File: 142-2-321

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

ASSOCIATION OF MARINE ASSESSORS, INSPECTORS AND INVESTIGATORS OF THE PUBLIC SERVICE OF CANADA (AMAIIPSC)

Applicant

and

TREASURY BOARD

Employer

and

PUBLIC SERVICE ALLIANCE OF CANADA

Intervenor

RE: Application for Certification

Before: P. Chodos, Vice-Chairperson

For the Applicant: S. Chaplin, Counsel

For the Employer: M. LeFrançois, Counsel

For the Intervenor: A. Raven, Counsel

Heard at Ottawa, Ontario,
November 25 to 27, 1997 and
March 10 to 12, 1998.

DECISION

The Association of Marine Assessors, Inspectors and Investigators (AMAIIPSC) is a newly formed organization which was established for the express purpose of representing employees currently classified in the Technical Inspection Group (TI) whose duties, broadly speaking, involve the investigation of marine incidents, and the regulation and inspection of marine vessels and facilities. In its application for certification the Applicant described the proposed bargaining unit as follows:

> *All employees, both supervisory and non-supervisory, performing duties which involve the assessment of needs, and the development of plans and drawings, for the purchase and refitting of marine vessels (civilian and military), the inspection of marine vessels and dock facilities for compliance with all applicable laws and standards, including licensing, and the investigation of all maritime incidents for which federal law requires an investigation, along with any related duties.*

According to the Applicant, the proposed bargaining unit contains 237 employees; this number is not disputed by the parties. These employees are employed almost exclusively in two organizations: the Inspectors are found in Transport Canada, and the Investigators are employed with the Transportation Safety Board (TSB). According to the employer, as of the date of this application (i.e. June 20, 1997) the TI bargaining unit, which currently subsumes these employees, consists of 1,133 employees.

This type of certification application is commonly referred to as a "carve-out" application: that is, the Association is seeking a determination from the Board, pursuant to its authority under section 33 of the Act, that the current TI bargaining unit does not permit satisfactory representation of those employees which the Association is seeking to represent, and consequently the marine employees should have their own discrete bargaining unit. This application also raises other issues, in particular, whether the Association was duly constituted, and authorized to make the subject application. The Applicant presented evidence with respect to these matters, and the Intervenor had raised a number of objections concerning those issues. While the objections are not without merit, the Board has decided to focus exclusively on the major issue, that is, the appropriateness of the proposed bargaining unit. In view of the Board's conclusion on this issue, it is not necessary to address the procedural objections raised by the Intervenor.

The Applicant presented evidence concerning the qualifications and responsibilities of the Marine Inspectors and the Marine Investigators primarily through the testimony of Mr. Eric Classen of Transport Canada and Mr. Jean Gagnon of the TSB. Both witnesses also testified extensively concerning the longstanding grievances which they and their colleagues have had concerning their many efforts to get the employer to recognize, by way of compensation, their professional expertise.

Mr. Classen has been employed in the Public Service for 30 years; for the last 10 years, he has been a Marine Surveyor or Steamship Inspector; he is currently located at Charlottetown. He holds a first class Marine Certificate from the Coast Guard College. Mr. Classen identified several documents which outlines the qualifications and responsibilities of Marine Surveyors; among other things the document notes the 10 appointments which persons such as Mr. Classen are conferred, as well as the many types of inspection that they may be called upon to perform. Mr. Classen noted in particular that as Steamship Inspector appointed pursuant to section 301 of the *Canada Steamship Act*, he has the authority to board any ship in Canadian waters. His authority also includes boarding and shutting down non-propelled barges and derricks, sometimes at considerable cost to the owners. Mr. Classen would also be involved in overseeing a series of safety tests, including sea trials involving a ship and its crew. He noted that the ships cannot legally set sail without a proper certificate. Inspectors bill the ships' owners for the cost of inspection time, which can be a substantial amount of money. He observed that Inspectors are subject to pressure from owners, port managers and sometimes even political pressures about their inspections however it is their call alone.

From time to time Inspectors would also assist in the interdiction of illegal goods on ships, in cooperation with police agencies. They would also inspect tackle and other loading equipment on shore as well as on the ship. He is also appointed by Order in Council as Port Warden, as Tonnage Inspector, and as an Examiner of Engineers, the latter, because of his qualifications as a Marine Engineer. Mr. Classen also noted that as a Pollution Convention Officer he has the authority to order clean ups and to determine whether a court proceeding should be recommended under the *Arctic Waters Pollution Prevention Act*, which would require him to prepare material for crown counsel and to testify in court. As a Safety Officer appointed pursuant to the *Canada Labour Code*, he is responsible for safety concerns on the wharf and on ships;

in response to a refusal to work under the *Code*, he can "tag out" equipment which prevents work being done. Mr. Classen also noted that he is an inspector under the *Dangerous Goods Act* pursuant to which he provides guidance respecting the transportation of dangerous goods and ensures compliance with that Act. He is also a Shipping Master which requires him to adjudicate complaints between captain and crew members respecting pay and working conditions; he can prevent a vessel from sailing until the disputes are resolved.

Mr. Classen maintained that the number of regulations for which Inspectors are responsible have been steadily increasing. He noted that when he first started 30 years ago the Marine Inspectors were not appointed as Examiners, or Tonnage Inspectors or Dangerous Goods Inspectors, or Safety Officers. He estimated that 60% of his time is devoted to crew issues, including examinations, 40% involves the inspection of equipment and mechanical devices.

