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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Applicant

and

CANADIAN NUCLEAR SAFETY COMMISSION

Employer

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

Before: [Yvon Tarte, Chairperson](#)

For the Applicant: [Dougald E. Brown, Counsel](#)

For the Employer: [Stephen Bird, Counsel](#)

Heard at Ottawa, Ontario,
December 16, 17, 18 and 19, 2003.

DECISION

[1] The Professional Institute of the Public Service of Canada (PIPSC) submitted on July 2, 2003, an application to be certified as bargaining agent for a bargaining unit described as:

All employees of the Canadian Nuclear Safety Commission (CNSC) engaged in the issuance and maintenance of regulations standards and guides; approval of license applications, approvals and certifications; promotion, verification and enforcement of nuclear safety and security save and except managers/directors and persons above the rank of manager/director, persons fulfilling administrative support, corporate services duties and persons in the Office of Regulatory Affairs.

In its application, the PIPSC further identified the proposed bargaining unit by including a clarity note which stated that the employees for which certification was being sought worked in what is “commonly referred to as the Operations Branch and the Office of International Affairs”.

[2] The Board notes that the PIPSC is the certified bargaining agent for several bargaining units under the *Public Service Staff Relations Act* (PSSRA) and as such, finds that the PIPSC is an employee organization for the purposes of the PSSRA. The Board is also satisfied that the person who signed the application in this case was duly authorized by the PIPSC to do so.

[3] The Canadian Nuclear Safety Commission (CNSC) is a separate employer pursuant to Part II of Schedule I to the PSSRA. It has in its employ approximately 500 employees. The CNSC, established in May 2000, replaced the Atomic Energy Control Board. Its mission is to regulate the use of nuclear energy and materials in order to protect nuclear industry workers, Canadians and the environment and to ensure the respect of Canada’s international commitments on the peaceful use of nuclear energy.

[4] From the very start of this application, the parties have been at odds as to the true nature and composition of the proposed bargaining unit. Discussions between the Board, the applicant and the employer to resolve these issues were held prior to the hearing.

[5] At the hearing, counsel for the applicant indicated that the bargaining unit the PIPSC was proposing was comprised of all employees, excluding managers classified as Technical Specialist (TS) and Science and Engineering (SE) in the employer’s pay bands.

[6] The employer objected to this change in the proposed bargaining unit description. It argued that the PIPSC should withdraw its application and re-file.

[7] Given the pre-hearing discussions between the parties, as well as the Board's broad discretion in certification matter, I decided to allow the parties to present evidence as to the nature of an appropriate bargaining unit in this case without limiting their presentations to the initial proposal in the PIPSC's application. I note also that shortly before the PIPSC filed its application in this case, the CNSC decided to introduce three new pay bands to its classification structure (Exhibit E-13), which until then, consisted only of seven levels identified simply as RL-1 through 7. The new pay bands were intended to deal with market forces. The three groups for which separate pay bands were created are: Science and Engineering (SE), Technical Specialist (TS) and Administration and Program Professional (APP). All SE and TS positions are at the RL-5 to 7 levels in the employer's plan of classification.

[8] Section 33 of the PSSRA reads:

33. (1) Where an employee organization has made application to the Board for certification as described in section 28, the Board shall determine the relevant 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 shall have regard to the plan of classification, including occupational groups or subgroups, established by the employer for positions in the Public Service and shall establish bargaining units coextensive with the classes, groups or subgroups established by the plan, unless any such bargaining unit would not permit satisfactory representation of the employees to be included in it and, for that reason, would not constitute a unit appropriate for collective bargaining.

(3) [Repealed]

(4) For the purposes of this Act, 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 application for certification was made.

[9] In support of this application, PIPSC forwarded to the Board 167 signed memberships, 166 of which were signed by employees occupying RL-5, 6 or 7

positions. Employees in all three pay band subgroups signed cards. One card was signed by an employee whose classification is not contained in the RL-1 to 7 levels. No cards were signed by employees in the RL-1 to 4 levels.

