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Citation: 2007 PSLRB 18

*Public Service
Staff Relations Act*



Before the Public Service
Labour Relations Board

BETWEEN

RÉAL LAMARCHE

Complainant

and

YVAN MARCEAU

Respondent

Indexed as
Lamarche v. Marceau

In the matter of a complaint made under section 23 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Léo-Paul Guindon, Board Member

For the Complainant: Pierrette Gosselin, Professional Institute of the Public Service of Canada

For the Respondent: Stéphane Hould, counsel

Heard at Sherbrooke, Quebec,
May 30 and 31, 2006.
(P.S.L.R.B. Translation)

I. Complaint before the Board

[1] Réal Lamarche (“the complainant”) has held a technical adviser (AU-3) position in the Appeals Division of the Canada Customs and Revenue Agency (“the Agency”) for 10 years. He has worked for the Agency since 1975. He claims in his complaint of October 4, 2002, that Yvan Marceau (Chief of Appeals) refused to consider his application for a position as appeals team leader at the Sherbrooke office on the grounds that he was unavailable because he held a national position with the union.

[2] An initial hearing was held before the Public Service Labour Relations Board (“the Board”) concerning Mr. Lamarche’s complaint on January 19 and 20, 2004. The decision rendered on April 26, 2004 (2004 PSSRB 29), was referred for judicial review to the Federal Court of Appeal. The decision on March 8, 2005 (2005 FCA 92), ordered a new hearing before a differently constituted panel.

[3] On April 1, 2005, the *Public Service Labour Relations Act* (“the new Act”), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force.

[4] The parties submitted their arguments to the Board on the transitional measures and the applicability of the new *Act*. The interim decision of October 28, 2005 (2005 PSLRB 153), states that the complaint will be decided on the basis of the rights and obligations arising under the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (“the former Act”), as though it had not been repealed.

II. Summary of the evidence

[5] The complainant held a variety of union positions with the Public Service Alliance of Canada (PSAC) between 1978 and 1989 as representative, then as vice-president and president for the Sherbrooke local. The AU group was transferred to the Professional Institute of the Public Service of Canada (PIPSC) in 1989. The complainant became involved with that union in 1990 and has been National President for the Audit-Financial Services group since 1996.

[6] The complainant began working for the Department of Revenue in 1975 in a PM-2 position in auditing. He then held a team leader position (PM-3) and moved to a position at the AU-1 group and level in 1985. He moved to the AU-2 level in 1988 and was assigned to the Appeals Division in 1989. In 1993, he held a team leader position

in training (AU-3). Until 1995, he worked as an auditor of base files. He accepted a temporary lateral transfer to the Appeals Division on April 3, 1995, as an appeals officer and technical adviser (AU-3). He performed these functions out of the Sherbrooke office. The transfer was extended for the period from April 1, 2001, to March 31, 2003 (Exhibit P-3). He qualified for the competition for Chief of Appeals held in October 1995 (Exhibit P-4).

[7] Jean-Claude Fontaine, who held the position of acting chief of appeals at the Sherbrooke office, was appointed Chief of Appeals in October 1995. On several occasions, the complainant replaced Mr. Fontaine. The complainant assumed certain delegations of authority from the Chief of Appeals, who consulted him for a second opinion on important files.

[8] Following the re-organization of the Agency on April 1, 2002, Yvan Marceau (“the respondent”) became Chief of the Appeals Division, which was integrated into the Tax Services Office of Eastern Quebec. The Appeals Division of the Sherbrooke office then became the appeals team of the Sherbrooke office for which Mr. Fontaine was given responsibility as team leader.

[9] Mr. Fontaine accepted a position as quality controller of the work of appeals officers in May 2002, for a temporary period of two years. During lunch with Mr. Fontaine on June 3, 2002, the complainant was told of Mr. Fontaine’s departure and then asked how he could apply for the team leader position. He informed Mr. Fontaine of his interest in the position and stated that he would have decisions to make regarding his involvement with the union.

