Date: 20190411

File: 585-02-39309

Citation: 2019 FPSLREB 41

Federal Public Sector Labour Relations Act

Before the Chairperson of the Federal Public Sector Labour Relations and Employment Board

IN THE MATTER OF
THE *FEDERAL PUBLIC SECTOR LABOUR RELATIONS ACT*
and a dispute affecting
the Canadian Federal Pilots Association, as bargaining agent,
and the Treasury Board, as employer,
in respect of the Aircraft Operations bargaining unit

Indexed as

Canadian Federal Pilots Association v. Treasury Board

TERMS OF REFERENCE OF THE ARBITRATION BOARD

To: Ian Mackenzie, chairperson of the arbitration board;
Phillip Hunt and Anthony Boettger, arbitration board members

Before: Catherine Ebbs, Chairperson of the Federal Public Sector Labour Relations and Employment Board

For the Bargaining Agent: Jennifer Duff, counsel

For the Employer: Daniel Cyr, Treasury Board

Issued on the basis of written submissions,
dated October 30, November 9, 21, and 30, and December 12, 2018,
and January 4, 2019.

Requests before the Chairperson

[1] On October 30, 2018, the Canadian Federal Pilots Association (CFPA or "the bargaining agent") requested arbitration with respect to the Aircraft Operations (AO) group bargaining unit. The AO group is composed of all the employees of the Treasury Board of Canada ("the employer") in the AO group as described in the *Canada Gazette, Part 1*, of March 27, 1999, and in the certificate issued by the former Public Service Staff Relations Board on January 18, 2001.

[2] The CFPA provided a list of the terms and conditions of employment that it wished to refer to arbitration. They are attached as Schedule 1.

[3] On November 9, 2018, the employer provided its proposals with respect to the terms and conditions of employment specified in the CFPA's request for arbitration along with the employer's list of additional terms and conditions of employment that it wished to refer to arbitration. The employer's proposals and list of additional terms and conditions are attached as Schedule 2.

[4] The employer also raised a number of jurisdictional objections.

[5] On November 21, 2018, the CFPA provided its proposals with respect to the employer's list of additional terms and conditions. Its proposals are attached as Schedule 3.

[6] On November 30, 2018, the CFPA filed a response to the employer's jurisdictional objections. It is attached as Schedule 4.

[7] On the same day, the employer emailed the Federal Public Sector Labour Relations and Employment Board ("the Board"), requesting an opportunity to present detailed submissions with respect to its objections.

[8] On December 5, 2018, the Board directed the employer to provide details about its jurisdictional objections. The CFPA was directed to reply to those submissions after that.

[9] The employer provided the particulars of its objections on December 12, 2018, which are attached as Schedule 5.

[10] On January 4, 2019, the CFPA responded to the employer's particulars. The CFPA's response is attached as Schedule 6. In the response, at paragraph 10, it advised

that in an effort to narrow the outstanding issues between the parties, it would no longer pursue its proposals at clauses 10.02, 16.05, 16.06, 20.XX (the second 20.XX of Schedule 1), and 24.12 and at article 29. Therefore, those proposals are considered withdrawn.

[11] On January 22, 2019, I advised the parties that I would rule on the jurisdictional objections on the basis of the written submissions.

Jurisdictional objections

[12] The employer objected to a number of proposals on the basis that they were not referable to an arbitration board under several of the provisions set out in ss. 7 and 150 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; *FPSLRA*), which read as follows:

> ***7*** *Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.*
>
> …
>
> ***150 (1)*** *An arbitral award that applies to a bargaining unit — other than a bargaining unit determined under section 238.14 — must not, directly or indirectly, alter or eliminate any existing term or condition of employment, or establish any new term or condition of employment, if*
>
> > ***(a)*** *doing so would require the enactment or amendment of any legislation by Parliament, except for the purpose of appropriating money required for the implementation of the term or condition;*
> >
> > ***(b)*** *the term or condition is one that has been or may be established under the* Public Service Employment Act, *the* Public Service Superannuation Act *or the* Government Employees Compensation Act*;*
> >
> > ***(c)*** *the term or condition relates to standards, procedures or processes governing the appointment, appraisal, promotion, deployment, rejection on probation or lay-off of employees;*
> >
> > ***(d)*** *in the case of a separate agency, the term or condition relates to termination of employment, other than*

> *termination of employment for a breach of discipline or misconduct; or*
>
> ***(e)** doing so would affect the organization of the public service or the assignment of duties to, and the classification of, positions and persons employed in the public service.*
>
> ***(2)** The arbitral award may not deal with a term or condition of employment that was not the subject of negotiation between the parties during the period before arbitration was requested.*

[13] In the reasons detailed in these terms of reference, I analyze each jurisdictional objection in numerical order, with the exception of the proposed article 47 and Appendix C, which I address at the end. The employer made submissions about its objections to the proposals that the CFPA has since withdrawn. Since they have been withdrawn, I will deal only with the objections about the proposals that remain outstanding. The proposals appear in either boldface or strikeout, as applicable.

Proposed new clauses 10.03 and 10.04

[14] The proposed new clauses read as follows:

> ***10.03 Employees shall have the right to conduct themselves in a manner consistent with the Values and Ethics Code for the Public Sector, without fear of discipline or reprisal.***
>
> ***10.04 Employees shall have the right to carry out their duties according to the legislation, policies and directives that apply, and in a non-partisan and impartial manner.***

[15] The employer objects, arguing that they fall under the exceptions set out in ss. 7 and 150(1)(c) and (e). In particular, it submits that employees would view these clauses as limiting its ability to appraise them (s. 150(1)(c)) if in their view, they conducted themselves and carried out their duties in a manner consistent with their interpretation of the *Values and Ethics Code for the Public Sector* ("the Code") and applicable legislation, regulations, policies and directives.

[16] The employer also contends that these proposals are "clearly" incompatible with its prerogative under ss. 150(1)(e) and 7 to assign duties to persons employed in the public service. It predicts that employees and the bargaining agent would file grievances to challenge, question, or refuse work assignments that in their view were inconsistent with the Code, legislation, and other listed sources. The employer points out that s. 150(1)(e) refers to the assignment of duties **directly or indirectly** and

argues that this means that the provision should be interpreted broadly (see *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20 at para. 28; "*AJC*").

[17] I find the employer's submissions highly speculative as to how employees and their bargaining agent **might** interpret these provisions as limiting its ability to appraise them and to assign them duties. As the CFPA correctly points out, when viewed together, these proposals do nothing more than protect existing pilots' ethical, legal, and professional obligations. The *AJC* decision dealt with a provision that was similarly worded after a specific reference preventing the employer from "negatively evaluating" an employee who had raised professional code of conduct concerns was removed. In that case, the modified proposal was accepted and included in the terms of reference.

[18] For these reasons, I find that the proposed new clauses 10.03 and 10.04 can be included in the terms of reference.

Proposed new clause 10.05

[19] The proposed new clause reads as follows:

> ***10.05 Employees shall not be required to perform work that is not in full compliance with the requirements of Canadian Aviation Regulations that would apply to a commercial air operator.***

[20] The employer contends that this proposal is "clearly" incompatible with the "untouchable prerogative" of government under s. 7 to assign duties to employees, as the former Public Service Labour Relations Board noted in *Federal Government Dockyard Trades and Labour Council East v. Treasury Board*, 2005 PSLRB 42. The clause proposes to curtail the duties or work that the employer can assign and subjects assigning duties to regulations applicable to commercial operators.

[21] The CFPA maintains that this provision does not restrict the employer's ability to organize the workforce or assign duties. It argues that the employer has failed to demonstrate how the proposed provisions would affect its authority to assign duties in any way. The employer appears to be reserving to itself the right to assign duties to its employees that may violate regulations with impunity.

