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File: 561-02-625

Citation: 2013 PSLRB 138



*Public Service
Labour Relations Act*

Before a panel of the Public
Service Labour Relations Board

BETWEEN

PUBLIC SERVICE ALLIANCE OF CANADA

Complainant

and

**TREASURY BOARD
(Canada Border Services Agency)**

Respondent

Indexed as

Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)

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

REASONS FOR DECISION

Before: Linda Gobeil, a panel of the Public Service Labour Relations Board

For the Complainant: Michael Fisher, counsel

For the Respondent: Richard Fader, counsel

Heard at Ottawa, Ontario,
July 30 and 31, 2013.

REASONS FOR DECISION

I. Complaint before the Board

[1] On May 27, 2013, the Public Service Alliance of Canada (“the complainant” or “the bargaining agent”) filed a complaint under section 190 of the *Public Service Labour Relations Act* (“the Act”) against the Treasury Board (Canada Border Services Agency) (“the employer” “the respondent”). At the time of the filing of the complaint, the parties were engaged in bargaining for a new collective agreement for the Border Services Group (FB). The collective agreement between the complainant and the respondent for the FB group expired on June 20, 2011 (“the collective agreement”). For the purpose of this decision, it should be noted that the terms and conditions contained in the collective agreement were maintained in force, at the time of the filing of the complaint, by virtue of section 107 of the Act.

[2] Essentially, the complainant alleged that the respondent violated sections 106 and 107 and subsection 186(1) of the Act by preventing it from distributing a bargaining agent meeting invitation via the “desk drop” method at some of the employer’s locations (Exhibit G-1, tab F). The complainant maintained that the respondent interfered with its right to communicate with its members. It also argued that the long-standing practice of distributing its documents via desk drop is a term and condition of employment that may be embodied in a collective agreement and as such could not be interfered with by the employer by virtue of section 107.

[3] On June 14, 2013, the respondent maintained that the complaint was untimely since it was filed after the 90 days prescribed by subsection 190(2) of the Act. The respondent also submitted that the complaint was without merit in that in addition to being told many years ago that using desk drop to distribute its documents was not authorized, prior approval by the employer was required for that type of notice. The respondent asserted that the complainant had other means of communication provided for under the collective agreement and that it had home contact information for its members. The respondent also argued that there has been no breach of the freeze provided for under section 107 and that the employer merely exercised its discretionary authority to authorize access to its premises in accordance with the negotiated collective agreement.

II. Summary of the evidence

[4] Six witnesses testified on behalf of the complainant. The employer called four witnesses. Each party introduced a book of exhibits.

A. Complainant's evidence

[5] Chantal Rajotte was the complainant's first witness. She has been a local president of the Custom and Immigration Union for six years and had been involved in bargaining agent business before that. Ms. Rajotte indicated that the complainant's members in the Ottawa-Hull area work at several facilities, such as 191 Laurier Avenue West, 250 Tremblay Road, Isabella Street and St. Laurent Boulevard.

[6] Ms. Rajotte described the desk drop method as a method that the complainant had resorted to in the past to distribute documents after working hours or at lunch. Ms. Rajotte testified that in 2011, she distributed documents such as Christmas invitations, bargaining agent calendars and election information via desk drop at the work locations mentioned earlier. She desk dropped roughly 150 to 200 of each document. Ms. Rajotte indicated that in January 2013, she also desk dropped about 150 to 200 bargaining agent calendars at the Laurier Avenue West, Metcalfe Street and Tremblay Road buildings (Exhibit G-1, tab M). Ms. Rajotte testified that every time she distributed via desk drop, she never asked the employer for permission, since that was not her job and she was not required to do so. Ms. Rajotte added that over the years, she also received documents from her bargaining agent in the desk drop fashion.

[7] Ms. Rajotte explained that to disseminate information, bulletin boards are not as effective as using desk drop because in most buildings, the bulletin board is located at the back of a corridor. Also, bulletin boards are divided in two, one side for the bargaining agent and one side for management which means that the notices are often covered by information from other bargaining agents or the employer. As a result, bargaining agent members cannot really see what is on the bulletin board. In response to a question from counsel for the respondent, Ms. Rajotte indicated that on numerous occasions, the bargaining agent complained about the location of the bulletin boards and that it might have grieved.

[8] As to the specific events leading to this complaint, Ms. Rajotte testified that on April 5, 2013, she sent an email (Exhibit G-1, tabs F and G) to the director of human resources (HR) for the employer about distributing an invitation to a meeting on collective bargaining (Exhibit G-2). Ms. Rajotte explained that the purpose of her email was simply to inform management about the distribution of a notice of a meeting to be held on May 7, 2013 (Exhibit G-1, tab F), that it was done only as a courtesy and that she did not need the employer's approval for the distribution. Ms. Rajotte indicated

that she had created the notice (Exhibit G-1 tab F), on her own time at home. Ms. Rajotte testified that while the employer allowed notices to be posted on bulletin boards, as evidenced in its reply email of April 8, 2013, it did not permit the distribution via desk drop (Exhibit G-1, tab F). In cross-examination, Ms. Rajotte agreed that the invitation was posted on the bulletin boards one month before the scheduled event.

[9] Ms. Rajotte also indicated that in the past, she distributed documents on secure floors of some buildings but never asked for the employer's permission. She indicated that in the instances mentioned earlier, she was not sure if approval had been sought from the employer for the desk drop. It was not her job to seek that approval. Ms. Rajotte explained that for her, distributing documents through the means of desk drop was bargaining agent business as per article 12 of the collective agreement and, as such, did not require the employer's approval. Ms. Rajotte testified that on numerous occasions, the bargaining agent complained about the locations of bulletin boards.

[10] Francine Stuart also testified for the complainant. Ms. Stuart is retired. She indicated that she worked in several locations in her career, such as the Connaught Building in Ottawa and 191 Laurier Avenue West, and that over the years, she held several bargaining agent positions. Ms. Stuart indicated that the practice of using the desk drop to distribute the bargaining agent's documents goes back many years and that in 1991, she did it on weekends. She indicated that she desk dropped documents such as bargaining agent calendars, branch election material, collective bargaining updates and Christmas party invitations.