He is currently classified at the top of the TI-6 level. He observed that Inspectors are not satisfied with this classification, and this has been an ongoing problem since 1979. Mr. Classen referred to a briefing paper dated January 2, 1991 entitled "The TI 06 Grievances, The Story So Far" which he had helped to prepare. The document outlines their concerns respecting the rating and classification of TI 06's. This document was distributed by Mr. Anthony Woods, the Union Representative for PSAC (i.e. Public Service Alliance of Canada) / U.C.T.E (i.e. Union of Canadian Transport Employees). Mr. Classen explained that this grievance was commenced because of their concerns that the classification standard did not reflect some of the work that they did, in particular, their dealings with the marine industry, their professional qualifications, their appointments, and their contacts. He noted that they had lost many grievances over the years on these matters. Their complaints reflected their concerns that they were in the same classification as a group of machinists and welders, notwithstanding that their qualifications were not of the same order. It was their view that the only way to resolve this classification issue was to move them into an occupational group which recognizes their various levels of qualifications, for example, in the Ships Officers' Group.

Mr. Classen referred to Exhibit A-9, a fourth level reply to his grievances dated February 28, 1991. He was not satisfied with that response and wanted to pursue this

matter further; he was advised by the PSAC that the contents of the job description was a management prerogative. He prepared another document concerning the TI-6 classification issue dated April 9, 1991 (Exhibit A-10) which was also distributed by Mr. Woods. In a letter dated April 30, 1991 Mr. Classen advised that he wished to have his classification grievance held in abeyance pending results emanating from the so-called "Daniels" report (Exhibit A-12). This report dealt with a number of issues including pay and benefits problems. Mr. Classen also referred to Exhibit A-14 the job description for his Marine Surveyor position; he noted that he refused to sign this document, as in his view, it did not fully reflect his duties, for example, it did not state that he had full authority to do his inspection responsibilities without supervision.

Mr. Classen also provided input to another internal management study, known as the Marois report; he noted that the report concluded that there were problems with the compensation of Marine Inspectors, which should be addressed by revising their classification (Exhibit A-13, page 8). A summary of the Marois report was provided to a TI Group Consultation Committee which was part of the U.C.T.E. component; the mandate of the committee, of which Mr. Classen was a member, was to ensure that surveyors had input in respect of the issues which the Marois and Daniels reports were to address. He noted that a meeting was called at Ottawa on September 16, 1992 by U.C.T.E. to address this problem. Prior to this meeting he discussed the issues with the union representatives. They met for an entire day on September 16th with Mr. Michael Turner, the Deputy Commissioner of the Coast Guard as well as with Huguette Marois, Chief, Ship Safety Renewal (the author of the Marois report), among others. The minutes of the Committee (Exhibit A-20) observes that:

. . .

> *... the Committee suggested that the solution to the TI salary issue was the creation of a distinct Group or sub-Group for Marine Surveyors, but in a shorter time-frame than had been proposed in the Strategic Review. The Representatives recommended an immediate reopening of negotiations with the Treasury Board.*
>
> *CCG management agreed that this was its favoured solution as well, but Personnel gave detailed explanations of the legal*

> *Acts, Regulations and authorities which prevented a quick solution to the problem.*
>
> . . .

Mr. Classen received a draft of these minutes for his review from Mr. Ray Carrière, a Labour Relations Officer with U.C.T.E. who was his main contact with the union. Members of the Committee of U.C.T.E./Ship Safety Marine Surveyors, TI Advisory Committee also received a memorandum from Mr. R. Quail, the Commissioner of the Coast Guard, in which he states that:

> . . .
>
> *I can assure you that both the Deputy Commissioner and I support the creation of a new Group or sub-Group which would include Marine Surveyors, and where there would be direct comparability between qualifications and experience required for all positions....*

Mr. Classen also referred to Exhibit A-30, a memorandum dated October 1, 1993 from Mr. R. Lanteigne, the Acting Director General of the Coast Guard which referred to a proposal endorsed by the Coast Guard to create a "marine operations" occupational group which would be pursued with Treasury Board officials. A memorandum dated October 24, 1994 from the then Commissioner of the Coast Guard observed that:

> . . .
>
> *Over the past several years, Marine Surveyors have voiced their concerns about the TI classification evaluation criteria. Their job responsibilities have expanded without the accompanying changes to classification levels....*

The document went on to note that the proposal to Treasury Board recommended the creation of a sub-group for Coast Guard TI's, among other things. This proposal was also endorsed by the Minister of Transport, as noted in a letter from the Minister to Ms. Coline Campbell, M.P. (Exhibit A-32).

At the 1993 U.C.T.E. convention, a resolution was passed providing funding to the TI Consultation Committee in order to continue to pursue their objectives. Mr. Classen observed that he had not received any negative comments from the union with respect to the objective of creating a new group or sub-group.

Mr. Classen also referred to a number of grievances pertaining to compensation and classification matters which he submitted in March/92; in January 1993 Mr. Classen withdrew these grievances, in light of Mr. Quail's memorandum of December 1992 which Mr. Classen viewed as "a very positive step towards resolution of the problem areas" (Exhibit A-28).

In 1997 the management of the Coast Guard directed Mr. Dick Theedom, who is an excluded employee, to revisit the issue of compensation and classification for Marine Surveyors. Mr. Classen, among others, provided input into the report entitled "Remarks on Marine Surveyor Issues" dated March 26, 1997 (Exhibit A-34) which was submitted by Mr. Theedom. This report recommended among other things that:

> - *Highest level representation as possible to Treasury Board for urgent long term resolution of this situation through means such as La Releve, UCS or reclassification, etc. ....*

Mr. Classen reviewed in detail the qualifications of Marine Surveyors. He noted that as a Marine Engineer he was required to complete a four-year college course at the Coast Guard College. A fourth class Marine Engineering certificate demands a thirty-six months relevant experience with examinations, in accordance with the *Canada Shipping Act and Regulations*. For a third class certificate, an additional twelve months experience is required, followed by a series of examinations. For a second class certificate one needs an additional twelve months experience, again with examinations. A further twelve months is needed for a first class certificate; in addition it must be established that the candidate holds a second class certificate and has been in charge of an engine room. He also noted that to become a TI-6 Marine Surveyor, one needs a first class engineer certificate; however, a Captain, Naval Architect, or Marine Electrician can be appointed to the TI-6 level, because of their professional qualifications.

