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Public Service Labour Relations Act

Before a panel of the Public Service Labour Relations Board

BETWEEN

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-TCA CANADA), LOCAL 2182

Complainant

and

TREASURY BOARD
(Department of Fisheries and Oceans)

Respondent

Indexed as
National Automobile, Aerospace, Transportation and General Workers Union Of Canada (CAW-TCA Canada), Local 2182 v. Treasury Board (Fisheries and Oceans Canada)

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

REASONS FOR DECISION

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations Board

For the Complainant: Anthony Dale, counsel

For the Respondent: Sean F. Kelly, counsel

Heard at Ottawa, Ontario,
February 14, 2013.

I. Complaint before the Board

[1] The complainant, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-TCA Canada), Local 2182, filed a complaint under section 190 of the *Public Service Labour Relations Act* ("the *Act*") on June 21, 2012 alleging that the respondent, the Treasury Board, had failed to bargain in good faith contrary to paragraph 190(1)(*b*) of (the *Act*"). The basis for the allegation is that the employer failed to disclose or provide notice of any kind of the pending decision to close 10 Marine Communications and Traffic Service Centres (MCTSCs) operated by the Canadian Coast Guard (CCG), affecting 184 members of the bargaining unit.

[2] The respondent raised an objection to my jurisdiction on the basis that the complaint was statute barred as it was filed outside the mandatory 90-day period prescribed in section 190(2) of the *Act.*

[3] On August 10, 2012, I ordered that this matter be set down to hear arguments on the timeliness of the complaint before it could proceed on the merits.

II. Summary of the evidence

[4] The parties agree that the complainant served notice to bargain on the respondent on January 7, 2011. The applicable collective agreement was to expire on April 30, 2011. In the course of meetings on February 22 and 23, 2011, the complainant asked the respondent's representative at the bargaining table if the respondent had any intention of closing or reducing the number of MCTSCs it operated across Canada. The complainant claimed to have had no knowledge of any such plans, hence the reason for the question. The respondent refused to answer the question, stating that any such plans were covered by Cabinet secrecy rules.

[5] The parties also agree that the complainant asked the respondent the same question on November 9, 2011. The respondent's answer was the same. Such plans were subject to Cabinet secrecy rules.

[6] The parties met again in December 2011. The complainant expressed the view that, if significant staff changes were to be implemented, then any efficiencies ought to be translated into improved compensation for the remaining members of the bargaining group. A tentative agreement was reached on March 7, 2012, was ratified on April 25, 2012 and was signed on May 25, 2012.

[7] On May 14, 2012, the respondent announced to the complainant that the CCG, a special operating agency of Department of Fisheries and Oceans (DFO), would consolidate the remaining 22 MCTSCs into 11. During the course of negotiations on October 13, 2011, the respondent had announced the consolidation of the Inuvik and Iqaluit MCTSCs.

[8] Michel Vermette, Deputy Commissioner, Vessel Procurement, CCG, testified on behalf of the respondent. At the relevant time, he had functional responsibility for the MCTSC program operated by the CCG at 22 locations in Canada. The MCTSCs provide vessel traffic management and distress services to mariners and serve a role in the environmental protection of Canadian waters.

[9] During 2011, the DFO was undergoing a period of strategic review, under which it was asked to review all the programs it operated. The purpose was to identify lower-priority programs that could be reduced or eliminated in favour of higher-priority programs. The DFO provided proposals to the respondent for Cabinet review. That was followed by a strategic operating review exercise, which soon became known as the "Deficit Reduction Action Plan," as announced in the June 24, 2011 federal government budget.

[10] All departments were asked to identify low-priority programs and provide proposals for reductions in overall spending. Mr. Vermette led the exercise on behalf of the DFO. The proposals put forward to the respondent were subject to Cabinet confidence, and no one knew until the budget announcement on March 29, 2012 what Cabinet had approved. In June 2012, the DFO released specifics of which of its proposals were to be implemented. One of the proposals accepted was the closure of 11 of the 22 remaining MCTSCs.

[11] During the relevant period Mr. Vermette attended union-management meetings at both the CCG and the DFO. At each meeting, Martin Grégoire, President of the complainant, was present, with the exception of the CCG meeting on October 4, 2011. (See Exhibit 1, Tabs 2, 3, 4, 7 and 8). The minutes of each meeting were provided to those who sat on the committees, including Mr. Grégoire.