The Evidence

For the Applicant

[10] John Brauneisen, whose curriculum vitae is found at Exhibit A-3, has held various positions with the CNSC and its predecessor, the Atomic Energy Control Board, over the last 18 years.

[11] Mr. Brauneisen gave an overview of the operations of the CNSC, its structure and mandate. He referred to various documents and organization charts introduced as exhibits.

[12] Prior to June 2003, the employer's plan of classification consisted of several responsibility levels or RL (Exhibit A-2, tab 4).

[13] In June 2003, well after the PIPSC had commenced its organization drive at the CNSC, the employer revised its classification system by restructuring its pay bands (Exhibit A-2, tab 5). Following this restructuring, all positions not at the senior management level were assigned to the APP, SE or TS groups.

[14] The bulk of APP positions are found in the Corporate Services Branch, whereas most SE and TS positions are located in the Operations branch and the Office of International Affairs.

[15] Since June 2003, all position descriptions include the APP, SE or TS nomenclature when referring to the classification of a position (Exhibit A-2, tab 6). SE and TS positions normally require that their incumbents hold university degrees in fields related to nuclear science whereas this is not the case for most APP positions.

[16] Employees who are required to travel to the various nuclear sites controlled by the CNSC must hold a Nuclear Energy Worker (NEW) card. Although some Security and Licencing Officers in the APP subgroup are issued NEW cards because of their site work, most of the NEW cardholders are in the SE and TS groups. The same holds true when dealing with the requirement for regular medical testing which applies mostly to the SE and TS groups.

[17] Mr. Brauneisen was part of the PIPSC organizing drive at CNSC. The initial intent was to sign up and represent all non-management employees. It quickly became apparent that employees in the APP subgroup were not as inclined to sign up as those in the SE and TS groups. Had a majority of lower level APPs (RL-1 to RL-4) signed membership cards, the PIPSC would have requested a single bargaining unit composed of all employees.

[18] The witness described in general terms the similarities and differences in work assignments, qualifications and terms and conditions of employment between the APP and the TS and SE groups. Although some APPs at the higher levels (RL-5, 6 and 7) are more easily compared with SEs and TSs, the other APPs are not.

[19] Mr. Brauneisen expressed the view that TS and SE employees compare themselves for pay purposes to other professionals in the nuclear industry whether provincial, private or international. On the other hand, for the most part, APP comparators are found in the rest of the federal public service. The witness recognized the existence of a Staff Council created by the employer to allow all employees to liaise with management.

[20] Mr. Brauneisen believes that an SE-TS bargaining unit would have sufficient clout to bargain effectively, since most of the revenues received by the CNSC are generated by employees in those groups.

[21] Prior to March 1, 2003, some employees received terminable allowances to adjust salaries to market level and thereby retain staff. The payment of these allowances was a management decision based on market forces for particular positions and was not based on the employer's classification plan.

For the employer

[22] Michael Edward Leblanc, whose curriculum vitae was filed as Exhibit E-10, is the Manager, Job Evaluations and Compensation Research, at the CNSC. Prior to joining the CNSC, he was involved in classification issues for the federal government as an employee and private consultant.

[23] Mr. Leblanc is familiar with the CNSC's job evaluation and classification plans. The job evaluation plan rates positions pursuant to 8 different factors. It then assigns a point rating to each position, which is in turn used to classify each position in an RL

classification structure. The RL classification structure has seven separate levels. Those levels are further divided into pay bands according to market forces. The APP, TS and SE pay bands are not, however, part of the employer's plan of classification.

[24] In 2003, all positions were examined using set criteria (Exhibit E-12) to assess vulnerability to outside market pressures. This exercise led to the creation of the APP, SE and TS pay bands. These pay bands could be abolished by the employer at any time, as were the previously paid non-renewable retention bonuses.

[25] The APP, SE and TS acronyms refer to job families (Exhibit A-2, tab 5), which is not a classification concept. The job families are now included in all competition posters so that individuals who are interested in particular jobs will know what salary to expect.

[26] Linda Keen, whose curriculum vitae is found at Exhibit E-14, tab 1, is the President and CEO of the CNSC. She has held that position since January 2, 2001. Ms. Keen explained the transition from AECB to CNSC and the workings of the institution she currently leads.