Mr. Classen also observed that there are non-marine TI-6's at Transport Canada on the Aviation side, as well as Military personnel. He recently saw a competition poster for a TI-7 position which only required a grade twelve education; he is not aware of anyone having moved from the railway or aviation inspection area into a marine TI-6 position.

Mr. Classen maintained that he had submitted proposals for collective bargaining to U.C.T.E.; however, none of them were put on the bargaining table; according to Mr. Carrière, they were all management rights issues which were not bargainable. Prior to the 1991 general strike, he was on the PSAC TI bargaining team. He noted that the issue of classification was never dealt with at the bargaining table. He stated that on occasion, grievances would be submitted without any knowledge as to who was responsible for them; the union would have an oiler or fireman attempting to explain the complexities of the marine surveyors' jobs. Mr. Classen also had to present the grievances to management himself. He observed that initially the union had no knowledge of marine issues, however, Mr. Carrière of U.C.T.E. did develop some understanding of these matters.

In cross-examination Mr. Classen acknowledged he has been advised unofficially that the Marine Surveyors will be reclassified at the TI-7 level shortly. The TI-6 is the working level for Marine Surveyors as well as for TI's working in the aviation and rail side. He agreed that as a First Class Engineer, he cannot command a ship, although a Master Mariner can. Mr. Classen also acknowledged that the 54 Naval Architects, who are Marine Surveyors, are only required to complete a three or four-year university course. Some of the Marine Surveyors are Marine Electricians who have a four-year qualification period. He also acknowledged that not every Marine Surveyor has all the Order in Council appointments; the receipt of these appointments depends on where the individual in question works. Mr. Classen noted that the prestige traditionally associated with the position of Marine Surveyor has diminished, that the question of status is important to Marine Surveyors and constitutes part of his overall complaint. He observed that they are in the same bargaining unit as, for example, Weights and Measures Inspectors who have much lower qualifications. He is aware that Mr. Theedom is on the Treasury Board negotiating team; he believes that Mr. Theedom is doing a good job and has a good grasp of the concerns of Marine Surveyors; he continues to believe that the problem respecting recruitment and retention will not be addressed at the bargaining table as long as they remain within the TI group.

When cross-examined by the intervenor, Mr. Classen stated that he assumes Meat Inspectors are part of the TI group, although he has not met any. He does not feel that the TI benchmarked position covers the full range of their responsibilities,

although he acknowledged that the Marine Surveyor position is the benchmark for the TI-6 classification level standard. Mr. Classen insisted that when their concerns about the inadequacy of the standard in respect of Marine Surveyors were brought to the union's attention they were told that there is only so far that this issue can go; he maintained that if they were in a separate bargaining unit a resolution of this problem would be focussed on them rather than dispersed and diluted throughout a wider bargaining unit.

Mr. Classen also agreed that when he had been on the TI bargaining team in 1991, a day had been devoted to discussions with the union negotiator about their concerns; however, they were told that their issues could not be on the table. The bargaining team never met with the employer. Mr. Classen also agreed that Exhibit A-1, at page 7, notes that he was participating with the union in helping to present their case on classification to management. He never appeared before a Treasury Board classification committee hearing, since he had withdrawn all of his grievances prior to that level.

Mr. Jean Gagnon has been a Marine Investigator for the TSB since 1990. From 1986 to 1990 he was employed with Transport Canada in the Marine Casualties Investigation Directorate. In 1990 the four different modes of investigations that is Aviation, Marine, Pipeline and Rail were united under the TSB. Whenever there is a marine occurrence, that is an accident or a collision or near accident the TSB makes the determination whether there should be an investigation. If so, Investigators are dispatched either individually or as a team to the site. They would then carry out interviews of, for example, the ships crew, pilots, owners, etc. and would review material such as the "classification societies" that is the standards used by underwriters as well as various personnel involved in vessel traffic, navigation, etc. They would examine ships, shore aids, navigation equipment and anything else that might influence the seaworthiness of a vessel, including management policies and procedures, as well as emergency plans. Mr. Gagnon noted that they must have a knowledge of both national and international regulations including approximately 20 conventions emanating from the International Maritime Organization. There are some 20 statutes which they are required to work with, for example, the *Canada Shipping Act* and the *Canada Labour Code*. Their powers as Investigators are set out in section 19 of the *Canadian Transportation Accident Investigation and Safety Board Act*

which includes the right of search and seizure. Their duties also require them to examine considerations such as the health of persons involved in marine transport, and whether they have been adequately assessed with respect to their competence and their training.

Mr. Gagnon noted that Marine Investigators are required to have a valid certificate as a Master Mariner, or as a First Class Marine Engineer (Exhibit A-35). He corroborated Mr. Classen's testimony about the various certificates that are required to become the Master Mariner; he noted that most Master Mariners have a 30 month college certificate and then go through the four certificates of competency.

Mr. Gagnon stated that he has had several contacts with officers of the U.C.T.E. including the current President, Mr. Robert Desfonds, as well as Mr. Raymond Carrière, the Labour Relations Officer. He has also dealt with Mr. Michael Wing, the National Vice-President. He characterized his dealings with them as being very cordial; they tried to help him whenever he requested something, but the degree of help which could be provided was limited. Mr. Gagnon noted that he had submitted a classification grievance in July 1996 on behalf of ten out of the twelve TI-6's employed at TSB at the time. They had received some assistance from U.C.T.E. as to how to file this grievance. When concerns were raised about the merits of the grievance from a Classification Officer with the PSAC they received support from Mr. Desfonds in pursuing this grievance. Ms. Elizabeth Millar, Co-ordinator for Classification and Equal Pay with the PSAC expressed reservations about the Alliance pursuing this grievance noting that "*The Classification Grievance Process is management described and management controlled ... The Classification Standards are, as well, employer controlled and did not reflect the current work responsibilities of Public Service members* (Ref. Letter to Mr. Desfonds dated September 19, 1996, Exhibit A-41).