[10] At that time, Mr. Fontaine recommended to Mr. Marceau that he fill the position on a two-year acting basis through a competition. Mr. Marceau preferred to choose between two options, either to assign management of the team to someone from Quebec, or to proceed with an appointment without competition for a short period followed by a competition for the two-year acting period. The second option was chosen and five interested people, including the complainant, were advised accordingly by email on June 6, 2002 (Exhibit P-7). The competition to fill the position on an acting basis for two years was scheduled to be held between July and September 2002. It was actually launched in September 2002.

[11] During a meeting on June 6, 2002, Mr. Marceau informed the employees of the Sherbrooke appeals team of the appointment without competition of Danielle Rouleau to the position of team leader. Ms. Rouleau met the two eligibility criteria identified by Mr. Marceau for the temporary position, namely, recent significant experience in performing the tasks of an AU-3 position within the Agency and experience with programs administered by the Appeals Division (Exhibit P-5).

[12] Lucie Bouchard (AU-1) asked Mr. Marceau about his choice. The members of the team were concerned about Ms. Rouleau's lack of experience as she had held an AU-2 position with the team for eight months. Mr. Marceau responded that Ms. Rouleau had experience at the AU-3 level (in Tax Avoidance in Laval) and that she was working with the team. In addition, this choice did not create any shortage of personnel in another sector. In response to questions from Ms. Bouchard, Mr. Marceau explained that he did not consider the complainant's application for this position because the complainant was busy with the union.

[13] Jocelyne Létourneau, who has worked for the Agency since 1972, holds a PM-2 position with the Sherbrooke appeals team. She attended the June 6, 2002, meeting called by Mr. Marceau and corroborated, in her testimony at the hearing, the events of that meeting as described in Ms. Bouchard's testimony. Following the meeting, two members of the team informed the complainant of what had occurred and verified his interest in the position.

[14] Mr. Marceau explained in his testimony that the complainant's transfer to his substantive position in the Audit Division was decided during the re-organization of the Appeals Division on April 1, 2002. Mr. Marceau did not know if the complainant was informed of his assignment to his new position in the Audit Division, adding that Mr. Fontaine had perhaps told him. Mr. Marceau chose Ms. Rouleau on Mr. Fontaine's recommendation. In the Sherbrooke appeals team, Gaétan Goulet (PM-2), who has 15 years' experience, can provide technical support. Benoît Roberge (AU-4) in the Quebec office can be available as technical adviser for the Sherbrooke team.

[15] During a telephone conversation on June 6, 2002, Mr. Marceau and the complainant agreed to meet the next day when an employer-union meeting was scheduled in Sherbrooke. At the June 7, 2002, meeting, Mr. Marceau explained to the complainant his decision to proceed in two stages, first with an appointment without

competition for a short interim period and then with a competition to fill the position for two years.

[16] The complainant's availability was raised during the meeting. It was not a major issue in terms of continuity in the short term according to Mr. Marceau. Based on the complainant's testimony, Mr. Marceau told him at the meeting that his involvement with the union was very important and that he could not leave the union. According to a principle of union loyalty invoked by Mr. Marceau, it is the complainant's view that Mr. Marceau's comments meant that he could not be a turncoat, that is, leave the union and become a manager. The complainant believes that Mr. Marceau's comments meant that his commitment to the union interfered with his ability to obtain the team leader position. During the meeting, the complainant mentioned that he was not "[translation] married to the union" and that he could give up his elected position. Given the complainant's interest in the position, Mr. Marceau urged him to participate in the competition that was to be launched between July and September 2002.

[17] Ms. Rouleau withdrew from the team leader position on June 7, 2002, because she did not feel she had sufficient support from the members of the team. She advised Mr. Marceau and Mr. Fontaine accordingly (Exhibit P-2). Mr. Marceau convinced her to reconsider her decision and to continue in the position for a period of six months. At a meeting with the Sherbrooke team on June 14, 2002, Mr. Marceau informed the employees that Ms. Rouleau was remaining in the position and that Mr. Roberge would act as the technical adviser. He made it categorically clear to the employees that staffing was his responsibility. According to Ms. Rouleau, Mr. Marceau was angry and shaking during this meeting. Mr. Marceau explained that he was shaking because of his age and not from anger at the concerns raised with him.