[27] The CNSC was restructured during her first year at its helm. The organization moved from a silo structure to a team structure working across operational lines. The CNSC has been successful in ensuring the functional integration of employees at different classification levels on many projects. Employees in all three pay panels work closely together. Successful future growth at the CNSC will largely depend on its ability to continue and progress on the path to functional integration.

[28] Ms. Keen reviewed the CNSC's classification plan and the position evaluation plan (Exhibit E-11) used to classify positions. She indicated that the APP, SE and TS designators were not part of the classification plan. The witness then reviewed various CNSC policies which apply to all employees.

[29] The witness indicated that the RL-1 to 4 (all APP) group is female-dominated, which could lead to pay equity problems depending on the bargaining unit structure chosen by the Board.

[30] Ms. Keen stated that the CNSC is not opposed to collective bargaining and that it would respect and make work a Board decision to create an SE-TS bargaining unit.

[31] Although Ms. Keen expressed some concern that employees might have different terms and conditions of employment, she recognized that such differences exist now in their non-unionized workplace.

[32] Ken Pereira, an engineer whose curriculum vitae is found at Exhibit E-17, tab 1, is the Vice-President, Operations Branch, at the CNSC.

[33] Mr. Pereira reviewed several job descriptions contained in Exhibit E-17 and other exhibits to show the extent to which employees at various levels and subgroups work and interact together. In certain crisis situations, the CNSC has set up multidisciplinary teams composed of employees of different classifications drawn from across the organization. These teams would likely work closely with unionized employees from provincial, municipal, private and federal sectors.

[34] The witness recognizes that the CNSC would continue to function properly even if the SEs and TSs were unionized.

Arguments

For the Applicant

[35] The applicant seeks a bargaining unit composed of all employees in the SE and TS groups, whereas the employer proposes a bargaining unit composed of all employees in the APP, SE and TS groups.

[36] The Board has, under section 33 of the PSSRA, a broad discretion in the crafting of a first-time bargaining unit.

[37] The Board need not determine the most appropriate bargaining unit. The case law is clear that the Board should certify the unit requested if it is appropriate. Pursuant to its statutory mandate, the Board must exercise its discretion in this case with a view to facilitating effective collective bargaining.

[38] Unlike other labour boards, the PSSRB must, on initial certification, pursuant to subsection 33(2) of the PSSRA, “have regard to the plan of classification, including occupational groups or subgroups, established by the employer (...) and shall establish bargaining units coextensive with the plan, unless any such bargaining unit would not permit satisfactory representation of the employees to be included in it ...”

[39] This application is for initial certification at a workplace where there is no collective bargaining. The employer's suggestion that the Board fashion a single all-inclusive bargaining unit would have the effect of preventing any collective bargaining, given the APP group's resistance to unionization. Board decisions dealing with successor rights are of limited use in a case such as this one. All labour Boards have concluded that different considerations apply when they deal with initial certifications as opposed to subsequent applications.

[40] The viability of a proposed bargaining unit has two dimensions. First, the unit must have sufficient economic power to force the employer to bargain. The SE and TSs have such power, since they generate most of the revenues of the CNSC.

[41] Second, there must exist a community of interests. Where there is no history of bargaining, a proposed bargaining unit should have very close links and good affinity, more so than for established units. In this case, there exist very close links between the SE and TS groups. This community of interests touches duties, functions, nature of work, working conditions, training needs and compensation.

[42] The employees, in the bargaining unit proposed by the CNSC, have in many cases merely a functional relationship, whereas the employees in the SE and TS groups are truly functionally integrated.

[43] The employer argues that the applicant's proposed bargaining unit does not meet the requirements of section 33 of the PSSRA since it does not follow the employer's plan of classification. To allow this argument would be to allow the triumph of form over substance. The fact is that all of the positions at the CNSC are classified with both the RL level and the pay band subgroups. The PSSRB has already indicated in prior decisions that a plan of classification should include groups and subgroups. The Federal Court of Appeal has ruled that the establishment of separate rates of pay for certain groups has the effect of creating new classification levels for those groups.

