

Public Service Labour Relations Board

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An application for judicial review before the Federal Court of Appeal has been dismissed (2009 FCA 223) (Court file: A-375-08). An application for judicial review before the Federal Court of Appeal has been dismissed (2009 FCA 223) (Court file: A-383-08).



[Summary](#)

- **Date:** 20080620
- **File:** 547-02-4 to 6
- **Citation:** 2008 PSLRB 42

*Public Service
Labour Relations Act*



Before the Public Service
Labour Relations Board

BETWEEN

CANADIAN FEDERAL PILOTS ASSOCIATION

Applicant

and

Treasury Board

Respondent

and

PUBLIC SERVICE ALLIANCE OF CANADA

Intervenor

Indexed as

Canadian Federal Pilots Association v. Treasury Board

In the matter of applications, under section 58 of the *Public Service Labour Relations Act*, for determination of membership of employees or classes of employees in bargaining units

REASONS FOR DECISION

Before:

Barry Done, Board Member

For the Applicant:

Phillip G. Hunt, counsel

For the Respondent:

Neil McGraw, counsel

For the Intervenor:

Edith Bramwell, Public Service Alliance of Canada

Heard at Ottawa, Ontario,
April 11 and 12 and November 26 to 30, 2007.

I. Applications before the Board

1 On May 25, 2006, the Canadian Federal Pilots Association (CFPA) applied under section 58 of the *Public Service Labour Relations Act (PSLRA)* for a determination that the incumbents of three positions be included in their Aircraft Operations (AO) group bargaining unit.

2 The positions that are the subjects of those applications are:

1. Manager, Civil Aviation Contingency Operations (PSLRB File No. 547-02-4);
2. Superintendent, Enforcement Investigations (PSLRB File No. 547-02-5); and
3. Superintendent, Aerodrome Safety (PSLRB File No. 547-02-6).

3 It is not disputed that these positions had been included in the AO group until their job descriptions were rewritten and their classifications altered accordingly. The essence of the change to the duties and responsibilities of the three positions is that the requirement to hold a current pilot's licence was deleted as well as the need for recent experience piloting an aircraft.

4 The new classifications resulted in the three positions being moved from the AO group to the Program and Administrative Services (PAS) and Technical Services (TC) groups —bargaining units that belong to the Public Service Alliance of Canada.

5 Hearings were scheduled for May 2006 and January 2007, but the parties were unable to proceed. Ultimately, a hearing took place over seven days in 2007: April 11 and 12 and November 26 to 30. At the hearing, eight witnesses testified and 28 exhibits were filed.

6 The applications by the CFPA are brought under section 58 of the *PSLRA*, which states:

58. On application by the employer or the employee organization affected, the Board must determine every question that arises as to whether any employee or class of employees is included in a bargaining unit determined by the Board to constitute a unit appropriate for collective bargaining, or is included in any other unit.

7 The employer has the unfettered right to assign duties, classify positions and organize the public service. None of these can form any part of the determination. Rather, it is for me to examine the duties performed by the incumbents of these positions and compare those duties to the duties specified in the relevant group definitions – AO, PAS and TC. Moreover, within those duties I must pay special attention to the primary involvement of those who perform the duties or, as the AO group definition states, the duties that form the “primary purpose” of the positions.

8 The CFPA as applicant accepts the burden of proving that both the primary involvement and the primary purpose of the positions in dispute are found within the AO group definition.

9 Reading the case law on related issues, it becomes clear that my goal should be to determine the best fit in order to place these positions into their proper bargaining units, and not necessarily a perfect fit. Indeed, Edith Bramwell, the intervenor's representative, said, on behalf of the intervenor, that: “A perfect fit is not necessary or even particularly likely.” Fortunately,

both the applicant and the respondent agree and urge me to look for a “best-fit” in their submissions.

10 The format for group definitions, at least the group definitions I am concerned with, seems both consistent and, at first blush, reasonably easy to work with: a general description followed by more specific inclusions and exclusions sections. Both the respondent and the intervenor urge me to dismiss the application on the strength of the exclusions portion of the AO group definition: “Also excluded are positions in which experience as an aircraft pilot and a valid pilot’s licence are not mandatory.” They argue that, as the employer has the right to assign duties —to create a work description —and none of the work descriptions requires either the holding of a pilot’s licence or the need for experience as a pilot, recent or otherwise, that, in itself, determines the matter.

11 Surely that is too simplistic an approach. One that would preclude the Public Service Labour Relations Board (“the Board”) from fulfilling one of its statutory obligations, which is to oversee and ultimately to decide the proper composition of bargaining units. Moreover, it glosses over the thrust of a group definition, which is to look at what positions are primarily involved with and their primary purposes. For those reasons, while I will consider the exclusions section, I will not consider it in isolation without due regard for other equally compelling criteria.