[11] As for the bulletin boards, Ms. Stuart complained that some buildings do not have them. In other buildings, bulletin boards are not easily accessible or are located on secured floors with restricted access, meaning that the bargaining agent may not have access to them. Ms. Stuart indicated that the bargaining agent complained about that at some of the Union/Management Consultation Committee (UMCC) meetings.

[12] Ms. Stuart referred to the UMCC meeting of September 9, 2008, at its item 7 of Exhibit E-1, tab 14A. She indicated that she was president of the bargaining agent local at that time and that the bargaining agent asked for bulletin board postings and desk drops to be put on the agenda since it found it difficult to post its notices. Ms. Stuart testified that at that September 9, 2008 UMCC meeting, the bargaining agent asked for

a link to be created in Outlook and that a locked cover be installed on the bulletin board; it told management that otherwise, it would use desk drop. Ms. Stuart testified that management replied that it would get back to it on the issue of desk drop; it never did.

[13] In cross-examination, Ms. Stuart testified that in 2003 and 2004, after experiencing difficulty using bulletin boards, the bargaining agent tried to use desk drops to distribute information to its members but was told by the employer that it could not desk drop. Also, she agreed that it was told not to desk drop documents by the employer during the bargaining round for the FB group that took place previous to the round in issue here. Ms. Stuart indicated that while in the past, the bargaining agent filed grievances on the issue of access to bulletin boards, the matter was never referred to adjudication. Ms. Stuart indicated that the bargaining agent had been allowed to desk drop because the employer did not want to be bad mouthed by the bargaining agent.

[14] As for her email of January 16, 2008 to Lauralee Larose (Exhibit E-1, tab 10), Ms. Stuart maintained that it was meant only as a courtesy and that she was not asking permission since it was bargaining agent business for which the employer's permission was not required. Ms. Stuart indicated that she did not challenge Ms. Larose's January 16, 2008, response that there was no issue with it as long as the calendars were left in non-work areas.

[15] Charles Khoury was the complainant's next witness. He testified that as the first vice president for the bargaining agent, he desk dropped the collective bargaining update in issue in March 2013 at the 150 Isabella Street building (Exhibit G-2). Mr. Khoury indicated that he distributed about 100 copies of it with a colleague, Insa Fall, at lunch during the days preceding the event referred to in the update. Mr. Khoury testified that desk drop was the best method to distribute information to bargaining agent members. Mr. Khoury indicated that the turnout rate improves when members are invited to a meeting through a desk drop as opposed to being invited through a notice posted on a bulletin board.

[16] Mr. Khoury testified that for the March 2013 desk drop (Exhibit G-2), he told his manager that he would be doing it and gave him a copy of the document to be distributed. As for Mr. Fall, Mr. Khoury indicated that Mr. Fall talked to his manager, who was fine with the desk drop distribution as long as it did not involve the

electronic network. Mr. Khoury also testified that he desk dropped the bargaining agent's calendar in 2012 (Exhibit G-1, tab N). He indicated that he did not ask permission to distribute the calendars and that one manager even asked for copies for her staff. Mr. Khoury agreed that the bargaining agent might have a list of its members; however, he did not know whether it was accurate.

[17] Robert Lafortune also testified on behalf of the complainant. He testified that he has been a shop steward for the complainant as well as its vice president of communications. Mr. Lafortune indicated that for the 10 years he was in Ottawa, he desk dropped documents for the complainant at least once a year, sometimes twice. He indicated that the documents that he distributed varied from calendars to collective bargaining updates to business cards with addresses on them. Mr. Lafortune testified that six years ago or so, he carried out desk drop distributions at 250 Tremblay Road and 2265 St. Laurent Blvd. in Ottawa. Mr. Lafortune indicated that he did it after working hours for the Tremblay Road building. As for the St. Laurent Blvd. building, since it is secure, with limited access, he asked for permission to get in, and then carried out the distribution at lunch. Mr. Lafortune indicated that he had permission from management to distribute the business cards and that he distributed over 800 of them on employees' desks. Mr. Lafortune also testified that in October 2008, an election was underway for representatives of the bargaining agent, and he desk dropped his resumé. Mr. Lafortune testified that he probably passed out 1000 copies of his resumé after working hours and that he did not seek management's permission. Mr. Lafortune testified that he never asked for permission for a desk drop; he would simply tell management that he was about to do it and never received any complaints.

[18] As for the UMCC meeting of September 9, 2008 (Exhibit G-1, tab C, page 5), Mr. Lafortune indicated that not much was said about desk drop except that it should be done after working hours and that it should not require management's permission, as opposed to the bulletin board, for which management's approval on the content of a notice was required before posting it. In cross-examination, Mr. Lafortune testified that he did not recall that the employer did not agree with the desk drop method.

[19] Richard Carrier and Lynn Smith Doiron, both involved with the union, also testified on behalf of the complainant, essentially about the fact that in the past, they desk dropped bargaining agent materials with the knowledge of their managers, who never complained.

B. Respondent's evidence

[20] Scott Pryor testified for the respondent. Mr. Pryor stated that he is currently the manager of the Trusted Trader program with the employer and that he has been in that position for the last three years. Mr. Pryor indicated that he has 21 years of service with the employer.

[21] Mr. Pryor testified that it is not routine for the complainant to desk drop documents and that the bargaining update document (Exhibit G-2) was the first time, in March 2013, that it did so. Mr. Pryor testified that he became aware by talking to his director that the update was desk dropped by Mr. Fall, who works in his team and is a shop steward for the complainant.

[22] Mr. Pryor testified that in addition to being desk dropped, the notice (Exhibit G-2) was posted on the bulletin board. He indicated that the bulletin board is about 5' x 9' in size and that it is easily accessible to employees. It is located on the 11th floor of the Isabella Street building, outside the kitchen area.

[23] Mr. Pryor testified that Mr. Fall told him that he desk dropped the bargaining update document during his lunch break. Mr. Pryor indicated that not everyone in his group works the same hours or has the same lunch and break periods. He indicated that lunch and breaks are staggered.

