Date: 20220425

Files: 566-02-13891 and 569-02-39809

Citation: 2022 FPSLREB 32

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

MANUEL CABELGUEN AND PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Grievor and Bargaining Agent

and

TREASURY BOARD (Correctional Service of Canada)

Employer

Indexed as
Cabelguen v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance and a policy grievance referred to adjudication

Before: Renaud Paquet, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor and Bargaining Agent: Valérie Charrette, Professional Institute of the Public Service of Canada

For the Employer: Noémie Fillion, counsel

Decided on the basis of the parties' written submissions, filed January 21 and February 11 and 16, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Grievances before the Board

[1] Manuel Cabelguen ("the grievor") filed an individual grievance on January 21, 2014, and the Professional Institute of the Public Service of Canada ("the bargaining agent") filed a policy grievance on April 23, 2014. Both grievances involve the Correctional Service of Canada's ("the employer") decision on applying the National Joint Council's (NJC) *Travel Directive* ("the Travel Directive").

[2] By the parties' mutual agreement, the Federal Public Sector Labour Relations and Employment Board ("the Board") decided to deal with the grievances together, based on their written submissions, given that they seemed to have no dispute about the facts that gave rise to the grievances. The policy grievance is about the employer's interpretation of the collective agreement, while the grievor's grievance has to do with the application of that interpretation to his particular situation. The applicable collective agreement was between the Treasury Board and the Professional Institute of the Public Service of Canada for the Health Services group that expired in 2011 ("the collective agreement").

[3] According to the grievor and the bargaining agent, the employer circumvented the application of the Travel Directive in the context of a notice of interest to fill different positions.

[4] As for the policy grievance, the notice of interest dated March 18, 2014, involved all the employer's employees at the NU-HOS-03 group and level in the Quebec Region and included the following statement:

> [Translation]
>
> …
>
> *Employees applying under this notice agree to work on temporary assignments that they voluntarily and actively sought to obtain. Thus, the successful candidate will not be considered on travel status because the workplace change will not be at the employer's request but rather at that individual's request. Consequently, no travel or meal expenses will be granted.*
>
> …

[5] The policy grievance is about this notice of interest and reads as follows: "[translation] The employer is circumventing the application of the NJC's Travel

Directive in the context of a notice of interest to fill NU-HOS-03 IMHI positions". The corrective action requested is to "[translation] consider employees to be on government travel and to apply the Travel Directive".

[6] For the individual grievance, the October 16, 2013, notice of interest involved all the employer's employees at the PS-03 group and level in the Quebec Region holding a "[translation] program psychologist" position. It included the following statement:

> [Translation]
>
> …
>
> *The Quebec East-West District (QEWD) seeks a psychologist to fill two half-time positions (Laurentides office in Saint-Jérôme and Lanaudière office in Lachenaie) for an assignment of at least 4 months, possibly 12 months, to be filled as soon as possible. It is important to note that for this assignment, the psychologist will not be considered on travel status, and consequently, no travel/meal expenses will be granted ….*
>
> …

[7] The employer considered the grievor's candidacy for the two simultaneous half-time one-year assignments. Both assignment agreements had this statement:

> [Translation]
>
> …
>
> *Travel and meal allowance: No travel allowance (km and/or meals) will be paid. The employee agrees to work on a temporary assignment that he voluntarily and actively obtained, and he will not be considered on travel status because the workplace change is not at the employer's request but rather at the employee's request.*
>
> …

[8] In his grievance, the grievor asked the employer to apply the Travel Directive's provisions and to reimburse his travel and meal expenses. It reads as follows:

> [Translation]
>
> *I grieve that the employer asked me to sign a secondment agreement that stated that I waived my right to claim expenses arising from the NJC's Travel Directive (travel and meal allowances). By doing so, the employer circumvented the application of the Travel Directive and thus contravened the collective agreement.*
>
> *I replied to the notice of interest for two half-time psychologist positions (Lanaudière-PO and Laferrière-CCC) in response to the*

> *employer's operational need. Thus, it is false to claim that the assignments are at the employee's request.*

[9] Before the two half-time assignments, the grievor was a program psychologist at La Macaza Institution. At that time, he received commuting assistance under the NJC's *Commuting Assistance Directive* because his regular workplace was in La Macaza, which is a community 190 km northwest of Montréal. Due to its location and the village's size, all employees working at that institution receive commuting assistance. The grievor's home is in Ste-Agathe-des-Monts, which is located 46 km from the Saint-Jérôme office and 90 km from the Lachenaie office.