A. The first application

12 The CFPA filed an application for employees occupying the position of manager, Civil Aviation Contingency Operations (CACO). At the time of the application and of the hearing, there was only one employee who was the subject of the application. What the CFPA is in fact seeking is a return to what was the situation prior to the reclassification of this position, which happened in March 2003.

13 Exhibits A-9, A-10 and A-10(A) describe the duties of the manager or chief of CACO. In order, they are:

1. Exhibit A-9: Work Description, PM-06, position NCRL-;21198, Department of Transport, Ottawa (effective February 1, 2003; last updated May 20, 2003);
2. Exhibit A-10: Work Description, AO-CAI-04, position 0917 (effective April 1, 1996); and
3. Exhibit A-10(A): Work Description, AO-CAI-05, position ADC-0917 (no effective date; signature date October 1999).

14 As the application was filed on May 25, 2006, the relevant work description is Exhibit A-9, the most recent work description, effective February 1, 2003. No issue was raised concerning the delay in the application, between March 2003 and May 2006. I do note, however, that for the past five years the duties have been and continue to be performed by an incumbent who has neither a pilot’s licence nor experience.

15 Exhibit A-9, the work description for the position, is a draft version and is not signed as being either accurate or authorized. However, the testimony of two witnesses confirmed that it is both current and applicable. Denis Brunelle reports to and has acted in that position and recognizes the duties. Indeed, he stated that there is a great overlap between his own duties as contingency planning, exercise and operations inspector and the manager’s. Jennifer Taylor, Director, CACO, stated that the duties shown in the AO group definition are both current and accurate.

16 The approach suggested by Philémon Paquette, witness for the CFPA, to allocate a job to an occupational group is to consider the title, the client-service results and the key activities delineated in the work description. Simply put, this job assumes overall responsibility for ensuring the safe continuation of civil air transportation. That is accomplished by considering a range of future occurrences that may impede safe transportation and by developing appropriate strategies to deal with them. Finally, training the responsible personnel in those various

strategies. Mr. Brunelle provided examples such as diverting air traffic for purposes of quarantine, dealing with nuclear contamination, in-flight incidents, terrorism, diverting traffic as a result of the 9/11 situation, and selecting a safe diversion site for the NASA space shuttle when it is in Canadian airspace. Mr. Brunelle also discussed his role in training personnel in contingency plans.

17 I have no hesitation in concluding that those duties comprise the primary purpose of the job and fall squarely under the inclusions section of the AO group definition. Indeed, the definition provides that the position need only be responsible for “one or more” of the listed inclusions. I find that this job’s primary purpose includes responsibility for at least four of those inclusions. Inclusion 1(e) would suffice on its own:

the validation and dissemination of aeronautical information and the planning and management of civil air transportation systems during contingency periods;

[Emphasis added]

18 This position also meets at least three other inclusions:

1. *(a) the determination of requirements and the developments of operational procedures;*

(b) the determination of aviation operational requirements for airports, support facilities;

...

2. *the delivery of staff training to ensure the maintenance of operational standards;*

...

6. *the leadership of any of the above activities.*

19 Having determined that the position meets at least one of the inclusions requirements and the more general group definition, what am I to make of the exclusions section that seems to be at odds with the inclusions section? I return to the respondent’s opening statement, shared by the intervenor, that if a pilot’s experience and licence are not mandatory, the position must be excluded from the AO group. When asked whether a position that meets an exclusion factor of a group definition must automatically be excluded, Mr. Paquette’s answered as follows: “It depends. To exclude a position from a group, the exclusions statement has to be consistent with the work.” He went on to say that the crux in allocation to a bargaining unit is the position’s primary purpose. That can only be determined by examining the position’s key activities.

20 I think that the inclusions/exclusions dilemma can be resolved by applying the traditional “best fit” approach. Patricia Power, Acting Director General of Policy, Strategy and Classification, said that I should look at all related groups that seem possible. As more than one group might be a fit, one should choose the “best fit”. As pointed out earlier, the intervenor agrees, as do both the applicant and the respondent.

21 Clearly, a reasonable argument can be made for inclusion in the PAS group definition. That is until one reads the exclusions section. Having found that the primary purpose of this job is included in the AO group definition, to use the respondent’s argument it must be excluded from the PAS group: “Positions excluded from the PAS group are those whose primary purpose is included in the definition of any other group.” The best fit for this position is in the AO group.

B. The second application

22 The CFPA again seeks the return of a position formerly included in the AO group. This time it is the position of superintendent, Enforcement Investigations, which is allocated to the TC group, a group for which the intervenor is certified. The position was removed from the AO group in 2001 when the requirement for a pilot's licence was deleted.

