Date: 20140501

File: 567-02-39

Citation: 2014 PSLRB 51

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

FEDERAL GOVERNMENT DOCKYARD TRADES AND LABOUR COUNCIL (EAST)

Bargaining Agent

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Federal Government Dockyard Trades and Labour Council (East) v. Treasury Board (Department of National Defence)

In the matter of a group grievance referred to adjudication

REASONS FOR DECISION

Before: Kate Rogers, adjudicator

For the Bargaining Agent: Ronald Pink, counsel

For the Employer: Christine Diguer, counsel

Decided on the basis of written submissions,
filed July 16, September 30 and October 18, 2013.

I. Group grievance referred to adjudication

[1] Michael Ashley and 20 other employees ("the grievors") are employees at Fleet Maintenance Facility Cape Scott ("FMF Cape Scott"), Department of National Defence (DND), in Halifax, Nova Scotia. At the relevant time, the grievors were covered by the collective agreement between the Treasury Board ("the employer") and the Federal Government Dockyard Trades and Labour Council (East) ("the union") for the Ship Repair (East) (SR-E) occupational group; expiry date, December 31, 2009 ("the collective agreement").

[2] On April 20, 2009, the grievors filed a group grievance, which reads as follows:

> *We wish to grieve management's violation of our Collective Agreement, Article 6.01 & 32.01 with respect to the Ship Repair Occupational Group and their assignment of duties I.A.W. the Canada Gazette 1999 and their Statement of Duties and Responsibilities as per their Work Descriptions.*

[3] As corrective action, the grievors requested as follows:

> *Management assign the work and control of the work, duties and responsibilities as identified in the Canada Gazette 1999 for the Ship Repair Occupational Group East.*

[4] The employer denied the grievance at the final level on December 31, 2009, and it was referred to adjudication on January 13, 2010.

[5] The grievance was originally scheduled to be heard at adjudication on March 10 and 11, 2011. However, at the employer's request, the adjudication hearing was postponed. It was rescheduled for April 3 to 5, 2012.

[6] On February 20, 2012, the union filed a request for the disclosure of a number of documents in the employer's possession. The employer objected to the union's request on March 14, 2012, on the grounds that the information requested was unnecessary given the nature of the issue and because the underlying facts of the grievance were uncontested. It requested a pre-hearing conference to discuss the issue. A teleconference between the parties was held on March 23, 2012.

[7] The union's disclosure request covered large quantities of documents relating to the conduct of sea trials at FMF Cape Scott between 2008 and 2012. In the teleconference, it argued that these documents were necessary to establish its

contention that the employer was assigning bargaining unit work to employees outside the bargaining unit. The employer was prepared to concede that it assigned work on sea trials to employees outside the bargaining unit and, therefore, argued that the documents were not necessary. Although the employer contended that the issue raised by the grievances was a legal one, the union was of the opinion that the documents were necessary to its case. Furthermore, it was clear that the union would not agree to an agreed statement of facts without the opportunity to review the documents it requested. After a full discussion of the issue, the employer agreed to work with the union on its disclosure request. As a result, the hearing scheduled for April 3 to 5, 2012, was postponed.

[8] On February 28, 2012, the Federal Government Dockyards Trades and Labour Council (Esquimalt) filed an application for intervenor status under subsection 99(1) of the *Public Service Labour Relations Board Regulations,* SOR/2005-79. I denied that application on September 12, 2012 (see 2012 PSLRB 93).

[9] The adjudication hearing was rescheduled to January 10 and 11, 2013. However, before any evidence could be introduced at the hearing, the employer objected that a number of the documents the union intended to enter into evidence were subject to privilege, based on national security. Although the employer acknowledged that it had permitted the union access to the documents in question and had also permitted it to copy them, it stated that it had done so in error. The employer demanded the return of all the documents in question, most of which formed the basis of the union's case.

[10] Over the two days scheduled for the adjudication hearing, the parties attempted to find a solution to the issue of the union's access to the documents that it believed were necessary to make its case. However, the parties were not able to find an immediate solution and were not prepared to present arguments on the question of the claim that the disputed documents were privileged and inadmissible on the grounds of national security.

[11] Following the hearing, the parties attempted to reach an agreed statement of facts but could not. They also could not agree on how to deal with the evidentiary problem. A teleconference was held on March 4, 2012. At that time, the parties agreed to deal with the underlying legal issue as a preliminary matter, and they agreed to address it through written submissions. Depending on my decision on the underlying legal issue, the grievance would either be dismissed on the grounds that the employer

was entitled to assign work outside the bargaining unit and that, therefore, there was no violation of the collective agreement, or the adjudication hearing would be reconvened, and the parties would be prepared to deal with the outstanding evidentiary issues.

[12] The question that the parties agreed to address was as follows:

> *Do Articles 6.01 and/or 32.01 of the Ship Repair – East (SR-E) collective agreement restrict management's ability to assign any or all of the activities set out in the Ship Repair – East occupational group definition, to persons other than members of the SR-E bargaining unit?*

[13] The submissions of both parties refer to clauses 6.01 and 32.01 of the collective agreement, to sections 6, 7, 57 and 58 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "*PSLRA*"), and to sections 7 and 11.1 of the *Financial Administration Act* (R.S.C. 1985, c. F-11; "*FAA*"). For ease of reference, those provisions and the SR-E occupational group definition (*Canada Gazette,* Part 1, March 27, 1999, Vol. 133, No. 13) are reproduced starting in the next paragraph. Any other legislative or collective agreement provisions that the parties referred to in their submissions will be reproduced as necessary.