[44] In summary, the proposed SE-TS bargaining unit is a viable one with demonstrable communities of interest. Furthermore, it is coextensive with the employer's classification scheme. Given the strong support for unionization within the SE and TS groups as evidenced by the membership cards filed with the Board, the proposed bargaining unit should be certified without a vote.

[45] In support of its application, the PIPSC referred to the following cases:

United Food and Commercial Workers Union, Local No. 832, and Staff of the Non-Public Funds, PSSRB File No. 142-18-316 (1996) (QL);

Alberta Wheat Pool, 86 di 172, CLRB Decision No. 907 (1991) (QL);

Cominco Ltd., 104 di 53, 35 CLRBR (2d) 187 (1997) (QL);

Delta Bus Ltd., 88 di 7, CLRB Decision No. 932 (1992) (QL);

Island Medical Laboratories Ltd. and H.S.A. of British Columbia, (1993) 19 CLRBR (2d) 161;

Resort Municipality of Whistler and C.U.P.E., Local 3853, (1996) 30 CLRBR (2d) 107;

CIRB Letter Decision No. 944 (2003);

Council of Graphic Arts Unions of the Public Service of Canada and Canada Communications Group, PSSRB File Nos. 142-28-302 to 310, 161-28-702 & 705 (1994) (QL);

Professional Institute of the Public Service of Canada v. Public Service Staff Relations Board, [1982] 1 F.C. 584 (QL);

Bauer v. Canada (Public Service Commission Appeal Board), [1973] F.C. 626 (QL);

Public Service Alliance of Canada and Canada (Fisheries Research Board), PSSRB File No. 143-7-97 (1968) (QL);

Research Council Employees' Association and Canada (National Research Council), PSSRB File No. 147-9-2 (1973) (QL);

Canadian Food and Associated Services Union and Federated Building Maintenance Company Limited, Operating as Commercial Building Service, [1979] 3 Can LRBR 547;

B.D.C. Limited, Montreal, Quebec and Cartage and Miscellaneous Employees' Union, Local 931, [1982] 1 Can LRBR 365.

For the Respondent

[46] Although the applicant has raised interesting arguments, it has failed, on the basis of the evidence presented, to meet the requirements of section 33 of the PSSRA. The evidence is clear that the APP, TS and SE pay bands, established by the employer to address market vulnerabilities, are not part of the CNSC's plan of classification.

[47] Paying employees differently does not necessarily alter a classification plan if the reason for the pay differential is not related to classification but rather to market factors. In the case at hand, the different pay bands merely represent the cost of doing business in the nuclear field.

[48] Since the SE and TS categories are not classification subgroups, they cannot be used as a basis for certification unless it can be shown that a bargaining unit that is coextensive with the employer's plan of classification would not permit satisfactory representation. The applicant has presented no evidence to this effect. Since the application in this case does not conform with the PSSRA, it must be rejected.

[49] Should the Board decide that a group other than the one sought by the applicant is appropriate for collective bargaining, then that group must nevertheless meet the requirements of section 33 of the PSSRA and be coextensive with the employer's plan of classification.

[50] In this regard, the Board must look at the role of the CNSC, its organization and the dictates of sound labour relations. The Board must take a holistic approach in its determination of an appropriate bargaining unit in this case. In the end, there can only be one bargaining unit at the CNSC. This view is supported by recent jurisprudence of the Board, which promotes administrative and labour relations efficiency.

[51] All positions at the CNSC have a functional coherence. Employees at all levels work together to achieve a common goal. They work together on multi-disciplinary teams to execute major projects. The Board must facilitate collective bargaining for all employees of the CNSC. Given the communities of interest that exist for all employees, there are no issues which could not be commonly bargained if the Board fashioned a single bargaining unit composed of all employees. This view is supported by the work of the Staff Council which has been successful in dealing with the concerns of all employees regardless of their classification.