[24] Mr. Pryor testified that when he found out about the desk drop of the bargaining update document, he told Mr. Fall that there was a procedure to follow for the distribution of documents and that there was also a bulletin board for the purpose of communicating with employees.

[25] Mr. Pryor testified that there were other means that the complainant could have used to communicate with its members, such as distributing the material outside the Isabella Street building and in its lobby.

[26] Mr. Pryor stated that he is not the one who decided for the employer what documents can be desk dropped by the complainant. He testified that if he were asked for permission to desk drop documents by the complainant, he would have to refer that person to his director.

[27] Ron Goulet also testified on behalf of the respondent. Mr. Goulet is currently director of the Travellers System and Reporting Division for the employer. Mr. Goulet's office is located on the 4th floor at 250 Tremblay Road. He testified that he does not recall documents being desk dropped by the complainant at that location. He indicated that on his floor, employees have different lunch and break times and that some employees start their days earlier, some later. He stated that there is a bulletin board on his floor that has been used by the complainant, which also recently distributed documents to its members outside the building.

[28] Ann Kline testified on behalf of the respondent. She is the director general of the Trade Program for the employer. She has been working at 150 Isabella Street since 2012. She testified that desk dropping documents was not a routine means of distribution for the complainant and that except for the distribution of calendars and the incident of March 4, 2013, she was not aware of other instances of desk dropping by the complainant.

[29] Ms. Kline testified that on or about March 4, 2103, she noticed the bargaining agent's notice (Exhibit G-2) on one of her assistant's desks; another assistant also had a copy. Ms. Kline indicated that she also saw other employees outside their cubicles discussing what she assumed was the notice. The day after that, Ms. Kline saw the notice again. She took a picture of it and sent it to the employer's labour relations group since many questions were raised about it. Ms. Kline stated that she was told that Mr. Fall was the one who had distributed it.

[30] Ms. Kline testified that employees do not take their lunches or breaks at the same time. Ms. Kline explained that just because an employee distributes a document during his or her break time does not mean that those who receive it will read it only when they are on break. Ms. Kline indicated that she is not sure who has the authority for the employer to approve the desk drop of documents.

[31] Ms. Kline indicated that there is a bulletin board on every floor at the Isabella Street location and that on the 11th floor it is located at the entrance of the kitchen area. She also testified that recently, the complainant distributed handouts in the lobby of the building, sent material via mail or via the employer's email system, or posted information on its website.

[32] Ms. Larose was the respondent's last witness. She is currently the employer's labour relations manager. Ms. Larose testified that the employer does not allow the distribution of documents by the complainant or for that matter any other bargaining agent by the desk drop method.

[33] Ms. Larose testified that in the National Capital Region, the employer's employees are located in 24 buildings. Some of those buildings, like the one on St. Laurent Blvd, are 24/7 operations. Ms. Larose indicated that all the employer's buildings have bulletin boards except the one located at 11 Sussex Drive, but no employees from the FB group work there. Ms. Larose also stated that only the employer's president has the authority to grant permission for desk dropping.

[34] Ms. Larose testified that she is not aware of any instances when the employer allowed desk dropping and that the employer's position goes back a few years. Even when it was part of the Canada Customs and Revenue Agency, it still did not allow the method of desk dropping.

[35] Ms. Larose said she was surprised to hear the complainant claim that it has desk dropped in the past without the employer's approval. Ms. Larose testified that the employer's permission is always required before resorting to desk dropping.

[36] Ms. Larose stated that desk drop was never provided for under the collective agreement and that this issue was never raised during the last round of collective bargaining.

[37] Ms. Larose explained that desk dropping is just not permitted, regardless of when it is done, since while the person performing the desk drop may be on his or her own time, it does not mean that the employee who receives the material is on break. The practice of desk dropping may impact the employer's operations.

[38] Ms. Larose testified that the issue of desk dropping was raised at the UMCC meeting on September 9, 2008 (Exhibit E, tab 14-A, page 5). Ms. Larose indicated that at that meeting, the complainant raised the issues of posting to bulletin boards and the time it took to obtain a response from the employer for such a posting, along with desk dropping. Ms. Larose testified that while the employer undertook to look into the issue of its response time for posting on bulletin boards, the outcome of that meeting was that the employer's permission was always required for posting. As for the desk

drop issue, the employer refused to reply since it was simply not provided for in the collective agreement. Ms. Larose testified that she did not recall any further discussion on the matter and that no grievance or complaint was filed on the issue of desk dropping. Ms. Larose indicated that between September 9, 2008 meeting and March 2013, she was not aware that the complainant had raised the issue of desk dropping.

[39] Ms. Larose testified that the bargaining agents have means other than desk dropping to communicate with their members, such as through a list of addresses of employees that is provided to the bargaining agents twice a year. The bargaining agents also have the employees' email addresses, and can distribute documents outside buildings.

[40] Ms. Larose testified that while the content of the bargaining update document (Exhibit G-2) was approved on time and was posted, the employer was still concerned about allowing it to be desk dropped. Ms. Larose indicated that the employer is concerned that if a document is desk dropped during working hours, it will be disruptive, since not all employees are on a lunch or another break at the same time.

[41] As for the specific event involving the notice of the bargaining agent's meeting about a bargaining update, Ms. Larose explained that her colleague, Danielle Monette-Latouche, first received an email from Ms. Rajotte, informing her that the complainant intended to distribute the notice to employees. Ms. Larose explained that Ms. Rajotte's email was forwarded to Stéphanie Houde, who advised Ms. Rajotte on April 8, 2013 that while the notice was approved for posting on the bulletin board, it was not approved for desk dropping or distribution through the employer's electronic system (Exhibit G-1, tab F).

[42] Ms. Larose testified that the complainant, during this or earlier rounds of negotiations did not make any specific demand about the desk dropping of documents.