[14] The relevant provisions of the collective agreement provide as follows:

> ***Article 5 - Managerial Responsibilities***
>
> ***5.01*** *The Council recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage its operation in all respects and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.*
>
> *Such rights will not be exercised in a manner inconsistent with the expressed provisions of this Agreement.*
>
> ***5.02*** *This Article will not restrict the right of an employee to submit a grievance in accordance with the Public Service Labour Relations Act.*

> ***Article 6 - Recognition***
>
> ***6.01*** *The Employer recognizes the Federal Government Dockyard Trades and Labour Council (East) as the exclusive bargaining agent for all employees, other than chargehands, in the Ship Repair Occupational Group located on the east coast described in the certificate issued to the Council by the Public Service Labour Relations Board on the twentieth day of August, 1976 as amended on the twelfth day of May 2000 and on the twenty-first day of December 2005.*
>
> . . .
>
> ***Article 32 - Statement of Duties***
>
> ****
>
> ***32.01*** *Upon written request, an employee shall be given an official statement of the duties and responsibilities of his or her position, including the classification level and, where applicable, the point rating allotted by factor, and an organization chart depicting the position's place in the organization.*

[15] The relevant provisions of the *PSLRA* are as follows:

> ***Management Rights***
>
> ***6.*** *Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board under paragraph 7(1)(*b*) of the* Financial Administration Act.
>
> ***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.*
>
> . . .
>
> ***Determination of Appropriate Bargaining Units***
>
> ***57.*** *(1) When an application for certification is made under section 54, the Board must determine the group of employees that constitutes a unit appropriate for collective bargaining.*
>
> *(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.*
>
> *(4) For the purposes of this Part, a unit of employees may be determined by the Board to constitute a unit appropriate for collective bargaining whether or not its composition is identical with the group of employees in respect of which the application for certification was made.*
>
> ***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.*

[16] The relevant portions of the *FAA* are as follows:

> ***Responsibilities of Treasury Board***
>
> ***7.** (1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to*
>
> *(*a*) general administrative policy in the federal public administration;*
>
> *(*b*) the organization of the federal public administration or any portion thereof, and the determination and control of establishments therein;*
>
> *(*c*) financial management, including estimates, expenditures, financial commitments, accounts, fees or charges for the provision of services or the use of facilities, rentals, licences, leases, revenues from the disposition of property, and procedures by which departments manage, record and account for revenues received or receivable from any source whatever;*
>
> *(*d*) the review of annual and longer term expenditure plans and programs of departments, and the determination of priorities with respect thereto;*

(d.1) *the management and development by departments of lands, other than Canada Lands as defined in subsection 24(1) of the* Canada Lands Surveys Act*;*

(e) *human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it;*

(e.1) *the terms and conditions of employment of persons appointed by the Governor in Council that have not been established under this or any other Act of Parliament or order in council or by any other means; and*

(e.2) *internal audit in the federal public administration;*

(f) *such other matters as may be referred to it by the Governor in Council.*

. . .

Powers of the Treasury Board

11.1 *(1) In the exercise of its human resources management responsibilities under paragraph 7(1)(e), the Treasury Board may*

(a) *determine the human resources requirements of the public service and provide for the allocation and effective utilization of human resources in the public service;*

(b) *provide for the classification of positions and persons employed in the public service;*

(c) *determine and regulate the pay to which persons employed in the public service are entitled for services rendered, the hours of work and leave of those persons and any related matters;*

(d) *determine and regulate the payments that may be made to persons employed in the public service by way of reimbursement for travel or other expenses and by way of allowances in respect of expenses and conditions arising out of their employment;*

(e) *subject to the* Employment Equity Act, *establish policies and programs with respect to the implementation of employment equity in the public service;*

(f) *establish policies or issue directives respecting the exercise of the powers granted by this Act to deputy heads in the core public administration and the reporting by those deputy heads in respect of the exercise of those powers;*

(g) establish policies or issue directives respecting

(i) the manner in which deputy heads in the core public administration may deal with grievances under the Public Service Labour Relations Act *to which they are a party, and the manner in which they may deal with them if the grievances are referred to adjudication under subsection 209(1) of that Act, and*

(ii) the reporting by those deputy heads in respect of those grievances;

(h) establish policies or issue directives respecting the disclosure by persons employed in the public service of information concerning wrongdoing in the public service and the protection from reprisal of persons who disclose such information in accordance with those policies or directives;

(i) establish policies or issue directives respecting the prevention of harassment in the workplace and the resolution of disputes relating to such harassment; and

(j) provide for any other matters, including terms and conditions of employment not otherwise specifically provided for in this section, that it considers necessary for effective human resources management in the public service.