[22] I do not agree with the CFPA's position. In my view, it is clear that the proposed clause 10.05 would open the door to employees and the bargaining agent to refuse work that is not, **in their view**, compliant with regulatory requirements. As the

employer correctly argues, s. 150(1)(e) refers to the assignment of duties **directly or indirectly**, which means that it should be interpreted broadly (see *AJC*, at para. 28). Any provision that would have the effect of enabling employees to decide on their own what work to perform, as in proposed clause 10.05, would indirectly, if not directly, affect the employer's authority to assign duties to its employees, as contemplated in s. 150(1)(e).

[23] Accordingly, this proposal is not included in the terms of reference.

Proposed new clause 19.03

[24] The proposed new clause reads as follows:

> ***19.03*** *For the purpose of clauses 19.01 and 19.02,* ***the manager shall provide written authorization for overtime work to the employee prior to assigning the work to the employee and,*** *calculations for overtime shall be based on each completed* ~~*one half (1/2) hour*~~ ***period of fifteen (15) minutes****.*

[25] The employer submits that this provision would encroach on its prerogative under ss. 7 and 150(1)(e) to assign duties to its employees. It argues that by forcing management to provide written authorization for overtime work, its ability to assign work and effectively manage its workforce is constrained. Furthermore, in certain circumstances, it may prove difficult if not impossible for management to provide prior written authorization of overtime. The proposed provision would impinge upon management's right to assign duties and conceivably, employees would use it to challenge and potentially refuse to comply with overtime work assignments.

[26] The CFPA submits that nothing in the provision would usurp or otherwise constrain management's ability to assign work or manage its workforce. It would only result in an administrative obligation to provide documentation of its decision to assign overtime work. To address the employer's concern about its ability to provide written authorization before assigning the work, the CFPA is content to add a sentence to the proposed clause recognizing that when it is not possible to provide the documentation in advance, it shall be provided at the earliest available opportunity.

[27] The CFPA also notes that in its submissions, the employer did not advance any objection about the calculation of overtime pay.

[28] I find that the portion of the proposed new clause 19.03 with respect to prior

written authorization for overtime work would restrict and certainly impact the employer's prerogative to assign duties to its employees. As such, this portion of the proposed clause would have the effect contemplated in s. 150(1)(e) and therefore cannot be included in the terms of reference.

[29] The remainder of the proposed new clause is not subject to this objection, and the employer did not raise any other objection to it.

[30] Accordingly, the phrase "the manager shall provide written authorization for overtime work to the employee before assigning the work to the employee and," is deleted from the proposal, which will now read as follows and be included in the terms of reference:

> ***19.03*** *For the purpose of clauses 19.01 and 19.02, calculations for overtime shall be based on each completed* ~~*one half (1/2) hour*~~ ***period of fifteen (15) minutes.***

Proposed new clause 49.07

[31] The proposed new clause reads as follows:

> *49.07 Any document, relating to disciplinary action,* ***including letters of expectation,*** *which may have been placed on the personnel file of an employee, shall be destroyed after two (2) years have elapsed since the infraction took place; provided that no further occurrence of disciplinary action has been recorded during this period.*

[32] The employer submits that this proposed new clause should be excluded from the terms of reference as it "primarily or substantially relates to" appraisals, which is contrary to s. 150(1)(c) (see *AJC*, at paras. 28 and 45). It maintains that letters of expectation are not disciplinary actions as contemplated under article 49 of the collective agreement but are a tool it generally uses on an as-required basis to set performance expectations against which employees are subsequently appraised. Consequently, such letters form part of the process governing the appraisal of employees.