[12] At each meeting, a discussion was held on the progress of the strategic operating review. It was explained to those in attendance that a lower-to-higher reallocation was in process, which would be clearer after the budget. Until then, the

proposals were to remain secret. The unions would be notified before any announcements were made.

[13] Alex Li, at the relevant time Director, Safety and Environmental Response Systems, Maritime Services, CCG, also testified on behalf of the respondent. He represented the CCG at the bargaining table with the complainant in 2011 and 2012. He was present when the parties met on February 22 and 23, 2011, November 7 and 8, 2011, December 6, 7 and 8, 2011 and March 6, 7 and 25, 2012.

[14] At the February 22 and 23, 2011 sessions, the MCTSCs were discussed. On February 22, Mr. Li was asked by the complaint whether there would be any MCTSC closures. The complainant expressed an interest in negotiating increased compensation for its members in exchange for supporting the consolidation of the MCTSCs. He refused to respond to the question, citing Cabinet secrecy rules.

[15] Mr. Li received an email from Mr. Grégoire on February 27, 2011 concerning the Radio Officers (RO) Group's demands for additional increments or allowances (Exhibit 1, Tab 5). Mr. Grégoire discussed the justification for higher-than-average salary increases for the RO Group and referred to MCTSC consolidation and the cost savings that would be realized.

[16] Again, on November 9, 2011, Mr. Li was asked the same question. That was after the announcement in October 2011 that the Inuvik and Iqaluit MCTSCs were being amalgamated. Mr. Li repeated his previous response that he could not confirm if such a proposal were being put forward for Cabinet consideration, as such proposals were subject to Cabinet confidence. The issue was never raised again by the complainant.

[17] The complainant called no evidence.

III. Summary of the arguments

A. For the respondent

[18] The respondent submitted that the complaint was filed late. The DFO began its strategic review in 2010 and 2011. The complainant was well aware that the DFO was involved in the process and of what could possibly happen as a result of it. When expedited bargaining between the parties began in February 2011, the complainant knew or ought to have known that MCTSC closures would occur. That is why it

specifically asked its question. This is corroborated by the email from the complainant's president (Exhibit 1, Tab 5). The complainant did not know the specifics of what was to come, but it knew something was coming; otherwise, it would have called Mr. Grégoire as a witness. He was in the room during the hearing.

[19] The complainant did nothing when it received no response to its question posed in February 2011, in the course of negotiations, as to whether the MCTSCs would be closed. It continued to attend union-management meetings, at which strategic reviews and strategic operating reviews were discussed. It continued to attend negotiation sessions. Again, after the announcement of the consolidation of the Inuvik and Iqaluit MCTSCs in October 2011, the complainant did nothing. In November 2011, the question was asked again, and received the same response, and again, the complainant did nothing. At that point, the complainant had the benefit of discussions on the strategic operating review, the lower-to-higher realignment exercises, two refusals to provide the requested information and the consolidation of the Inuvik and Iqualuit MCTSCs, and yet it did nothing.

[20] In early March 2012, the parties reached a mediated settlement, knowing that further cost-cutting measures would be announced in the budget scheduled for March 29, 2012. The complainant knew that decisions on the strategic operating review were imminent and quickly signed the new collective agreement. Exhibit 1, Tab 13, states as follows:

> *"The bargaining committee felt it was important to bargain a collective agreement with this difficult employer prior to the Harper Government releasing the federal budget on March 29th," said CAW Local 2182 President Martin Gregoire. "The budget is sure to have further austerity measures that will negatively affect the work force across the federal civil service," he said.*
>
> (*Sic* throughout)

[21] No complaints were filed after the tentative agreement was reached. On May 14, 2012, the complainant was advised of the closure of 11 of the 22 remaining MCTSCs, and it did nothing. On May 25, 2012, the tentative agreement was signed. One month later, the complainant filed this complaint.

[22] It is a well-established principle of the Public Service Labour Relations Board ("the Board"), that the 90-day time limit prescribed by the *Act* is mandatory and cannot

be extended. See *Boshra v. Canadian Association of Professional Employees,* 2012 PSLRB 106; *Boshra v. Canadian Association of Professional Employees,* 2011 FCA 98; *Dumont et al. v. Department of Social Development,* 2008 PSLRB 15; and *Éthier v. Correctional Service of Canada and Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada - CSN,* 2010 PSLRB 7.

[23] To determine when the time limit begins to run, the essence of the complaint must first be defined, and then the triggering event must be identified. (See *Boshra,* 2011 FCA 98, at paragraph 40). The essence of this complaint is the respondent's failure to disclose information which may have a significant impact on the course of ongoing negotiation.

