Canada (Treasury Board)*, [1992] F.C.J. No. 1057 (C.A.)(QL); *Charpentier and Trudeau v. Treasury Board (Environment Canada)*, PSSRB File Nos. 166-02-26197 and 26198 (19970131); *Gvildys et al. v. Treasury Board (Health Canada)*, 2002 PSSRB 86; *Doiron v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 77; *Bungay et al. v. Treasury Board (Department of Public Works and Government Services)*, 2005 PSLRB 40; and *Majdan v. Treasury Board (Department of Public Works and Government Services)*, 2009 PSLRB 106.

[58] There is no evidence that the respondent will not comply with 2008 PSLRB 42. The respondent's letter of May 10, 2010 and other evidence show that it has remitted union dues to the applicant and that it has recognized it as the bargaining agent responsible for the three positions allocated to the AO bargaining unit. To support its contention that the applicant has not met the tests for a request under subsection 52(1) of the *Act*, the respondent referred me to *Bremsak*, R. M. Snyder, *The 2010 Annotated Canada Labour Code*, Carswell, pages 226 to 228, and *Veillette v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 174.

C. <u>For the intervenor</u>

[59] Applications under section 58 of the *Act* concern only the allocating of positions to bargaining units, and nothing more. The original section 58 applications filed by the applicant raised issues beyond the question of bargaining unit allocation (paragraphs 6(i) or (j) in the original applications), specifically, a return to the status quo when the three positions were classified in the AO group and were staffed by employees who had recent piloting experience. Those issues were placed squarely in front of the Board and the Federal Court of Appeal, and both just as squarely rejected them. The Supreme Court denied leave to appeal. In this case, the applicant is trying to put the very same unsuccessful argument before the Board once more.

[60] Disappointed expectations do not form the basis for an application under subsection 43(1) of the *Act*.

[61] The criteria for an application under subsection 43(1) of the *Act* listed in *Chaudhry*, at para 29, are not disjunctive, as argued by the applicant, but conjunctive. The applicant has failed to demonstrate that it has met all the listed criteria. For example, the case law is clear that an applicant may not relitigate the same case, but that is exactly what the applicant is attempting.

[62] A plain reading of 2008 PSLRB 42 establishes that both the respondent and the intervenor argued that the Board had no power to order a reclassification of the three positions, as confirmed in every single decision of the Board on that point since the 1960s. In addition to the case law cited by the respondent, see *Peck v. Parks Canada*, 2009 FC 686, and *Professional Institute of the Public Service of Canada v. Treasury Board and the Public Service Alliance of Canada*, 2001 PSSRB 68.

[63] The other ground argued by the applicant for a review of 2008 PSLRB 42 concerns the labour relations difficulties that it has since encountered — in collective bargaining and in representing individual incumbents of the TI and PM positions. However, the difficulties identified by the applicant are the bread and butter of labour relations. If it is not able to answer the questions that have arisen, perhaps it was not appropriate for it to file its section 58 applications in the first place.

[64] In the wake of a successful application under section 58 of the *Act*, an employer sometimes chooses to reclassify the affected positions and staff them accordingly. Ultimately, the decision to proceed in that fashion lies exclusively in the employer's hands. Clearly, it may choose to do otherwise. On that basis, the applicant should have approached the section 58 hearing knowing that it could have ended up with precisely the result that occurred and should have turned its mind to that contingency.

[65] With respect to the December 2008 memorandum of understanding between the applicant, the respondent and the intervenor (Exhibit R-2), no evidence was adduced to support the proposition that it demonstrates that the parties knew at that time that the three incumbents of the positions would lose their jobs as a result of 2008 PSLRB 42 and that they would be replaced by employees with recent piloting experience.

[66] Contrary to what the applicant tried to infer, there was no finding of fact in 2008 PSLRB 42 that holding a pilot's license or having recent piloting experience was a requirement for any of the three positions; see paragraph 14 for the first position,

paragraphs 22 and 27 for the second position and paragraphs 38 and 39 for the third position. Even if the Board had made such a finding of fact, it would have been without jurisdiction to use that fact to allocate a position to the AO group, a determination equivalent to deciding its classification. Similarly, the Board could not have determined the proper staffing requirements for any position based on its finding. In both respects, as stipulated by section 7 of the *Act*, it had absolutely no authority. For precisely that reason, the Board cannot in this case do what the applicant requests through the first sentence of its proposed amendment to the order in 2008 PSLRB 42 — "[t]he three positions presently occupied by the three incumbents best fit within the AO occupational group." Section 7 expressly forbids it.