[43] Ms. Larose also pointed out that the report of the public interest commission (PIC) dealing with the FB group issued on June 5, 2013, did not include desk drop distribution as an issue in dispute between the parties (Exhibit E-1, Vol. 1, tab 4). Ms. Larose also referred to examples of complainant notices that in the past were or were not allowed to be posted on the bulletin board (Exhibit E-1, Vol. 1, tabs 5 and 6)

as well as an email from management reminding managers about the bargaining agents' need to obtain management's approval before posting notices on bulletin boards (Exhibit E-1, Vol. 1, tab 8).

[44] Ms. Larose explained that in 2008, she was asked for permission to desk drop calendars from the complainant. Ms. Larose testified that while she did not recall a discussion on the matter, she remembered denying the desk drop request. She also stated that Ms. Stuart did not indicate at the time that she would do it anyway (Exhibit E-1, Vol. 1, tab 10). Ms. Larose stated that no grievance or complaint was filed as a result of the desk drop denial.

[45] Ms. Larose indicated that at Ms. Stuart's request, the bulletin board and desk drop issues were placed on the agenda for the September 9, 2008 UMCC meeting (Exhibit E-1, Vol. 1, tabs 11 to 13). Ms. Larose also explained that the draft minutes of that UMCC meeting were distributed on November 22, 2008 to all UMCC members, including representatives for the complainant, who did not raise any issue with the outcome on the specific issue of bulletin board postings and desk drops (Exhibit E-1, Vol. 1, tab 14-A). Ms. Larose testified that those minutes were approved and that the complainant did not grieve or complain on the issue (Exhibit E-1, Vol. 1, tab 14-A).

[46] Ms. Larose concluded by saying that Ms. Rajotte filed a grievance on April 29, 2013, in response to the employer's refusal to allow her to desk drop the notice, the subject of which is similar to the present complaint. Ms. Larose explained that while the grievance was denied at the second level of the grievance process, the final decision on the matter is still outstanding (Exhibit E-1, Vol. 2, tab 53). In cross-examination, Ms. Larose admitted that the employer has no policy on desk dropping.

III. Summary of the arguments

A. For the complainant

[47] On the issue of timeliness, the complainant argued that it was within the 90-day time limit prescribed by subsection 190(2) of the *Act* when it filed the complaint. Counsel for the complainant argued that while a debate occurred at the UMCC meeting of September 9, 2008, the complainant never received a clear answer from the employer. It is only on May 1, 2013 that the complaint really crystallized. It is only when the complainant's national president wrote to the respondent's vice president

that the complainant received a clear indication of the employer's position. Before the issue of desk dropping was brought up, there was no clear policy about the employer's position; there was nothing in writing. Counsel for the complainant stated that desk dropping is its free-standing right and that each time the employer refuses to allow it, the bargaining agent has a right to file a complaint.

[48] As for the merits of the case, counsel for the complainant argued that by refusing to allow the desk drop distribution of the notice about an upcoming bargaining update meeting, the employer violated sections 106 and 107 and subsection 186(1) of the *Act*. Essentially, counsel for the complainant argued that "desk drop" is a term and a practice that has been ongoing for many years and is a way, during non-working hours, for the complainant to share information with its members. Counsel for the complainant argued that this is not a case about access to the respondent's property but rather about the employer preventing the bargaining agent from exercising its right to communicate with its members. Counsel for the complainant insisted that by distributing documents during non-working hours to its members, even though it happened at the employer's premises, it did not use the employer's facilities. Therefore, by preventing the complainant from exercising its free-standing right to communicate and represent its members, the employer violated paragraph 186(1)(a).

[49] Counsel for the complainant reviewed the evidence and argued that on April 5, 2013, all Ms. Rajotte wanted was to communicate with her fellow members that a meeting on collective bargaining was to take place (Exhibit G-1, tab F). She forwarded the notice to the employer's representative only as a courtesy. Ms. Rajotte's understanding was that she did not need the employer's permission since the notice (Exhibit G-1, tab F) dealt with bargaining agent business. Counsel for the complainant insisted that no reason was given to explain the employer's refusal of the desk drop method. Counsel for the complainant maintained that there was no evidence that desk dropping would be disruptive.

[50] Counsel for the complainant argued that the method of desk dropping calendars, bargaining updates and elections propaganda has been used several times in the past at different locations and buildings and that it was a long-standing practice that had always been done without incident and with management's knowledge.

[51] Counsel for the bargaining agent argued that the distribution of its material during non-working hours is a lawful activity and is a free-standing right that it can pursue as long as it does not interfere with the employer's operations. In this case, counsel for the bargaining agent maintained, there is no evidence to support that such a disruption occurred.

[52] Counsel for the complainant argued that article 12 of the collective agreement deals with the employer's premises. This matter is not about the use of the employer's premises. Counsel for the complainant maintained that the employer cannot use its property right to limit the bargaining agent's ability to communicate with its members. Counsel for the complainant maintained that this case is about whether the method of dissemination of information from the complainant to its members was reasonable and whether the collective agreement expressly prohibits the desk drop method. Counsel for the complainant argued that if the parties wanted to prohibit the method of desk dropping, they would have done so expressly in the collective agreement, and while article 12 deals with posting on bulletin boards, it does not prohibit any other kind of communication, such as desk dropping.

[53] Counsel for the complainant insisted that the right for a bargaining agent to communicate with its members is crucial and permissible as long as it is exercised in a reasonable fashion. In the present matter, counsel for the complainant maintained that the evidence demonstrated that issues arose in the past with access to bulletin boards and the most effective way for the complainant to communicate with its members. Moreover, the notice about the upcoming meeting on an update on collective bargaining was very neutral, and it contained nothing detrimental to the employer's interests. Therefore, the employer's position is not reasonable.

[54] Counsel for the complainant argued that desk dropping has been a long-standing practice between the parties. It has been done for several years without complaint and without interference to the employer's operation. It is a legitimate activity for the complainant that is not prohibited by the collective agreement.

[55] In addition to the argument that the employer violated paragraph 186(1)(a) of the *Act*, counsel for the complainant also asked that I find that the respondent violated section 107, which deals with the freeze of all terms and conditions of employment that could be included in a collective agreement once notice to bargain is served.