[33] The CFPA disagrees. It submits that letters of expectation often have a disciplinary tone, even when they suggest that their intention is not disciplinary. As the employer implied in its submission, the purpose is generally to correct poor performance or undesirable behaviour, which assumes that discipline is needed to achieve such correction. Examples are often provided in letters of expectation to

describe culpable employee conduct, such as a specific incident of poor performance or an infraction of a rule, policy, or standard. In addition, consequences are normally attached to any future failure to meet the prescribed standards.

[34] The CFPA maintains that s. 150(1) does not oust an arbitration board's jurisdiction to hear and decide collective bargaining proposals relating to discipline. Since employers often use letters of expectation as part of the progressive discipline process, they are properly subject to the grievance procedure and ought to be expunged from an employee's personnel file after a two-year period.

[35] I am not persuaded by the CFPA's argument. Letters of expectation are plainly a means by which the employer appraises an employee against established standards. While employees who receive letters of expectation are likely having performance or behaviour issues, it is in no way certain or even likely that these issues will require disciplinary action. In other words, it cannot be assumed that discipline is a necessary component to correcting performance or behavioural issues.

[36] Therefore, I am satisfied that letters of expectation, as referred to in the proposal, relate essentially to the standards, procedures, and process governing the appraisal of employees and as such cannot be included in the terms of reference, pursuant to s. 150(1)(c).

[37] Accordingly, this proposal is not included in the terms of reference.

Proposed new article 47 and Appendix C

[38] For the sake of brevity, I will not reproduce the entire text of these proposed provisions. It can be viewed in the CFPA's proposals, which are attached to these terms of reference as Schedule 3.

[39] The employer has summarized these provisions in its submissions, which I have paraphrased as follows. The proposals define the requirements for it to assign a certain amount of duty time to employees aboard different types of aircraft and flight simulators, as well as training, as part of Professional Aviation Currency (PAC) programs aimed at allowing employees to maintain their PAC (pilot licence). The CFPA proposes to expand article 47 and to add a new Appendix C to include the process and contents of the proposed new PAC programs, including the details of how pilot currency for civil aviation inspectors and emergency test pilots would be maintained.

[40] The employer submits that these proposals would be contrary to ss. 150(1)(e) and 7 and that they would encroach on its managerial prerogatives. It argues that the CFPA's proposal at clause 47.17 is also incompatible with s. 150(1)(c).

[41] The employer maintains that these proposed provisions would considerably affect its discretion to assign certain flight duties to employees, which would infringe upon its right to assign duties to persons employed in the public service, contrary to ss. 150(1)(e) and 7.

[42] For example, the proposed clause 47.04 would require the employer to "provide adequate resources and duty time to enable employees to complete their PAC program", which in its view would affect the assignment of duties to persons employed in the public service. The proposal further goes into criteria for the assignment of PAC programs (clause 47.05), a requirement that PAC programs be approved by the employer and the bargaining agent (clause 47.06), the minimum components of a PAC program (clause 47.08), and a requirement that flight duties be assigned for a minimum duration (60 hours per year, per employee) and in a certain manner (in an aircraft or a simulator) (clauses 47.10 to 47.13).

[43] The CFPA's proposed clause 47.15 would also impose requirements on the employer to assign a minimum number of employees (five per aircraft) to specific duties (flight operation standby). The proposed clause 47.16 would require the employer to assign a different PAC program to certain employees who do not meet the required medical fitness requirements. Finally, the proposed clause 47.19 would further extend all the provisions proposed at article 47 to reclassified employees who are no longer members of the AO bargaining unit or represented by the CFPA so that they can continue to qualify for eventual staffing processes in the AO group.

[44] The employer submits that taken as a whole, the CFPA's proposal for article 47, as complemented by the proposal for Appendix C, which describes the details of the CFPA's proposed PAC programs, would require the employer to assign certain duties in a certain manner and for a certain duration to persons employed in the public service. It also notes that providing flight duty time to certain employees, either in an aircraft or a simulator, would involve assigning duties to other employees necessary for the operation of departmental aircraft and simulators.