From November 4 to November 7th, 1996 the Marine Investigators met with Mr. Desfonds as well as other officers of the union. Mr. Gagnon noted their dismay when one of the union officers commented that Marine Investigators could not obtain a higher classification because they do not have a licence like a pilot; it was the Marine Investigator's conclusion from this comment that the union did not understand who they were dealing with. It was suggested that they send letters to the President of the TSB, Mr. Benoit Bouchard setting out their concerns. They in fact met with the

Chairman on December 12, 1996; prior to that meeting, they briefed the Officers of U.C.T.E. respecting their duties and qualifications; at the meeting Mr. Desfonds and Mr. Carrière were in attendance as was Mr. Gagnon, a Captain Kasprzak and the Chairman. At the Chairman's request they forwarded to him a briefing setting out their concerns in detail. On March 13, 1997 they received a reply from the Chairman in which he noted the concerns about the wage freeze detracting from the Board's ability to employ staff; he observed that "*New contract negotiations are now being initiated, and so both union and management have an opportunity to advance this issue."* He also made reference of the need to *"advance our concerns within the development of the new Universal Classification System (UCS), which is still being targeted for introduction in 1998."* (Exhibit A-43) According to Mr. Gagnon, Mr. Carrière advised them that the union could not do much about this matter for the time being. The Marine Surveyors concluded they were just getting the "run around". Mr. Gagnon and his colleagues wrote to Mr. Desfonds on April 11, 1997 advising that "*... it is imperative that the union voice our classification group and level grievance at the present union negotiations for management to officially take action ... We believe that the present Technical Inspection classification group is not compatible with the duties and responsibilities of the job and more importantly it does not take in to consideration the qualifications and experience that are required for the TSB Marine Division to fulfill its mandate."* (Exhibit A-44). They never received a formal response to this letter, other than Mr. Carrière asking them to keep in touch.

Mr. Gagnon observed that Mariners are found only in the Department of Fisheries and Oceans, Transport Canada, Public Works and the TSB; he maintained that the only personnel movement respecting mariners would be from TSB to Transport Canada as a regulator; within the TSB itself there is no possibility of lateral movement. He also maintained that they have other work place concerns in addition to salary; he referred to issues with respect to travel and training in this context. He observed that generally speaking the TI collective agreement is not written with their needs in mind.

In cross-examination by the employer's counsel, Mr. Gagnon acknowledged that in accordance with Exhibit A-34, many of the Marine Surveyors are either electricians or Naval Architects and accordingly do not require the certificates of competence which apply to Master Mariners. He agreed as well that they had chosen not to pursue

their classification grievances. He also acknowledged that the Marine Surveyors are not compelled to engage in sea time; Aircraft Operations (AO) employees are required to fly aircraft as part of their training. It was his information that there are 566 AO's in total at Transport and TSB; he does not know how many aviation TI's are at Transport or TSB; it is his best estimate that there are 20 TI's involved in rail transportation at TSB. Mr. Gagnon also agreed that theoretically, and in accordance with competition posters for TI-6's positions there is no need for college training; Mr. Gagnon insisted that this is not representative of the educational qualifications of the majority of the marine TI's; all Inspectors have a secondary school diploma and all have received nautical school training, with a few exceptions. Mr. Gagnon expressed his view that they should more appropriately be compared to more highly qualified employees such as AI's, AO's and ENG's. He referred to his discussions with TI's on the aviation side; according to Mr. Gagnon, these employees examine such things as the state of repair of the planes, fire hazards, the stowage of cargo, etc.; while he is not aware of the extent to which they consider the human element, he believes that they do not investigate that aspect as extensively as do the marine inspectors. He agreed that in respect of the execution of their job, as opposed to their qualifications, they use the same Act and Regulations as the rail and aviation TI's, and that their work is more or less the same. Mr. Gagnon observed that their preference would be to have their own bargaining unit and then negotiate with whatever bargaining agent would be interested in representing them; that is, they are not enthusiastic about going it alone with respect to collective bargaining. He thought for example that the Canadian Merchant Seaman's Guild might be interested in negotiating on their behalf; he noted that Master Mariners in that bargaining unit had been successful in matching compensation with the private sector.

Mr. Gagnon also acknowledged that Mr. Fred Perkins, the Director of Marine, is very much aware of their concerns; he is currently at the bargaining table on the management's side representing the TSB.

In response to cross-examination by counsel for the intervenor, Mr. Gagnon observed that the lack of a positive response to their classification grievances has in part led to this application. He acknowledged that classification standards are the prerogative of the employer, and that they cannot force the Treasury Board to change

the TI Standard. Mr. Gagnon noted that Marine Surveyors are not happy with the Standard and would press their bargaining agent to do something about it.

Mr. Gagnon also agreed that there are some commonalties among Investigators both in the rail, air and marine functions; every year the Investigators in all the transportation modes get together to discuss general philosophy; he acknowledged some of these multi-modal meetings are useful.

Mr. Gagnon also agreed that Aviation Inspectors must deal with International Civil Aviation Organization (ICAO) Conventions. He admitted that he had not filed a grievance; he also does not contest the accuracy of Elizabeth Millar's letter to Mr. Desfonds with respect to the limitations respecting classification grievances. It was Mr. Gagnon's recollection that he did have discussions subsequent to April 11, 1997 about the TI issue with both Mr. Desfonds and Mr. Carrière. He acknowledged that he has never written to the union about his concerns over the overtime issue and has no familiarity with how the bargaining team has attempted to address this issue. He agreed that this is not one of their major concerns, although it is an issue which they have discussed among themselves.

In re-examination, Mr. Gagnon noted that an aviation TI cannot question the competency of a pilot, which is the responsibility of either an AO or AI; however, this is part of the responsibilities of a Master Mariner who is also a Marine Inspector. He reiterated that the purpose of this application is to have a different bargaining unit.