[52] In today's labour relations world, the old professional-non-professional split for bargaining units is no longer necessary or acceptable. Furthermore, the Board has in recent years expressed the view that bigger units are preferable to smaller ones. Finally, pay equity issues may eventually become a concern if the applicant's proposed bargaining unit is accepted.

[53] In conclusion, the CNSC has a plan of classification for the purposes of section 33 of the PSSRA. Since that plan does not include the SE-TS pay bands, it is non-compliant with the Act and must be rejected.

[54] There is no evidence before the Board that it must derogate from the employer's plan of classification in order to allow satisfactory representation. The application must therefore be dismissed. Alternatively, the only unit that can be certified is an all-inclusive unit composed of all employees from RL-1 to RL-7.

[55] Respondent's jurisprudence:

National Energy Board and Public Service Alliance of Canada and Professional Institute of the Public Service of Canada, 2003 PSSRB 79;

Communications Security Establishment, Department of National Defence v. Public Service Alliance of Canada, 2001 PSSRB 14;

Public Service Alliance of Canada and National Capital Commission, PSSRB File Nos. 142-29-312, 142-29-313 (1994) (QL);

Canada Post Corporation and Canadian Union of Postal Workers and various unions (1988), 73 di 66; 19 CLRBR (NS) 129 (QL);

Parks Canada Agency v. Professional Institute of the Public Service of Canada, 2000 PSSRB 109;

United Steelworkers of America v. Usarco Limited v. Group of Employees (Objectors), [1967] OLRB Rep. September 526;

Canadian Union of Public Employees v. Hospital for Sick Children v. Group of Employees (Objectors), [1985] OLRB Rep. February 266;

Mississauga Hydro-Electric Commission, [1993] OLRB Rep. June 523, (QL);

Canadian Museum of Civilization, 87 di 185; 92 CLLC 16,045 (1992) (QL);

Trade of Locomotive Engineers, applicant and Canadian Pacific Limited, 13 di 13; [1976] 1 Can LRBR 361; 76 CLLC 16,018 (QL);

Health Sciences Association of the Regional Municipality of Niagara Falls v. Niagara Regional Health Unit v. Canadian Union of Public Employees (Intervener), [1975] OLRB Rep. April 376;

Canadian Union of Public Employees v. Jewish Vocational Service of Metropolitan Toronto, [1977] OLRB Rep. November 754;

Association of Engineers of Bell Canada and Bell Canada Montreal, Quebec, [1976] 1 Can LRBR 345;

International Federation of Professional and Technical Engineers, A.F. of L., C.I.O., C.L.C. v. Canadian General Electric Company Limited, [1979] OLRB Rep. March 169;

Equal Wages Guidelines, 1986, SOR/86-1082;

International Union of Electrical, Radio and Machine Workers - AFL-CIO-CLC v. Lorain Products (Canada) Ltd. v. Group of Employees (Objectors), CLRB Decision Nos. 0884-77-R and 1040-77-U (1978);

Labourers' International Union of North America, Local 183 and Treasury Board, PSSRB File No. 146-2-267 (1986) (QL);

Hotels, Clubs, Restaurants and Taverns Employees' Union, Local 261 and Treasury Board and Service Star Building Cleaning, PSSRB File No. 146-2-268 (1986) (QL);

Public Service Alliance of Canada and Treasury Board, PSSRB File No. 125-2-41 (1985) (QL).

Reply of the Applicant

[56] The PSSRA requires that bargaining units certified by the Board be coextensive with classes, groups and subgroups established by the employer's plan of classification. The nature of the duties performed by the incumbents of various positions is therefore very important. In this case, the employer has established 3 subgroups based on the nature of the duties performed and their market vulnerability. An SE-TS bargaining unit therefore meets the requirements of the Act.

Reasons for Decision

[57] The applicant is seeking the initial certification of a bargaining unit composed of all the employees of the CNSC who are in the TS and SE pay bands or subgroups. All these employees encumber positions classified at the RL-5 to 7 levels in the employer's plan of classification.

