File: 169-2-588

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

CANADIAN AIR TRAFFIC CONTROL ASSOCIATION

Bargaining Agent

and

TREASURY BOARD
(Transport Canada)

and

NAV CANADA

Employers

RE: Reference under Section 99 of the Public Service Staff Relations Act

Before: Muriel Korngold Wexler, Deputy Chairperson

For the Bargaining Agent: Peter J. Barnacle, Counsel, and D. Lewis, President, Canadian Air Traffic Control Association

For the Employers: Harvey A. Newman, Counsel, Treasury Board, and Patricia Brethour, Counsel, Nav Canada

Heard at Ottawa, Ontario,
June 4 and 5, 1997.

This decision follows an interim decision which I rendered on July 14, 1997 concerning a reference under section 99 of the *Public Service Staff Relations Act* (PSSRA) submitted on July 9, 1996 by Mr. Fazal Bhimji, Vice-President, Labour Relations, on behalf of the Canadian Air Traffic Control Association (CATCA).

The said reference under section 99 of the PSSRA reads as follows:

Statement

The Canadian Air Traffic Control Association seeks to enforce the following obligation that is alleged to arise out of the Collective Agreement (Code 402/91):

Article 2.02, Article 4 and Letter of Understanding (1-91)

Particulars:

1. *The employer has failed to provide the current salary information for a six year period as required under Article 2.02 and Letter of Understanding (1/91).*

2. *Pursuant to Article 4, the employer has failed to check off and remit dues at the appropriate salary levels over the past six years for controllers in at least the following categories:*

   (a) controllers reclassified as a result of classification exercises;

   (b) controllers receiving acting pay in pool and/or training positions;

   (c) controllers in acting positions; and

   (d) controllers obtaining promotions.

3. *Under the AI collective agreement, dues are checked off and remitted based on a percentage of monthly salary. During the past six years, two different rates were in place: 1991-93 - 1.75%, post-1993, 1.5%.*

4. *The situation came to the attention of the Association early in 1996 as a result of a discovery that a controller reclassified from AI-04 to AI-05 in 1991 was still paying dues based on his 1991 salary.*

5. *The Association immediately advised the employer of the situation by letter dated February 14th, 1996.*

6. *Officials of the Association and the employer met on February 27th, 1996 and the employer conceded that its salary information to the Association had been incorrect or incomplete for a period of at least six years. The problem was identified to include dues for controllers other than those who had been reclassified, such as those controllers falling within the other categories noted in paragraph 2 above.*

7. *By letter dated March 1st, 1996, the Association sought the cooperation of the employer in identifying and reimbursing the Association for all losses. A follow up letter was dated March 28th, 1996.*

8. *A meeting was held between the parties on April 4th, 1996, in which the employer advised it was not able to reconstruct its records to determine the exact extent of losses to the Association.*

9. *Since April 4th, 1996, the parties have held further discussions, but been unable to resolve the matter.*

10. *The full losses to the Association have yet to be determined. We will require further information from the employer. Examples and estimates include:*

    (a) Reclassification

    Reclassification of approximately 1000 controllers from the AI-04 to AI-05 level took effect in August, 1991. While retroactive to January, 1991, increased dues are not retroactive in those circumstances. Based on the dues rates for the period 1991 - 1996, the loss to the bargaining agent for each individual controller in the six year period is approximately ***$163.42****, based on the average difference in monthly salary between AI-04 and AI-05 at the mid increment level.*

    An estimate of losses in this category would therefore be 1000 x ***$163.42*** *for a total of* ***$163,420.00.***

    (b) Trainees

    Approximately 360 trainees were active in ATC units across the country in each of the last six years. On graduation from TCTI, these trainees are classified as AI-00. While all during this period are recruited in the IFR, some trainees would have been put in VFR units for varying lengths of time. Once qualified in VFR units, these controllers will have received pay at the classification level consistent with the grade level of

their Tower (1, 2, or 3). Once in a Grade 4 or 5 Tower, or an IFR unit, either directly out of TCTI or by way of a Tower, each trainee would have been paid at the AI-02 or AI-03 level during the remainder of their training period.

The ultimate success rate of trainees varies, as does the time spent in training positions as the various AI pay levels. If the changes in classification during training are not reported to CATCA then the dues lost are substantial. For example, the loss for a trainee over a one year period based on the difference in monthly pay at the base increment level between AI-00 and AI-02, would be ***$262.58.***

(c) Promotions

Promotions in ATC arise out of the seniority bid program or supervisor position competitions. The difference in salary level will vary, depending on whether the controller goes from a VFR facility to an IFR unit or between units at different grade levels with either IFR or VFR. We will require particulars from the employer on the approximate number of promotions in each of the last six years.

However, for a controller going from a Grade 2 tower (therefore classified as AI-02) to a Centre (AI-05), the difference in dues at the mid increment level is ***$203.76*** *annually.*

(d) Acting Pay

Acting pay opportunities vary from year to year. We will require particulars from the employer with respect to acting positions filled by controllers over the past six years for whom dues check off did not reflect monthly salary levels.