[10] According to the grievor and the bargaining agent, the employer contravened the collective agreement by making it such that the assignments in question were not paid the travel allowances set out in the Travel Directive. In contrast with their position, the employer's view is that it was entitled to act and to take the position that it did and that it did not in any way violate the provisions of the Travel Directive or the collective agreement.

[11] It should be noted that on November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continued under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[12] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *PSLRA* to, respectively, the Board, the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*.

II. Summary of the grievor's and the bargaining agent's arguments

[13] According to the bargaining agent, since the grievances were filed, the same situation occurred with psychologist and community-mental-health nurse positions as well as with pharmacist and pharmacy-technician positions. The notices of interest for all those positions had this statement: "[translation] … employees applying under this notice of interest agree to work at temporary assignments that they voluntarily and actively sought to obtain." However, according to the bargaining agent, the regional healthcare director at the time reportedly applied the decision on the policy grievance to all other assignment agreements and thus modified the protocols.

[14] According to the bargaining agent, in September 2014, the employer, in its Quebec Region, would have introduced a series of local and regional measures aimed at reducing the deficit. The first measure read as follows: "[translation] Terminate travel expenses for acting assignments and appointments." According to the bargaining agent, the employer had already begun to post all its notices of interest in the Health Sector, including the clause stating that "[translation] … employees applying under this notice of interest agree to work on temporary assignments that they voluntarily and actively sought to obtain …". Thus, the employer decided that the successful candidate would not be considered on travel status because the workplace change would occur at the employee's request. As a result, the employer decided that no travel or meal expenses would be granted.

[15] The Travel Directive is an integral part of the collective agreement. It is unacceptable for a department to unilaterally decide to circumvent it as it pleases.

[16] The Travel Directive defines regular or permanent workplace as "… the single permanent location determined by the employer at or from which an employee ordinarily performs the work of his or her position or reports to." The same directive defines temporary workplace as "… the single location within the headquarters area to which an employee is temporarily asked to report or to perform the work of his or her position." It is clear that the notices of interest at issue in this case were about temporary assignments with maximum durations, which also implies that the employees at issue were to resume their previous duties when the assignments ended. Therefore, they were entitled to the travel allowances payable under the Travel Directive.

[17] Employees on temporary assignment are necessarily on "government travel" within the meaning of the Travel Directive, which includes "all travel authorized by the employer". Therefore, the employer must agree to pay the allowances set out in the Travel Directive. It is false to claim as the employer did that the workplace changes occurred at employees' requests, even though they applied for the assignments. In fact, the employer asked them to temporarily change their workplaces to elsewhere in the organization.

[18] While the employer does have some discretion to determine whether an employee must travel, when it agrees to assign an employee outside his or her headquarters area, it cannot cancel the application of the Travel Directive's provisions.

[19] The NJC's website contains a document entitled, *Frequently Asked Questions - Travel Directive (2017)* ("the FAQ") that states this:

> …
>
> … ***Workplace change*** *- If an employee is assigned to a different position within the headquarters area, is this deemed a workplace change?*
>
> *Section 1.9 covers those situations where an employee is asked to report to a temporary location to perform his/her regular duties (because the regular workplace is unavailable, for instance) and applies to Module 1 only ("within the headquarters area"). It doesn't involve situations where an employee is asked to attend a meeting or participate in a training session nor does it refer to situations resulting from a staffing action (new assignment, secondment, acting). Meetings or training within the headquarters area can involve travel and authorized reasonable expenses incurred should be reimbursed in accordance with the provisions outlined in Module 1.*
>
> …

[20] It is clear to the bargaining agent that the employer did not intend to permanently fill the positions referred to in the notices of interest and that the assignments were temporary. Therefore, the Travel Directive's provisions applied.

[21] The bargaining agent and the grievor referred me to the following decisions to distinguish or support their position: *Hamilton v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 91; *Barran v. Treasury Board (Agriculture Canada)*, [1987] C.P.S.S.R.B. No. 262 (QL); and *Lannigan v. Treasury Board (Correctional Service of Canada)*, 2012 PSLRB 31.