23 Three work descriptions were submitted for this position:

1. Exhibit A-18: last updated on December 20, 1999;
2. Exhibit A-3: position PRAL-8476, classified TI-07, Edmonton, last updated April 25, 2001; and
3. Exhibit A-2: position ACE-;03366, classified AO-CAI-03, last updated April 25, 2001.

24 This application comes more than five years after the position was removed from the AO group. No issue was raised concerning the delay.

25 On the second day of hearing, I was advised that all parties agreed that work description Exhibit A-3 (above) accurately reflects the current duties of the position. In addition, Richard Gagnon, who is a civil aviation safety inspector in Winnipeg, reports to and has acted in this position. In his substantive position, Mr. Gagnon is part of a six-person team investigating aviation occurrences. The superintendent receives occurrence reports from NavCanada and can either investigate them himself or assign them to an inspector if the superintendent feels that an investigation is warranted.

26 At the conclusion of an investigation, a final case report with recommendations is sent to the superintendent, "who has the final say" on any sanction to be imposed. Inspectors work primarily with the *Aeronautics Act* and the *Canadian Aviation Regulations*. A determination is made whether a violation of the *Aeronautics Act* or the *Canadian Aviation Regulations* has occurred. Part of the enforcement/investigation role is to conduct safety studies and random checks and to potentially ground a plane with a follow up with the pilot, the mechanical inspector and/or the manufacturer. The superintendent may assist in an investigation as part of the team but primarily his role is to oversee and manage logistics, case assignments and schedules.

27 Mr. Gagnon believes that recent experience as a pilot is required to fulfill the key activities of the position, such as understanding a complaint concerning a GPS approach, which is new technology. In his opinion, it helps to be a pilot to determine whether a situation is serious enough to warrant an investigation and whether it is a major or a minor occurrence, to explain the legislation, or to recognize a safety problem. On the other hand, the superintendent consults with his team, some of whom are pilots. In Winnipeg, where the witness works, piloting aircraft represents approximately 10 percent of the superintendent's time. A superintendent need not be an aircraft maintenance engineer, as he can speak to one on parts of a report that he may not technically understand.

28 Catherine Fletcher is the regional director for the Prairie and Northern Region and is the supervisor of all three positions that are the subject of these applications. The superintendent of enforcement's job involves handling finance and human resources as well as assessing staff and imposing monetary penalties, training, and assigning of files for investigation. As supervisor of the superintendant position, she wants an incumbent who has managerial competence, especially in law and tribunal proceedings, and is not concerned that the incumbent is not a pilot, even when the superintendent acts as regional manager. Ms. Fletcher supervises two superintendent positions in enforcement – one a TI-07, the other an AO – and they discuss issues together.

29 Turning to the pith and substance of the job, or its primary purpose, the testimony I have heard is consistent with the overall description under the heading Client Service Results and the specific tasks as outlined under Key Activities. In a nutshell, this position has overall responsibility to manage the enforcement of the *Aeronautics Act* and the *Canadian Aviation*

Regulations to ensure the safety of Canadian civil aviation. In the overall description of the AO group, it states that the primary responsibilities are, among others, regulating aircraft and aircraft operators, developing aviation legislation and information and ensuring compliance with the legislation and regulations. For greater clarity, the inclusions section specifies activities that must be a primary purpose of the position. Of note and relevant to the duties of this position are:

1. *(a) the determination of requirements and the development of operational procedures;*

...

(c) the investigation of aviation occurrences, the conduct of safety studies, and the identification of and the communication of information relating to safety deficiencies;

(d) the enforcement of aviation legislation to ensure an adequate level of safety for the national civil air transportation systems;

30 As I have said in the previous application (PSLRB File No. 547-02-4), only one of the inclusions need be a primary purpose to bring the position under the AO group definition. In this case there are three, with 1(c) and (d) above being so spot-on as to render further review superfluous.

31 I have no doubt that recent experience as a pilot and the possession of a current pilot's licence would enhance the performance of the duties or, to quote Mr. Gagnon, "it would help". However, the exclusions section, which would exclude all positions from the AO group where a pilot's licence and experience are not mandatory, is not the prevailing or determining factor. Paramount in my analysis is the application of the "best fit" rule. While many groups might be "a" fit, only one group can be a "best fit," and that is the AO group.

32 The position is currently allocated to the TC group. A careful reading of the inclusions to determine what is pivotal to positions in this group makes it abundantly clear that if a fit exists at all, it is a poor fit. Moreover, as in the previous application, the exclusions statement, which excludes positions whose primary purpose is included in the definition of any other group, operates against the employer and intervenor, as I have already found that the primary purpose of the position is included in the AO group definition.

