VPLR's order
Art. 4

PARTIESofDECISION

File: 169-2-357

PUBLIC SERVICE STAFF RELATIONS ACT
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION,

Bargaining Agent,

AND:

TREASURY BOARD
(Department of Transport),

Employer.

DECISION

Before: David H. Kates, Deputy Chairman.

For the Bargaining Agent: Catherine H. MacLean, Counsel, and
W.J. Robertson, President, Canadian
Air Traffic Control Association.

For the Employer: Robert Cousineau, Counsel.

Heard at Ottawa, December 8, 1980.

TEXTofDECISION

DECISION

1. This is a reference to adjudication filed under subsection 98(1) of the Act by the bargaining agent, the Canadian Air Traffic Control Association (hereinafter referred to as C.A.T.C.A.) alleging that the employer has failed to deduct "membership dues" in compliance with Article 4 of the collective agreement (Code 402/79). The collective agreement forming the subject matter of this dispute is due to expire on December 31, 1980. Subsection 98(1) reads as follows:

> 98. (1) Where the employer and a bargaining agent have executed a collective agreement or are bound by an arbitral award and
>
> (a) the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the collective agreement or arbitral award, and
>
> (b) the obligation, if any, is not an obligation the enforcement of which may be the subject of a grievance of an employee in the bargaining unit to which the collective agreement or arbitral award applies,
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> either the employer or the bargaining agent may, in the prescribed manner, refer the matter to the Board, which shall hear and determine whether there is an obligation as alleged and whether, if there is, there has been a failure to observe or to carry out the obligation.

2. The background circumstances precipitating these proceedings are straightforward and without dispute. Between September 16 and 19, 1980 a meeting of C.A.T.C.A.'s Board of Directors took place. At that meeting the organization's financial situation was discussed within the context of impending negotiations for a renewal of the collective agreement. The Minutes of the meeting reflect a consensus of the Board of irectors indicating that the prospects for successful negotiations were ominous. The Board surmised that the employer would be assuming

a hard posture with respect to its proposals for amendment of the agreement. In addition, concerns were expressed that the employer, owing to the deteriorating economy, might reintroduce "wage and price controls" or that steps might be taken in light of the current labour relations climate in the Public Service to abridge the members' right to engage in strike action. If either of these contingencies transpired, the Board of Directors resolved that C.A.T.C.A. ought to be prepared to lend financial support to its members in the event that they should be disciplined or otherwise subjected to sanctions as a result of their reaction to the employer's tactics. It was anticipated that C.A.T.C.A.'s members might very well defy legislation that Parliament might introduce whose perceived effect would be to abridge their rights.

3. In this light, the Board of Directors reviewed the status of C.A.T.C.A.'s financial reserves. It was concluded that the amount of monies in their current account ($272,870.00) might not be sufficient to meet its perceived obligations to its members. Those obligations included a guarantee of a member's salary in the event of his discharge pending adjudication, the payment of any fine imposed by a court and the furnishing of counsel to represent their interests in any legal proceeding. The message that can be distilled as a result of the meeting was that C.A.T.C.A. ought to take immediate steps to be prepared to support its members should they incur any economic hardship that might arise because of the "surreptitious" tactics adopted by the employer to curtail and prejudice their rights.

4. Accordingly, the Board of Directors passed two resolutions both of which were to be confirmed by referendum of the membership. The membership's views were secured by a poll on October 24, 1980. They approved by the necessary majority the resolutions recommended to them by the Board of Directors. The evidence was uncontradicted

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that the resolutions and subsequent procedures followed by the Board of Directors were in compliance with C.A.T.C.A.'s governing by-laws. The resolutions read as follows:

RESOLUTION No. 12

Be it resolved that the policy of this Association is to guarantee that any members who are disciplined, fined, imprisoned, or otherwise acted against by any authority, agency, individual or other entity, as a result of their support of CATCA's aims in relation to its 1980/81 negotiations, will receive the full and unending support of the Association, as long as it is in existence, in every way including but not limited to the payment of salary, fines, legal representation, and any other emergency expenses which may be incurred.

