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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

THE PUBLIC SERVICE ALLIANCE OF CANADA

Applicant

and

STATISTICS SURVEY OPERATIONS

Employer

RE: Application for certification pursuant to section
28 of the Public Service Staff Relations Act

Before: Yvon Tarte, Chairperson

(Decided without an oral hearing.)

DECISION

[1] This is an application for certification made by the Public Service Alliance of Canada (PSAC) pursuant to section 28 of the Public Service Staff Relations Act (PSSRA) for the following bargaining unit:

All employees of the employer engaged in the carrying out of survey activities primarily outside of Statistics Canada offices.

[2] These employees have not previously been represented by a bargaining agent. Their employer, the Statistics Survey Operations (the employer), is a separate employer listed under Part II of Schedule I of the PSSRA.

[3] The terminal date fixed by the Secretary of the Board pursuant to section 20 of the P.S.S.R.B. Regulations and Rules of Procedure was June 16, 2000. In accordance with section 21 of the Regulations, the Treasury Board forwarded to the persons affected by this application a notice of the application in specified form. Pursuant to the Board's Regulations, the notice stated, among other things, that any employee or group of employees affected by the application and intending to make representations in opposition thereto was required to file, in writing, with the Board by the terminal date a concise statement of opposition signed by the employee or each member of a group of employees. The Board received a number of statements expressing opposition to the application.

[4] Because there was some dispute between the PSAC and the employer regarding membership in the bargaining unit, on June 1, 2000, the Board appointed Guy Baron and Gilles Grenier, who are officers of the Board, to enquire into the matter and to report back to the Board. On October 19, 2000, they issued their report. According to the information contained in the report, the employees in the proposed bargaining unit work primarily at home; they work part-time and they are paid on an hourly basis. While some of these employees work on a continuing, part-time basis, others are employed for specific periods of time. The number of employees in this bargaining unit fluctuates significantly depending on the workload, which in turn follows a fairly constant cycle throughout the year. The peak periods are from January through June, with a diminishing level of activity from July to October and a slow down in activity during the fall and early winter months (October to December).

[5] In light of the employees' variable work hours the Board's officers concluded that it was necessary, in order to determine whether a person qualified as an employee

within the meaning of the PSSRA, to examine the hours worked by each such person over a representative period of time. Accordingly, the parties agreed to a period of six and one-half months retroactive from the date of the application, that is, from October 1, 1999 to April 13, 2000, which according to the report would “better reflect the peaks and valleys of the workload fluctuations and levels of hiring associated with them”. On this basis, the Board’s officers found that there were 758 employees in the bargaining unit and that there was no dispute between the PSAC and the employer regarding these 758 employees. The Board’s officers also indicated in their report that the PSAC had adduced evidence that established it had the unqualified support of 53% of these employees.

[6] However, the Board’s officers also stated in their report that the employer believed that an additional 55 persons should be added to the bargaining unit for the purpose of this application even though they had not worked the entire six and one-half month review period agreed to by the parties. If these people are added to the bargaining unit, the support for the PSAC will drop to 50%.

[7] By letter dated October 20, 2000, the Board advised the parties that it intended to determine the application for certification without an oral hearing on the basis of the material on the record and any additional submissions which the parties wished to make.

SUBMISSIONS OF THE PARTIES

Position of the PSAC

[8] The PSAC pointed out that the work of these employees is not carried out entirely in their homes. Some of the work is carried out in other people’s homes and, occasionally, on the employer’s premises. The PSAC objected to the employer’s attempt to add 55 persons to the list of employees in the bargaining unit for the purpose of the application for certification, as this is contrary to what had been established by the Board’s officers and agreed upon by the parties.

Position of Employer

[9] With reference to the six and one-half month time frame within which employee status was determined pursuant to the report of the Board’s officers, the employer expressed the opinion that a longer period would have been just as appropriate in light of the dynamic nature of the work resulting in significant fluctuations in the hours

worked by the employees. The list of 758 names, which represents the employees in the bargaining unit who worked more than 12 1/2 hours per week on average throughout the full six and one-half month period, is not in dispute.

[10] There is a dispute, however, as to whether the additional 55 names submitted by the employer should be included in the bargaining unit for the purpose of this application. The employer is of the opinion that they should as they met, on April 13, 2000, the definition of employee as set out in subsection 2(1) of the PSSRA. These persons had a period of employment of three months or more and were required to work on average more than one-third of the normal work week. According to the employer, these persons should not be denied their right of membership in an employee organization as established in section 6 of the PSSRA. In addition, the employer pointed out that, if a bargaining agent had already been certified for this bargaining unit, these 55 persons would have been required to pay union dues from the commencement of their employment.

[11] The inclusion of these 55 persons in the bargaining unit would cast doubt on the ability of the PSAC to clearly demonstrate that it has the support of a majority of the employees therein. In addition, the employer questioned the validity of some of the membership evidence adduced by the PSAC in support of its application. Accordingly, the employer requested the Board to exercise its authority under subsection 36(2) of the PSSRA to order a representation vote to determine the wishes of the employees in the bargaining unit.

