

FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD
In the matter of a Complaint alleging a violation of Section 190
of the *Public Sector Labour Relations Act*

Between:

TREASURY BOARD SECRETARIAT

Complainant
(Employer)

AND

CANADIAN MERCHANT SERVICE GUILD ('the Guild')

Respondent
(Union)

Response of the Guild

Introduction

1. On May 5, 2022, the Complainant Treasury Board Secretariat ('Treasury Board') filed a Complaint under section 190 of the *Public Sector Labour Relations Act* alleging that the Respondent Guild had engaged in surface bargaining and violated its duty to bargain in good faith.
2. Several days later, Treasury Board also requested that the Board delay the establishment of an Interest Arbitration Board in its Form 9 filed with the Board in Board Reference No. 585-02-44668.
3. The Guild denies that it has violated its duty to bargain in good faith and further submits that the Complainant is out of time to submit this complaint.
4. What follows is the Guild's Response to the Complaint.

Response

5. The Guild is a federal public service bargaining agent certified to represent the approximately twelve hundred (1200) Ships' Officers at the Canadian Coast Guard and the Department of National Defence.

6. The Guild's Bargaining Committee is made up of approximately sixteen (16) individuals, including eight (8) Ships' Officers from across the country. Ships' Officers work on numerous vessels across Canada with a variety of schedules and are frequently "at sea" and unable to leave their home port and/or access virtual platforms which creates logistical difficulties when attempting to schedule meetings of the bargaining committee. Neither the inclusion of Ships' Officers on the bargaining team, nor the logistical difficulties, were unique to this round of bargaining. The logistical difficulties with respect to Officers' schedules and the lack of internet at sea would be well known to the members of the Employer's bargaining committee who, like the Ships' Officers, were Coast Guard employees.
7. Treasury Board is the Employer of all federal public service employees including the Ships' Officers.
8. The Collective Agreement between the parties expired on March 31, 2018.
9. Notice to bargain was provided by the Guild in December 2020.
10. The parties held a "pre-bargaining" meeting in January 2021 to discuss bargaining protocols and dates. The Union had already conveyed to the Employer's Negotiator that its bargaining committee was comprised of Officers who work across the country and that there may be some logistical challenges to coordinate mutually agreeable times when they were not all working at sea. The Guild asked that the Employer provide a range of available bargaining dates.
11. The Employer subsequently advised that the earliest that it could meet was March 2021 and, in May 2021, the Employer proposed bargaining dates in mid-July 2021. The Guild agreed to the dates proposed and the parties subsequently met on July 14, 15 and 16, 2021 to exchange proposals and to conduct the first three (3) days of collective bargaining.
12. Between May and July 2021, the Guild continued to engage with the Complainant and the parties had several conversations to discuss process and parameters for moving forward. On May 11, 2021, the parties held a zoom meeting and during discussions, the Complainant proposed a possible pattern agreement to cover the period from 2018-2021. The Guild advised that it would respond by the end of the week. After discussing the proposal, the Guild determined it could not agree to anything without approval from the bargaining committee and as bargaining had not yet commenced, it did not yet have a full mandate. The Guild invited the Treasury Board to present the concept at the beginning of the bargaining dates in July so that the bargaining committee could give it proper consideration.
13. On July 14, 2021, the parties exchanged bargaining proposals. Both sides provided a presentation and the Guild provided rationales for each of its proposals.
14. On the second day of collective bargaining, July 15, 2021, the Union agreed to sign off on four (4) of the Employer's proposals involving eighteen (18) collective agreement articles. The Employer also asked a number of questions about the Guild's proposals.