(2) The powers of the Treasury Board in relation to any of the matters specified in subsection (1)

(a) do not extend to any matter that is expressly determined, fixed, provided for, regulated or established by any Act otherwise than by the conferring of powers in relation to those matters on any authority or person specified in that Act; and

(b) do not include or extend to

(i) any power specifically conferred on the Public Service Commission under the Public Service Employment Act, *or*

(ii) any process of human resources selection required to be used under the Public Service Employment Act *or authorized to be used by the Public Service Commission under that Act.*

[17] The SR-E occupational group definition provides as follows:

> ***Ship Repair-East Group Definition***
>
> *The Ship Repair-East Group comprises positions in the Department of National Defence located on the East Coast that are primarily involved in the repair, modification and refitting of naval vessels and their equipment.*
>
> ***Inclusions***
>
> *Notwithstanding the generality of the foregoing, for greater certainty, it includes positions that have, as their primary purpose, responsibility for one or more of the following activities:*
>
> 1. *the installation, testing, inspection, maintenance, repair, modification, quality control and sea trials of mechanical equipment, weapons, missiles and torpedoes, and the propulsion systems of vessels;*
>
> 2. *the installation, repair or modification of electrical and electronic equipment including work such as electrical instrument repair, electric motor repair and testing and work performed by an electrician, electrical technician, electronics communications technician, electronic component technician, electronic systems technician and fire-control technician;*
>
> 3. *the repair and modification of a vessel's hull;*
>
> 4. *the physical preparation of vessels for refitting or repair;*
>
> 5. *the installation, repair and modification of machine tools, test equipment and apparatus used in the above activities, on-board ship and in the dockyard workshops; and*
>
> 6. *the preparation of detailed plans and estimates of time and material for individual pieces of work related to the installation, maintenance, repair or modification of systems and equipment.*
>
> ***Exclusions***
>
> *Positions excluded from the Ship Repair-East Group are those whose primary purpose is included in the definition of any other group or those in which one or more of the following activities is of primary importance:*
>
> 1. *the leadership of any of the activities listed in the inclusions above;*

2. *the application of electronics technology to the design, construction, installation, inspection, maintenance and repair of electronic and associated equipment, systems and facilities and the development and enforcement of regulations and standards governing the use of such equipment;*

3. *the alteration, maintenance, or cleaning of buildings, construction engineering equipment, or other installations on shore;*

4. *the operation of stores and storerooms;*

5. *the operation of naval auxiliary vessels, harbour-craft, or floating plant equipment, or mobile equipment; and*

6. *the supply, proofing or repair of ammunition.*

II. Summary of the submissions

A. For the union

[18] The union explained that it is the certified bargaining agent for about 800 members of the SR-E bargaining unit who are employed at FMF Cape Scott in Halifax. Other employees at FMF Cape Scott fall within six other occupational groups: Ship Repair Chargehands (SR(C)), Electronics (EL), Operational Services (SV), Technical Services (TC) and Human Resources Management (HM).

[19] The SR-E occupational group definition, as amended in 1999, describes the group as being composed of ". . . positions in the Department of National Defence located on the East Coast that are primarily involved in the repair, modification and refitting of naval vessels and their equipment." Positions that are primarily responsible for ". . . the installation, testing, inspection, maintenance, repair, modification, quality control and sea trials of mechanical equipment, weapons, missiles and torpedoes, and the propulsion systems of vessels . . ." are included in the group definition.

[20] The union was originally certified as the bargaining agent for the SR-E occupational group in 1976 (*Federal Government Dockyard Trades and Labour Council East v. Treasury Board,* PSSRB File Nos. 146-2-161 and 162 (19760820)). The certificate was amended in 1999 (*Federal Government Dockyard Trades and Labour Council East v. Treasury Board,* PSSRB File No. 142-2-330 (19990520)) to reflect the changes to the occupational group definition following the enactment of section 101 of the *Public Service Reform Act* (S.C. 1992, c. 54; "*PSRA*"). Clause 6.01 of the collective agreement

incorporates by reference both the bargaining certificate and the group definition for the SR-E occupational group as it was amended in 1999.

[21] The union stated that although sections 6 and 7 of the *PSLRA* and sections 7 and 11.1 of the *FAA* grant the employer the right to organize the federal public service, changes to occupational groups have always been made by formal amendments and subsequent applications to the Public Service Labour Relations Board (PSLRB) and its predecessor for the review and amendment of bargaining certificates. The union cited *Professional Institute of the Public Service of Canada v. Treasury Board,* 2005 PSLRB 107, and *Treasury Board (Canada Border Services Agency) v. Public Service Alliance of Canada,* 2007 PSLRB 22, as examples of applications to change bargaining certificates following amendments to occupational group definitions.

[22] The employer does not have the power to determine the composition or jurisdictional lines of bargaining units, as set out by the occupational groups. Only the PSLRB has the authority to determine whether a unit is appropriate for collective bargaining and, while subsection 57(3) of the *PSLRA* requires it to consider occupational group structure when determining appropriate bargaining units, it may depart from that structure if a unit based on the occupational group would not be appropriate for bargaining.

[23] The union submitted that the PSLRB's jurisprudence demonstrates that it will not permit the employer to move employees who perform the activities identified in one occupational group into a different occupational group if the particular activities are not part of the group definition. Citing *Federal Government Dockyards Trades and Labour Council (Esquimalt) v. Treasury Board,* PSSRB File No. 147-2-25 (19840524), the union stated that the occupational group definition, not classification, influences bargaining unit structure.