The difference between dues payable at the mid increment range between an AI-03 and AI-04 would be approximately ***$70.08*** *annually.*

11. The Association reserves the right to provide further particulars and/or evidence.

Order Sought:

The bargaining agent seeks an order of the Board:

> *1. declaring the employer in violation of the terms of the collective agreement, specifically Article 2.02, Article 4 and Letter of Understanding (1/91);*
>
> *2. directing the employer to cease and desist such violations;*
>
> *3. directing payment by the employer to the Association of an amount equal to the Association's losses arising from the breach of the collective agreement; and*
>
> *4. providing such other relief as may be requested or necessary to make the bargaining agent whole.*

In this reference, CATCA named Treasury Board as the employer. On November 1, 1996, Nav Canada became the employer of all Transport Canada employees designated as Nav Canada employees by the Minister of Transport and placed on a list by November 1, 1996 and who had received an offer of employment by Nav Canada and had accepted such offer of employment. Thus, Nav Canada as the new employer was added as a party to this reference.

The Evidence

The parties agreed on the facts and no witnesses were called to testify. In addition, the parties submitted eight exhibits.

The evidence disclosed that due to salary changes resulting from various situations, such as acting appointments and reclassifications, discrepancies occurred because no dues or erroneous amounts were checked off; this did not come to CATCA's attention until sometime in 1996. CATCA requested information from the employers and, finally, the employers agreed that the amount owed to CATCA was $43,195.43. Thus, there is agreement amongst the parties that the dues in dispute amount to $43,195.43. The issue to be determined is whether the two employers are responsible for this amount and are obliged to remit it to CATCA. The parties agreed also that this amount reflected $4,417.74 owed from employees not transferring to Nav Canada and $38,777.69 from employees who had transferred to Nav Canada.

Arguments

Mr. Peter Barnacle, counsel for CATCA, submitted that pursuant to clause 2.02, Article 4 of the CATCA collective agreement (Code: 402/91) (Exhibit 8), and the Letter of Understanding 1-91, the employers were obliged to pay to CATCA the amount claimed. Mr. Barnacle requested that I order that the monies be paid within a six-month period which would permit the employers to make recovery to which they are entitled from the employees or persons affected. The employers' violation of Article 4 resulted in a major loss to CATCA. Therefore, the employers are legally obliged to pay to CATCA the amount owed regardless of whether the employers are able to recover it from the individuals affected. In support of CATCA's submissions, Mr. Barnacle cited the following decisions: *Re Canada Post Corp. and C.U.P.W.* (1992), 29 L.A.C. (4th) 289 and *Professional Institute of the Public Service of Canada and Treasury Board* (Board files 125-2-63 and 169-2-529).

Mr. Barnacle referred to clause 2.02 of the collective agreement; he concluded that on the basis of this clause and the Letter of Understanding 1-91, the employers were required to provide specific information to CATCA such as the current salary of all members of the air traffic control bargaining unit. CATCA had no independent means of determining the salary of its members. Thus, CATCA is totally reliant on the information provided by the employers. The salary information enables CATCA to monitor the amount of dues remitted and for a six-year period, CATCA was provided with incorrect information. As a result, CATCA received less than what it was entitled to. The employers breached clause 2.02 and the Letter of Understanding 1-91.

Ms. Patricia Brethour and Mr. Harvey Newman, counsel for the employers, argued the following. The employers do not dispute the numbers. However, the debt here is not one between Nav Canada and CATCA but one between the bargaining agent and its members. The employers are mere facilitators for the collection of dues. In this regard, counsel cited the *Canada Post Corp.* (supra) decision. Counsel distinguished the decisions cited by Mr. Barnacle on the ground that clause 4.05 of the CATCA collective agreement is worded differently from the provisions cited in the afore-mentioned decisions. The CUPW and PIPSC clauses are similar. The PIPSC clause reads as follows:

> *10.08 The* [bargaining agent] *agrees to indemnify and save the Employer harmless against any claim or liability arising out of the application of this Article, except for any claim or liability arising out of an error committed by the Employer limited to the amount actually involved in the error.*

Clause 4.05 of the CATCA collective agreement provides that:

> *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.*

Hence, according to counsel for the employers, clause 4.05 is a full indemnity clause. There is nothing preventing CATCA from collecting the monies themselves. Moreover, there is no suggestion of bad faith in this case; it was a plain mistake which gave rise to this loss. Counsel added that the employers have no difficulty with CATCA's claim with respect to the amount owed by individuals from whom the employers can collect the dues owed. However, the issue arises with respect to the monies owed which the employers have difficulty collecting from the individuals in question. In particular, if there is a shortfall, who would be responsible for it?