[67] The ambiguity of the wording of the order in 2008 PSLRB 42 may have given some hope to the applicant that the Board had accepted the status quo, as understood by the applicant. However, the subsequent Federal Court of Appeal decision put an end to that hope. The Board decided to treat the three positions as if they were in the AO group for the purposes of collective bargaining; nothing more. To comply with the Board's decision, the respondent was required only to check off and remit membership dues to the applicant and to treat it as the exclusive representative of the three positions for all collective bargaining purposes. There is no evidence that the respondent has not done exactly those things.

[68] The intervenor urges the Board to dismiss both the request and the application.

D. Applicant's rebuttal

[69] The comments made by the Federal Court of Canada about "Issue 1" — "[w]ere piloting qualifications still mandatory after the changes to the work descriptions of the three positions?" — comprises obiter. That issue was not formerly before the Court, its jurisdiction was not engaged and it did not formally decide the question. The only decision made in 2009 FCA 223 concerned the issue of jurisdiction raised by the Board's treatment of the exclusion statements in the group definitions that it examined.

[70] The Board is not bound by obiter comments that have nothing to do with the operative issue that was before the Federal Court of Canada. When the Supreme Court refused to grant leave to appeal, it essentially left the parties without any judicial determination on the issue of piloting experience. The Board's original decision stands.

[71] The Board did not rewrite the law about subsection 43(1) of the *Act* when it issued *Chaudhry*. Although it used the connector "and" in assembling the tests cited in the governing decisions, it is clear from reading *Chaudhry* as well as *Danyluk et al.*, *Czmola* and the Board's other decisions that the criteria are disjunctive.

IV. Reasons

[72] I believe that it is appropriate to proceed by examining the application under subsection 43(1) of the *Act* to review 2008 PSLRB 42 first and then to turn to the request under subsection 52(1). In my view, I must first decide whether there is any basis for reviewing the original order before determining whether that order, as amended or as originally issued, should be certified for filing in the Federal Court.

A. Application under subsection 43(1) of the *Act*

[73] Applications to review a Board decision under subsection 43(1) of the *Act* or under subsection 27(1) of the *PSSRA* have been relatively infrequent. Reflecting on the existing case law, the Board observed at paragraph 29 of *Chaudhry* as follows:

> ***29*** *A review of the jurisprudence shows the following guidelines or criteria for reconsidering a decision of the PSLRB (see* Quigley, Danyluk, Czmola *and* Public Service Alliance of Canada*). The reconsideration must:*
>
> - *not be a relitigation of the merits of the case;*
> - *be based on a material change in circumstances;*
> - *consider only new evidence or arguments that could not reasonably have been presented at the original hearing;*
> - *ensure that the new evidence or argument have a material and determining effect on the outcome of the complaint;*
> - *ensure that there is a compelling reason for reconsideration; and*
> - *be used "…judiciously, infrequently and carefully…" (Czmola).*

[74] The list of guidelines or criteria identified in *Chaudhry* underscores the need for caution when considering an application under subsection 43(1) of the *Act*. As indicated, subsection 43(1) is not a vehicle for routinely reconsidering past decisions.

Specific grounds consistent with the existing case law must be proven by an applicant to justify the Board taking the exceptional step of intervening to alter the outcome of a previous proceeding. (I should note that I do not believe that a ruling on the disjunctive or conjunctive nature of the criteria listed in *Chaudhry* is necessary in these reasons.)

[75] In this case, it is particularly important to proceed cautiously. The Federal Court of Appeal examined the reasons given by the Board in 2008 PSLRB 42 and found no basis to grant the judicial review applications brought by the respondent and the intervenor. The Supreme Court, in turn, denied leave to appeal the judgment in 2009 FCA 223. With that record before the supervising courts, the Board's decision in 2008 PSLRB 42 must be considered soundly based in law. The Board should not disturb the outcome of the judicial review proceedings in any way.

[76] I acknowledge that the Federal Court of Appeal's comments about the requirement for recent piloting experience ("Issue 1") technically may constitute obiter. Nonetheless, they reveal the Court's thinking on that issue and should not be dismissed as having no weight or value. That said, I do not need to rely on paragraphs 22 to 26 ("Issue 1") of 2009 FCA 223 in making my decision.

[77] The applicant submits that I should amend the order in 2008 PSLRB 42 by adding the following:

> *The three positions presently occupied by the three incumbents best fit within the AO Group. This determination is based on findings that the core duties (or the pith and substance) of the positions include one or more activities expressly listed in paragraph 1 of the "Inclusions" to the AO Group definition (activities for which recent experience in piloting an aircraft is required, as deemed by Treasury Board in promulgating the AO Group Definition and Classification Standard).*

The existing order provides that "[t]he positions at issue are to be included in the AO group for which the Canadian Federal Pilots Association is the certified bargaining agent."