The application of this policy is contingent upon the member(s) following explicitly any and all direction of the Board of Directors. Any individual who is in receipt of salary maintenance from the Association will as a condition of continued receipt, be required to work for the Association wherever and as it may require.

The payment of funds under this Resolution does not include strike pay.

Moved by J.R. Pottinger, seconded by J.C. Butt

CARRIED

RESOLUTION No. 13

Be it resolved that the Board of Directors conduct a referendum vote of the membership

and recommend that effective December 1, 1980, all basic membership dues be doubled until at least the conclusion of the 1980/81 contract negotiations and

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for such time thereafter as may be necessary to discharge all of CATCA's financial obligations arising from those negotiations. Such monies collected will be kept in a special reserve to be utilized only in the event that CATCA's normal reserves become entirely depleted. Any surplus funds in the special reserve following the final conclusion of any difficulties arising from the 1980/81 negotiations will be refunded in whole, on a pro-rata basis if necessary, to the members.

Moved by A.C. Fisher, seconded by R.T. Smith

CARRIED

5. In essence the increase in the membership dues was to provide C.A.T.C.A. with a contingency fund to be used in the event of need. A circular dated September 19, 1980 was distributed to each member setting out the background circumstances that caused the Board of Directors to appeal for more funds. As has already been noted, in due course the membership duly ratified and mandated the doubling of their membership does in accordance with the resolutions of the Board of Directors. Mr. Robertson, President of C.A.T.C.A., testified that the increase in dues, once adopted, was intended to be compulsory. Failure of a member to pay his dues would obviously result in recourse against him in accordance with the governing rules of the organization. In this regard, Article 4.01 of the collective agreement stipulates that the payment of dues is to be considered as a term and condition of employment. The circular specifically sets out the contingencies in which the increased revenues are to be applied:

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CATCA's income (dues) can only be amended by ether a Convention or referendum decision. Since the next Convention is scheduled for May of 1981, any decision effected there would not be sufficiently in advance of a crisis to generate the additional potential income we will require if we are to pursue every avenue in achieving the recognition we desire. Therefore the Board of Directors is conducting a referendum vote of the membership and recommending that effective December 1, 1980, all basic membership dues be doubled until at least the conclusion of the 1980/81 contract negotiations and for such time thereafter as may be necessary to discharge all of CATCA's financial obligations arising from those negotiations. Such monies collected will be kept in a special reserve to be utilized only in the event that CATCA's normal reserves become entirely depleted. Any surplus funds remaining in the special reserve account following the final conclusion of any difficulties arising from the 1980/81 negotiations will be refunded in whole, on a pro-rata basis, if necessary, to the members. At the time the dues are deducted they will be tax deductible. If any refunds are paid back to the membership, they will be taxable income. If approved by the membership, this additional due deduction will generate approximately $363,000.00 by the Summer of 1981. This amount should be sufficient to ride out the immediate impact of a crisis. It will also assist CATCA in securing additional funds by way of loan guarantees should they be required. The referendum ballot and instructions for voting are contained under separate cover with this distribution.

6. On November 3, 1980 the parties entered negotiations with a view to a renewal of their collective agreement. Mr. Robertson stated that shortly thereafter C.A.T.C.A.'s worst expectations were realized. Specific reference was made to the employer's proposal that all operating personnel engaged in air traffic control functions be designated "in the interest of the safety or security of the public". It is clear that C.A.T.C.A. perceived the employer's proposal pursuant to section 79 as the type of "dirty" tactic calculated to undermine their membership's legitimate right to engage in lawful strike activity.

7. By letter dated November 3, 1980, C.A.T.C.A. advised the Compensation Services Branch of the Department of Supply and Services of the increase in dues authorized by its membership. The expectation was that the employer would make the mechanical arrangements necessary for the increased "check-off" to take place by December 1, 1980. Copies of the notice were sent to representatives of regional pay offices and the Department of transport. By letter dated November 21, 1980, Treasury Board, under the name of Mr. G.V. Orser, Assistant Secretary of Treasury Board, wrote the bargaining agent advising in essence that the employer was not prepared to give effect to "the general revision" in that the Association failed to notify "the employer" as required by Article 4.06 of the collective agreement in writing at least sixty days prior to the effective date of such revision. For purposes of clarity, "the employer" that should have been notified was the Treasury Board and not the Department of Supply and Services. Treasury Board also advised that it "had instructed the Department of Supply and Services not to implement action to revise membership dues at this time."