[24] The complainant knew that MCTSC closures were possible, as is evidenced by Exhibit 1, Tab 5, and by the lack of testimony by Mr. Grégoire on behalf of the complainant. It might not have known the specifics, but it had general knowledge. There is no minimum or maximum degree of knowledge that a complainant must have before filing a complaint. See *Éthier,* at para 21.

[25] The MCTSC closures are not the essence of this complaint. The respondent's refusal to answer the complainant's questions in the process of collective bargaining is that essence. The complainant knew in February 2011 that it would not be provided the information. It was again refused in November 2011. The refusal to provide the requested information triggers the time limit clock. See *Larocque v. Professional Institute of the Public Service of Canada*, 2010 PSLRB 77. No lie was made, and no untrustworthy information was provided. The requested information was refused outright.

[26] Despite the two refusals to provide the requested information, the complainant continued to bargain with the respondent, and it ultimately signed a new collective agreement. The ongoing discussions did not extend the time limits; see: *International Brotherhood of Electrical Workers, Local 424 v. Jim Pattison Sign Company,* [1987] Alta. L.R.B.R. 313 (QL).

[27] The decisions of the Canadian Industrial Relations Board (CIRB) are inapplicable in this case, as the CIRB's approach is inconsistent with this Board's and the Federal Court of Appeal's decisions under section 190 of the *Act*. There can be no perpetual

violation of the *Act*. The CIRB has discretion to extend deadlines for filing complaints. The Board does not. See *England v. Taylor et al.,* 2011 PSLRB 129, at para 16.

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

[28] The respondent took the wrong point of view by considering isolated actions rather than the circumstances as a whole. The duty to bargain in good faith is ongoing and continuous. As there are no Board decisions on the duty to bargain in good faith, the closest and analogous statute must be examined. In this case, the proper sources for guidance are the CIRB's decisions under the *Canada Labour Code*, R.S.C. 1985, C. L-2.

[29] To identify the essential nature of this complaint, it is important to identify the nature of the allegations. Once that is identified, the Board can then determine when the complainant knew or ought to have known of the circumstances giving rise to the allegation. See *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 13, at para 24.

[30] In this case, the lack of disclosure of the respondent's decision to close the MCTSCs is the essential nature of the complaint. That lack of disclosure became material only when the closures were announced on May 14, 2012. The Inuvik closing and the union-management meetings were of no consequence to decisions on job security. Since job security is a matter of great importance to the complainant and would have had a great impact on how it negotiated, it expected to be provided with the information. That is why it asked its question. Without it, the complainant was deprived of the full opportunity to bargain with the respondent.

[31] That essential information was disclosed only after the new collective agreement was signed. The materiality became relevant only on May 14, 2012, when the MCTSC closure announcements were made.

[32] In *Iberia Airlines of Spain* (1990), 80 di 165, the CIRB's predecessor, the Canadian Labour Relations Board, held that it was not effective labour relations to force a party to file a complaint to safeguard time limits every time it received an answer that it did not like. Such a practice would not contribute to the effectiveness of the bargaining process. Therefore, a complaint may be filed within 90 days of the end of the collective bargaining process. Using that philosophy, the breach of the

respondent's duty to bargain in good faith continued until the collective agreement was ratified, at the earliest which was April 15, 2012.

[33] According to the decision in *Air Canada Pilots Association v. Air Canada* (1996), 60 L.A.C. (4th) 176, time starts to run when a union knows that it has something to complain about. In this case, that date was May 14, 2012. If the Board determines that the complaint against the refusal to answer the questions was out of time, it should hear evidence about the questions to determine if the duty to answer them continued until the end of the bargaining process, which is until the date on which the collective agreement was signed on May 25, 2012; see *D.H.L. International Express Limited*, C.I.R.B. Decision 20608-C. In that case, the CIRB considered evidence outside the 90-day time limit to determine if the duty of fair representation had been breached.

IV. Reasons

[34] The complainant would have me decide in its favour based on what it stated was the respondent withholding information, which it claimed prevented it from fully participating in the collective bargaining process. The respondent would have me decide in its favour based on the fact that it made a clear and distinct refusal to provide information that the complainant requested in the course of the collective bargaining process.