[24] In this case, the SR-E occupational group description lists sea trials in the activities specific to the occupational group. In fact, it is the only occupational group at FMF Cape Scott that includes sea trials in the list of included activities. The activities of the SR-E bargaining unit should not be transferred to employees of another occupational group when those activities do not form part of the included activities of the other occupational group. Although employees in other occupational groups might be on-board ship during sea trials to supervise the SR-E group members' work or to

perform related functions, the principal work during sea trials must be done by SR-E members.

[25] The union stated that the PSLRB's jurisprudence demonstrates that it engages in careful analysis to determine appropriate bargaining units. Citing *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board et al.,* 2000 PSSRB 52, the union stated that it was clear that the PSLRB would examine the actual duties and responsibilities of employees in a proposed bargaining unit and compare them to the duties described in the occupational group definition. That analysis is predicated on the understanding that the employees in the bargaining unit will actually perform the work described in the occupational group definition and would be undermined if, in fact, the employer assigned the work to whomever it pleased.

[26] Work assignments made without considering the occupational group definitions are inconsistent with the PSLRB's power to review bargaining units under section 58 of the *PSLRA.* The union also stated that those assignments would also threaten labour relations by causing unnecessary strife and uncertainty in the workplace. For example, if the employer were able to assign work that falls within the SR-E occupational group description to members of the EL or the SV occupational groups, there would be no way for the union to protect the jobs in the SR-E bargaining unit. The occupational group definitions of both the EL and SV groups specifically exclude work involving naval vessels and their equipment. If the employer could ignore the occupational group definitions when assigning work, there would be no point in linking occupational groups and bargaining units and no way to enforce bargaining unit descriptions. Members of the bargaining unit would have no job security, since anyone could do their work.

[27] While the bargaining unit description alone does not give the union exclusive jurisdiction over the work described in it, the fact that the description was incorporated by reference into the collective agreement infers that the work is exclusive. In determining the SR-E bargaining unit, the PSLRB took into account the occupational group description. Therefore, incorporating the bargaining certificate into the collective agreement in clause 6.01 reflects the PSLRB's determination that the unit is appropriate. For that reason, the employer should not be permitted to disregard the bargaining unit structure when assigning work.

[28] Although section 7 of the *PSLRA* gives the employer certain management rights, such as the power to amend occupational groups, reclassify positions and assign duties within the occupational group structure, it does not give the employer the right to act outside the structure that it has created in an arbitrary or ad hoc manner. Subsection 7(1) of the *FAA* also does not grant the employer the power to modify the duties described in the occupational group definitions without engaging in formal amendments. The union noted that the employer did not add responsibility for sea trials to any other occupational group definition.

[29] The union argued that the employer's management rights were further circumscribed by clause 6.01 of the collective agreement. The employer must recognize the union as the bargaining agent for those employees whose duties are described in the SR-E occupational group definition.

[30] The union stated that the matter at issue was not about contracting out or a single work assignment. In fact, the issue arose because the employer took a task from the SR-E occupational group description and assigned it to another occupational group on a regular, long-term basis, without any formal amendment to the occupational group definitions. That action constituted a breach of clause 6.01 of the collective agreement, and therefore, the hearing should be reconvened to allow the union to present evidence in support of its claim.

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

[31] The grievance before the PSLRB is a group grievance filed under section 215 of the *PSLRA*, which permits a bargaining agent to file ". . . a . . . grievance on behalf of employees in the bargaining unit who feel aggrieved by the interpretation or application, common in respect of those employees, of a provision of a collective agreement or an arbitral award." The group grievance alleges breaches of clauses 6.01 and 32.01 of the collective agreement.

[32] The employer submitted that clause 6.01 of the collective agreement is simply a recognition clause and that it does not grant exclusive jurisdiction over any of the work described in the SR-E group definition. The employer stated that the purpose of clause 6.01 is to identify the employees in the bargaining unit and to acknowledge the union's exclusive right to represent those employees. Clause 32.01 gives employees the right to receive a complete and accurate work description on request. It does not grant

employees the exclusive right to the work described in the SR-E occupational group definition.

[33] The employer stated that it has the right and responsibility to organize and manage work in the public service and that nothing in the collective agreement prevented it from assigning such tasks to employees in other occupational groups, although it did not concede that, in fact, it did so. It acted within its management rights and did nothing to undermine the security of the bargaining agent or to violate the collective agreement.

[34] Management rights are expressly recognized in article 5 of the collective agreement, which acknowledges the employer's right to manage the workplace "in all respects." Furthermore, the employer's management rights are protected by statute. Section 7 of the *PSLRA* states that nothing in that *Act* is to be construed as undermining the employer's management rights and, in particular, its right to organize the workplace, assign duties and classify positions. Sections 7 and 11.1 of the *FAA* also confer broad management authority on the employer to organize the workplace, manage human resources, determine human resource requirements, and ". . . provide for the allocation and effective utilization of human resources in the public service . . . ." Citing *Brescia v. Canada (Treasury Board),* 2005 FCA 236, *Purchase v. Treasury Board (Correctional Service of Canada),* 2005 PSLRB 67, and *Peck v. Parks Canada,* 2009 FC 686, the employer stated that, absent an express limitation in statute or the collective agreement, its right to organize and manage the workplace was broad.