8. By letter dated November 24, 1980, Mr. Robertson wrote Treasury Board indicating inter alia that the bargaining agent's action in advising the Department of Supply and Services in the time frame that

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was exercised was in conformity with the past practice of the parties. The employer adduced no evidence to contradict the assertions made by Mr. Robertson both in testimony and in his written correspondence. Indeed, the attachments to Mr. Robertson's letter do support the notion that with some exceptions the practice is for C.A.T.C.A. to deal directly with the Department of Supply and Services with respect to changes in membership dues. Incidentally, Mr. Robertson also testified that the increased check-off as of the date of the hearing had already been implemented by the Department of Supply and Services and the appropriate monies were in fact scheduled for deduction from the members' next pay cheques. He also advised that Treasury Board has since directed the Department of Supply and Services to cease any further deductions from employees' pay cheques and to take such measures that may be necessary to recover the amounts improperly deducted. The employer made no effort to contradict Mr. Robertson's testimony in this regard.

9. The employer's position in this dispute is succinctly summarized in a letter dated November 27, 1980 from Mr. G.V. Orser, Assistant Secretary, Treasury Board, to Mr. Robertson:

November 27, 1980

Mr. W.J. Robertson
President
Canadian Air Traffic
Control Association Inc.,
Suite 604,
1 Nicholas Street,
Ottawa, Ontario.
K1N 7B7

Dear Mr. Robertson:

1 refer to your letter of November 24, 1980, with attachments, concerning increases in dues.

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It appears from an examination of these documents that in all instances no notification was provided the Employer but rather notification provided directly to the paying office. A review of our files, however, does not contain any exchange of correspondence between ourselves that established the Paying Office as the official contact for purposes of serving notification pursuant to clause 4.06.

Regarding the notification served on November 3, 1980, while this has been identified as an increase in the dues structure, the additional dues we have been requested to check-off are not membership dues but funds requested from the membership for special purposes.

In my view, these additional funds are for purposes not related to the normal operating expenses of the Canadian Air Traffic Control Association and as such are not covered by Article 4 of the collective agreement.

It should also be noted that the application of the sixty-day notification period would result in the Employer being called upon to check-off these special dues after the expiration of the collective agreement. Under article 4.06, our obligation ceases when the agreement expires.

For the foregoing reasons, I am not in a position to agree to your request of November 3, 1980.

Yours sincerely,

(Signed)
G.V. Orser,
Assistant Secretary.

10. Because of the parties' detailed exchange of information prior to the commencement of the hearing, the reasons as to why the employer refused to implement the revised dues check-off are clear and straight-forward. Of course, the key question before me is whether the employer, notwithstanding those reasons, was bound by both the terms of the collective agreement and the provisions of the Public Service Staff Relations Act to comply with C.A.T.C.A.'s request to implement the dues increase levied upon it members. The relevant provisions of the collective agreement read as follows:

> DEFINITIONS
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> Unless specified elsewhere in this Agreement, the following definitions will apply throughout this Agreement:
>
> ...
>
> (5) "Employer", except as specifically provided in Article 18, means Her Majesty in right of Canada as represented by the Treasury Board, and includes any person authorized to exercise the authority of the Treasury Board.
>
> ARTICLE 4
>
> CHECK-OFF
>
> 4.01 Subject to the provisions of this Article, the Employer will, as a condition of employment, deduct Association membership dues from the monthly pay and/or training allowance provided for under the terms of the Retraining and Reassignment Program for Air traffic Controllers, of all employees in the bargaining unit.

4.02 The provisions of 4.01 will be applied effective the first of the month following the signing of this Agreement and the deductions from the pay and/or the training allowance for each employee in respect of each month will start with the first full month of employment. Where an employee does not have sufficient earnings in respect of any month to permit deduction the Employer shall not be obliged to make such deduction from subsequent salary.

4.03 The amounts deducted in accordance with 4.01 shall be remitted by cheque to the National Secretary-Treasurer of the Association within a reasonable period of time after deductions are made and shall be accompanied by particulars identifying each employee and the amount of the deduction made on his behalf.