15. On the third day of bargaining, July 16, 2021, the Guild provided substantive answers to the questions posed by the Employer the day before. The Guild also asked a number of questions about the Employer's proposals and advised the Employer of the Guild's position regarding the Employer's proposals. To date, the Guild's questions regarding the Employer's proposals remain mostly unanswered.
16. At the end of the July bargaining, the Guild had proposed that the parties meet again in the first few weeks of September but the Employer was not available. The parties subsequently confirmed October 4, 5 and 6, 2021 as the next three (3) days of collective bargaining.
17. When the bargaining continued, the Employer had a new Negotiator. The new Negotiator had been in attendance at the July dates and had also been the Treasury Board Negotiator for the SO group in previous rounds of bargaining so the Guild was hopeful that the transition would be seamless.
18. Unfortunately, at the commencement of the fourth day of bargaining on October 4, 2021, the Negotiator for Treasury Board commenced bargaining by advising the Guild that he did not have a mandate to agree to any major proposals. However, he had brought a representative from PSPC to conduct a presentation regarding the Employer's proposed Memorandum of Understanding regarding Collective Agreement implementation.
19. Notwithstanding that the Employer had explicitly advised that it had no mandate to bargain any proposals of significance, the Guild, in good faith, continued discussions with the Employer, listened to and asked questions of their presentation and even prepared a counter proposal to the Memorandum of Understanding that the Employer had tabled. The Employer was solely interested in discussing their proposed MOU and showed no interest in discussing any of the Guild's proposals. However, in an effort to keep momentum moving forward, the Guild posed questions of the Employer which remained unanswered.
20. The next day, October 5, 2021, the Employer's Negotiator reiterated that he could not agree to any proposals including the Guild's counter proposal on the MOU due to his lack of mandate. He also confirmed that he had no mandate to negotiate any monetary items particularly economic increases. It was only after being advised that the Employer's representative had no mandate that the Guild advised the Employer that the parties had reached an impasse and the Guild would be requesting mediation.
21. The Guild utilized the next day that had originally been set aside for collective bargaining, October 6, 2021, to meet with its bargaining committee.
22. On November 23, 2021, the Guild wrote to the Board and requested the assistance of a mediator pursuant to section 108 of the *Act*.
23. The parties subsequently agreed to three (3) days of mediation on March 1 – 3, 2022.
24. At no point between the last date of collective bargaining on October 5, 2021 and the commencement of the mediation on March 1, 2022 did the Employer reach out to the Guild to advise that it now had a mandate and wished to resume collective bargaining.

25. At the first day of mediation on March 1, 2022, the Guild provided the Mediators with a list of six (6) proposals that it wanted to discuss and address. These 6 items were not even core issues but were intended to engage the Employer and to invite feedback and discussion before moving on to other proposals. The Mediators spent the remainder of the day meeting with the Employer.
26. On the second day of mediation, March 2, 2022, the Mediators advised the Guild that the Employer would not address any of the Guild's proposals individually but would do so via a comprehensive package. Later that day, the Employer tabled a comprehensive package to resolve all outstanding bargaining issues. The Guild spent the rest of the day and the following morning thoroughly reviewing the Employer's package before it determined that the Employer's "comprehensive" package only addressed a couple of the Guild's six (6) individual proposals that had been put forward on March 1, namely improvements to bereavement leave (which had already been offered to the Ships' Crew) and pay administration. The Employer's 43-page package consisted primarily of the Employer's outstanding proposals.
27. If the Guild's bargaining committee were to agree to the Employer's package, it would mean that nearly all of the Guild's outstanding proposals to amend approximately thirty Articles, Appendices and LOU's of the Collective Agreement would be withdrawn. It was apparent to the Guild at this point that the Employer was not seriously interested in considering the Guild's bargaining proposals.
28. Contrary to the Employer's assertion at paragraph 9 of its complaint, at no time was the Guild advised during the mediation sessions in March that the Employer was interested in continuing to engage in any of the Guild's priorities or outstanding issues.
29. To date, the Employer has not agreed to a single one of the Union's proposals although the Guild has signed off on several of the Employer's proposals.
30. During discussions with the Employer in April 2022, the Guild advised the Employer more than once that, if the Employer believed there were items that could be agreed upon and signed off, the Employer's Negotiator should reach out to the Guild's Negotiator. The Employer's Negotiator failed to reach out to the Guild's Negotiator.
31. The Guild submits that it has made every effort to bargain in good faith and has taken all aspects of the bargaining process seriously.

Complaint is Untimely

32. Section 190(2) requires that unfair labour practice complaints filed under section 190(1) of the *Act* must be filed "not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint".
33. Virtually all of the particulars set out at paragraph 8 of the Complaint contain allegations that took place between December 2020 when notice to bargain was given and October 2021.
34. There is no question that the Complainant had full knowledge of the events that took place up until October 2021 and, if it truly believed that the Guild had violated its

statutory duty to bargain in good faith, it had 90 days to file a complaint with the Board but it chose not to do so.