[45] In addition, the employer contends that employees and the CFPA could be expected to rely on those proposed collective agreement provisions to require that

certain duties be assigned to certain employees and to challenge, question, or refuse work assignments. Employees and the bargaining agent could also file grievances pertaining to the assignment of duties by the employer and could even pursue grievance adjudication of such grievances before the Board, pursuant to Part II of the *FPSLRA*.

[46] In light of that, the employer submits that the CFPA's proposal clearly interferes with its authority to determine the organization of the federal public administration and to assign duties to positions, an authority reserved to it by s. 7. Including such a proposal in an arbitral award would be contrary to s. 150(1)(e).

[47] The employer also states that the CFPA's proposed clause 47.17 deals with eventual employee shortcomings and relates to standards, procedures, or processes governing appraising employees. The clause provides that if employees are unsuccessful in a training program, they shall be referred to a joint committee composed of employer and CFPA representatives, which shall examine the circumstances of each case to achieve consensus and to determine an appropriate plan of action. The employer submits that this would affect its ability to reject an employee during probation by requiring consensus between the employer and the bargaining agent on an appropriate plan of action, all of which is incompatible with s. 150(1)(c).

[48] The CFPA disagrees with the employer and maintains that the proposed provisions are compatible with ss. 7 and 150(1)(e). They place no restriction on the employer's ability to organize the workforce. Its prerogatives in these respects remain intact. The CFPA submits that the employer has failed to demonstrate how the proposals impinge on its exclusive powers to organize the public service or to conduct appointment, appraisal, promotion, and classification processes.

[49] The CFPA's members are all experienced pilots, who must maintain recency and currency to perform their employment obligations and to meet the qualification standards for the AO group, as established by the employer.

[50] Both parties agree that recency and currency are essential for pilots to be able to perform their employment duties, as reflected in clause 47.01 of the current collective agreement. As a result, the employer must assign all Transport Canada and Transportation Safety Board employees to a PAC program (clause 47.02). Such a program is a pre-existing, jointly administered management-bargaining agent policy that ensures that employees maintain their professional currency and professional

knowledge and that they earn an extra-duty allowance provided for under the terms of the current collective agreement.

[51] The CFPA states that it was mandated to bring the important elements of the PAC program into the collective agreement, to protect its members' qualifications and to ensure that they are always legally qualified to carry out their duties on behalf of the employer. The proposed article 47 and Appendix C relate to protecting the pilots' existing professional obligations.

[52] In addition, the proposal relates to existing terms and conditions of employment for employees in the bargaining unit, as has been held in *Canadian Federal Pilots Association v. Department of Transport*, 2018 FPSLREB 91, and as referred to in article 47 of the current collective agreement. This article already provides for a PAC program to be afforded to every employee, in accordance with a program established between the CFPA and the employer. In particular, clause 47.04 requires the employer to assign each employee to a PAC program, in accordance with the criteria and procedures established by the employer and the bargaining agent. Clause 47.05 confirms that the parties must mutually agree to all changes to the program.

[53] The CFPA takes issue with the employer's submissions that suggest that provisions relating to training and professional qualifications are outside an arbitration board's jurisdiction. On the contrary, collective agreement provisions relating to maintaining professional qualifications can and have been the subject of arbitral awards. By way of example, the bulk of the Association of Justice Counsel's proposal that was found appropriate for referral to an arbitration board in the *AJC* case related to maintaining professional expertise. Article 20 of its collective agreement with the employer, which was the subject of the ensuing arbitral award dated October 23, 2009, also provides for maintaining professional expertise.

[54] The CFPA claims that the employer is expressing a desire to limit or remove the right of employees and bargaining agents to file grievances about the assignment of duties or the exercise of what it believes to be management rights. However, the CFPA submits that pursuant to s. 208 of the *FPSLRA*, an employee is already entitled to grieve any employer direction that deals with terms and conditions of employment.