4.04 The Employer shall provide a voluntary revocable check-off of premiums payable on health and sickness, and life insurance plans provided by the Association for its members on the basis of production of appropriate documentation, provided that the amounts so deducted are combined with Association dues in a single monthly deduction.

4.05 The Association agrees to indemnify and save the Employer harmless against any claim or liability arising out of the application of this Article.

4.06 If a general revision in the amount of membership dues is to be made during the term of the Agreement, the Association agrees to notify the Employer in writing at least sixty (60) days prior to the effective date of such revision.

ARTICLE 31

APPLICATION, DURATION, MODIFICATION

...

31.04 Notwithstanding the provision of the term of this Agreement under 31.02, this Agreement shall remain in effect during the negotiations for its renewal and until a new Agreement becomes effective.

11. Miss MacLean argued that the employer was clearly bound by both Article 4 of the collective agreement and section 51 of the Public Service Staff Relations Act to comply with the bargaining agent's request of November 3, 1980 to deduct and remit the revised check-off of membership dues. Moreover, it was submitted that this obligation commented on December 1, 1980 and continues after the expiry of the collective agreement until such time as conciliation board proceedings are exhausted or a new collective agreement is entered into. For purposes of these proceedings, Miss MacLean advised this adjudicator (with the concurrence of Mr. Cousineau) that the employer's obligation (assuming it exists) would cease in the event no new collective agreement is entered into by the parties seven days after receipt of the report of a conciliation board. Most of Miss MacLean's remaining arguments were made in anticipation of Mr. Cousineau's submissions. Because I intend to adopt as my own most of the arguments advanced by Miss MacLean in disposing of this case, I do not propose to outline them in detail.

12. Mr. Cousineau's submissions on the other hand were merely an elaboration of the position taken by Mr. Orser in his letter of November 27 and referred to in paragraph 9 herein. The employer's argument as to why it ought not to be bound by Article 4 may be itemized in the following manner:

1. The bargaining agent in its letter of November 3, 1980 failed in compliance with Article 4.06 to notify the proper "employer" as defined in the collective agreement. Or, more precisely, in notifying the Department of Supply and Services and not the Treasury Board, "the employer" was thereby justified in disregarding the request.

2. Because the bargaining agent failed to notify the employer in writing "at least sixty (60) days prior to the effective date of such revision" as contemplated by Article 4.06, the employer was justified in disregarding the request. It is conceded by C.A.T.C.A. that the letter dated November 3, 1980 was far short of the sixty-day period before the effective date of the revision slated for December 1, 1980.

3. The employer asserts that the increase authorized by C.A.T.C.A.'s membership is not "Association membership dues" contemplated by Article 4.01 of the collective agreement. Rather it alleges that the increased funds represent a special levy to be used as a contingency fund for the purposes cited in C.A.T.C.A.'s circular to its members. Moreover, since the special levy would not likely qualify for "special tax allowance" by the Minister of National Revenue, it could not be considered as "membership dues" as defined by the Regulations to the Income Tax Act.

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As I understand Mr. Cousineau's argument, because the monies are to be returned to the members in the event they are not needed, the Minister of National Revenue would not thereby approve any forebearance of the special levy for tax purposes.

4. The employer asserts that because the increased revenues are designed to help defray expenses incurred in contesting any employer action, taken to the prejudice of C.A.T.C.A.'s members whether before this Board or before a court of law, the employer ought to be exculpated from any obligation to deduct the increased levy. To otherwise impose this obligation might be perceived to suggest employer complicity or collaboration with the tactics engaged in by C.A.T.C.A.'s membership. In this regard, a decision of the Supreme Court of British Columbia was relied upon indicating it to be a contempt of court "where a union by its executive board acts to initiate and hold a vote of the members of the union on the question of whether or not the union should obey a Court order..." (see Regina v. United Fishermen and Allied Workers Union, Stavenes and Two Others (1967) 65 D.L.R. (2d) 220).