[35] That speaks directly to the first task that I must address to determine whether this complaint is timely. The Federal Court of Appeal, at paragraph 40 of *Boshra,* clearly identified the process for determining when the clock begins to run for complaints made under section 190 of the *Act*. In its words, when assessing whether a complaint was filed within the 90-day time limit, the Board ". . . had to define 'the complaint', and to decide when [the complainant] knew or ought to have known of the action or circumstances that gave rise to it."

[36] In this matter, the complaint is best defined as whether or not the respondent has discharged its duty to inform the complainant, in the course of negotiations, of any significant changes which will have an impact on the bargaining group for which it is bargaining. Specifically, did the respondent advise the representatives of the bargaining group of the potential closures of the MCTSC's?

[37] I find that the essence of this complaint is the respondent's failure to provide information that the complainant believed it required to participate fully in the

negotiations. It is trite law to say that the respondent is obligated to disclose information which will have a significant impact on the course of collective bargaining. While the respondent in this case was not entirely transparent in its communication with the complainant on the topic of MCTSC closures, they did share as much as possible in various forums, at which union representatives were present, that reductions in service were inevitable.

[38] I have reviewed all the documents submitted in Exhibit 1. I have also carefully listened to the oral evidence offered by the respondent as to the knowledge of the complainant and especially of its president, Mr. Grégoire. I do not believe that the complainant had no knowledge of the impending MCTSC closures.

[39] The complainant had to have been aware, at the very latest in October 2011 when the Inuvik MCTSC was closed, that the DFO was reviewing the then-current MCTCS system as part of the strategic operating review. It was confirmed in the email Mr. Grégoire sent to Mr. Li which is in Exhibit 1, Tab 5. It is also confirmed by Mr. Grégoire's lack of testimony, which could have contradicted the testimony of Messrs. Vermette and Li. Counsel for the respondent asked that I draw a negative inference from the fact that Mr. Grégoire was in the room during the hearing and yet did not testify as to what, as the complainant's president, he did or did not know. I agree with counsel for the respondent. The complainant had ample opportunity to convince me that it had no knowledge of the strategic operating review and its potential to impact DFO and CCG structure and operations, yet it did not.

[40] The degree of that knowledge is not relevant, according to *Éthier*. What the complainant did not know, and what it sought to discover, was the extent of consolidation that the DFO was considering. What it expressly requested was whether there would be any MCTSC closures and whether it could negotiate increased salaries for those remaining in exchange for supporting the closures.

[41] That is what the complainant explicitly sought on February 22, 2011 and again on November 9, 2011. The respondent refused to provide the specifics of the proposals put forward to Cabinet on both occasions.

[42] This is not a case where the actions of the respondent prevented the complainant from participating fully and effectively in the collective bargaining process, as the complainant asserted. Had that been the case, it might have been guilty

of failing to bargain in good faith. However, in the case at hand, the respondent's failure to provide these specifics did not preclude the complainant from negotiating effectively on behalf of its members. In fact the complainant prepared a plan to deal with just this eventuality as is evidenced by the proposals put forward relative to the union cooperating with the respondent in the closure of MCTSC's in exchange for increased benefits for the remaining members of the bargaining group. The existence of these proposals speaks to the complainant's knowledge of the facts in issue and demonstrates that the respondent's refusal to answer specific questions did not prevent the complainant from negotiating effectively.

[43] It is clear from the documents and the oral evidence that to the best of its ability, the respondent did provide this information to the president of the bargaining unit through the strategic operating review meetings. It may have not been provided in a direct format as was requested on two occasions at the bargaining table but, it was provided in another forum so as to impel the complainant to put forward proposals which would facilitate the closure of the MCTSC's in exchange for increased benefits for the remaining members of the bargaining group.

[44] The complainant cannot argue that it had no knowledge of the impending closures. Closures were announced while the parties were at the bargaining table. Despite having been refused disclosure of the specifics of future closures, as the complainant alleges, the complainant put forward proposals based on the assumption that the closure of MCTSC's would occur and then signed a collective agreement which did not include these proposals.

[45] Having found that the complainant was aware of the issue of the possible closure of some MCTSC's in the fall of 2011 and that the respondent's refusal to provide more specific information occurred in November 2011, I find that the complaint has been filed beyond the time limits provided for in the *Act.* The applicant's reliance on the date of the closure announcement is misplaced as it had the knowledge of this possibility long before the announcement was made.

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

(The Order appears on the next page)

V. Order

[47] The complaint is closed.

April 18, 2013.

Margaret T.A. Shannon,
a panel of the Public Service
Labour Relations Board