[22] Note that from the start, the bargaining agent acknowledged that if I allowed the grievor's grievance, my order would apply no earlier than 25 days before it filed its grievance.

III. Summary of the employer's arguments

[23] According to the employer, it applied the Travel Directive appropriately and reasonably and respected the collective agreement. It exercised its right to authorize government travel.

[24] The Travel Directive and the collective agreement grant the employer the discretion to determine whether travel is required. Therefore, the employer can unilaterally determine whether travel is authorized, which occurred when it issued notices of interest stating that the successful candidates would not be considered on travel status. By agreeing to the new assignment, the employee agreed that the assignment's location would become his or her new regular workplace and consequently that he or she would not be on government travel. In addition, the assignment agreements that the grievor signed clearly stated that no travel allowance would be paid.

[25] The burden of proof was with the employee and the bargaining agent, who had to prove that the employer violated the collective agreement. But they did not discharge that burden.

[26] The employer recalled the main principles that must guide the Board in collective agreement interpretation, which are that it cannot amend the agreement's clear terms and conditions, it must limit itself to the parties' intent, the collective agreement's provisions must be read in its overall context, and a right to a monetary benefit must be clearly established. Based on those principles, when there is no ambiguity, the agreement's terms and conditions must be given effect, even if it may seem unjust.

[27] The Travel Directive states that the employer is solely responsible for authorizing government travel. Therefore, the directive applies only when an employer has authorized travel. This is an exclusive management right. Thus, the employer can unilaterally determine whether travel is authorized. It was clearly stated in the notices of interest that the successful candidates would not be considered on travel status.

[28] There is an important difference between an employee who voluntarily chooses to apply for an assignment and one who is required to travel at the employer's request. On that point, the employer referred me to the Travel Directive, which I will reproduce later in this decision.

[29] A staffing action in the form of a voluntary assignment is not a temporary workplace change within the meaning of the Travel Directive. In this case, the employees were not assigned to their new positions irrespectively of their wills. Instead, they applied and obtained assignments voluntarily, based on agreements that provided that they would not be on government travel. After signing the agreements, the employees' regular workplaces became those of the assignments. In addition, because the employer did not authorize travel status for the assignments, the travel to the new workplaces could not be considered government travel within the meaning of the Travel Directive.

[30] Finally, the loss of the commuting assistance that the grievor received to attend work at La Macaza Institution was not raised during the grievance process. Therefore, the loss could not be raised at adjudication as it would have amounted to changing the grievance.

[31] The employer referred me to the following decisions: *Lannigan*; *Hamilton*; *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112; *Beese v. Treasury Board (Canadian Grain Commission)*, 2012 PSLRB 99; *Campeau v. Treasury Board (Correctional Service of Canada)*, 2019 FPSLREB 120; *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.); and *Canada (National Film Board) v. Coallier*, [1983] F.C.J. No. 813 (C.A.)(QL).

IV. Reasons

[32] The Travel Directive, like other NJC directives, is part of the collective agreement, clause 35.03 of which states this:

> ***35.03*** *The following directives, policies or regulations, as amended from time to time by National Joint Council recommendation and which have been approved by the Treasury Board of Canada, form part of this collective agreement:*
>
> …
>
> *Travel Directive*
>
> …

[33] I will begin with the provisions of the Travel Directive relevant to this case, as follows:

> …
>
> *Purpose and scope*
>
> *The purpose of this directive is to ensure fair treatment of employees required to travel on government business consistent with the principles above. The provisions contained in this directive are mandatory and provide for the reimbursement of reasonable expenses necessarily incurred while travelling on government business and to ensure employees are not out of pocket. These provisions do not constitute income or other compensation that would open the way for personal gain.*
>
> …
>
> ***Workplace*** (lieu de travail)
>
> ***Permanent/Regular*** (permanent/régulier) - *the single permanent location determined by the employer at or from which an employee ordinarily performs the work of his or her position or reports to.*
>
> ***Temporary*** *(*temporaire*) - the single location within the headquarters area to which an employee is temporarily asked to report or to perform the work of his or her position.*
>
> …
>
> ***Government travel*** *(*voyage en service commandé*) - all travel authorized by the employer and is used in reference to the circumstances under which the expenses prescribed in this directive may be paid or reimbursed from public funds.*
>
> ***Headquarters area*** (zone d'affectation) - *for the purposes of this directive, spans an area of 16 kms from the assigned workplace using the most direct, safe and practical road.*
>
> …
>
> *1.1 Authorization*
>
> …
>
> *1.1.2 Government travel shall be authorized in advance in writing to ensure that all travel arrangements are in compliance with the provisions of this directive. In special circumstances, travel shall be post authorized by the employer.*
>
> …
>
> *1.9 Workplace change (applies within the headquarters area only)*
>
> *1.9.1 When an employee is asked to report from a permanent workplace to a temporary workplace for a period of less than 30 consecutive calendar days, the provisions of this directive shall apply.*