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5. Finally, the employer asserted that its obligation to deduct dues check-off in compliance with Article 4 ceased upon the expiry of the current collective agreement (December 11, 1980). Mr. Cousineau initially suggested that once the collective agreement expired only the employer's "obligations" with respect to the terms and conditions of employment embodied in the expired collective agreement continued and not the collective agreement itself. The implication I was invited to draw was that although the "obligation" existed it was unenforceable. When pressed by this adjudicator to explain the nature of the "obligation", Mr. Cousineau conceded that the employer was at least bound to comply with the check-off provision during the course of the period contemplated by section 51 of the Act but not to the extent that it included the increased levy. Counsel relied upon Dumas (File 166-2-5882) in support of this position.

13. As I have already suggested, in arriving at my conclusion disposing of the parties' dispute, I intend to incorporate and adopt as my own the very able arguments advanced by counsel for the bargaining agent. In so doing, I am finding that the employer was duty-bound by Article 4.01 of the collective agreement to comply with the bargaining agent's request of November 1, 1980 to deduct Association "membership dues" effective December 1, 1980 and until the period of time contemplated by section 51 of the Act is exhausted or a new collective agreement is entered into, whichever is first to occur.

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My reasons for arriving at this conclusion are detailed in the following paragraphs.

14. The employer's submissions with respect to C.A.T.C.A.'s failure to notify the appropriate employer and within the sixty-day time period anticipated by Article 4.06 may be dealt with together. In the first instance, I am satisfied, having regard to the uncontradicted evidence, that "the employer" as represented by the Department of Supply and Services has been treated by the parties as an appropriate "person authorized by Treasury Board" to implement the increase of the check-off. The evidence demonstrates that it has been the consistent practic of C.A.T.C.A. to contact the Department of Supply and Services for said purposes. A letter from the employer dated April 18, 1979 addressed to a C.A.T.C.A. representative indicates the following directive: "changes to individual members' dues deductions will be authorized by the relevant union by direct correspondence to the relevant pay office." The employer made no effort to contradict this evidence. Indeed, it makes reasonable, pragmatic sense for the bargaining agent to have contacted the agency of Government that would be directly responsible for implementing the increase in that the appropriate pay office attached to the Department of Supply and Services is responsible for making authorized changes to employee pay cheques. The only exception to this practice appears to pertain to deductions made with respect to new employees and to collective agreements containing for the first time a union security clause. In such instances, the practice appears to be that Treasury Board is contacted prior to effecting the check-off. Moreover, the simple answer to the employer's objection in this regard is that Treasury Board, as early as November 24 (the date of Mr. Orser's letter), was made aware of the revision. Once made aware, I cannot appreciate how it made the least bit of difference with reference to the employer's obligations. Surely there was no effort to conceal the

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revision from the employer. Copies were sent to the Department of Transport, the de facto employer, and to the appropriate regional pay offices throughout the country. Surely, this ought to suffice to satisfy the onus of notifying Treasury Board and/or an authorized representative of Treasury Board. In any event, I am satisfied that the bargaining agent's technical shortcoming in failing to advise Treasury Board directly ought not to be seen to permit the employer to evade a substantive obligation contained in the collective agreement.

15. I quite agree with Miss MacLean's assertion that the bargaining agent's failure to comply with the sixty-day notice requirement under Article 4.06 should not be allowed to be exploited by the employer as a "sword" but its use should be confined in appropriate circumstances as a "shield". The object of the sixty-day notice is to allow the employer sufficient lead time to make the necessary mechanical changes in the processing of employee pay cheques to reflect the change. The bargaining agent would be precluded from alleging any breach by the employer of its obligation under Article 4.01 should the failure to comply be attributable directly to a breach of the minimal requirement for notice. In this case, the complete answer to the employer's objection is that the employer was ready technically as of the date of the hearing to make the appropriate deduction in compliance with the effective date requested by C.A.T.C.A. Treasury Board has nonetheless issued a directive ordering that such deductions cease forthwith. In other words, the employer has by its actions waived the sixty-day notice. To allow this directive to remain in effect and to permit the employer to evade its obligations under Article 4.01 on the basis of C.A.T.C.A.'s failure to comply with the sixty-day notice would be a patent absurdity.