[56] Counsel for the complainant argued that the evidence demonstrated that there had been a long-standing practice in place before notice to bargain was given on February 21, 2011, in which the complainant could resort to the desk-drop method with the employer's knowledge and without its permission. Counsel for the complainant asked me to apply the "business as usual" approach and to find a pattern in the past in which desk dropping was performed, which could have been embodied in a collective agreement, as per section 107 of the Act. Therefore, by unilaterally stopping that long-standing practice after the notice to bargain was issued, the employer also violated section 107.

[57] In support of his arguments, counsel for the complainant referred me to the following decisions: *Fording Coal Ltd. v. United Steelworkers of America, Local 7884*, [1998] B.C.C.A.A.A. No. 98 (QL); *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2012 PSLRB 58; *Heffernan and White v. Treasury Board (Post Office Department)* (1981), 3 L.A.C. (3d) 125; *Merriman and Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada (UCCO-SACC-CSN) v. MacNeil and Justason*, 2011 PSLRB 87; *Canadian General Electric Co. v. United Electrical, Radio and Machine Workers of America* (1952), 3 L.A.C. 909; *Plainfield Children's Home v. Service Employees Union, Local 183* (1985), 19 L.A.C. (3d) 412; *Time Air Inc.* (1989), 77 di 55; *Reynolds-Lemmerz Industries*, [1994] O.L.R.D. No. 4119 (QL); *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers v. Correctional Service of Canada*, 2006 PSLRB 76; *Air Canada v. Canadian Air Line Employees' Ass'n* (1980), 27 L.A.C. (2d) 289; *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees v. American Airlines Inc.* (1981), 43 di 114; *CFCN Television* (1988), 76 di 8; *Hamilton-Wentworth District School Board*, [2002] O.L.R.D. No. 2676 (QL); *Andres et al. v. Canada Revenue Agency*, 2009 PSLRB 36; *Quan v. Canada (Treasury Board)*, [1990] 2 F.C. 191 (C.A.); *MacKenzie v. Treasury Board (Employment & Immigration Canada) and Public Service Alliance of Canada v. Treasury Board (Employment and Immigration Canada)*, PSSRB File Nos. 166-02-21187, 21188, 21189 and 169-02-501 (19910620); *Public Service Alliance of Canada v. Treasury Board*, 2011 PSLRB 106; *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46; *The Queen in right of Canada as represented by the Treasury Board v. Canadian Air Traffic Control Association*, [1982] 2 F.C. 80 (C.A.); *Canadian Air Traffic Control Association v. Treasury*

Board, PSSRB File No. 148-02-186 (19910724); *Canadian Air Traffic Control Association v. Treasury Board*, PSSRB File No. 148-02-187 (19910502); *Public Service Alliance of Canada v. Treasury Board*, PSSRB File No. 148-02-118 (19860611); *Éthier v. Correctional Service of Canada and Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN*, 2010 PSLRB 7; *Roy v. Professional Institute of the Public Service of Canada*, 2011 PSLRB 142; *Castonguay v. Public Service Alliance of Canada*, 2007 PSLRB 78; *Boshra v. Canadian Association of Professional Employees*, 2009 PSLRB 100; and *Comiskey v. Jensen et al.*, 2012 PSLRB 22.

B. Respondent's arguments

[58] On the issue of timeliness, counsel for the respondent argued that the complaint should be dismissed since it was filed beyond the 90 days provided for in subsection 190(2) of the *Act*. Counsel for the respondent pointed out that the issue of whether the complainant can desk drop documents was dealt with at the UMCC meeting in September 2008, at which the respondent clearly indicated to the complainant that desk dropping would not be allowed. Counsel for the respondent maintained that the evidence clearly demonstrated that the complainant was made aware of the employer's position at the UMCC meeting.

[59] Counsel for the respondent indicated that the time limit of 90 days referred to in subsection 190(2) of the *Act* cannot be extended by Public Service Labour Relations Board ("the Board"). Therefore, the complainant's complaint should be dismissed as untimely.

[60] As for the merits of the case, counsel for the respondent argued that the Board's most recent jurisprudence stands for the proposition that any limitation on the employer's rights must be prescribed in a collective agreement.

[61] Counsel for the respondent argued that this case clearly involves the use of the employer's facilities. The notice, (Exhibit G-1, tab F), was to be distributed within the employer's facilities and on the employer's desks.

[62] Essentially, counsel for the respondent argued that the only way the complainant can claim the right to communicate with its members by using the employer's property is if such a right has been negotiated through collective

bargaining. The complainant must establish that such a positive right to communicate with members exists in the collective agreement.

[63] Counsel for the respondent argued that such rights for the complainant to communicate with its members using the employer's facilities have been negotiated by the parties and are embodied in article 12 of the collective agreement under the title of "Use of Employer Facilities."

[64] However, counsel for the respondent argued that article 12 of the collective agreement is self-contained and is limited to the use of bulletin boards and access to the employer's premises. Counsel for the respondent stressed that no reference is made to desk drop.

[65] Counsel for the respondent insisted that a review of article 12 of the collective agreement indicates that the parties addressed the issue of the use of the employer's facilities, that the complainant negotiated exceptions to the employer's exclusive control over the workplace, that the complainant has negotiated an effective way to communicate with its members in the workplace within or outside the work hours in every workplace, and that, in clause 12.02, the complainant has recognized that the distribution of material on the employer's property is in fact a use of the employer's property.

[66] For counsel for the respondent, if the bargaining agent wants to increase its ability to expand its information distribution at the workplace, it should be done at the bargaining table.

[67] Counsel for the respondent argued that the complainant's position that it has a right to desk drop would render article 12 of the collective agreement meaningless inasmuch as the bargaining agent could simply ignore article 12 when it wants to distribute information or material to its members.

[68] Counsel for the respondent argued that it was up to the complainant to file a policy grievance if it was dissatisfied with the way the employer addressed the issue of the bulletin board in article 12 of the collective agreement.