[55] Moreover, the CFPA maintains that the Treasury Board's suggestion that the proposal would lead to the refusal of work assignments is equally without merit. An

employee's recourse, in the event that he or she disagrees with a direction, is to obey now and grieve later, with the only exceptions being when an employee has received an unlawful order or perceives a danger to health or safety; see *Cavanagh v. Canada Revenue Agency*, 2015 PSLREB 7 at para. 240. Unless a manager's direction is unlawful or poses a danger to health or safety, an employee who refuses a work assignment would likely be disciplined for insubordination.

[56] Finally, the CFPA submits that should the Board find that any part of the proposed article 47 and Appendix C is not within an arbitration board's jurisdiction, it ought to sever the parts in question and refer the remaining portions to the arbitration board; see *AJC*, at para. 31. Alternatively, given the importance of the substantive issue of the PAC program and the ongoing dispute between the parties, the CFPA submits that if I have any jurisdictional concerns with the proposed article 47 and Appendix C provisions as written, I could nevertheless refer the proposed language to the arbitration board with clear terms of reference, and the arbitration board could choose to accept it as written or substitute different language if it deems it appropriate.

[57] I find that the employer has demonstrated that the proposed article 47 and Appendix C would be contrary to ss. 150(1)(e) and 7. Their provisions clearly affect the assignment of duties to persons employed in the public service. Both parties agree that it is essential for pilots to maintain their recency and currency, as is already evident from the provisions of article 47 in the current collective agreement. However, the scope of the proposed article goes significantly beyond merely confirming that employees are entitled to maintain and enhance their professional accreditations.

[58] For instance, clauses 47.05 and 47.09 to 47.16 set out detailed criteria about who will be assigned a PAC program and under what circumstances that assignment will be made. This clearly impacts the employer's prerogative to assign duties to the persons in its employ, within the meaning of ss. 7 and 150(1)(e). The CFPA states that the Association of Justice Counsel collective agreement also includes provisions for maintaining professional expertise, but it is not evident whether that agreement contains the same level of detail with respect to the conditions for the assignment of employees to the training programs that the proposed clauses do in the present case.

[59] Therefore, I am persuaded that the proposed article 47 and Appendix C would violate ss. 7 and 150(1)(e). Given this finding, I need not address the employer's additional argument with respect to s. 150(1)(c).

[60] The CFPA suggested that I consider severing those portions of the proposed provisions that cannot form part of the terms of reference and that I refer the remainder to the arbitration board. However, I find that the proposals are far too intertwined and integrated to be severed. Each clause of article 47 flows or relates to another, and separating one or a few of them would not be effective and may make the resulting provision illogical overall.

[61] As for the suggestion that I refer the entire proposal to the arbitration board and let it determine what is appropriate, doing so would go against the provision at s. 144(1) of the *FPSLRA*, which stipulates that it is the Chairperson's responsibility to refer the matters in dispute to the arbitration board (see *Canada (Attorney General) v. Professional Institute of the Public Service of Canada*, 2010 FC 578 at para. 10).

[62] For these reasons, I find that proposed new article 47 and Appendix C cannot be included in the terms of reference.

Conclusion

[63] Accordingly, pursuant to s. 144, the matters in dispute on which the arbitration board shall render an arbitral award in this dispute are those set out in the attached Schedules 1, 2, and 3, with the exception of the withdrawn proposals mentioned at paragraph 10 of Schedule 6, and subject to the deletions and amendments stated in my findings in these terms of reference.

[64] Should any additional jurisdictional question arise during the course of the hearing as to including a matter in these terms of reference, it must be submitted to the Chairperson of the Board because, according to the provisions of s. 144(1), the Chairperson is the only person authorized to make such a determination.

April 11, 2019.

Catherine Ebbs,
Chairperson of the
Federal Public Sector Labour
Relations and Employment Board