The employer's first witness was Mr. Bud Streeter, who is currently the Director General of Marine Safety, Transport Canada. Mr. Streeter is the custodian of the Department's responsibilities under the *Canada Shipping Act*; the Marine Inspectors are accountable to him in his capacity as Chairman of the Board of Steamship Inspection under section 305 of the Act. At one time Mr. Streeter was Manager of Marine Safety in P.E.I. and in that capacity had hired Mr. Classen.

Mr. Streeter referred to the appointments which Marine Inspectors may receive; he stated that some of these functions are no longer performed by the Marine Surveyors, and not all Surveyors receive these appointments. The Regional Director determines which appointment the Surveyor requires, depending on the need. He

noted for example that the duties of a Shipping Master are the responsibility of the Regional Director; also, the approval of drawings is performed at the regional level.

Mr. Streeter observed that in November or early December 1997, all the Marine Surveyors classified as TI-6's were reclassified to the TI-7 level, retroactive to February 1, 1996. Approximately 95 percent of Marine TI's at Transport Canada were upgraded; he noted that 75 percent of the Aviation TI's were reclassified, and that the working level for Aviation TI's has gone from TI-5 to TI-6. He agreed that the other types of inspectors do not deal to the same extent with the human element as do Marine Inspectors; for example, the crews of ships outnumber those of planes or trains and are on board for longer periods; this is reflected in the higher level classification as between Marine TI's and the others. While Marine Surveyors have significant delegated authority, Aviation Inspectors can also ground an airplane; all modes of inspection have a fair degree of discretionary powers.

With respect to qualifications, Mr. Streeter observed that Aviation TI's have to have operational certifications at various levels; normally they must have a two-year to four-year technology program plus related work experience. Currently advertised positions for Aviation Inspectors require eight to ten years experience in the aircraft industry. Mr. Streeter stated that AO's require a valid Pilot's licence which they must obtain through a specified number of hours in command of an aircraft of the type for which they are certified. He stated as well that for the calibration of equipment they must also fly the planes in question.

Mr. Streeter observed that there is a problem with respect to recruitment and retention of Inspectors in all modes of transportation; on the Marine side, the major problem is as a result of an aging surveyor population and a decline in the number of qualified Mariners. On the Aviation and Rail side, problems have arisen as a result of deregulation resulting in a proliferation of shortline railways and regional airlines, who have recruited staff away from the Public Service. As a consequence, the Department has reviewed and reclassified position descriptions, and have recognized that a higher classification within the TI Standard was the proper response. They have also looked at the recruitment and retention problems by benchmarking the Marine Surveyor positions against industry and other government departments who are seeking the same pool of qualifications. He noted that the firm of

Price-Waterhouse has been given the assignment of comparing the situation in industry. A final report has been prepared by Price-Waterhouse and is being currently being reviewed by Transport Canada for presentation to Treasury Board by the Assistant Deputy Minister, Safety and Security.

Mr. Streeter also noted that their Department is working with Treasury Board to ensure that, where possible, qualifications and experience factors are being considered in the context of the proposed Universal Classification System. Mr. Streeter also observed that the Deputy Minister of Transport has written to Treasury Board to request the TI problem be addressed during the current collective agreement negotiations; he noted that Mr. Theedom, who is a member of management, is very knowledgeable about and sympathetic to the Marine TI situation, and is his "proxy" at the negotiations table.

In cross-examination Mr. Streeter was questioned about the Aircraft Operations Classification Standard; he noted that AO's are required to have a valid Pilot's licence, and in order to retain their licence they must put in a certain amount of flying time. While sea trials would be performed by Marine Inspectors, they would not take command of a vessel. The Inspectors would not have the authority to suspend certificates of competence but would report observations of any deficiencies with respect to personnel. He agreed that air worthiness Inspectors do not observe pilots, which is the responsibility of the Civil Aviation Inspectors, who are classified as AO's. Mr. Streeter agreed that the responsibilities of a Master Mariner and a pilot are comparable; that is both are responsible for the safety of their craft; however, aircraft react in feet per second, while ships react in feet per minute.

Mr. Streeter stated that he is aware of the earlier studies concerning the TI compensation issue, for example the Marois report; he agreed that these reports have not resolved the problem. He acknowledged as well that Treasury Board has not committed to following the recommendations of these reports. Mr. Streeter maintained that it was not the intent of Transport Canada to initiate the Price-Waterhouse study with a view to obtaining a new classification standard for TI's; he noted that remuneration is based on duties and not qualifications, and accordingly Ships Officers' salaries are based on the duties which they are assigned.

Mr. Streeter was referred to the comparative salary scales between TI's and Ships Officers found in Exhibit A-12; he observed that the differential in salaries was in part as a result of the expansion of the offshore industry in the mid-1980's; at that time Ships Officers employed by the government were being raided by the shipping industry. In the late 1970's TI's and SO's were paid approximately the same. He agreed that had Marine Inspectors obtained the same salary compensation as the SO's in 1986, it would address much of the recruitment and retention problems applicable to the TI's. Mr. Streeter stated that he knows of only one example where a particular part of an occupational group was given special remuneration; this involved Engineering group who dealt with the oil and gas industry in the 1970's.

Mr. Arthur Oulton also testified on behalf of the employer. Mr. Oulton is currently a consultant with Transport Canada in respect of the TI group; he retired from Transport Canada in June 1995, as Chief, Classification Programs. Mr. Oulton identified a series of correspondence and memos dated from 1991 to 1995 from several senior officials within Transport Canada and the Canadian Coast Guard (Exhibits R-1 to R-19). In general, these documents address various classification proposals considered by departmental officials. These proposals include the possibility of moving the Marine TI's to the SO group (Exhibit R-2). In Exhibit R-3 the then Deputy Commissioner of the Coast Guard notes the following:

> *Because Treasury Board has indicated to all unions that the PS 2000 classification conversion exercise will not be implemented in such a way as to affect union affiliation in the first five years, any solution to problems such as those associated with the TI group would be severely restricted to what could be done within the current classification structure. The Department is opposed to this restriction and has initiated discussions with Treasury Board to find a solution. Any solution will require the cooperation of the various unions involved and this will be sought at the appropriate time.*