[69] Reviewing the evidence, counsel for the respondent also concluded that the existing mechanisms as well as the bargaining agent's ability to communicate outside the employer's property have proved effective means of communication. Counsel for

the respondent referred to the evidence that the bargaining agent is able to use its members' home contact information, that the bargaining agent has its members' personal email addresses, that the bargaining agent has a website that could be consulted by its members and that the bargaining agent can continue to distribute material outside the workplace.

[70] Counsel for the respondent insisted that in this case, the complainant had the employer's approval to post the notice about the update on collective bargaining on bulletin boards one month before the event, which shows that the complainant was not prevented from communicating with its members in a timely fashion.

[71] As to the law governing the use of the employer's facilities, counsel for the respondent noted that the jurisprudence appears divided. Counsel for the respondent argued that the jurisprudence cited by the employer is more relevant to the employer's property rights, collective bargaining and the employer's statutory authority under the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA*).

[72] Counsel for the respondent referred me to sections 7 and 11 of the *FAA*, essentially stating that in this case, and contrary to the private sector, the *FAA* confers general management rights, including property rights, on the employer, which can be limited only through collective bargaining. Counsel for the respondent maintained that the parties have already negotiated provisions addressing the issues of communication and the use of the employer's facilities as per article 12 of the collective agreement. Nothing in article 12 or in the whole collective agreement for that matter deals with desk dropping. The only way to expand on article 12 and thus restrict the employer's general rights under the *FAA* is through collective bargaining.

[73] Counsel for the respondent concluded that, in addition, there is just no evidence to suggest that the employer violated its duty to bargain in good faith as per section 106 of the *Act*. Specifically, counsel for the respondent argued that in no way did the evidence support that the employer acted differently and discriminated against the complainant. He pointed out that the employer's position vis-à-vis the issue of desk dropping has always been the same, regardless of bargaining agent. As for the issue of the prohibition imposed on the employer from interfering with the administration of a bargaining agent, referred to in subsection 186(1), counsel for the respondent indicated that the concept of "administration" contemplated in that subsection is an in-house issue and does not include communications between the

bargaining agent and its members. Alternatively, he argued that the employer's position is within its property rights and that the notice was posted well in advance on the bulletin boards. Thus, it cannot be argued that the employer prohibited the complainant from communicating with its members.

[74] As for the complainant's allegation that the employer also violated section 107 of the *Act*, which deals with the freeze period, counsel for the respondent argued that, in this case, the employer has always been consistent in its approach that desk dropping is not allowed. Therefore, it cannot be argued that the employer changed a term and condition of employment during the freeze period.

[75] Finally, counsel for the respondent concluded that the evidence demonstrated that the desk dropping of the notice had a negative impact on the employer's operations.

[76] In support of his arguments, counsel referred me to the following decisions: *Babcock et al. v. Attorney General (Canada)*, 2005 BCSC 513; *Brescia v. Canada (Treasury Board)*, 2005 FCA 236; *Li v. Canada (Citizenship and Immigration)*, 2011 FCA 110; *Merriman; Public Service Alliance of Canada v. Treasury Board*, 2011 PSLRB 106; *United Rubber, Cork, Linoleum and Plastic Workers of America v. Michelin Tires (Canada) Ltd.*, [1979] N.S.J. No. 794; *Telus Communications Inc. v. Telecommunications Workers Union* (2010), 195 L.A.C. (4th) 334; *Bay v. Retail, Wholesale Department Store Union, Local 1000* (1990), 16 L.A.C. (4th) 298; *Skeena Cellulose Inc. v. Industrial Wood and Allied Workers of Canada (I.W.A. Canada)*, [2002] B.C.L.R.B.D. No. 267 (QL); *Canadian Union of Operating Engineers and General Workers v. Brookfield Management Services Ltd. (BCE Place)*, (2000) C.L.R.B.R. (2d) 238; *Convention Centre Corp. v. C.U.P.E., Loc. 500 (Union Buttons)* (1997), 63 L.A.C. (4th) 390; *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 46; *Public Service Alliance of Canada et al. v. Canadian Grain Commission et al.*, [1986] 5 F.T.R. 51; *Peck v. Parks Canada*, 2009 FC 686; *Almeida v. Canada (Treasury Board)*, [1991] 1 F.C. 266 (C.A.); *Quan; Public Service Alliance of Canada v. Treasury Board*, 2008 PSLRB 43; *International Association of Machinists and Aerospace Workers and District Lodge 147, National Association of Federal Correctional Officers; Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2012 PSLRB 58; *Pronovost v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB

93; and *Chafe et al. v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112.

IV. Reasons

[77] At the outset, I would like to point out that the parties to these proceedings referred me to 45 decisions. While some facts and issues involved in those decisions bear some resemblance to the ones in this complaint, they remain different. In addition, while I appreciated and considered the legal aspects of those decisions, I will not, with few exceptions, refer to them.

[78] The issue I have to decide is whether the employer, by preventing the complainant from distributing through the desk drop method an invitation to its members to attend a meeting on collective bargaining, violated sections 106 and 107 and paragraph 186(1)(a) of the *Act*.

[79] Before doing so, I must first address the employer's argument that the complaint should be dismissed since it was not filed within the 90 days prescribed in section 190 of the *Act*.

[80] Subsection 190(2) of the *Act* reads as follows:

190. (2) Subject to subsections (3) and (4), a complaint under subsection (1) must be made to the Board not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

[81] Essentially, the employer argued that at the September 9, 2008 UMCC meeting, the complainant was clearly told that desk dropping would not be allowed and that the complainant then had 90 days from that date to file its complaint.

[82] I am not convinced. I agree with counsel for the bargaining agent that the evidence is contradictory as to the parties' understanding following the UMCC meeting of September 9, 2008, and for a long period after that. However, as of April 8, 2013, the undisputed evidence is that it was then clear to both parties that the employer's position was not to allow desk dropping within its facilities. In my view, the 90-day limitation period runs from April 8, 2013, which in this case is the date on which the complainant knew for certain the action or circumstances giving rise to the complaint. The complaint was filed on May 13, 2013. It is therefore timely.