[35] Under section 101 of the *PSRA,* all occupational groups were reviewed and amended. As a result of the review, some occupational groups were consolidated, and new groups were created. Existing bargaining unit affiliations were maintained, although some bargaining units were altered because of the changes to the occupational group structure. Although no substantive changes were made to either the occupational group definition or bargaining certificate for the SR-E group, an updated SR-E group definition was published in the *Canada Gazette,* and the PSLRB issued an updated bargaining certificate following its decision reviewing the bargaining unit (*Federal Government Dockyard Trades and Labour Council East v. Treasury Board,* PSSRB File No. 142-2-330)*).*

[36] The occupational group definition for the SR-E group is in the same format as other occupational group descriptions, as described in the Treasury Board's *Guide to*

allocating positions using the 1999 occupational group definitions ("the *Guide*"; employer's submissions, Tab 7). It contains a general description of the type of work allocated to the occupational group, followed by more specific examples of the work included and excluded from positions in the occupational group.

[37] The general description of the SR-E occupational group definition states that the group is made up of positions in the Department of National Defence on the east coast that are "primarily involved" in the repair, modification or refitting of naval vessels and their equipment. The statement describing the type of work included in the group definition lists positions that as their primary purpose have responsibility for, among other things, ". . . sea trials of mechanical equipment, weapons, missiles and torpedoes, and the propulsion systems of vessels. . . ." The statement describing the work excluded from the SR-E occupational group includes positions whose "primary purpose" is included in the definition of another occupational group or positions in which one or more of the activities listed in the exclusion statement are of "primary importance."

[38] The employer submitted that a position is allocated to an occupational group when the group definition best reflects its primary purpose. However, the position could also include duties that fall within the occupational group definition of another group. In the same manner, a position could also be allocated to another occupational group even though it includes duties that would fall within the SR-E group definition. The federal public service is not organized in silos or watertight compartments. The employer stated that it has the discretion to assign a range of duties to a position but that for classification purposes it will allocate the position to the group that best fits its primary function.

[39] The PSLRB does not have jurisdiction over classification. However, citing section 57 of the *PSLRA*, the employer noted that, when considering applications for certification, the PSLRB must determine whether a group constitutes an appropriate unit for collective bargaining, while considering the employer's classification system and the occupational group structure. Subsection 57(3) requires the PSLRB to establish bargaining units that are "co-extensive" with occupational groups unless doing so would impede the satisfactory representation of the group for the purposes of collective bargaining.

[40] The PSLRB also has jurisdiction under section 58 of the *PSLRA* to resolve any questions that might arise as to which bargaining unit employees properly belong. Citing *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board and Public Service Alliance of Canada,* 2013 PSLRB 9, the employer stated that the PSLRB's function is to assign an employee or group of employees to a particular bargaining unit based on the primary purpose of the core duties of the employee or group of employees. The employer stated that the underlying premise of section 58 is that employees' job descriptions regularly include duties that may fall within one or more groups. It follows that employees do not have a proprietary interest in the activities described in an occupational group description and that an employee's bargaining unit affiliation is based on the core duties of the position and not on any absolute right to particular work.

[41] Citing *Longshoremen's Protective Union, Local 1953 v. St. John's Shipping Association,* 3 CLRBR (NS) 314, the employer stated that it is well established that certification does not confer proprietary rights over the work described in the certificate. Certification grants the right to represent employees, not jurisdiction over the work they do. Proprietary rights over the work of members of the bargaining unit must be obtained at the bargaining table.

[42] The employer contended that on a plain reading of clause 6.01 of the collective agreement, it was clear that that clause was intended only to recognize the union as the bargaining agent for the employees in the SR-E bargaining unit, as the unit was described in the original certificate issued by the Public Service Staff Relations Board in 1976, which was subsequently amended in 2000 and 2005.

[43] Citing *Suric v. Treasury Board (Department of Human Resources and Skills Development),* 2013 PSLRB 44, and *Belliveau and Sinnesael v. Treasury Board (Department of Agriculture and Agri-Food),* 2013 PSLRB 69, the employer submitted that clause 32.01 of the collective agreement gives employees the right to complete and current job descriptions at their request but does not impose a requirement on the employer to assign particular work to them.

[44] The employer submitted that neither clause 6.01 nor 32.01 of the collective agreement confers jurisdiction over the work of the bargaining unit. Further, the employer stated that no provision in the collective agreement supports the grievors' contention that they have jurisdiction over the work or that it cannot be assigned to

employees outside the bargaining unit. Citing *Alcan Smelters and Chemicals Ltd. v. Canadian Association of Smelter and Allied Workers, Local 1* (1979), 23 L.A.C. (2d) 123, and *British Columbia Maritime Employers Association v. International Longshoremen's and Warehousemen's Union, Canadian Area,* [1998] C.L.A.D. No. 429 (QL), the employer stated that an exclusive proprietary interest over the work of the bargaining unit can be obtained only through express language in the collective agreement and cannot be inferred.

[45] The employer is not required to remove duties set out in the SR-E occupational group definition in order to assign them to employees of other groups. *Federal Government Dockyards Trades and Labour Council (Esquimalt)* does not state that sea trials can be carried out only by employees who fall within an occupational group definition that specifically includes sea trials in its provisions. The employer noted that employees in the SR-E occupational group are not the only employees responsible for working on sea trials. Members of the TC bargaining unit have a memorandum of agreement included in the collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Technical Services Group that specifically concerns their work on sea trials.

