File: 125-2-25

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

BETWEEN:

Her Majesty in right of Canada as represented by the Treasury Board,

Applicant,

- and -

The Canadian Air Traffic Control Association,

Respondent.

RE: Application under section 25 of the Public Service Staff Relations Act - Request for Review.

BEFORE: J.H. Brown, Q.C., Chairman, and Board Members S.J. Frankel and R. Steward.

DECISION

1. By letter dated June 4, 1981, pursuant to section 25 of the Act, counsel for the Applicant is requesting that the Board review its decision of May 19, 1981 and rescind the compliance order that it made in paragraph 4 thereof, in respect of a direction contained in paragraph 24 of a decision of the Board dated May 4, 1981 rendered by Deputy Chairman David H. Kates.

Compulsory Overtime

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2. Attached to the letter of June 4 is a copy of an excerpt from the transcript of contempt proceedings instituted by the Applicant in respect of named members of the Air Traffic Control Group bargaining unit. The excerpt is from pages 82 to 94 of the proceedings of May 22, 1981. Those proceedings are presently before Mr. Justice Addy in the Trial Division of the Federal Court. In support of his request, counsel for the Applicant is relying solely on the "findings" of Mr. Justice Addy contained in the excerpt.

3. In order to have some appreciation of the instant request it is necessary to at least briefly review the events and circumstances which led to the compliance order which counsel for the Applicant is now asking the Board to rescind. In an application made under section 18 of the Public Service Staff Relations Act, the Respondent alleged that the Applicant contrary to section 51 of the Act, improperly changed the nature of employees' requirement to work overtime from "voluntary" to "compulsory" at the Montreal Area Control Centre (Dorval). A second application, filed under the same section, alleging a violation of section 51 was consolidated with the first. In that proceeding before the Board, the parties submitted an agreed statement of facts. Based on those facts and his interpretation of section 51 of the Act, as applied to them, for the reasons set out in his decision of May 4, Deputy Chairman Kates found that, to the extent that the employer's requests that employees work overtime were treated as "voluntary" at the time notice to bargain was given, the employer was obliged, by the operation of the provisions of section 51, to continue to maintain the parties' practice during the negotiating or "freeze" period. In light of this finding, he directed that the Applicant remove a posting dated March 6, 1981 imposing compulsory overtime until such time as a new collective agreement was entered into by the parties or until the release of the report of a conciliation board in respect of the impasse which exists between the parties over the negotiation of a new collective agreement.

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4. In an application, also made under section 18, on May 12, the Association alleged that the above direction contained in paragraph 24 of Deputy Chairman Kates' decision had not been complied with and requested that the employer be ordered to comply. Following its usual practice in applications alleging non-compliance with a decision of the Board, the times prescribed in the P.S.S.R.B. Regulations and Rules of Procedure for the filing of a reply by the employer was abridged and the hearing scheduled for May 15. It was admitted that there had been non-compliance. However, the justification advanced by the Applicant in its reply and at the hearing was that, in another proceeding between the same two parties in the Trial Division of the Federal Court, Mr. Justice Addy had found the Applicant had the right to impose compulsory overtime. The position of the Applicant was that the determination of Deputy Chairman Kates in his decision was inconsistent with that of Mr. Justice Addy. Counsel advised the Board that it was in light of this conflict and the fact that the finding of Mr. Justice Addy was rendered by a court of superior jurisdiction, that the Applicant had not complied with the direction contained in the Board's decision of May 4, 1981.

5. At the hearing on May 15 on the request for the compliance order, counsel for the parties on agreement, filed certain excerpts from the transcripts of the proceeding before Mr. Justice Addy. More specifically there were filed pages 56 to 60 and pages 63 to 67 of the transcript of the proceedings of April 24, pages 158 and 159 of the transcript of the proceedings of April 27 and pages 70 to 129 of the transcript of the proceedings of April 28, 1981. At the hearing before us, counsel for the employer particularly referred the Board to statements made by Mr. Justice Addy at pages 125 to 127 inclusive in the transcript of the proceedings of April 28 in which inter alia he stated that the employees in the ATC bargaining unit had no right to the choice of voluntary overtime.

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6. After entertaining the submissions of counsel for the parties and having considered them, the Board made an oral decision at the hearing on May 15 which is incorporated in a subsequent written decision dated May 19. We would mention here that in applications for compliance orders the Board either grants or denies the request at the conclusion of the hearing or in a reasonably short time thereafter. To do otherwise would be to defeat the whole purpose of such an application. That decision reads as follows:

> Counsel is asking that the Respondent not be required to comply with the decision of this Board dated May 4, 1981 rendered by Deputy Chairman David H. Kates because it allegedly is in conflict with a finding made by Mr. Justice Addy in a contempt proceeding before him, involving the same parties, in the Trial Division of the Federal Court.
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> We appreciate that there may have been some confusion on the part of the Employer as a result of the finding of Mr. Justice Addy. However, we cannot accept that a finding made in connection with a preliminary ruling in the Trial Division of the Federal Court, based solely on the evidence adduced by one party, (the Respondent to this proceeding), for the purpose of establishing a prima facie case, can or does impugn the Board's decision of May 4, 1981.
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> In these circumstances we find that the reasons advanced by the Respondent for its non-compliance with the Board's decision of May 4, 1981 are not well founded. This being so, we further find that the Applicant is entitled to the compliance order which it is seeking, namely, that the Respondent remove the posting of March 13, 1981 which the parties agree reflects the policy set out in the posting of March 6, 1981, referred to in Deputy Chairman Kates' decision of May 4, 1981.
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> In the result, the compliance order sought by the Applicant is hereby granted.
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> The Board would add that, in making this order, it is in no way suggesting that the Respondent was intentionally seeking to avoid the obligation imposed upon it by the Board's decision of May 4, 1981.

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Counsel is now asking the Board to rescind that order "in light of the findings of Mr. Justice Addy" contained in the copy of the excerpt from the transcript of the proceedings before him of May 22, filed in support of the request for review.

7. We have carefully studied the contents of the excerpt relied on by counsel for the Applicant and we would make the following observations. The application alleging that the employer was acting in contravention of the provisions of section 51, in respect of which Deputy Chairman Kates rendered his decision of May 4, 1981, was made during the period after notice to bargain had been given and when the parties were in the midst of negotiations for a new collective agreement. In these circumstances it is incumbent on the Board to deal with all issues raised in an expeditious manner as their resolution has some considerable urgency in the context of employer-employee relations. Stated another way, until the kind of issue which confronted Deputy Chairman Kates is resolved, it is bound to create tension between the parties which, in turn, is likely to impede the progress of negotiations and prove to be an obstacle to an amicable settlement. This possibility was even greater in the instant situation due to the fact that an injunction order issued by Mr. Justice Walsh dated October 9, 1980 restrained air traffic controllers from engaging in a strike..."by ceasing to work or refusing to work or to continue to work or by restricting or limiting output contrary to the Public Service Staff Relations Act...".

8. We would draw attention to the fact that in paragraph 16 of his decision, Deputy Chairman Kates stated as follows:

> By the same token, it is also not the intention of section 51 to permit the employees in a bargaining unit or their bargaining agent to withdraw unilaterally during the period reserved for negotiations from the obligation to work overtime whether that obligation

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> be characterized as "voluntary" or "compulsory". Indeed, "voluntary" overtime presupposes that in the event an employee cannot commit himself to work overtime then another employee is expected to accede to the request. A mass refusal to work overtime, in my view, could be concluded to be an alteration of a working condition that might very well have been the subject matter of an employer initiated application.

With respect to the issue before Deputy Chairman Kates, the Board did not consider that its resolution would in any way interfere with or impinge upon the contempt proceedings in the Federal Court. Indeed, the Board regarded them as being quite separate and apart. This was due to the fact that, irrespective of whether overtime in this case was found to be on a compulsory or voluntary basis, any concerted refusal to work overtime on the part of the employees would fall within the restraint of the order of Mr. Justice Walsh. We would further add that, in an application for a compliance order, the merits of the decision in respect of which the order is being sought are not an issue before the Board.

9. The interpretation placed on section 51 by Deputy Chairman Kates is now the subject of an application for review made by the Applicant under section 28 of the Federal Court Act. We are fully in accord with the view expressed by Mr. Justice Addy in the excerpt from the transcript of the proceedings before him of May 22 that what constitutes the proper interpretation of section 51 is an issue to be resolved by the Federal Court of Appeal in the reference now before it. In our view, any confusion that currently exists as to whether the Respondent does or does not have the right to impose compulsory overtime upon the air traffic controllers at Dorval will only be cleared up at such time as a judgment is rendered by the Federal Court of Appeal on that reference. It is therefore to be hoped that the Applicant will seek to expedite its hearing.

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10. In the intervening period, however, and with due deference to the comments made by Mr. Justice Addy in the excerpt of the transcript of May 22 concerning our written decision of May 19, we see no reason to rescind the order contained in that decision, quoted in paragraph 6 above. Essentially there is nothing before us in the excerpt of the transcript of May 22, upon which the Applicant is relying in its request for review, which was not before the Board at the time the compliance order was made. Accordingly, the request of the Applicant to rescind the compliance order is denied.

DATED AT OTTAWA this 12th day of June, 1981.

"J. Harold Brown"
for the Board.

ADDENDUM OF BOARD MEMBER RUSSELL STEWARD

Whilst I agree with the substance of the Board's decision, I am very disturbed by the comments of the Honourable Mr. Justice Addy concerning the responsibilities of one tribunal to another. In the light of this unusual circumstance, I would have scheduled a hearing to permit the parties to argue the merits of the Applicant's request that the compliance order of this Board be rescinded.

"Russell Steward"
Board Member.