> *1.9.2 When an employee is asked to report from a permanent workplace to a temporary workplace, for a period of 30 consecutive calendar days or more, the provisions of this directive shall apply unless the employee is notified, in writing, 30 calendar days in advance of the change in workplace. In situations where the employee is not notified of a change of workplace in writing, the provisions of the directive shall apply for the duration of the workplace change up to a maximum of 60 calendar days.*
>
> *1.9.3 When conditions under workplace change outlined in 1.9.2 are not met, transportation shall be provided to the temporary workplace, or the kilometric rate paid for the distance between the home and the temporary workplace, or between the permanent workplace and the temporary workplace, whichever is less.*
>
> …
>
> [Emphasis in the original]

[34] Whether it is for the grievor's or the bargaining agent's grievance, I will summarize the issue before me as follows:

> [Translation]
>
> *Were the employees selected for the assignments at issue in the October 16, 2013, and March 18, 2014, notices of interest on government travel within the meaning of the Travel Directive during the assignments?*

[35] To answer this question, the government travel definition in the Travel Directive cannot be solely relied on. The directive certainly refers to all travel authorized by the employer, but it specifies that it is used in reference to the circumstances under which the prescribed expenses may be reimbursed. As a definition, it is somewhat tautological and not very illuminating.

[36] The "Purpose and scope" section is aimed at treating employees fairly who are required to travel on government business. The Travel Directive ensures that they incur no losses and obtain no gains from the simple fact of travelling.

[37] The concept of government travel necessarily refers to an employer's travel request. It implies that the employer made an advance authorization unless special circumstances are in place (see section 1.1.2 of the Travel Directive).

[38] According to the employer, no such authorization was ever given. On the contrary, the notices of interest and the assignment agreements explicitly stated that

the employees would not be considered "[translation] on travel status" during the assignments. According to the bargaining agent, as soon as the employer assigned the grievor to the temporary assignments, he was on government travel that the employer authorized.

[39] The Travel Directive provides some clarification on its application in situations in which an employee temporarily works in a place other than his or her regular or permanent workplace. However, whether in the previously cited definitions or in section 1.9 of the Travel Directive, the only reference is to duties or work in the employee's headquarters area, which spans an area of 16 km from the workplace. Nowhere, including in the FAQs (see paragraph 19), is there a reference to work outside the headquarters area, which occurred with respect to the grievor's grievance.

[40] The Board and its predecessors have had to rule on the Travel Directive's application in situations comparable in some respects to those at issue in these grievances.

[41] In *Lannigan*, the Board found that the grievors were on travel status when they had to monitor inmates during hospital stays somewhere other than their usual workplace and outside their headquarters area. The issue in that case was whether they performed inmate escort duties during the hospital monitoring. If so, expenses were reimbursed under an appendix to the collective agreement. Otherwise, the reimbursement was based on the Travel Directive. The issue was not at all the same as the one raised in these grievances; instead, it involved the reimbursement rate that applied, as the Travel Directive's rates were more advantageous. The employer did not dispute its obligation to reimburse the employees.

[42] In *Hamilton*, the grievors volunteered for a temporary three-year assignment to a workplace outside the headquarters area of their regular workplace. They agreed to secondment offers that stated that travel expenses to their new workplace would not be reimbursed. Later, an employer representative suggested that the grievors claim their travel expenses, which was done. Ultimately, the claims were denied, and grievances were filed. The Board ruled in the employer's favour, finding that the grievors had requested a secondment with pre-established terms that they had agreed to and that provided that their travel expenses for commuting to work would not be reimbursed. In addition, the Board found that the secondment workplace became the

grievors' regular workplace during their secondment. Having to travel to work did not constitute government travel. However, I note that the Board also dismissed the grievances on the basis that the grievors' new workplace was closer to their homes than was their permanent workplace. Therefore, they did not have to incur additional expenses to go to work.

