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Citation: 2004 PSSRB 24



Public Service
Staff Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

SOLANGE BOUCHER *ET AL.*
(SEE ATTACHED LIST)

Grievors

and

THE TREASURY BOARD
(Human Resources Development Canada)

Employer

Before: Jean-Pierre Tessier, Board Member

For the Grievors: Valérie Charette, Professional Institute of the Public Service of
Canada

For the employer: Stéphane Hould, Counsel



Heard at Montréal, Quebec,
from October 27 to 29, 2003.

DECISION

[1] The grievors are employed by Human Resources Development Canada (H.R.D.C.) and work in the field of informatics in positions classified in the CS (Computer Systems) Group. The grievors are members of the Professional Institute of the Public Service of Canada.

[2] During the summer of 2001, there was a strike and a picket line, in particular at the building on Peel Street in Montréal. This building is occupied by a number of departments and agencies, including Immigration Canada, the H.R.D.C. Regional Operations Centre, the H.R.D.C. call centre, and the Canadian Grain Commission. At that time, for various reasons (bargaining unit not in a legal position to strike; excluded or designated positions), approximately 300 employees were not in a position to take part in the strike and were required to report to work. The grievors fell into this category.

[3] Concerning August 29 and September 7 and 11, 2001, the employer reprimanded approximately 20 employees for not following the instructions allowing them to enter the workplace; depending on the situation, it docked their wages or imposed a disciplinary measure (a financial penalty equivalent to one day's wages).

[4] In grievances lodged in October 2001, the grievors contested the actions taken by the employer. These grievances were referred to adjudication in September 2002 and heard in October 2003. The delay between September 2002 and October 2003 was caused by the fact that the parties were unable to proceed on the earlier dates proposed by the Board.

[5] At the hearing, the parties stated that the grievances now before me had also referred to events on August 21 and 22, 2001, which were strike days, but that those issues had been resolved. Therefore, the events on August 29 and September 7 and 11, 2001, are still to be considered. A list (Exhibit E-1) notes the grievors, the dates of the events, and the financial penalties or docked wages.

Evidence

[6] The employer emphasized that, following the events of August 29, 2001, the grievors' wages were docked because they arrived at work later than the other employees. Docking their wages would therefore be an administrative measure, which

must be considered as such and which differs from the financial penalties imposed following the events of September 7 and 11, 2001.

[7] Ms Chrystine Beaupré is the director of the technology and computer centre, which has four divisions: customer services, operations, technical support, and corporate services. The grievors are part of the technical support division.

[8] In the summer of 2001, a memorandum was sent to all employees informing them that, in case of a strike, employees not in a position to strike were required to report to work and to follow the instructions to be given to them allowing them free access to the workplace (Exhibit E-6).

[9] Ms Beaupré stated that she sat on the H.R.D.C. regional security committee for the building, which contacted the Montréal police. Depending on the circumstances, police officers might form a safety cordon allowing employees to get through on foot or by bus.

[10] There was communication between the H.R.D.C. security chief and the union official responsible for the picket line. Apparently, an agreement was reached allowing employees to enter on foot in small groups, by means of the police cordon. On August 29 and September 7 and 11, 2001, however, it was not possible to reach an agreement and apparently a decision was made to use buses.

[11] As a result, on August 28, 2001, the employees were informed in writing that there was a new assembly point in case of a strike, in Dominion Park, located one block from the building on Peel Street.

[12] August 29, 2001, was a strike day, and the employees reported to Dominion Park. There were approximately 300 employees. They were then directed to the buses by their respective managers. That was the first day buses were used to allow the employees to cross the picket lines. Some employees refused to board the buses: 280 employees boarded the buses but approximately 20 employees refused to do so, including mostly the grievors, plus a few employees from other departments.

[13] Ms Beaupré admitted that some employees boarding the buses were fearful. One woman employee felt unwell. As soon as the bus reached the door of the building on Peel Street, the employees disembarked and entered the building. The managers accompanied the employee who felt unwell, and an ambulance was called.

[14] Ms Beaupré noted that this employee subsequently rode the bus on the September 7 and 11, 2001, which were strike days.

[15] Although the employees were able to enter the building calmly on August 29, 2001, management asked a representative of the Employee Assistance Program to come and meet with the employees that afternoon.

[16] The 15 employees who did not board the buses arrived at work around 11:00 a.m. on August 29, 2001.

[17] On September 7, 2001, at the request of the bargaining agent, Ms Beaupré met with the 15 employees who had not wanted to board the buses. They stated that if they had boarded the buses, they would not have felt in control but would have felt like scabs, and that persons on the buses could be targets.