In a discussion paper entitled *"PS 2000 - Classification Simplification"* (Exhibit R-5) the problem of increasing salary differential among occupational groups employed within Transport Canada was recognized; several options were put forward, including the establishment of a separate Marine Professional Group; in respect of this option, it was noted that "*... It would, however, position the employees to take action to move to employee representatives who might represent them better in the*

future. ...." Another option was to *"Create Transport Canada specific groups and sub-groups separate from the establishment of the occupational groups already announced by the Treasury Board Secretariat. ...."* A memo dated March 4, 1993 from the Director General, Marine Navigation notes that the preferred option was "*the creation of groups and sub-groups alligned with TC's major operational, programs and modes."*

Mr. Oulton noted that in 1993 the question of restructuring occupational groups as it affects Transport Canada was complicated by a major divestiture initiative of five areas under Transport's jurisdiction, resulting in the reduction of the workforce from 21,000 to 5,000 employees. In September 1993 the Commissioner of the Canadian Coast Guard, Mr. John Thomas wrote to Mr. Claude Bernier, ADM, Personnel, at Transport Canada urging a resolution of the *"long-standing classification issue"* prior to the proposed restructuring of the CCG; in particular, it was recommended that the Department urge Treasury Board to *"create a Marine Occupational Group encompassing those positions related to Marine operational functions."* which would include a number of current classification groups including the TI's and the SO's. Other alternatives were also put forward by senior personnel, including the creation of three occupational groups: a Transport Inspection Safety Group, which would encompass a Technical Inspector sub-group; a Coast Guard Group encompassing, among others, a Marine sub-group, and a Navigation Group (Exhibit R-17). This proposal was put to Mr. Jean-Guy Fleury, Deputy Secretary of the Treasury Board in a letter dated August 3, 1994 from Mr. Bernier (Exhibit R-18).

In a letter drafted by Mr. Oulton dated January 4, 1995, Mr. Bernier recommended putting the revision of Occupational groups on hold pending the resolution of other decisions relating to the proposed Universal Classification Standard (Exhibit R-19). As a result, the Job Families Project was placed on hold.

In cross-examination, Mr. Oulton stated that the Canadian Coast Guard were looking for solutions which would not necessarily involve a merger of Marine TI's with the SO's. He acknowledged that groups that are unique tend to fare better in the collective bargaining process.

Mr. Oulton was referred to the Aircraft Operations Classification Standard (Exhibit A-45). He observed that the classification definition excludes anyone for whom a valid Pilot's licence is not necessary. He noted that the question of contacts is not considered a significant basis for differentiation between jobs, and has been removed from some standards, including the AI classification. He agreed that flying responsibility in the AO standard has only a seven percent factor weighting.

Argument

Counsel for the Applicant acknowledged that a request for a "carve-out" of an existing bargaining unit is in the nature of an extraordinary remedy; he noted that the Board appears to be of the view that the largest bargaining unit possible is desirable. However, Mr. Chaplin submitted that in this instance the Board should invoke the exception to larger bargaining units, as permitted under subsection 33.2(2) of the Act. He submitted that a long standing TI problem has not and cannot be resolved without the establishment of a distinct bargaining unit for Marine Inspectors. He noted that both management and employees have recognized that there is a compensation problem, and there is also a consensus as to the solution - the establishment of a new classification group. In order to establish a new compensation plan which is specific to these employees one must establish a new occupational group encompassing these employees exclusively, and then allow for collective bargaining with this new group.

Mr. Chaplin maintained that the testimony of Mr. Streeter and Mr. Oulton demonstrates that the current compensation disparities are due to the failures in the bargaining process. For example, there is the evidence of how the Ships Officers have done increasingly better than the Marine employees over the last few years. Notwithstanding that external comparators strongly justify higher compensation for Marine Surveyors, they have been left behind. Mr. Chaplin noted that the existing classification system is a given and must be considered in addressing a solution to the Marine Surveyors' concerns. Mr. Chaplin also submitted that the viability of the bargaining unit is not an issue, as the Association has made it clear that it does not want to "go it alone" at the bargaining table, but rather would wish to affiliate itself with another bargaining agent.

Counsel for the Applicant maintained that, despite being well aware of this problem for many years, there is no evidence that the Alliance had pursued a solution at the bargaining table; he noted that in April of 1997 there was no meaningful communication from the Alliance with the Marine Surveyors and Investigators on this issue. Mr. Chaplin also observed that the union in fact agreed with the Marois solution that a separately bargained group would be the answer.

Counsel also argued that the Board has fragmented an existing bargaining unit where that was in the interest of fair representation. The Board has explicitly recognized that it has the authority to determine that a portion of an occupational group is an appropriate bargaining unit, and this does not encroach on the employer's authority to establish occupational groups and classify positions. See for example the *Patent Examination Sub-Group* decision (Board file 142-2-274, at page 22). In that case, the Board found that a fragmentation of a bargaining unit is appropriate because of diversions in the community of interest between the Patent Examiners and other members of the larger bargaining unit. Mr. Chaplin submitted that the evidence of Mr. Classen and Mr. Gagnon demonstrate that the concerns of the Marine TI's were not being addressed; they testified that the issues of concern to the Marine Surveyors got lost among the other concerns of the bigger Technical Inspection group. Exhibit A-20, the Minutes of a Union/Management Committee Meeting in September 1992, demonstrates that the union itself acknowledged that the creation of a group or sub-group for Marine Surveyors would facilitate a solution to these problems; this implicitly recognized that the solution lies in the formation of a new bargaining structure. Mr. Chaplin noted that the Alliance chose to call no evidence in this case; accordingly, there is no evidence from the PSAC that they disagreed with the position put forward at that meeting.