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16. The employer submits that the increase contemplated by C.A.T.C.A., owing to its special nature and purpose, ought to be treated as a special levy and not as "Association membership dues" as contemplated by Article 4.01 of the collective agreement. It is clear that the collective agreement does not contain any express definition of "membership dues". In the absence of any words of limitation contained in the collective agreement that would suggest the contrary, I am of the view that what constitutes "membership dues" for purposes of Article 4.01 is strictly an internal matter to be determined by C.A.T.C.A. in accordance with its own constitution and by-laws. The evidence disclosed that C.A.T.C.A.'s Board of Directors duly passed a resolution authorizing "the doubling" of membership dues. That resolution was ratified by a majority of the members in a referendum held in accordance with the organization's governing by-laws. Once the resolution was adopted increasing "membership dues", nobody save a member in good standing of the C.A.T.C.A. organization has any status at law to question the legitimacy of the increase. Or, more precisely, it certainly does not lie in the mouth of the employer to question its legitimacy. The question of defining the nature of membership dues was partly touched upon in Re United Steelworkers and Triangle Conduit & Cable Canada (1968) Ltd. (1970) 21 L.A.C. 332 (Weiler). In that case the Steelworkers' Union amended its constitution to allow for a more equitable formula in levying membership dues. Employees in due course authorized the employer, pursuant to the union security provision contained in the collective agreement, to make the necessary deductions of "union dues as required by the Constitution of the United Steelworkers of America."

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The company did not object to any increase in dues but questioned the formula devised by the union for determining the amount of dues. The employer was quite prepared to implement a liquidated amount but contemplated all sorts of difficulties (particularly with its computer) in applying the formula prescribed by the union's constitution. Mr. Weiler in finding for the union makes direct reference to the inviolability of the union's internal procedures as they may affect the determination of membership dues, at p. 344 (Vol. 21):

> ... The objective of the new union formula is quite rational - to make union dues a proportional rather than a regressive tax. It is true that the constitution does not state precisely and exactly the meaning of the new formula but then no constitution can ever do so. This failure does not prevent reference to the constitution in collective agreements as can be shown by the usual reference to union membership. The various alternatives proposed by the Burke memorandum appear to complicate the picture but the parties merely had to select between them to arrive at the formula. Each of them appears quite consistent with the spirit and meaning of the new constitution provisions and, as long as the company receives no objections from employees or different formulae from different union officials, it should not question the "internal management" of the union in interpreting its own constitution.
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> (emphasis added)

17. In a like fashion, in the absence of any reference defining membership dues in the collective agreement, the question of what constitutes "dues" is totally a matter for the bargaining agent to determine in accordance with its governing by-laws. Whether the Minister of National Revenue, having regard to the appropriate regulations,

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is prepared to accord the employees who must pay these dues a tax allowance, is totally irrelevant to the definition of "membership dues" for purposes of Article 4.01 of the collective agreement. Moreover, none of the other definitions cited at the hearing of what constitutes membership dues are of any help or relevance. C.A.T.C.A. has made a decision in accordance with its governing by-laws to double its members' dues. The employer upon notice of that increase ought to be constrained from imposing its particular views as to what should be treated as C.A.T.C.A.'s "membership dues". Miss MacLean bluntly expressed this notion by indicating "it is none of the employer's business."

18. Moreover, it is also none of the employer's business as to the purposes monies raised by way of dues are intended to be spent. the evidence shows that the bargaining agent's Board of Directors recognized a certain reality in the current industrial relations climate affecting public servants that may have an impact upon the impending negotiations. Whether the employer, or indeed this adjudicator, agrees with that perception is quite superfluous to the issues raised in these proceedings. C.A.T.C.A.'s Board of Directors decided, and its members concurred, that certain contingencies might very well transpire that could create a financial hardship for the organization and its members. To maintain as a result of the expression of those concerns that C.A.T.C.A. is thereby authorizing its members to engage in illegal "job action" is clearly premature, if not speculative. What C.A.T.C.A. is anticipating based upon past experiences (known to the employer) is that public servants when they are perceived to be unnecessarily provoked by their employer are inclined to react in unorthodox ways. The Board of Directors resolved that the bargaining agent in the event of need ought to be prepared to protect and support its members. This adjudicator does not wish to be seen as condoning the "unorthodox ways" in which employees might express their concerns.