[18] Following that meeting, Ms Beaupré met with the other members of the building committee to see whether employees could enter on foot by means of a safety cordon. The members all agreed that this procedure should be given priority, but that when it was impossible, the buses would have to be used.

[19] Negotiations were then held with the strike captain; it was not possible to reach an agreement allowing employees to enter the building on foot.

[20] On September 7, 2001, there were more demonstrators. They approached the park where the buses were parked. The managers asked the employees to board the buses, but it was impossible for the buses to be driven. The employees were therefore asked to disembark from the buses and to return around 11:00 a.m. It should be noted that 15 employees refused to board the buses.

[21] Around 11:00 a.m., it was noted that the demonstrators were still present. It was not possible for the buses to be driven, and the employees were sent home.

[22] September 11, 2001, was a strike day. However, it was possible for the buses to be driven. The same group of employees again refused to board the buses. However, when the managers and the other employees entered the building, they noted that the group of employees who did not board the buses had been able to make their way through the demonstrators and were already in the building.

[23] After discussion with human resources representatives, the employer issued a reprimand, docked these employees' wages for August 29, 2001, and imposed a financial penalty equivalent to one day's wages for the days of September 7 and 11, 2001.

[24] Ms Lucie Paron was the manager of the operations division in 2001, and confirmed Ms Beaupré's remarks about what happened on the strike days. She specifically added that she witnessed one employee feeling unwell on the bus on August 29, 2001.

[25] During the September 11, 2001 meeting, Ms Paron emphasized to the employees that, if they had health problems and were afraid of feeling panicky on the buses, they could submit a medical certificate to the employer.

[26] Ms Paron stated that she was not impressed by the reasons given by the employees who refused to board the buses. Some of them stated that they wanted to enter the building by the main door. One employee, Mr. Tardif, considered that using buses to have employees enter the building constituted provocation.

[27] Ms Josée Fontaine is the manager of corporate services at the technology and computer centre. She explained that some employees in the CS Group rode the buses on August 29, 2001, but refused to board them on September 11, 2001.

[28] Employees Gaétan Demers, François Éthier, Jean-Marc Ouellet and Serge Milot (a striker) gave their version of the facts.

[29] Gaétan Demers explained that, on August 29, 2001, he and approximately 15 of his co-workers did not board the buses; he followed the buses. People negotiated with the strikers in order to be able to enter the building. Mr. Demers stated that on August 29, 2001, he saw a striker weeping with anger and had the impression that it would be more difficult to enter the building on subsequent occasions. He stated that he felt no need to meet with the psychologist on the afternoon of August 29, 2001. He explained that he had the impression that the buses would enter the garage, instead of letting the employees off at the garage door.

[30] François Éthier stated that he did not consider using buses a good way of having employees enter the workplace. He did not feel he would be safe on the bus, and decided not to board it on August 29, 2001, or subsequent days.

[31] Jean-Marc Ouellet boarded the bus on August 29, 2001. He found the atmosphere tense. After boarding the bus, he noted that some co-workers were not present and said he felt somewhat uncomfortable but had no reason not to board the bus. On Peel Street (1,000 feet away), he was surprised that the bus did not enter the garage because, as things were, he had [translation] "to parade in front of the strikers". He explained that he did not board the bus on September 7 and 11, 2001, because on August 29, 2001, he witnessed one employee feeling unwell on the bus and he no longer felt safe.

[32] Serge Milot took part in the demonstrations. He is a member of the Public Service Alliance of Canada and was legally on strike on August 29 and September 7 and 11, 2001. He stated that he considered using buses on August 29, 2001, disproportionate. He pointed out that the strikers made no show of violence. There was a watchword to that effect. However, there was a desire to find ways to prevent the buses from being driven.

Arguments

[33] The employer argued that a distinction must be made between the events of August 29, 2001, and the events of September 2001. The events of the former date resulted in wages docked for lateness, while the events of the latter dates, September 7 and 11, 2001, resulted in financial penalties for refusal to follow instructions.

[34] Managers were present at the assembly point. They accompanied the employees, whose safety was assured. According to the employer, employees who refused to follow instructions were required to establish that there was grave danger and that their health and safety were threatened. There had to be a reasonable apprehension of danger, such that any other reasonable person would reach the same conclusion.

[35] According to the grievors' representative, where disciplinary measures are concerned, the burden of proof is on the employer.

[36] In case of a strike, the employer must ensure that the employees can enter the workplace safely. Using buses can be dangerous: there are tinted windows and persons inside cannot be identified. From the demonstrators' perspective, buses are more impersonal and may be attacked.

[37] On August 29, 2001, the employer did not provide prior notice that it would use buses. The fact that one employee felt unwell on the bus could cause other employees to feel unsafe.