35. Instead, the Complainant waited seven (7) months and ignored several invitations from the Guild for the Complainant's Negotiator to contact the Guild's Negotiator. It was not until the Guild filed its Form 8 Request for Arbitration on May 3 that the Complainant filed its Complaint.
36. The comments embedded in the Complaint itself make it clear that the Complainant had started drafting the Complaint as early as March 31, 2022.
37. From the Guild's perspective, it clearly communicated to the Employer in October 2021 that, based on the Employer's lack of mandate, the parties appeared to be at an impasse and that the assistance of a mediator may be the only way to resolve outstanding issues. The Guild was also clear with the Employer that it was the Employer's refusal to address issues that the Guild wished to discuss that had led to the impasse.
38. At no point during the intervening months or after the Guild requested the assistance of federal mediators in November 2021 did the Employer reach out to the Guild to indicate a willingness to address any of the Guild's outstanding proposals.
39. The Guild entered the mediation sessions in March 2022 in good faith, hopeful that the Employer would be willing to discuss and address the Guild's outstanding proposals.
40. Requesting the assistance of federal mediators is a statutory right that has been regularly utilized by the parties during each round of collective bargaining subsequent to the 1998 agreement. It has proved helpful in the past, with minor items being agreed upon in mediation, and the Guild was optimistic that the involvement of federal mediators would result in movement that would bring the parties closer together.
41. Unfortunately, after the Employer tabled their comprehensive offer, the Guild realized that the parties were still very far apart. After careful consideration of the comprehensive offer, the Guild's bargaining committee determined that a counter proposal would not be fruitful and would result in the Guild negotiating against itself. Therefore, the Guild made the decision to file its request for arbitration, as per the parties' historical practice.
42. The Guild was therefore surprised to learn that the Employer thought that bargaining had ended too early. Nonetheless, the Guild invited the Employer's Negotiator to reach out to the Guild's Negotiator if it wished to continue discussions, but no such contact was initiated.
43. In these circumstances, the Guild believes that the Employer knowingly and intentionally waited more than seven (7) months to file its complaint and it is now statute barred from proceeding.
44. As confirmed in *Boshra v CAPE*, 2009 PSLRB 100, section 190 (2) of the *Act*, "gives no authority to relax the deadline" of 90 days and "[t]he issue of timeliness goes directly to the Board's jurisdiction" (para 19-20)

45. While the parties engaged in mediation – a process defined as voluntary – in March, the Board noted in *Boshra* that “the Board does not have the option of taking the complainant’s efforts to continue to work with the respondent on his case into consideration. Subsection 190(2) of the Act requires timely filing even where efforts continue to resolve a problem amicably. When those efforts later succeed, a complainant can withdraw his or her complaint.” (para 47)
46. In these circumstances, the Guild submits that the Complaint is out of time and requests that the Board dismiss the Complaint without hearing.

Response to Particulars

47. The Complainant’s allegations are set out at paragraph 8 of its Complaint. In addition to the general Response set out above, the Guild provides the following further response:
- a. The Complainant alleges the Guild made proposals that Treasury Board could never accept including proposals that have failed in every round of collective bargaining including arbitration:
 - i. Guild response – the Complainant failed to particularize which of the Guild’s proposals it views as “non-starters” and / or reasons why it views these proposals as “non-starters”. If anything, the Guild submits that this allegation demonstrates that the Complainant entered into bargaining with a “closed mind” to some of the Guild’s proposals and was not willing to entertain and engage in an open discussion of them. The Guild reserves the right to comment more fully in the event the Complainant specifies which of the Guild’s proposals were “non-starters”. Finally, the Guild disputes the Employer’s argument that the submission of a proposal that has not been successful in previous rounds of bargaining is evidence of surface bargaining or a violation of its duty to bargain in good faith.
 - b. The complainant alleges the Guild failed to provide a full justification of its bargaining position:
 - i. Guild response – The Guild is puzzled by this allegation. The Guild provided a full explanation and rationale for its proposals when the initial exchange took place on July 14, 2021. As set out above, the Guild also provided a full response to questions posed by the Complainant the following day. The Guild is not aware of any outstanding questions posed by the Complainant to which it has failed to provide an answer. Again, the Complainant failed to provide any particulars of this allegation and the Guild reserves its right to comment more fully in the event that the Complainant provides further particulars.
 - c. The Complainant states that the Guild failed to respond to or make counter offers to the comprehensive offer presented in March 2022:
 - i. Guild response – As the Guild explained to the Mediators, it reviewed and considered what the Complainant called its “comprehensive offer” but, after determining that the “comprehensive offer” contained virtually none of the Guild’s proposals, the Guild’s bargaining committee determined that the Complainant was not serious about entering into a renewal collective agreement. Had the Guild submitted a counter proposal, it

would have been negotiating against itself. The Guild's bargaining committee was of the view that the parties were far apart and, after careful consideration and a further review and discussion of the Employer's package, the committee determined a counter proposal would not be productive. Nonetheless, the Guild's President subsequently communicated to the Complainant that it would be necessary for Treasury Board to address some of the Guild's proposals in any comprehensive package and invited the Complainant's Negotiator to contact the Guild's negotiator but no response was forthcoming.