Counsel for the Applicant also referred to the *Federal Government Dockyard Chargehands Association* decision (Board file 146-2-278) where the Board upheld the fragmentation of an existing bargaining unit. In that case the Board examined collective bargaining proposals in concluding there was a failure to accommodate the differing interests within the existing bargaining unit, and accordingly found there was a lack of community of interest. Counsel also cited the *Canadian Airline Pilots Association* decision (Board file 143-2-134) where the Board considered the degree of mobility as a factor to be taken into account in the determination of a bargaining unit;

counsel submitted that the evidence here demonstrates that there is mobility between the Ships Officers and the Marine Surveyors and Inspectors, but none within the TI Group itself among the various transportation specialities.

In summary, counsel for the Applicant submitted that the TI's had been attempting to deal with their problems for twenty years. There is broad recognition from both management and within the U.C.T.E. that this problem needs to be resolved; the solution clearly lies with the Board, by upholding this application.

Counsel for the employer stated that the employer is taking no position with respect to the questions as to whether the Association is an employee organization for purposes of the Act. Rather, the employer would prefer a decision on the merits that is, a decision which addresses the proposed fragmentation of the bargaining unit.

Counsel submitted that pursuant to subsection 33(2) the Applicant must demonstrate that because of unsatisfactory representation, the present unit is not appropriate for collective bargaining. Unless the Applicant can show that it has no community of interest with other TI's, it does not assist them to demonstrate that there is an affinity with other bargaining units. Counsel for the employer submitted that there is no evidence demonstrating a lack of community of interest between the Marine Inspectors and others in the TI group. He submitted that Mr. Classen's evidence about his appointments is largely irrelevant; his appointments are a function of geography and the fact that he works out of a small office. Mr. Classen did not provide evidence about the work of Aviation or Surface TI's compared to his responsibilities, except to observe that he can command a ship. However, he was never called upon to do so or to go to sea, except for the occasional sea trials. Mr. Streeter agreed that there is a different dimension to the Marine Surveyors' accountability, which is the reason why the working level is classified one step above their counterparts in the other modes of transportation. Mr. LeFrançois also noted for purposes of classification, the qualifications Mr. Classen brings to his position are less important than the functions of the job. Mr. LeFrançois also maintained that Mr. Gagnon did not provide evidence that his occupation is substantially different from those of Investigators in other modes of transportation; in fact he admitted that the work is substantially the same. Counsel also dismissed the comparisons with the

AO group, noting that AO'S must put in regular flying time in order to maintain their licence.

Counsel for the employer agreed that the TI problem is “real and regrettable”; however, they were victims of a series of circumstances, for example the wage freeze and the suspension of collective bargaining for several years. Mr. LeFrançois submitted that the solution to these problems lies at the bargaining table and the new Universal Classification Standard, particularly in view of the fact that management is clearly sympathetic to the concerns of the employees. There is no evidence to demonstrate that the TI bargaining agent would not pursue the Marine TI’s interest at the bargaining table, when it has had an opportunity to do so.

Counsel referred to the *Heating Power Group* decision (supra) at page 5, where the Board observed that opening the door to fragmentation creates a real danger of others pursuing the same path. With respect to the *Patent Examiners* case (supra) the Board noted the many differences between the two groups, as well as the substantial evidence of continual discord on the collective bargaining front in concluding that there was a lack of community of interest. There is no such evidence here. In the *CALPA* decision (supra) the Board concluded that different conditions of work are not determinative of the appropriateness of a bargaining unit. Counsel also cited the case of *Le Syndicat des contrôleurs aériens du Québec* (Board file 143-2-164) at page 123 where the Board sets out guidelines in respect of the termination of appropriate bargaining units; the Board noted its concern about the balkanization of collective bargaining, the need for stability in labour relations and the factor of efficiency and convenience in respect of collective bargaining. Finally the Board observed at page 137 of the decision that the onus demonstrating unsatisfactory representation is greater than upon initial certification, and that dissatisfaction generally speaking does not outweigh other objective factors.

Counsel for the Intervenor noted that the language of subsection 33(2) is mandatory, subject only to the exception that the bargaining unit does not permit satisfactory representation. This criterion does not depend on the bargaining agent but rather on the configuration of the bargaining unit. The issue is whether the bargaining unit is so configured that a minority within the bargaining unit would never be able to get their concerns addressed. Mr. Raven noted that Mr. Classen was

on the bargaining team in 1991, which is the last time there was collective bargaining for the Public Service; Mr. Classen did not give evidence that his concerns were voted down. There is in fact no evidence that this bargaining agent cannot or will not represent their interests; nor is there any evidence that a smaller bargaining unit would in fact be more efficient than a larger one.

Counsel for the Intervenor submitted that there is in fact a strong community of interest in this bargaining unit; he noted that the members have regular multi-modal meetings and that their responsibilities are in fact very similar. To uphold a fragmentation proposal there must be evidence that the members cannot live together; there is simply no such evidence here. Counsel noted that in other cases under subsection 33(2) the Board looked carefully at the collective bargaining history. For example in the *National Energy Board* case (Board files 142-26-297 to 301) it was demonstrated that the aspirations and interests of the non-professional employees were at variance with the professionals. Counsel also submitted that the Board has consistently taken the position that it is loathe to fragment existing bargaining units, see for example, the Board's decision in the *CALPA* case (supra), the *Heating and Power* case, (supra) and the *Jessome* case (Board file 150-2-1).

Counsel for the Intervenor also noted that in the original certification decision in 1969 respecting the Technical Inspection Group, the Ship Inspectors sought to be recognized as a separate bargaining unit, and this was rejected by the Board (Board files 143-2-32 and 60). In 1971 the Ship Inspectors again sought to have their own separate bargaining unit; the same arguments which were put forward here, i.e. that the group was special, was rejected then; there is no reason to accept it now (Board file 143-2-136).

Counsel argued that the main concern of the Marine Inspectors and Investigators is in respect of classification issues; there is no evidence that the Alliance failed to support their classification grievances; the Alliance could have brought this application itself, they did not do so because the case does not meet the criterion of subsection 33(2); furthermore the Alliance believes that the TI's are better off acting together.