Reasons

[38] The parties stated that the issue of docked wages for August 21 and 22, 2001, had been resolved. Concerning those actions, therefore, the grievances have been settled.

[39] As I stated in *Desrosiers v. Canada Customs and Revenue Agency* (2002 PSSRB 44), the collective working relationship implies bilateral obligations: on the one hand, the employer is required to provide work and an accessible workplace; on the other hand, the employees are required to report to work and to perform their duties.

[40] In case of a strike, the employer is required to facilitate access to the workplace. In the present case, the employer gave the grievors advance notice of the required assembly point. Managers were present at that assembly point. Buses were used and police officers ensured safety.

[41] After hearing the testimony and studying the photographs (Exhibit E-4) and the diagram of the location where the events occurred (Exhibit E-5), I am obliged to conclude that all the events occurred in a relatively orderly manner. The parties have not contradicted each other concerning the sequence of events; the difference lies in the interpretation of the facts.

[42] In the opinion of some grievors, using buses constituted provocation. Once aboard the buses, the employees were powerless against the demonstrators and, if they felt unwell, they were unable to disembark.

[43] In the present case, it must be borne in mind that between 15 and 20 out of 300 employees refused to board the buses; 15 of those employees worked in the same division. One point that could be made in favour of the grievors is the fact that they were informed only at the last minute that buses would be used on August 29, 2001.

[44] That fact might have given rise to certain fears about using buses as a means of crossing the picket lines. It might explain why there was confusion and why, although

reluctant to board the buses, the grievors did make efforts to report to work and arrived around 11:00 a.m. In fact, on that occasion, the employer only issued a reprimand. The grievors made a personal choice and reported to work late. The employer merely took notice of this lateness in comparison with the other employees.

[45] Concerning the events of September 7, 2001, I cannot accept fear, inspired by the fact that on August 29, 2001, one employee on the bus felt unwell, as a reason for refusing to follow instructions. That employee took the bus on September 7, 2001; furthermore, at the September 4, 2001 meeting, the managers stated that employees who were afraid of feeling unwell on the buses could submit a medical certificate.

[46] All the testimony confirms that on August 29, 2001, the employees entered the building in complete safety. This fact must be taken into account in considering the events of September 7, 2001. When 280 out of 300 employees rode the buses in complete safety on August 29, 2001, it is difficult to take into account apprehension that the buses might be unsafe.

[47] On September 11, 2001, an additional reason should have led the grievors to take the buses. The fact that on September 7, 2001, the employer did not insist that the buses be driven among so many demonstrators shows that the employer did not want to use the buses as a form of provocation against the strikers or as aggressive means that could have resulted in acts of violence.

[48] Thus, any reasonable person would have to conclude that on September 11, 2001, all else being equal, using buses would allow the employees to enter the building in safety, as was the case on August 29, 2001, or, if the situation made that solution impossible, that the employer would not insist that the buses be driven and would have the employees disembark, as was the case on September 7, 2001.

[49] For all these reasons, the grievors had no legitimate reason for refusing to board the buses on September 7 and 11, 2001. The financial penalty imposed by the employer is justified.

[50] I cannot take into account the fact that on September 11, 2001, the grievors did report to work. The purpose of the disciplinary measure is to sanction their refusal to follow the procedure set up to ensure that the 300 employees could enter the building safely. In the circumstances, allowing the employees to enter the building on foot

would have necessitated a police cordon that was very secure and could resist attacks by the demonstrators for a long time. Ensuring safety is the employer's responsibility, and the employer cannot leave the choice of how to ensure safety up to each and every employee. The financial penalties are therefore justified and reasonable.

[51] Concerning August 29, 2001, there was no financial penalty. The grievors made a personal choice and their lateness is attributable to them alone.

[52] I therefore dismiss all the grievances.

**Jean-Pierre Tessier,
Board Member**

OTTAWA, March 30, 2004.

P.S.S.R.B. Translation

LIST OF GRIEVORS

<u>NAMES</u>	<u>PSSRB FILES</u>
Solange Boucher	166-2-31542 166-2-31555
Pierre Bourgeois	166-2-31543 166-2-31556
Gaétan Demers	166-2-31544 166-2-31558
Michel Dupuis	166-2-31545 166-2-31559
François Éthier	166-2-31546 166-2-31560
Simon Lachapelle	166-2-31547 166-2-31561
Alain Lambert	166-2-31548 166-2-31562
Tan-Phu Lu	166-2-31549 166-2-31563
Jean-Marc Ouellet	166-2-31550
Maxime Ranger	166-2-31551
Mario Roy	166-2-31552 166-2-31564
Stephen Roy	166-2-31553 166-2-31565
Louis-Eric Tremblay	166-2-31554 166-2-31566
Gabriel Demers	166-2-31557