- d. The Complainant alleges that the Guild has failed to respond to the Complainant's objections to its proposals:
 - i. Guild response – Again, the Complainant has failed to particularize its allegation and detail which of the Guild's proposals are objectionable. The Complainant is stating that it objected to the Guild's proposals and effectively acknowledges that it did not provide counter proposals on those issues, which would have furthered bargaining. Nevertheless, while the Guild disputes that it is obligated to respond to "objections", the Guild reserves its right to respond more fully should the Complainant provide particulars of the allegation.
- e. The Complainant alleges that the Guild rejected the Complainant's list of "plausible issues to discuss at the October 2021 negotiation session and focused the majority of the negotiations on one issue":
 - i. Guild response – As set out above, the Guild submits that this characterization of what took place during the October 2021 negotiations is inaccurate. The Complainant commenced negotiations by indicating that it had no mandate to discuss anything "major" and had already invited Mathieu Carrière from Public Services and Procurement Canada to provide a presentation on its proposed MOU to implement the Collective Agreement.
- f. The Complainant alleges that the Guild refused to discuss unnamed issues because the Complainant could not agree to the issue the Guild wanted to discuss.
 - i. Guild response – This allegation also lacks particulars and the Guild is truly puzzled as to what single issue the Complainant alleges that the Guild insisted on discussing. The Guild reserves its right to respond more fully in the event the Complainant provides particulars.
- g. The Complainant alleges that the Guild arbitrarily ended both the October and March sessions:
 - i. Guild response – As set out herein, the Guild clearly communicated its reasons for ending the October session, namely, the Employer had indicated it had no mandate to discuss major issues. Similarly, with respect to the March sessions, the Employer's comprehensive offer was completely one-sided to the extent that agreeing to it would have meant

that the Guild's bargaining committee would have had to withdraw virtually all of its bargaining proposals. The Employer knew, or ought to have known, that this was untenable to the Guild.

- h. The Complainant alleges that the Guild refused to start negotiations in March 2021 and seems to suggest that the Guild delayed bargaining for nearly 7.5 months:
 - i. Guild response – the Guild disagrees with this characterization of events. The Employer was not available to start bargaining until March 2021 at the earliest (3 months after notice to bargain was given) and then only provided July bargaining dates as a possibility when the Guild advised that its bargaining committee was not all available in March 2021.
 - i. The Complainant alleges that the Guild did not make itself available for mediation until March 2022 – 6 months after walking away from negotiations:
 - i. Guild response – Contrary to the Complainant's assertion, mediation occurred 5 months, not 6 months, after negotiations. The Request for the Appointment of a Mediator was sent by the Guild on November 23, 2021, and two weeks later, the Board emailed the parties on December 10, 2021 to confirm March 1-3, 2022 as the dates. Mediation occurred less than 3.5 months after the request was sent. Given the intervening holiday period along with the need to coordinate multiple schedules, and that a date was assigned two weeks after the request was sent, the Guild submits that there were no unreasonable delays that would lend support to the Complainant's allegation.
 - j. The Complainant alleges that the Guild prematurely requested arbitration of the collective agreement:
 - i. Guild response – As stated above, the Guild advised the Complainant in October 2021 that the parties were at an impasse and the Complainant remained unwilling to discuss the Guild's proposals. The President advised Stephen Diotte on at least two (2) occasions that the Treasury Board Negotiator ought to reach out to the Guild's Negotiator, but they did not do so. Considering the impasse and that 3 days of mediation had failed, the logical next step and customary process was to request arbitration of the collective agreement.
- 48. The Guild disagrees that the steps taken by the complainant as described in paragraph 9 can be characterized as "reasonable efforts to reach a collective agreement throughout the bargaining process".
- 49. Inviting the Guild to submit alternative proposals, and then providing a "comprehensive proposal" that includes none of the Guild's priorities, were not indicative of a desire to arrive at a contract.
- 50. Additionally, the Complainant acknowledges at paragraph 9 (2) that it was in "caretaker period" and suggested the parties continue discussions in preparation for future negotiation sessions. The Complainant's description of being in "caretaker period"

confirms that it lacked a mandate and did not enter mediation with an intention to resolve outstanding matters.

51. As stated in *Professional Institute of the Public Service of Canada v. Treasury Board*, 2009 PSLRB 102, at para 84, “[t]he duty to bargain in good faith does not impose an obligation to reach an agreement. It imposes an obligation on each party to intend to reach a collective agreement and to make every reasonable effort to achieve that goal.”
52. The Guild has, at all times, made every reasonable effort to achieve a collective agreement; however “there is no obligation for the parties to continue bargaining when further discussions are no longer fruitful” (*Professional Institute of the Public Service of Canada v. Treasury Board*, 2009 PSLRB 102 at para 88)
53. Based on the foregoing, the Guild submits that the Complainant has failed to support its allegation that the Guild has not entered bargaining in good faith and that it has engaged in “surface bargaining”.
54. The Guild respectfully requests that:
 - a. The Board dismiss the Complaint as being untimely;
 - b. The Board dismiss the Complaint on the basis that it fails to meet both the subjective and objective components of the test required to establish that the Guild has entered into bad faith bargaining;
 - c. The Board dismiss the Employer’s request to delay establishing an arbitration board and direct the Employer to appoint its nominee so that a Chair can be appointed without further delay.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20TH DAY OF MAY 2022.