[18] After annual leave and a period of illness, Ms. Rouleau resigned as team leader for personal reasons and was transferred to Montréal. Mr. Marceau temporarily assigned the team leader position to Mr. Roberge, who assumed the position but remained in Quebec. On average, he came to the Sherbrooke office three days a week, one week in two. Mr. Roberge was transferred to an appeals team leader position through a temporary lateral transfer valid from September 16 to December 27, 2002 (Exhibit P-6). At the time of the hearing of this complaint, he was still the incumbent of that position.

[19] Mr. Marceau testified that he again urged the complainant to participate in the competition at a coffee break during the last week of August 2002. The complainant countered by stating that he does not recall meeting Mr. Marceau at that time because he contested Ms. Rouleau's appointment through the individual feedback procedure on July 10, 2002. The July 17, 2002, reply closed the file at Mr. Marceau's level (Exhibit P-9). In that reply, Mr. Marceau stated that the complainant did not meet the criteria for experience in performing the tasks of an AU-3 position and experience with programs administered by the Appeals Division. He specified in the reply that "[translation] there were serious doubts about your availability in the short term" and that he did not "[translation] consider it necessary to investigate those doubts further because the two criteria had not been met." A request for review was filed concerning this decision on July 25, 2002 (Exhibit P-10). Correspondence with André Paquin, Director, Tax Services Office for Eastern Quebec shows that the file was under review at that level in July and August 2002 (Exhibits P-11 and P-12). In August 2002, the complainant was in the process of moving to his new workstation in the Audit Division.

[20] The complainant was not informed of his return to his substantive position in the Audit Division until after the events surrounding Ms. Rouleau's appointment to the team leader position. At the time of Ms. Rouleau's appointment on June 6, 2002, he continued to perform the duties of appeals officer and technical adviser with the Sherbrooke appeals team. He continued to stay in touch with the members of the Sherbrooke team and always maintained a regular presence in the office despite his important union responsibilities. Although he was not in the office 37.5 hours a week, he answered questions from members of the team and remained responsible for important Objection to Notice of Assessment files. In the past two years, he spent an average of about 15 hours a week on his union activities, although he could be absent for an entire week upon occasion.

[21] During his career, the complainant has performed each of the main activities contained in the team leader work description (Exhibit P-8). His union activities have given him the opportunity to develop the desired skills for the team leader position in the areas of bargaining, consultation, supervision and intervenor management.

[22] Jacques Roy (recruiter for PSAC and then for PIPSC) acknowledged the complainant's abilities for bringing people together and his significant leadership

qualities. Joseph Painchaud, who worked with the complainant on union activities in 1975, considers him a calm, thoughtful union official who seeks consensus. Patrice Allard (PM-6) was involved in bargaining as the employer's representative in 2000 and 2002 and met the complainant during these rounds of bargaining. He found him to have good negotiating skills and openness to compromise. In his view, the experience that the complainant gained in bargaining is applicable to the team leader job.

[23] Mr. Marceau always refused to sign his union membership card despite repeated requests by Mr. Roy between 1978 and 1990. Mr. Marceau's response to the solicitation was that he did not need the union. Mr. Marceau allegedly offered Mr. Roy the team leader position on an acting basis on several occasions. Mr. Roy stated that these offers were made by Mr. Marceau "[translation] as a last resort."

[24] Mr. Painchaud worked for the Department of Revenue from 1965 to 1990. He held union executive positions from 1972 to 1990 and then the presidency. He reported to Mr. Marceau in 1981. In Mr. Painchaud's annual performance appraisal, Mr. Marceau noted that his union activities did not go well with his duties as an auditor in the special audit section of the Business Directorate. Mr. Marceau refused to remove this element from the appraisal and Mr. Painchaud complained about this situation in a letter to the Deputy Minister. Mr. Painchaud did not file a grievance concerning this appraisal. Mr. Marceau does not recall this incident and argues that if such correspondence was sent to the Deputy Minister, it was not brought to his attention.