C. The third application

33 The CFPA has applied for a determination that the position of superintendent, Aerodrome Safety, presently included in the TC group, is more properly included in the AO group. Three work descriptions were submitted for this position:

1. Exhibit A-25: position ACE-02719, Edmonton (final version);
2. Exhibit A-27: position PRAL-19826, classified TI-07, Edmonton (draft version; last updated on October 7, 2005); and
3. Exhibit A-7: position PRAL-19826, Edmonton (final version; last updated on December 15, 2000; reviewed on April 7, 2006).

34 In addition to the work descriptions, Duncan Wilson, for the CFPA, and Ms. Fletcher, for the respondent, gave evidence concerning the superintendent, Aerodrome Safety position. Both Mr. Wilson and Ms. Fletcher agreed that the Exhibit A-7 work description was accurate; Ms. Fletcher helped in the drafting of that work description.

35 Mr. Wilson was a civil aviation safety inspector in Edmonton until November 2007. He reported to the superintendent position and has acted in that position. There is an annual inspection of the airport and an audit done on a three- to five-year cycle. Mr. Wilson believes that his pilot experience helped him perform the superintendent's duties on an acting basis. He gave examples of how he used his pilot experience to respond when the airport manager did not understand the need for a continuous line from the runway to the gate and to provide guidance and input on lighting requirements for low-visibility approaches. As well, he used his pilot experience to help an inspector determine the proper location for a glide-path transmitter and to provide input on the appropriate selection of a route into the Arctic. Nonetheless, he believes that the present incumbent of the superintendent position, who is not a pilot, is able to do his job. Nor does he believe he should not be reporting to a non-pilot superintendent.

36 Ms. Fletcher has been the regional director of the Prairies and Northern Region since 2006 and supervises the superintendent, Aerodrome Safety. Generally speaking, the superintendent is responsible for ensuring compliance with safety standards. Specifically, the superintendent identifies hazards, manages both financial and human resources, recommends strategies, standards and practices, and sits on various committees and working groups.

37 Once again, the preferred approach is to determine in which group this position best fits, having first determined the primary purpose of the position. The primary purpose of the job is to ensure that all airports, air carriers and aviation personnel comply with existing safety regulations and standards. To achieve that goal, the incumbent and his team conduct inspections and audits, provide advice to regulatory authorities, consult on regulatory standards, provide safety awareness through presentations, and determine both immediate and longer-term corrective action as a result of audit and inspection findings, and interpret regulations and standards.

38 To begin with, these duties seem to fall within the general AO group definition, which states that:

... positions that are primarily involved in inspecting, licensing and regulating aircraft, aviation personnel, air carriers, aircraft operations and airports and supporting facilities; determining certification; developing aviation legislation, standards and information and ensuring compliance with them...

39 If in any doubt that this position is a fit, the following inclusions seem to remove that doubt:

1. (a) the determination of requirements and the development of operational procedures;

...

(c) ... the conduct of safety studies, and the identification of and the communication of information relating to safety deficiencies;

(d) the enforcement of aviation legislation to ensure an adequate level of safety for the national civil air transportation systems;

...

6. the leadership of any of the above activities.

40 So, clearly it is a fit. But is it the best fit? Turning to the group definition for the TC group, the group in which this position is presently allocated, the overall group definition seems, at least, a loose fit. The primary involvement is the performance, inspection and leadership of "skilled

technical activities." Reading the inclusions section sheds light on what is meant by "skilled technical activities." It lists such skills as:

- *making of maps, drawings, and illustrations;*
- *designing three-dimensional exhibits;*
- *inspection and analysis of biological, chemical and physical substances;*
- *engineering technology;*
- *computer software;*
- *meteorology, hydrography or oceanography;*
- *environmental hazards;*
- *human and animal diseases;*
- *agricultural, fishery and forestry products;*
- *construction of prostheses;*
- *etc.*

41 Again, as in the two previous applications, excluded from the TC group are positions whose primary purpose is included in the definition of any other group. I agree with the applicant that the primary purpose falls squarely within the AO group definition. Thus, the best fit is within the AO group.

42 Finally, I have been shown no evidence that including any of the three positions within the AO group would not provide satisfactory representation for the incumbents, nor that the positions do not enjoy a community of interest. On the contrary, from my findings, and noting that the positions were historically included in the AO group, I am confident that they will fit.

43 For all of the above reasons, the Board makes the following order:

II. Order

44 The applications are allowed. The positions at issue are to be included in the AO group for which the Canadian Federal Pilots Association is the certified bargaining agent.

June 20, 2008.

**Barry Done,
Board Member**

Date Modified: 2008-09-19