[83] I will turn now to the merits of the case. In this matter, the complainant bore the burden of proof and had to demonstrate that, by refusing to allow the desk drop of the invitation to a meeting on collective bargaining, the employer violated sections 106 and 107 and subsection 186(1) of the *Act*. I should also point out that no reference to the *Canadian Charter of Rights and Freedoms* was made during these proceedings.

[84] It is important to keep in mind that in this case, the content of the invitation (Exhibit G-1, tab F) is not an issue. In other words, the parties admitted that there is nothing against the interests of the employer in that invitation. The employer's refusal is not linked to the content of the invitation; as a matter of fact, the employer authorized its posting on the bulletin boards. The employer objected to its distribution method.

[85] Essentially, the complainant claimed that this matter is not about the employer's property rights but rather about the fundamental right of the bargaining agent to communicate with its members and that it has a free-standing right to communicate with its members through desk drop.

[86] As I understand it, the complainant's argument is that it enjoys an unfettered right to communicate with its members regardless of the employer's property rights. Moreover, as I will explain later, counsel for the complainant argued that even if I consider the employer's property rights argument, this case should be distinguished from other decisions involving the employer's property rights cited by counsel for the respondent.

[87] Dealing first with the issue of employer's property rights, I should point out that it is not disputed that the complainant distributed the notice on desks that belong to the employer, located within its facilities. I find that the distribution of material through the desk drop method involves the use of the employer's property. For me, it is quite clear that the employer's property, such as its desks and premises, were the conduit for the distribution, and that cannot be ignored.

[88] Having concluded that the desk drop of documents involved the employer's property, the question becomes whether the bargaining agent has an unfettered right to communicate that can be exercised regardless of the employer's property rights?

[89] I do not think so. I agree that the rights of a bargaining agent, as a certified bargaining agent for employees, include the general right to communicate with its members. However, in my opinion, that right is not absolute and has to be balanced against, in this case, the employer's property rights. In the present matter, I fail to see what authority would give the complainant a free-standing right to desk drop its communications using the employer's facilities without its consent. As I understand counsel for the complainant's argument, the bargaining agent in this case claims an unfettered right to communicate via desk dropping with its members that would trump the employer's right to its property. Again, while I agree that the bargaining agent has a general right to communicate with its members, it does not have the right to use the employer's facilities to do so unless that right is expressly provided for. In other words, and in this specific context, article 12 of the collective agreement speaks to the bargaining agent's ability to use the employer's premises to communicate with its members. The parties have dealt with this issue in article 12 of the collective agreement and it covers all issues related to the bargaining agent's communication with its members using the employer's premises.

[90] I agree with counsel for the respondent that some of the respondent's rights are provided by virtue of the legislation, namely, sections 7 and 11 of the *FAA*, which deal with personnel management. Those provisions clearly give general authorities to the employer with respect to personnel management. In my view, only a clear indication in legislation or other contractual authorities can set aside those rights of the employer. As decided in *Canadian Grain Commission et al.* at para 52:

It is common ground that the general management rights conferred on the Treasury Board may be substantially circumscribed by negotiated terms and conditions of employment embodied in a collective agreement. . . This principle is also found in article 7 of the collective agreement which recognizes that the authority of management is limited by the terms and conditions of the agreement.

[91] In this case, that is precisely what the employer has done. It deliberately agreed to limit its property rights by allowing the bargaining agent to use its property to communicate with its members. Both parties agreed at the bargaining table to the terms of article 12, which reads in part as follows:

ARTICLE 12**USE OF EMPLOYER FACILITIES**

12.01 Reasonable space on bulletin boards, in convenient locations, including electronic bulletin boards where available, will be made available to the Alliance for the posting of official Alliance notices. The Alliance shall endeavour to avoid requests for posting of notices which the Employer, acting reasonably, could consider adverse to its interests or to the interests of any of its representatives. Posting of notices or other materials shall require the prior approval of the Employer except in the case of notices related to the business affairs of the Alliance, including posting of the names of Alliance representatives, and social and recreational events. Such approval shall not be unreasonably withheld.

12.02 The Employer will also continue its present practice of making available to the Alliance specific locations on its premises and, where it is practical to do so on vessels, for the placement of reasonable quantities of literature of the Alliance.

...

[92] I believe that by agreeing with the bargaining agent to the terms of article 12 of the collective agreement, the employer agreed to a limitation of its property rights by allowing, subject to certain conditions, bargaining agents to use bulletin boards for communicating with their members. In my view, article 12 is self-contained and specific as to the limitations imposed on the employer. I do not believe that any other means of communication can be read into it, such as the right for bargaining agents to desk drop documents related to the business affairs of the Alliance on employees' desks without the employer's consent. While in this particular case the content of the notice that was to be distributed through desk drop is not an issue, nevertheless, the method, a desk drop, is not insignificant in a workplace and can be very disruptive. I am convinced that if the parties sought the need to embody the use of bulletin boards in a collective agreement, they could have also done so for the desk dropping of bargaining agent documents.

[93] As mentioned, article 12 of the collective agreement not only deals with the employer's property rights per se but also refers, in clause 12.01, to another means of communication for the bargaining agent with its members: the use of the bulletin board. With the negotiation and inclusion of article 12 in the collective agreement,

clearly the employer limited its property rights, and at the same time, the bargaining agent negotiated some rights that gave it access to the employer's property. I cannot help but conclude that in negotiating a clause on the use of bulletin boards, the bargaining agent recognized the employer's property rights and felt at the time of the negotiation the necessity to incorporate in the collective agreement such a provision. Why did it do so if it has a free-standing right to communicate with its members that supersedes the employer's property rights? Clause 12.01 includes the right, under certain conditions, for the bargaining agent to use the bulletin boards; it does not include a positive right for the complainant to use the respondent's facilities for desk dropping. If the complainant wants to do so, it has to obtain the employer's permission or to negotiate such a right in the collective agreement, as it did for the use of the bulletin boards.