[46] The employer stated that the union's arguments completely disregard the fact that no explicit provision in the collective agreement gives the bargaining unit ownership over its work. Furthermore, clauses 6.01 and 32.01 in no way restrict the employer's exclusive right to assign work. Therefore, the employer asked that the group grievance be denied.

C. Union's rebuttal

[47] Clause 6.01 of the collective agreement incorporates by reference the SR-E occupational group definition. Therefore, the employer must abide by the occupational group definition with respect to the organization of work at FMF Cape Scott. This position is not inconsistent with the employer's management rights as set out in section 7 of the *FAA*. The employer exercised its management rights by creating the occupational group structure, and therefore, its power to assign duties and classify positions must be exercised in accordance with the structure it created.

[48] The language used in the occupational group definitions is precise and limiting. The employer could have used more flexible language but chose to use specific

definitions that set out the tasks for each group. Therefore, the employer must follow the definitions that it drafted and cannot, without first amending the occupational group definition, depart from the language of the definition.

[49] The SR-E occupational group definition was amended in 1999. The amendment specifically included work on sea trials. At the same time, the occupational group definition for the EL group was amended to specifically exclude work on sea trials. Those amendments reflected the employer's intention to assign particular work to the SR-E occupational group rather than to other occupational groups, such as the EL group.

[50] The organization of work at FMF Cape Scott must conform to the occupational group definitions. The amendments to the occupational group definitions in 1999 reinforce the union's contention that work on sea trials belongs to the SR-E bargaining unit and not to other bargaining units.

[51] It would be inconsistent with the occupational group definitions and the collective agreement to suggest that the employer can assign duties that are included in the primary responsibilities of a position to a position in a different occupational group. Occupational group definitions have a general description of the group's work and a specific list of activities that are included in that work. Labour relations havoc would result if the employer could assign to a position responsibility for activities that fall within two different occupational groups. The occupational group structure was created out of an intent to provide a coherent structure to the organization of work in the federal public service. Duties must be assigned in accordance with the occupational group structure because that is the only meaningful way that positions can be classified.

[52] The cases cited by the employer on the issue of management rights are not relevant to the issue in this grievance because they do not deal with questions relating to occupational group structure. Similarly, the cases the employer cited concerning jurisdictional disputes are not relevant because they did not arise in the jurisdiction of the federal public service and do not involve interpreting or applying occupational group definitions.

[53] Although the employer has the power to define and amend occupational groups, as set out in the *FAA*, local management cannot unilaterally depart from the structure

the employer created. The occupational group definition for the SR-E group was incorporated by reference in the SR-E collective agreement and must be respected.

III. Reasons

[54] On April 20, 2009, 21 employees in SR-E bargaining unit employed at FMF Cape Scott in Halifax filed a group grievance, which read as follows:

> *We wish to grieve management's violation of our Collective Agreement, Article 6.01 & 32.01, with respect to the Ship Repair Occupational Group and their assignment of duties I.A.W. the Canada Gazette 1999 and their Statement of Duties and Responsibilities as per their Work Descriptions.*

[55] As corrective action, the grievors asked as follows:

> *Management assign the work and control of the work, duties and responsibilities as identified in the Canada Gazette 1999 for the Ship Repair Occupational Group East.*

[56] The occupational group definition for the SR-E was published in the *Canada Gazette* in 1999 and incorporated by reference in clause 6.01 of the collective agreement. It states that employees in the group are ". . . primarily involved in the repair, modification and refitting of naval vessels and their equipment" (union's submissions, Tab 4, Page 811). The definition clarifies that positions that have "as their primary purpose" responsibility for, among other listed activities, ". . . the installation, testing, inspection, maintenance, repair, modification, quality control and sea trials of mechanical equipment, weapons, missiles and torpedoes, and the propulsion systems of vessels . . ." are included in the group.

[57] This grievance arose because the grievors believe that employees who are not part of the SR-E bargaining unit and, therefore, not included in the SR-E occupational group definition have been assigned by the employer to work on sea trials. No evidence has yet been presented to establish whether, and to what extent, employees in other occupational groups have worked on sea trials. The employer has taken the position that members of the SR-E bargaining unit do not have a proprietary interest in the work of the bargaining unit and that it has an unfettered right to assign and organize work. Therefore, the parties were asked to provide submissions, as a preliminary matter, on the following question:

> *Do Articles 6.01 and/or 32.01 of the Ship Repair – East (SR-E) collective agreement restrict management's ability to assign any or all of the activities set out in the Ship Repair – East occupational group definition, to persons other than members of the SR-E bargaining unit?*

[58] The union's argument is relatively straightforward. Acknowledging that section 7 of the *PSLRA* and sections 7 and 11.1 of the *FAA* give the employer the right to organize the public service and to assign work, the union argued the employer must operate within the occupational group structure it created when exercising its right to organize the public service. Although the employer can change the occupational group definitions as it considers necessary, the union stated that such amendments are generally formal and published in the *Canada Gazette,* as was done in 1999 to the SR-E group definition.