In this regard, counsel for the employers quoted *Re United Steelworkers and Triangle Conduit & Cable Canada (1968) Ltd.* (1970), 21 L.A.C. 332. Counsel added that the six-month period for collecting the monies owed may cause hardship. Thus, counsel suggested that this Board adopt the order granted in the *United Steelworkers* case to the effect that the employers "shall deduct from the pay of each employee retroactively to" January 1991. Moreover, what is owed should be limited to the actual amount of arrears of dues that should have been deducted and because of clause 4.05 of the CATCA collective agreement, it should be limited to the amount the employers are able to collect from the employees or individuals in question. The employers recognize their obligation to make every effort to comply with Article 4 of the CATCA collective agreement. However, the employers do not have a debt liability. Moreover, concerning clause 2.02, the sole remedy available to CATCA is a declaration.

Mr. Barnacle replied that clause 4.05 of the CATCA collective agreement does not address clause 2.02 or the Letter of Understanding 1-91. Moreover, clause 4.05 is not a total indemnification to the benefit of the employers against a claim by the bargaining agent. Rather, it is an indemnification to the benefit of the employers

against all claims by the employees. This clause does not indemnify the employers for their errors. Very clear language is required to make a finding that CATCA gave carte blanche to the employers in the form of an indemnity for their failure to check off the right amount of dues. In case of a shortfall, it is not appropriate for the bargaining agent to absorb the losses which are not of its own doing. CATCA should not bear the losses. It is the employers who must pay the monies because they breached the collective agreement.

Determination

The relevant provisions of the CATCA collective agreement which I have to interpret and apply are the following: clauses 2.02, 4.01, 4.03 and 4.05 and Letter of Understanding 1-91 dated August 30, 1991. They read as follows:

> *2.02 The Employer agrees to provide to all members of the bargaining unit and, on enrollment, to all employees entering the bargaining unit a copy of this Collective Agreement. The Employer further agrees to provide the Association quarterly with the names of new employees, their geographic location and classifications. In addition, a list of changes in employees' status will be forwarded each month to the National Office of the Association.*
>
> *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.*
>
> *4.03 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 behalf of each employee.*
>
> *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.*

LETTER OF UNDERSTANDING (1-91)

Dear Mr. Fisher:

This letter will confirm our understanding with respect to clause 2.02.

It is agreed, that following signature of the current collective agreement, Transport Canada will provide your Association with the following information on a monthly basis pertaining to all employees in the AI bargaining unit:

(a) Employee's name,
(b) Position number,
(c) Group and level,
(d) Location (unit),
(e) Tenure or status in position,
(f) Effective date of change,
(g) Current salary,
(h) Date of appointment,
(i) Acting level,
(j) Position title.

Current salary will not be provided unless the Employer has received authorization from the employee permitting release of this information.

The jurisprudence is to the effect that in cases such as this one, where the employer errs in the check-off of membership dues, it bears the responsibility and must remit to the bargaining agent the monies it ought to have deducted from the employees (see the decisions cited by the parties (supra)). The issue in this case therefore turns on whether clause 4.05 of the CATCA collective agreement is an indemnity clause the effect of which is to absolve the employers from their obligation to remit the monies owed to the bargaining agent.

Having reviewed the circumstances of this case and the jurisprudence, I have come to the conclusion that clause 4.05 should not be interpreted in such a way as to benefit the employers for their own mistakes which have caused the loss to the bargaining agent. Such a clause should not be construed to excuse liability for such a basic obligation as the duty to check-off dues.

In this regard, Chairperson Yeoman in a decision of the New Brunswick Public Service Labour Relations Board indexed as *Canadian Union of Public Employees, Local 1251 (New Brunswick Council of Provincial Institutional Unions) v. New Brunswick*

(Treasury Board) [1977] N.B.P.S.L.R.D. No. 6, considered an indemnity clause which reads as follows:

> *EMPLOYER HARMLESS OF LIABILITY - The Union agrees to indemnify and save the Employer harmless from any liability or action arising out of the operation of this Article.*

Chairperson Yeoman stated the following in relation to that indemnity clause:

> *Indemnity clauses by definition are clauses where one party agrees to protect a person from the consequences of action taken by another party. Surely they cannot be interpreted to mean that the indemnifying party himself cannot make a claim arising from a breach of the very agreement which contains the indemnity. If that were the case Article 4 would be a nullity because the Employer could simply refuse to carry out its provisions and define this refusal by claiming that the Union could do nothing about it.*

This decision was overturned a year later by the New Brunswick Supreme Court on the ground that the employer was not required to check-off union dues from wages of summer students because they were not employees under the *Public Service Labour Relations Act* and therefore the collective agreement did not apply to them. However, the above-cited finding in relation to the indemnity clause was not reviewed and overturned. I concur with Chairperson Yeoman's interpretation of this indemnity clause. It simply cannot be interpreted and applied to the employers so as to indemnify them for their own breaches of the very agreement and obligation they agreed to.

For all these reasons, this reference under section 99 is hereby granted. I will retain jurisdiction in case the parties encounter difficulty in the implementation of this decision.

Muriel Korngold Wexler,
Deputy Chairperson.

OTTAWA, July 30, 1997.