[58] The CNSC opposes this application on the basis that the application fails to meet the test set out in section 33 of the PSSRA. More particularly, the CNSC argues that the proposed bargaining unit is not coextensive with its plan of classification, which does not include the APP, TS and SE pay bands. The employer further argues that a single bargaining unit composed of all non-managerial employees at the RL-1 to RL-7 levels would be appropriate and in keeping with its plan of classification.

[59] The first issue to be decided deals with the employer's plan of classification. Does it include the APP, TS and SE pay bands defined in Exhibit A-2, tab 5, and put into place to allow the CNSC to adjust pay rates independently in response to market pressures? The pay bands, which reflect job families along similar functions, were put into effect by the employer in April 2003. The employer's competition posters (see Exhibit A-2, tab 6, for examples) include the pay band group under the classification rubric. Position classifications are therefore listed at RL-SE-07 or RL-TS-06. The Board has already decided in establishing terms of reference for an arbitration board that "the establishment of a separate pay plan or separate rate of pay for a special group of positions ... would have the effect of creating a new classification level for those positions (see *PIPSC v. PSSRB*, [1982] 1 F.C. 584 *supra*). I therefore conclude that the APP, TS and SE categories are groups or subgroups of the employer's plan of classification for the purposes of subsection 33(2).

[60] As a second issue, the Board must determine what constitutes a "majority of employees" for the purposes of subsection 35(c) of the PSSRA. Although the PSSRA has from the outset always only referred to the need for the support of a majority of employees, the Board in its earliest decisions at times referred to the concept of "clear" majority. It is difficult to ascertain what prompted this departure from the clear text of the Act since no explanation is given in those early decisions. More recent decisions of the Board have followed the practice of other labour boards in interpreting the requirement for a majority support as meaning 50% plus one. The clear language of the Act makes it difficult to find otherwise. A majority of employees must mean just that. The Board must therefore certify a bargaining agent under section 35 of the PSSRA where it is satisfied that 50% plus one of the employees in the bargaining unit wish the employee organization that has made the application to represent them.

[61] The third issue centres on the appropriate bargaining unit to be determined. I believe that neither of the units proposed by the parties is appropriate. The applicant's proposed bargaining unit excludes all of the APPs in the RL-5 to 7 range, many of whom have signed membership cards. Furthermore, it is at the RL-5 to 7 levels (whether in the APP, TS or SE subgroups) that we see true functional integration. The community of interests between these latter positions is significant.

[62] The employer's proposed all-inclusive bargaining unit cannot be accepted at this time. The employer's position might have been acceptable had there been before the

Board a satisfactory indication of the desire of a majority of the employees at the CNSC to participate in collective bargaining. The fact is that no employee at the RL-1 to 4 levels has shown an interest in being represented by the applicant. That fact is evidenced by the signed membership cards submitted by the PIPSC with its application. Accepting a single all-inclusive bargaining unit would therefore likely have the effect of preventing collective bargaining given the lower level APPs clearly expressed opposition to unionization. The Board, in exercising its discretion on initial certification, must respect the purposes and objectives of the PSSRA which include the promotion and facilitation of collective bargaining within the federal public sector.

[63] The Board therefore concludes that an appropriate bargaining unit in this case would be composed of all employees, regardless of pay band, at the RL-5 to 7 levels who are not excluded from collective bargaining by law or determination of the Board.

[64] The applicant has submitted duly signed membership cards showing support at slightly over 50 % (.50145) for the bargaining unit described in paragraph 63. Accordingly, the Board orders that a representation vote be conducted in the matter that the Board, through its Secretary, will direct.

[65] In preparation for the vote, the CNSC is hereby directed to provide the Board, on or before April 2, 2004, with a list of all the employees in the bargaining unit described in paragraph 63 as of the date of this decision, together with addresses by which each such employee may be contacted by mail.

[66] In addition, the CNSC is directed to provide the list referred to in paragraph 65 without the mailing addresses of the employees to the Board and the applicant no later than April 2, 2004. The PIPSC may provide comments with respect to this list to the Board and the CNSC no later than April 16, 2004. The Board will then issue, through its Secretary, the necessary directions for the taking of the vote.

**Yvon Tarte,
Chairperson**

OTTAWA, March 18, 2004.