[59] The union noted that subsection 57(3) of the *PSLRA* requires the PSLRB to establish bargaining units that are co-extensive with the employer's occupational groups when certifying a bargaining agent as the exclusive representative of a group of employees, unless it would inhibit satisfactory representation. In this case, the certificate issued by the PSLRB for the SR-E bargaining unit incorporated by reference the occupational group definition for the SR-E group. The bargaining certificate and the SR-E occupational group definition were incorporated by reference in clause 6.01 of the collective agreement. Therefore, the work described in the certificate and in the SR-E occupational group definition and incorporated by reference in the collective agreement is the work of the bargaining unit and cannot be performed by employees of other occupational groups or transferred to other occupational groups without formal amendments to the occupational group definitions, the bargaining certificates and the collective agreement.

[60] At its core, the union's argument suggests that certification conveys not just the right to represent employees but also a proprietary interest in the work of the bargaining unit employees. I do not believe that to be the case. Division 5 of the *PSLRA,* which covers certification, is entitled "Bargaining Rights" and concerns granting bargaining rights to a bargaining agent. Although a determination of an appropriate bargaining unit may be closely tied to the occupational group structure, its purpose is to define the scope of the union's representation for the purpose of collective bargaining. The definition of "bargaining unit" in subsection 2(1) supports that view, as

it provides that a bargaining unit is ". . . a group of two or more employees that is determined by the Board to [be] . . . appropriate for collective bargaining." Furthermore, section 67, which lists the effects of certification, does not include a proprietary interest in the work of the bargaining unit members in the list. I agree with the decision cited by the employer, *Longshoremen's Protective Union, Local 1953*, in which the Canada Labour Relations Board said as follows:

> *. . . the work function of an incumbent in any classification of employees is a consideration of the appropriateness of a bargaining unit and it can be determinative in defining the scope of such a unit, but the certification does not grant an absolute right over those functions. The right to the work, vis-à-vis an employer's right to assign or contract out, etc., can only be won at the bargaining table. Trade union jurisdiction over work is therefore a separate issue from bargaining rights. The latter may be obtained through certification or voluntary recognition; the former must be asserted.*

[61] However, the union argued that it was not simply its certification as the bargaining agent for employees in the SR-E occupational group that gave rise to a proprietary interest in the work of the bargaining unit but the fact that its certificate and the occupational group definition were incorporated by reference in clause 6.01 of the collective agreement. As I understand the union's position, because the certificate was granted on the basis of the occupational group definition, and because that occupational group definition was incorporated by reference into the collective agreement, the employer agreed that only employees in the SR-E bargaining unit could perform the work described in the occupational group definition.

[62] If work can be assigned only in accordance with occupational group definitions, then those definitions, by necessity, must be rigid and clear to avoid frequent jurisdictional battles. However, I do not believe that the occupational group structure is, or was intended to be, as limiting as the union's argument requires. The *Guide* (employer's submissions, Tab 7) defines occupational groups as ". . . a series of jobs or occupations related in broad terms by the nature of the functions performed." Positions are allocated to occupational groups based on the primary purpose of the work. However, the *Guide* recognizes that there are positions for which the work could fall within more than one occupational group. In such circumstances, it directs that the position be allocated to an occupational group based on the best fit with the primary purpose of the group.

[63] The relationship between occupational group allocation and bargaining unit certification and the notion of "best fit" was examined in *Canadian Federal Pilots Association v. Treasury Board*, 2008 PSLRB 42, and upheld in *Public Service Alliance of Canada v. Canadian Federal Pilots Association and Canada (Attorney General),* 2009 FCA 223 (leave to appeal to the Supreme Court of Canada was denied in *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.,* [2009] S.C.C.A. No. 387 (QL)). Further applications to the PSLRB under sections 43 and 52 of the *PSLRA* were also dismissed (see 2011 PSLRB 84). In that case, three positions that had been part of the Aircraft Operations (AO) occupational group and bargaining unit were reclassified and moved into different occupational groups and bargaining units because their duties no longer required them to have piloting qualifications, and therefore, they were specifically excluded from the AO occupational group definition. The Canadian Federal Pilots Association, bargaining agent for the AO bargaining unit, filed an application under section 58 of the *PSLRA* to have the positions returned to the AO bargaining unit on the ground that they were a better fit within the AO occupational group than in the occupational groups to which they had been assigned.

[64] The adjudicator found that the fact that the AO occupational group definition specifically excluded positions that did not require piloting qualifications did not preclude him from determining that the AO bargaining unit was a better fit than the bargaining units to which they had been assigned. Therefore, he returned the positions to the AO bargaining unit. Since the adjudicator's decision did not change either the classification or the occupational group allocation of the disputed positions, it had the effect of including positions of different occupational groups in the AO bargaining unit.

[65] In its review, the Federal Court of Appeal noted the interplay between the occupational group structure and the determination of appropriate bargaining units for the purpose of collective bargaining. It upheld the PSLRB's finding that a specific exclusion in an occupational group definition did not override the PSLRB's jurisdiction to determine the proper composition of bargaining units and approved the methodology used by the adjudicator to determine which bargaining unit provided a better fit for the disputed positions. In upholding the PSLRB's methodology, the Court stated as follows, at paragraph 69:

> *. . . In my opinion, it was not unreasonable for the Board to have considered the group definitions as a whole, that is,*

> *their inclusive and their exclusive elements. As the Board found, it was not possible to allocate the positions to a group without running foul of some aspect of the definitions.*

[66] It is clear from the *Canadian Federal Pilots Association* decision that although bargaining units are generally co-extensive with occupational groups, it is not always the case. It is also clear from that decision that occupational group definitions are not precise and limiting and that positions may contain duties that fall within more than one occupational group. In my opinion, this supports the view that a bargaining certificate is intended to define the scope of the bargaining unit for the purpose of collective bargaining rather than to grant proprietary rights to the work of the unit. Given those facts, I am not persuaded that the recognition clause, article 6 of the collective agreement, which incorporates the bargaining certificate by reference, was intended to do anything other than recognize the scope of the bargaining unit, or that it is sufficiently precise to find that the employer intended to grant exclusive jurisdiction over the work described in the occupational group definition to the bargaining unit.