[78] The applicant argues that the amendment that it seeks is justified because the order in 2008 PSLRB 42 was not sufficiently explicit and because it could not reasonably have foreseen the respondent's approach to implementing the order at the

time of the hearing — that is, that the respondent would divert union dues checked off from the pay of the incumbents of the three positions to the applicant and would recognize its exclusive bargaining rights with respect to those positions, but no more. According to Captain Slunder, the applicant expected that a positive outcome in the case — and the outcome that it believed that it had won in 2008 PSLRB 42 — would have compelled the respondent to take the further steps of allocating the duties performed by the incumbents of the existing PM and TI positions to the AO group and of requiring that the positions be staffed by employees with "recent experience in piloting an aircraft," in accordance with the AO Group Classification Standard. Neither expected outcome resulted. There was no return, as anticipated, to the status quo.

[79] For the reasons that follow, I find it unnecessary to assess whether the evidence about the applicant's expectations gives the Board a reason to review, rescind or amend 2008 PSLRB 42. In my view, this case turns around the following more fundamental question: Did the applicant have any legal foundation for expecting that the order in 2008 PSLRB 42 could have had the result that it anticipated?

[80] The applicant came before the Board in the first instance under section 58 of the *Act*, which reads as follows:

> ***58.*** *On application by the employer or the employee organization affected, the Board must determine every question that arises as to whether any employee or class of employees is included in a bargaining unit determined by the Board to constitute a unit appropriate for collective bargaining, or is included in any other unit.*

[81] The wording of section 58 of the *Act* is unambiguous. Section 58 appears in the *Act* (along with section 57) under the Division V subtitle, "Determination of Appropriate Bargaining Units." The questions that the Board determines under section 58 concern the inclusion of employees "in a bargaining unit" or "in any other unit." The term "bargaining unit," defined in subsection 2(1), has a very specific connotation. It refers only and exclusively to "a group of two or more employees that . . . constitute[s] a unit of employees appropriate for collective bargaining." It is the key defining construct for organizing bargaining agent representation and the conduct of collective bargaining. In the circumstances of the case brought to the Board under section 58, the question to be determined was whether the three subject positions were properly included in the PA and TC bargaining units or, as contended by the

applicant, whether they best fit in another bargaining unit — what the applicant referred to as the "AO group," as did the Board throughout its decision.

[82] In determining the structure of bargaining units, the Board is bound by subsections 57(2) and (3) of the *Act*, which read as follows:

> *57. (2) In determining whether a group of employees constitutes a unit appropriate for collective bargaining, the Board must have regard to the employer's classification of persons and positions, including the occupational groups or subgroups established by the employer.*
>
> *(3) The Board must establish bargaining units that are co-extensive with the occupational groups or subgroups established by the employer, unless doing so would not permit satisfactory representation of the employees to be included in a particular bargaining unit and, for that reason, such a unit would not be appropriate for collective bargaining.*

[83] The statute presumes a close correspondence between bargaining unit structure and the respondent's plan of classification, including the occupational groups that the respondent establishes for classification purposes. The Board must "have regard" to that plan and must fashion bargaining units that are coextensive with the respondent's occupational groups or subgroups unless there is a reason for not doing so based on the Board's evaluation of what will permit "satisfactory representation." Because the Board has the latitude to make alternate determinations that permit "satisfactory representation," it can depart from an absolute correspondence between bargaining units and occupational groups when appropriate circumstances exist.

[84] As it exercises its authorities with respect to the compositions of the bargaining units, the Board is always constrained by section 7 of the *Act*, which reads as follows:

> ***7.*** *Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.*

[85] As conceded by the applicant, the Board cannot intrude upon the respondent's exclusive right to classify positions. When the Board considers an application under section 58, it is prohibited from ordering an action that directly or indirectly alters the

classification of positions or of employees. In 2008 PSLRB 42, the Board made that limitation clear in paragraph 7 as follows:

> ***[7]*** *The employer has the unfettered right to assign duties, classify positions and organize the public service. None of these can form any part of the determination. . . .*

[86] The Board's case law is manifestly consistent in respecting that limitation.

[87] The applicant took pains to argue that it did not seek from the Board at the original hearing, or at this hearing, a remedy that would have it intrude into the respondent's prerogatives over classification. I cannot agree, particularly with respect to the text of the proposed amendment. I am strongly persuaded that the amendment inevitably draws the Board into the realm of classification and — by the applicant's admission — into the related domain of staffing. The outcomes that the applicant seeks involve the allocation of the duties of the three positions to the AO group for classification and staffing purposes. The applicant wants pilots to perform the duties in question. To secure that objective, it wants the duties assigned to the AO group to fall within the boundaries of the AO Group Definition. However, that definition is, in its genesis, a classification construct. It exists, as does the requirement to staff AO group positions with experienced pilots, as a fundamental element of the AO Group Definition and Classification Standard to which the applicant's proposed amendment specifically refers. If there was any question about the result sought by the applicant, all doubt was removed by its repeated stipulation that it expected, and continues to expect, to achieve a "return to the status quo" — by which it means having experienced pilots perform the duties of the positions in compliance with the AO Group Definition and Classification Standard, as was the case when the three positions were classified in the AO group.