[43] In *Campeau*, the grievor was temporarily assigned to workplaces other than his own and outside his initial headquarters area for periods that were not consecutive and that were from 7 weeks for one assignment to 11 months for the other. He filed a grievance after the employer refused to pay him for his travel time to the new workplaces. The Board dismissed the grievance; it considered that the new assignments had become the new places of work and wrote the following at paragraph 42:

> *[42] …The grievor did not work outside his headquarters area while on assignment; he worked in a new headquarters area. He assumed the duties of the positions at those locations during the established times. Government travel means all travel authorized by the employer to a place other than the usual workplace. While the grievor worked at an office other than that of his substantive position, his usual workplace ("assigned workplace" in the definition of "headquarters area") became that office. That is not government travel, which refers to travel, as the title of the Directive quite clearly indicates.…*

[44] I note from the Board's decisions in *Hamilton* and *Campeau* that an employee on a voluntary assignment to a position outside his or her headquarters area changes his or her usual workplace. The new workplace becomes the employee's usual workplace, located in a new headquarters area. Therefore, it is not government travel as a result of an employer requirement. He or she simply goes to the new workplace and therefore cannot claim the reimbursement of travel expenses unless, of course, for different reasons, the employer authorized it in advance.

[45] Therefore, given the case law, and based on what has been submitted to me, I dismiss the policy grievance because the bargaining agent did not convince me on the balance of probabilities that employees who accept temporary assignment offers to positions different from their regular positions should be considered on government travel. The new workplaces of their assignments become their usual workplaces within the meaning of the Travel Directive.

[46] However, my conclusion could be different based on the facts that apply to a particular situation. In fact, in certain circumstances, the employer might have to consider that employees on temporary assignment are on government travel. And the fact that an employee volunteers for a temporary assignment does not mean that the Travel Directive no longer applies. I do not wish to speculate about circumstances in which the Travel Directive applies in a temporary assignment, but an employer announcing that it will not pay for travel is certainly not sufficient to absolve it of its obligation under the Travel Directive to pay for it. Each case must be considered by taking account of the facts, the Travel Directive, and the applicable case law. The facts relating to the grievor's double temporary assignment is a good illustration of my point.

[47] In both *Hamilton* and *Campeau*, the assignments involved only one position at a time. The assignment to the new position then became the new workplace, and even though it was not permanent, the new workplace became the usual workplace. From that point on, the employees could no longer be considered on government travel and eligible to have their travel expenses reimbursed.

[48] The Travel Directive defines the workplace, whether it is regular or temporary (see paragraph 33), as a **single location** determined by the employer at or from which an employee ordinarily or temporarily performs the work of his or her position.

[49] For the grievor, the fact that there were two simultaneous assignments in two distinct locations at the same time changed the situation. His usual workplace could not have been Saint-Jérôme and Lachenaie at the same time. Recall that these two towns are at some distance from each other and are located 46 and 90 km, respectively, from the grievor's home.

[50] According to the Travel Directive, one of the two workplaces should have been considered his usual or single workplace, especially since the employer decided to fill two half-time positions with a single full-time employee, who as a result necessarily had to have more than one workplace. For the purposes of interpreting or applying the Travel Directive, there cannot be several usual or single workplaces.

[51] For the same reasons as for the policy grievance, the employer does not have to pay for the travel between the grievor's residence and his new workplaces. However, it

should pay him for his travel between his two new workplaces. Thus, on that basis, I allow in part the grievor's grievance.

[52] To apply my decision, the employer will first have to establish the workplace of the two that was the grievor's usual or single workplace. Once that is established, I leave it to the parties to calculate the employer's reimbursement to him. In fact, I do not have the necessary information to make such a calculation. I could intervene later, after the parties' submissions and if they are unable to agree to the calculation.

[53] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[54] The policy grievance is denied.

[55] The grievor's grievance is allowed in part.

[56] The parties have 30 days to agree to the amounts that the employer must pay the grievor.

[57] I will remain seized of the grievor's file for a period of 60 days to determine, if necessary, the amounts payable to him.

April 25, 2022.

FPSLREB Translation

Renaud Paquet,
a panel of the Federal Public Sector
Labour Relations and Employment Board