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Nor ought the employer feel it is collaborating in such activities by virtue of its compliance with the obligations assumed under Article 4 of the collective agreement. During the course of his testimony, Mr. Robertson stood by C.A.T.C.A.'s record in assuring me that C.A.T.C.A. is not attempting by virtue of its actions to promote any unlawful job action. Nonetheless, because of his perception of the present climate and the dubious negotiating tactics engaged in by the employer, he felt duty-bound to have his organization financially prepared. I might also add that C.A.T.C.A. acts at its peril if it fails to take positive steps to discourage any such unlawful activity (see Re Polymer Corporation Ltd. and Oil Chemical Workers International, Local 1614 et al, 59 C.L.L.C. par. 18158 (Laskin) at p. 1819). For purposes of these proceedings, I am of the opinion that the employer has no standing to question the purposes to which the bargaining agent intends to spend its members' dues. That fact simply has no relevance as to whether the employer is obliged under Article 4 to deduct the increases authorized by them.

19. The employer's position in this respect manifests a certain lack of appreciation of its obligations under Article 4.01. The employer's role in collecting check-off was described as "a conduit" or "a stakeholder" by Miss MacLean. A more adept description is simply that of "a collection agency". The employer, unless the collective agreement reads otherwise, is clearly not a censor or an auditor of the expenditure of union funds. In Re United Steelworkers of America and Brooks Manufacturing Co. Ltd. (1969) 20 L.A.C. 298, Mr. Weiler described the employer's role as a collector of dues as being more in the nature of a trustee (at p. 300, Vol. 20):

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> ...The company is not personally entitled to this money at all since it is required merely to be the agent for collecting and transmitting the dues to the union. It is uncertain whether it is the agent of the union to collect the dues for the union, or the agent to transmit the dues on behalf of the employees. In either event, the money in its hands would be impressed with a trust on behalf of whomever is its principal...

In summary, the employer's argument with respect to both its definition of union dues and the uses to which those dues may be applied are, in my view, irrelevant to the enforceability of the employer's obligations under Article 4 of the collective agreement.

20. Lastly, the employer argued that its obligations to collect dues under Article 4.01 ceased upon expiry of the collective agreement. Or, more precisely, the obligations continued having regard to the precise wording of section 51 but these obligations were not enforceable at adjudication whether pursuant to a reference under paragraph 91(1) (a) or subsection 98(1) of the Act. Needless to say, there is a long history of jurisprudence in the adjudication of disputes pertaining to the application and interpretation of collective agreements during the period contemplated by section 51 of the Act (see Ouellette, File 166-2-426; Smith, File 166-2-847; Mackie et al, File 166-2-858; and Letourneau et al, File 166-2-859). Adjudicators have consistently taken the position that pursuant to section 51 of the Act, terms and conditions of employment contained in a collective agreement remain in force and are binding upon the parties thereto until such time as a conciliation board has been established in accordance with the Act and seven days have elapsed from the receipt by the Chairman of the report of the conciliation board. Indeed the adjudicator's jurisdiction has yet to

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be challenged in Federal Court with respect to the assertion of authority to entertain such questions. If the employer's position in this case is sound then, of course, "the obligation" imposed by Parliament "to observe" the terms and conditions of employment embodied in the expired collective agreement would be truly meaningless. Or, more simply, obligations that cannot be enforced are not obligations at all. I am satisfied, particularly having regard to paragraph 98(1)(a) of the Act, that "where the employer and the bargaining agent have executed a collective agreement" and "the employer or the bargaining agent seeks to enforce an obligation that is alleged to arise out of the collective agreement...either the employer or the bargaining agent may in the prescribed manner refer the matter..." Surely the dispute between C.A.T.C.A. and the employer in this case involves "the enforcement of an obligation that is alleged to arise out of the collective agreement..."