[88] In 2008 PSLRB 42, the Board looked for the best fit by comparing the primary purposes of the three positions to the inclusion and exclusion statements in the respondent's group definitions. The Board explicitly stated at paragraph 9 that it performed that comparison ". . . to place [those] positions into their proper bargaining units . . . ." The Board did not, and could not, conduct that analysis to determine whether the three positions should be classified in the AO group. It did not, and could not, order the respondent to staff the positions in question with experienced pilots. Its authority began and ended with the issue of proper bargaining unit allocation.

[89] To some extent, the wording of the Board's order in 2008 PSLRB 42 may well have caused confusion. Instead of stating that "[t]he positions at issue are to be included in the AO group . . . ," the Board could have written, "[t]he positions at issue are to be included in the AO bargaining unit . . ." [emphasis added]. The fact that the Board did not chose the latter formulation does not change the legal result. As the Board made clear in its decision, its task was always ". . . to place [those] positions into their proper bargaining units . . . ." Assigning duties or classifying positions never "form[ed] any part of the determination." Staffing requirements were also never at issue.

[90] The amendment to the Board's order proposed by the applicant may not specifically seek the reclassification of the three positions, but it aims to achieve the same end by having the Board declare ". . . that the core duties (or the pith and substance) of the positions include one or more activities expressly listed . . . in the AO Group definition . . ." in the classification standard. The applicant's goal is to require incumbents to have recent piloting experience, bringing them within the constituency defined by its constitution. In my view, there is no legal basis for the Board to involve itself in that matter.

[91] To the extent that the applicant's proposed amendment takes the Board outside its jurisdiction under section 58 of the *Act* and offends the limitation stated in section 7, it must be rejected.

[92] I cannot identify any other remedy — were there reason to do so — that would be consistent with the applicant's position to achieve restoration of the status quo without similarly falling outside the Board's authority under section 58 of the *Act* or otherwise running afoul of section 7. From that perspective, I do not believe that there is any need to take the additional step of analyzing whether the applicant has proven a ground or grounds, consistent with the case law, for conducting a review under subsection 43(1). When the end purpose of a review is an outcome that cannot be achieved in this forum, the matter effectively ends there.

B. Request under subsection 52(1) of the *Act*

[93] The wording of subsection 52(1) of the *Act* makes it abundantly clear that the Board must accede to a request, properly made by an affected person or organization,

to file a certified copy of an order of the Board in the Federal Court, unless it forms the opinion that one (or both) of the following conditions applies:

. . .

> *(*a*) there is no indication of failure or likelihood of failure to comply with the order; or*
>
> *(*b*) there is other good reason why the filing of the order in the Federal Court would serve no useful purpose.*

[94] The Board's order in 2008 PSLRB 42 was straightforward. It required that the three positions at issue ". . . are to be included in the AO group . . . ." As mentioned earlier, I must take this order to mean that the three positions are to be included in the AO bargaining unit because the only lawful purpose of a ruling under section 58 of the *Act* is to allocate positions to bargaining units.

[95] The undisputed evidence is that the respondent reacted to the order in 2008 PSLRB 42 by diverting union dues to the applicant as the certified bargaining agent for the AO bargaining unit and by recognizing its exclusive representation rights vis-à-vis the three positions. In my view, those actions prove that the respondent recognizes that the three positions form part of the AO bargaining unit and that it is conducting its relations with the certified bargaining agent accordingly. On that dimension, there is ". . . no indication of failure or likelihood of failure to comply with the order" under paragraph 52(1) of the *Act*.

[96] As I have indicated, the applicant's essential purpose in this hearing is to achieve something more, namely, that the three positions should be staffed by employees with recent experience in piloting an aircraft as if those positions bear the AO classification. However, the Board cannot take that further step because it has no authority over classification or staffing. For all intents and purposes, the Board went as far as it could go in 2008 PSLRB 42, and its order has been given the legal effect that was possible.

[97] Therefore, I rule that there is no indication of failure or likelihood of failure to comply with the Board's order in 2008 PSLRB 42. For that reason, the exception stated in paragraph 52(1)(*a*) of the *Act* applies, and I decline to order the filing of a certified copy of the previous Board order in the Federal Court.

[98] Given my ruling based on paragraph 52(1)(*a*) of the *Act*, I do not need to consider whether paragraph 52(1)(*b*) may also apply.

[99] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[100] The application under subsection 43(1) and the request under 52(1) of the *Act* are dismissed.

June 24, 2011

Dan Butler,
Board Member