In rebuttal counsel for the Applicant maintained that Inspectors are distinctive because they deal with human issues. He noted that from 1979 to 1988 this problem was known to the bargaining agent yet, it remained unaddressed. Mr. Chaplin also argued that there is now a history which did not exist in 1969, or 1971, in particular the growing salary disparity which goes back to the mid-1980's.

Reasons for Decision

The Board's authority to determine the appropriate bargaining unit is found in section 33 of the Act, which provides as follows:

> *Determination of Appropriate Bargaining Units*
>
> *Determination of unit*
>
> ***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.*
>
> *Unit coextensive with class*
>
> *(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.*

Counsel for the Applicant has frankly acknowledged that it is required to discharge a significant burden in view of the fact that the applicant is proposing the fragmentation of an existing bargaining unit. In fact, in a number of cases dating back to the Board's earliest days, the Board has expressed its apprehensions about fragmenting existing bargaining units. For example, the Board made the following observations in the *Heating, Power and Stationary Plant Operation Case No. 2*, (1970), PSSR Reports K 607:

> *One of the major concerns of the Board in carrying out its responsibilities under the Public Service Staff Relations Act to determine the appropriateness of bargaining units under s. 32 is the proper functioning of the bargaining system in the Public Service. The sheer size of the Service, the dispersal of employees throughout the country and at various points in the world, the complexity of the employment relationship and the multiplicity of classifications into which the employees are divided makes undue fragmentation impractical and probably unworkable. It should be borne in mind that, in some respects, the employer in the Public Service is unlike other employers. There are probably some employers that may be under obligation to bargain for employees in a greater number of bargaining units than the number that has already been established in the Public Service of Canada. Nevertheless, lack of uniformity in conditions of employment among various sections of the Public Service is more difficult to justify than it is in the private sector. It is our considered opinion that the inclination of the Board should be towards service-wide units. That is not to say that there are no circumstances in which a service-wide occupational group should not be split into two or more segments. However, there is a heavy burden resting on an applicant that seeks severance.*

The Board's jurisprudence is replete with similar expressions of concern (see the Board's decisions cited by the parties, *supra*). It should be noted, however, the Board's predilection against the fragmentation of bargaining units is primarily a consequence of the legislative framework within which the Board operates, and in particular, the language of subsection 33(2). It is quite apparent from reading that provision that there is a strong, albeit rebuttable, presumption in favour of bargaining units which are, in the words of this subsection, "*coextensive with the classes, groups or subgroups"* set out in the employer's plan of classification. In fact, if one compares the language of the current provision (which was part of the 1993 amendments to the Act) with its predecessor (subsection 32(2)), it is apparent that Parliament intended to strengthen the predisposition towards bargaining units encompassing an entire occupational group or subgroup, as opposed to a smaller bargaining unit configuration. Thus, former subsection 32(2) stated:

> *The Board <u>shall take into account</u>, having regard to the proper functioning of this Act, the duties and classification of the employees in the proposed bargaining unit in relation to any plan of classification ...*
>
> (underlining added)

While subsection 33(2) currently provides that:

> *... The Board shall have regard to the plan of classification ... and shall establish bargaining units coextensive with the classes ... unless any such bargaining unit would not permit satisfactory representation ...*
>
> (underlining added)

In view of this statutory direction, it is clear that there is a heavy onus on the part of the Applicant to demonstrate that the current bargaining unit, which is coextensive with the Technical Inspection group definition, and has been in place for nearly thirty years, does not permit satisfactory representation in respect of those employees who are members of the Applicant. In my view, notwithstanding the sincerely held beliefs of the officers and members of the Applicant organization to the contrary, the evidence does not support the conclusion that the current bargaining unit would not allow satisfactory representation of these employees.

The reality of collective bargaining in the Federal Public Service is that a number of significant matters respecting terms and conditions of employment, for example, the classification function, are reserved to the employer. Thus, section 7 of the Act states that:

> ***7.*** *Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.*

I believe that it is this fact, and not any reluctance to promote the interests of the Marine Inspectors and Investigators, which caused Ms. Millar of the PSAC to express her reservations about pursuing the Marine Inspectors' classification grievances (Exhibit A-41). Another historical reality which undoubtedly had a significant impact on the issue of compensation for Marine Inspectors and Investigators (and for many others as well) is the collective bargaining and compensation freeze from 1991 until very recently. Clearly, neither the PSAC, or any other bargaining agent had the means to address anomalies in compensation in the face of the *Compensation Restraint Act* of 1991 and its successor. As a result of this legislation, it is doubtful whether any bargaining agent representing a Public Service bargaining unit of any configuration or

size, could have had much impact during this period in addressing the compensation concerns of the Marine Inspectors and Investigators.

I have carefully reviewed the voluminous evidence put forward by the Applicant; however, I have found very little which demonstrates a failure, or even a reluctance, on the part of the PSAC, to address the concerns of the Marine Inspectors and Investigators. In fact it is quite clear that officers of the Alliance, and especially the representatives of U.C.T.E. had considerable sympathy with the objectives of the Marine employees, as did departmental management, even at the highest echelons; it would appear that these union representatives attempted to pursue these objectives in numerous ways, and with various levels of management. Furthermore, the reasons for these employees' lack of success in obtaining what they view as their proper level of compensation, does not lie with the configuration of their current bargaining unit. The evidence simply does not support such a conclusion, and certainly does not meet the onus pursuant to subsection 33(2) of the Act; it would constitute only conjecture and speculation on the part of the Board to find that a bargaining unit as proposed by the applicant would have achieved the same levels of compensation as, for example, the Ship's Officers or the Aircraft Operations employees. Rather, the evidence suggests that they were adversely affected by a variety of circumstances - the compensation restraint legislation, the statutory restrictions on collective bargaining in the PSSRA, the devolution of departmental functions, to name a few - none of which, however, related to the nature of bargaining unit to which they belonged.

Accordingly, this application must be dismissed.

P. Chodos,
Vice-Chairperson.

OTTAWA, June 8, 1998.