21 . Mr. Cousineau in support of his position relied quite heavily on the Dumas decision (File 166-2-5882). In that case the incumbent union had been displaced as the representative bargaining agent upon successful application for certification. The incumbent union prior to the certification proceedings and while the collective agreement was in force referred a matter to adjudication under paragraph 91(1)(a) of the Act. The necessary approval of the incumbent bargaining agent was secured pursuant to subsection 91(2) of the Act. The reference to adjudication was not heard until after the certification of the new trade union. Nonetheless the new trade union sought to continue the reference proceedings as if there had been no change in bargaining agents. Because the grievance involved a bargaining agent who did not approve (and indeed was in no position to approve) the reference to adjudication under subsection 91(2), there was absent "a provision of the collective agreement" that was in force by operation of a collective agreement or by statute. Accordingly, the adjudicator was precluded from assuming jurisdiction under paragraph 91(1)(a) to entertain the dispute.

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The adjudicator added that "it is therefore implicit, and even necessary, in the usage made of the expression 'provision of a collective agreement'..., that the collective agreement in question be a collective agreement in force." It is clear that an application for certification whose effect is to terminate an incumbent's bargaining rights also operates to render inoperative the collective agreement between the employer and the incumbent (see Stephenson, File 166-2-2373 and Clow, File 166-2-2524). However, Mr. Weatherill in Dumas (supra) specifically qualified his finding by saying that a collective agreement that had expired but remained in force by operation of secyion 51 was not in issue before him. Section 51 in part reads as follows:

> 51. Where notice to bargain collectively has been given, any term or condition of employment applicable to the employees in the bargaining unit in respect of which the notice was given that may be embodied in a collective agreement and that was in force on the day the notice was given, shall remain in force and shall be observed by the employer, the bargaining agent for the bargaining unit and the employees in the bargaining unit, except as otherwise provided by any agreement in that behalf that may be entered into by the employer and the bargaining agent, until such time as
>
> (a) ...
>
> (b) in the case of a bargaining unit for which the process for resolution of a dispute is by the referral thereof to a conciliation board,
>
> (i) a collective agreement has been entered into by the parties,
> (ii) a conciliation board has been established in accordance with this Act and seven days have elapsed from the receipt by the Chairman of the report of the conciliation board, or

> (iii) a request for the establishment of a conciliation board has been made in accordance with this Act and the Chairman has notified the parties pursuant to section 78 of his intention not to establish such a board.

22. Mr. Cousineau nonetheless has put the question in issue in this case. He has failed, in my view, to advance any argument demonstrating how the Dumas (supra) situation is analagous to a dispute that arises with respect to the enforcement of an obligation embodied in a collective agreement assumed by the parties thereto during the period contemplated by section 51 of the Act. Surely section 51 contemplates a statutory "freeze" on the terms and conditions of a collective agreement so that the parties, once notice to bargain is served, can apply themselves exclusively to their negotiations. It is the intention of Parliament that those terms and conditions in the expired collective agreement are to remain in forte (save upon consent of the parties) and thereby are intended to be mutually enforceable during the period of time necessary for the negotiation of a new collective agreement or until conciliation board proceedings have been exhausted whichever comes first. This notion is more clearly expressed in Re United Mine Workers of America. District no. 26 v. McKinnon et al and Dominion Coal Co. Ltd. (1958) 12 D.L.R. (2d) 449. S.C.C., at p. 459 (per Cartwright J.)

> The right of the Dominion Coal Company Ltd. to make deductions from the wages of any of its employees against their will and to pay the amounts deducted to the appellant must, if it exists, be found in a statute or in a contract binding upon those employees. That right was contained in the collective agreement so long as by its terms or by virtue of the statute it continued in force.
>
> (emphasis added)

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23. Accordingly, I find and declare that by virtue of the collective agreement and by operation of section 51 of the Public Service Staff Relations Act the employer is bound by Article 4 of the collective agreement to deduct and remit the revised "Association's membership dues" effective December 1, 1980 until such time as the conciliation board proceedings have been exhausted and/or a new collective agreement has been entered into, whichever should first occur.

24. Moreover, the employer is directed to comply forthwith with Article 4.01 as aforesaid. The parties are referred to subsections 98(2) and 96(4) of the Act (see Canadian Union of Postal Workers and Treasury Board, File 169-2-288).

For the Board,

David H. Kates,
Deputy Chairman.

OTTAWA, December 12, 1980.