[67] It is worth noting at this juncture that the employer submitted that other bargaining units contained positions that had at least some responsibility for work on sea trials. In particular, the employer noted that the collective agreement for the TC bargaining unit contained a memorandum of agreement specifically related to work on sea trials. Although I think that evidence would be required to determine the similarity between the work of the TC unit to the work claimed by the SR-E bargaining unit, it is clear that there is overlap and that the employer's argument has merit that work in the federal public service is not as strictly delineated as the union claimed.

[68] Disputes over assigning work to non-bargaining unit members are not uncommon in other labour jurisdictions. In Mitchnick and Etherington, *Labour Arbitration in Canada,* the following point is made at paragraph 18.1.1:

> *Arbitrators have repeatedly emphasized that certification and the conclusion of a collective agreement do not confer on the union a property interest in the work performed by members of the bargaining unit. In the absence of specific restrictions in the collective agreement, therefore, the employer retains an inherent right to assign or reassign bargaining unit work to employees outside the bargaining unit, including supervisors. Management's right in this regard is not, however, completely unfettered,*

> *notwithstanding the fact that the parties have failed to address the matter expressly. . . [a]rbitators have generally been prepared to imply some restriction into the collective agreement in order to ensure that the job classification, seniority, promotion and layoff provisions which* have *been negotiated are not rendered meaningless.*

[69] In *Ottawa (City) Hydro Electric Commission v. I.B.E.W., Local 636* (2000), 90 L.A.C. (4th) 62, which dealt with a supervisor doing bargaining unit work, the arbitrator noted that absent an express prohibition against non-bargaining unit employees doing bargaining unit work, management's right to assign work was unrestricted, unless the exercise of that right became a threat to the security of the bargaining unit. Similarly, in *Transport and Allied Workers (TC, Local 855) v. Hickman Motors, Carbonear* (2012), 223 L.A.C. (4th) 410, which concerned non-bargaining unit members being assigned bargaining unit work, the arbitrator found as follows, at paragraph 28:

> *. . . An implied prohibition does not mean than an employee outside the bargaining unit, such as a Utility Worker, is not permitted to do any work of the Automotive Service Technician trade. If the parties had intended to have such a prohibition, then the parties would have used express language to that effect. As stated in the authorities, an implied prohibition means that a person outside the bargaining unit is not permitted to do work to such an extent as to bring that person within the bargaining unit or to deprive a bargaining unit worker of a job. . . .*

[70] Sections 7 and 11.1 of the *FAA* and section 7 of the *PSLRA* give the employer broad management rights. In particular, those sections grant the employer the right to organize the public service, allocate resources and assign duties. Clause 5.01 of the collective agreement recognizes the employer's management rights and expressly acknowledges the employer's ". . . exclusive right and responsibility to manage its operation in all respects . . ." and acknowledges that the employer retains all rights and responsibilities "not specifically covered or modified" by the collective agreement. No specific provision in the collective agreement limits the employer's management right to assign bargaining unit work to non-bargaining unit employees. In my opinion, in the face of such clear management rights, an express prohibition in the collective agreement would be required to limit the employer's right to assign work to non-bargaining unit members.

[71] On the facts of this case, I do not believe that it is possible to argue that the work assigned to non-bargaining unit members threatens the security of the bargaining unit. Although I acknowledge that the parties have not adduced evidence of the extent of the challenged work assignments, I note that the union's claim is not that employees outside the bargaining unit perform the whole range of bargaining unit work but simply that they perform one task, working on sea trials, out of a long list of job duties. Furthermore, if there is a concern that non-bargaining unit employees perform a significant range of the work of the bargaining unit, the union is not without recourse, because an application under section 58 of the *PSLRA* could be made to bring those workers within the bargaining unit and to protect the security of the unit.

[72] Although the union has framed the issue as a concern that the employer is transferring a task found uniquely in the occupational group description for the SR-E group to another group, in contravention of the occupational group structure and articles 6 and 32 of the collective agreement, there is no suggestion that the employer has actually amended the occupational group definitions. In fact, the issue is a grievance against assigning work described in the occupational group description and the bargaining certificate for the SR-E unit to non-bargaining unit members. Whether sea-trial work is unique to the SR-E bargaining unit or not, for all the reasons already stated, I find that nothing in article 6 prevents the employer from assigning such work to non-bargaining unit members. Although the union adduced no arguments in relation to article 32, I also find that that article, which simply provides that employees are entitled to a complete and accurate job description on request, does not prevent the employer from exercising its management right to assign work on sea trials to non-bargaining unit members.

[73] For all of the above reasons, I make the following order:

(The Order appears on the next page)

IV. Order

[74] The group grievance is dismissed.

May 1, 2014.

Kate Rogers,
adjudicator