REASONS FOR DECISION

[12] The Board finds that the PSAC is an employee organization as defined in subsection 2(1) of the PSSRA and that Deborah Broad, Organizing Program Officer, has been duly authorized to make this application on behalf of the PSAC. The Board finds, as well, that the unit proposed by the PSAC is appropriate for collective bargaining.

[13] This application for certification relates to a bargaining unit comprised of employees who work variable hours, depending on the workload and the time of year. The Board is of the opinion that it is therefore not possible to determine their employment status by looking at a particular point in time, for example, the terminal date or the date of the application. Rather, it is necessary to examine their record of employment over a representative period of time to determine whether they qualify as

employees pursuant to the definition of employee contained in subsection 2(1) of the PSSRA, particularly in light of the exception to the definition contained in paragraph (d) thereof.

[14] That definition reads as follows:

2.(1) In this Act,

...

"employee" means a person employed in the Public Service, other than

a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act,

b) a person locally engaged outside Canada,

c) a person whose compensation for the performance of the regular duties of the position or office of the person consists of fees of office, or is related to the revenue of the office in which the person is employed,

d) a person not ordinarily required to work more than one third of the normal period for persons doing similar work,

e) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that Force under terms and conditions substantially the same as those of a member thereof,

f) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature,

g) a person employed on a casual basis,

h) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more,

i) a person employed by or under the Board,

j) a person who occupies a managerial or confidential position,

k) a person who is employed in a portion of the public service of Canada specified in Part I of Schedule I under a

program designated by the Treasury Board as a student employment program, or

l) a person who is employed in the Parks Canada Agency established by the Parks Canada Agency Act under a program designated by the Agency as a student employment program,

m) a person who is employed by the Canada Customs and Revenue Agency under a program designated by the Agency as a student employment program,

and, for the purposes of this definition, a person does not cease to be employed in the Public Service by reason only that the person ceases to work as a result of a strike or by reason only of the termination of employment of that person contrary to this Act or any other Act of Parliament;

...

[15] The parties, with the assistance of the Board's officers, accepted a six and one-half month period retroactive from the date of the application as the representative period for determining employment status. On this basis, according to the report of the Board's officers there are 758 persons who qualify as employees in the bargaining unit on the basis of the hours they worked during the representative period, namely, on average they worked "more than one-third of the period for persons doing similar work" over the six and one-half month period. Certainly, if the Board had been required to select a representative period for this bargaining unit, six and one-half months is the very minimum period which would have been acceptable to it. As previously indicated, the PSAC has adduced evidence which establishes that it has the unqualified support of 53% of these 758 employees.

[16] The employer wishes to add 55 persons to the list as according to the employer, on the date of the application, they met the definition of employee as defined in the PSSRA. However, as previously indicated, the Board does not believe that this is an appropriate approach to take in determining employment status in a bargaining unit where the hours worked and the people who work them fluctuate throughout the year. The employer has expressed the view that in light of the dynamic nature of the work resulting in significant fluctuations in the hours worked, a period longer than six and one-half months would have been just as appropriate to determine employee status. In other words, the six and one-half month period was appropriate, but a period longer than six and one-half months would also have been appropriate. To include the 55

persons whom the employer acknowledges did not work the full six and one-half month period would circumvent the very purpose of establishing a representative period to determine employee status.

[17] Accordingly, the Board determines that these 55 persons are not employees in the bargaining unit for the purpose of this application for certification. In this regard, I note that on applications for certification the Ontario Labour Relations Board adopts a similar policy when determining the employment status of persons who work part-time; it examines the hours worked by each such person over a representative period of time prior to the application: *Ontario Labour Relations Board Law and Practice*, Third Edition, Volume 1, paragraph 3.305. The Canada Labour Relations Board has also adopted such a practice in determining employment status: *Alberta Wheat Pool* (1993), 86 di 172; *Canadian Imperial Bank of Commerce* (1977), 25 di 355.

[18] Furthermore, while the employer questioned the validity of some of the membership evidence adduced by the PSAC, it offered no evidence to support its position. Unsupported allegations of this kind are never helpful. Clearly, in the absence of any evidence which might suggest the contrary, the Board must accept the evidence of support as valid.

[19] Having considered the report of the Board's officers and the submissions of the parties, the Board is satisfied that a majority of the employees in the bargaining unit wish the PSAC to represent them as their bargaining agent. Accordingly, the Board hereby certifies the PSAC as bargaining agent for the following bargaining unit:

All employees of the employer engaged in the carrying out of survey activities primarily outside of Statistics Canada offices.

[20] The Board will issue a certificate to the PSAC for this bargaining unit in due course.

**Yvon Tarte,
Chairperson**

OTTAWA, November 30, 2000.