[94] In *Merriman*, the Board member examined whether the employer's decision to deny Mr. Merriman access to the employer's telephone system constituted an unfair labour practice under section 185 of the *Act*. The Board member decided at paragraphs 27 and 28 as follows:

[27] . . . *This raises the issue of the extent to which employer property is available to an employee organization for the purposes of communicating with and representing its members and whether the use of an employer's telephone system by an employee organization is protected under the unfair labour provisions of the Act.*

[28] *I note certain provisions in the applicable collective agreement . . . that are relevant here. Clause 9.01(a) requires the employer to make available to the employee organization "[r]easonable space on bulletin boards . . . for the posting of official . . . notices . . ." of the employee organization. This is a common provision in collective agreements that permits employee organizations to have access to what would otherwise be the exclusive property of the employer. Similarly, clause 9.01(b) permits the employee organization to use the employer's electronic network to distribute information to members, with some conditions. Clearly, the objective of these provisions is to create a contractual right that permits the employee organization to use employer property for certain specified purposes. The corollary of these provisions is that, generally, an employee organization does not have the right to use employer property to communicate with its members. Where that right exists it is usually a result of collective bargaining.*

[Emphasis added]

[95] Moreover, to agree with the complainant's proposition that it has an unfettered right to communicate through desk drop despite the employer's property rights would in my view render clause 12.01 of the collective agreement completely meaningless. Under that scenario, the bargaining agent could then completely ignore clause 12.01 and just proceed with desk dropping or, in situations in which the employer denies the bargaining agent's request for posting on a bulletin board, the bargaining agent could then simply distribute its documents through the desk drop method.

[96] Counsel for the complainant insisted that this case should be distinguished from other cases involving employer facilities such as bulletin boards, photocopiers, etc. For me, the action of desk dropping a document within the employer's premises, on the employer's desks, is clearly a use of the employer's property. In my view, it can be likened to another means of communication, such as the use of a telephone within the employer's facility. Looking at this very issue of a bargaining agent's right to communicate and an employer's property rights, the Board member decided as follows in *Merriman*, at paragraph 32:

[32] . . . Again, the telephone system at issue is the property of the employer, it is subject to the control and regulation of the employer and I am unable to find in this case a legal restriction on how the employer uses its property.

[97] Again, I am of the view that the distribution of the invitation to a meeting (Exhibit G-1, tab F) was clearly done by using the employer's facilities. The complainant insisted that the desk drop was done outside working hours and that therefore there was no impact on the employer's business operations. I am not convinced. The evidence is inconclusive as to when exactly the desk drops took place. However, it is clear from the evidence that employees' lunch and break times differ and that the notice could well have been dropped on the desk of a working employee. Therefore, I cannot conclude that it was done outside working hours and that there was no impact on the employer's operations.

[98] Counsel for the complainant argued that the evidence was that using bulletin boards is not always efficient, often due to their location, and that desk dropping better draws members' attention. While issues might arise with location and with the time it takes to obtain the employer's approval to post on bulletin boards, those are not reasons to bypass the mechanisms that, through collective bargaining, the parties have chosen for communications between a bargaining agent and its members using

the employer's property. While it appears that using bulletin boards may be frustrating at times for the complainant, it is up to the bargaining agent to challenge the problems related to bulletin boards through policy grievances or through collective bargaining.

[99] Counsel for the complainant also made the argument that by refusing distribution via desk dropping, the respondent prevented it from communicating with its members. I disagree. The undisputed evidence is that while the employer objected to distributing the notice through desk dropping, it nevertheless allowed for its posting pursuant to clause 12.01 of the collective agreement a month before the planned event. Therefore, I do not find that the employer prevented the bargaining agent from communicating with its members.

[100] Moreover, in the present matter, the communication and the method chosen to communicate should be distinguished. The employer did not object to the communication per se but objected to the method used by the complainant. The employer prohibited desk dropping. In *Merriman*, the Board member stated as follows at paragraph 30:

[30] In my view, restricting how a member contacts his or her employee organization is not the same as preventing any contact at all; a distinction must be made between the communication and the mechanism or medium of the communication. . . .

[Emphasis in the original]

[101] Moreover, the evidence also disclosed that the complainant could have distributed the notice outside the employer's premises, which was done in the past, could have used the list of employees that the employer provides it with twice a year to reach its members, or could have posted on its website the information about the upcoming meeting.

[102] Therefore, with respect to its duty to bargain in good faith, I conclude that the employer did not violate section 106 of the *Act*. This issue of desk drop was simply never part of collective bargaining between the parties. I simply fail to see any relationship or evidence that this was an issue at the bargaining table or that this dispute intensified with collective bargaining.

[103] As for subsection 186(1)(a) and (b) that deals with the formation and administration of an employee organization, the representation of employees and

discrimination against an employee organization, it is clear to me that this subsection is designed to prevent the employer's involvement in internal union affairs. There is simply no allegation or evidence of such in the present matter. There is also no evidence or even any allegation that the employer discriminated against the complainant; the evidence disclosed that all bargaining agents were treated the same.

[104] Counsel for the complainant made the argument that the employer violated section 107 of the *Act*, which deals with the freeze of all terms and conditions that were in place when notice to bargain was served and that could be embodied in a collective agreement. The complainant's argument is essentially that the employer, by refusing to allow it to use desk dropping, changed a long-standing practice, contrary to section 107. As stated earlier, the evidence as to whether a past practice existed is contradictory. Witnesses for the complainant testified that they used that method for a long period for all kinds of documents in different locations, while the employer's witnesses challenge that position through testimony, a summary of the UMCC meeting and Ms. Larose's email of January 16, 2008 that specifically opposed the desk drop distribution of documents (Exhibit E-1, tab 10). In my view, the evidence as to whether the desk drop method was used and was condoned by the employer is inconclusive. The complainant had the burden of proof. I am not convinced that the evidence supported the existence of a long-standing practice. Therefore, I cannot conclude that the employer violated section 107.

[105] Finally, I cannot help but notice that neither party raised those specific matters in their respective demands during the current or previous rounds of collective bargaining or that they have been referred to the PIC. It certainly would have been a good forum to settle these matters.

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

(The Order appears on the next page)

V. Order

[107] The complaint is dismissed.

November 13, 2013.

**Linda Gobeil,
a panel of the Public Service
Labour Relations Board**