[25] Mr. Allard began working for the Department of Revenue in 1972. He held a management position (PM-6) in 1982 in Montréal and the position of chief of appeals (excluded position) in 2000. He was involved in collective bargaining in 2000 and 2002 as an employer representative. The complainant was part of the union team for these negotiations. According to Mr. Allard, the complainant's involvement with the union enabled him to develop the desired skills for the team leader position. Mr. Marceau informed Mr. Allard of Ms. Rouleau's appointment as Mr. Fontaine's replacement. In response to a question from Mr. Allard about the number of candidates, Mr. Marceau told him that there were not many and that he was not required "[translation] to consider a guy from the union because he did not belong to the Appeals Division." Mr. Marceau vaguely recalls meeting Mr. Allard but does not recall the substance of the conversation.

[26] Mr. Marceau countered by stating that he had assigned Mr. Roy to management positions for acting periods on several occasions in the International Audit Division between 1976 and 2000. Others with union duties were appointed to management positions. Réjean Michaud (Vice-President of the Quebec local) was appointed as team leader of the Appeals Division in Quebec from October 2003 to March 2004, and Frédéric Shooner (a member of the Quebec union team) was appointed on an acting basis to a manager position (CO-03) from May 2005 to May 2006.

[27] The complainant participated in the selection competition for the Acting Team Leader position launched in September 2002. He withdrew because he concluded that “[translation] it was clear that they did not want him in this position.”

III. Summary of the arguments

A. For the complainant

[28] The complainant argues that the reason (union activity) given for his application not being considered is illegal and that Ms. Rouleau was appointed in order to avoid considering his candidacy.

[29] Ms. Bouchard and Ms. Létourneau testified that the reason given by Mr. Marceau for not considering the complainant’s application is that he is busy with the union. The reason that the complainant did not meet the experience criteria is invalid because he has over 10 years of experience with appeals and was performing his duties as a technical adviser with the Sherbrooke team at the time of the events that gave rise to the complaint. The complainant informed Mr. Fontaine and Mr. Marceau of his interest in the position in early June 2002.

[30] Mr. Marceau demonstrated anti-union animus because he always refused to sign a union membership card. In addition, he stated in Mr. Painchaud’s appraisal that his involvement in union activities is not compatible with a manager’s duties.

[31] Mr. Marceau told Mr. Allard that he did not have to take into consideration the application of “[translation] of a guy in the union because he was not in the division.” This reason is a pretext because the complainant physically performed his duties as technical adviser with the appeals team of the Sherbrooke office until August 2002. Mr. Marceau never informed the complainant of his decision to transfer him to the

Business Audit Division following the re-organization of the Appeals Division in April 2002.

[32] Unlike Mr. Marceau, the other witnesses consider that the experienced gained by the complainant during his involvement with the union is an asset in terms of the desired skills for the team leader position.

[33] Mr. Marceau pressured Ms. Rouleau to reconsider her decision to resign from the position in order to avoid having to consider the complainant for the position. The evidence shows that Mr. Marceau does not want a union representative in the appeals team leader position.

[34] The decision in *Stonehouse v. Canada (Treasury Board)*, PSSRB File No. 161-02-137 (19770524) states that employees have the right to participate in union activities without experiencing discrimination. This right is key to exercising the right of association. The respondent never asked the complainant if he would make himself available for the position of team leader. Consequently, in the circumstances of the matter before us, Mr. Marceau acted in violation of the former *Act* by concluding that the complainant was not available for the position.

[35] The complainant asks that I find that Mr. Marceau violated the prohibition set out in the former *Act* and that I recommend to the employer that the complainant be appointed to a team leader position.

B. For the respondent

[36] The burden is on the complainant to show that Mr. Marceau's decision is in violation of the former *Act*. Only one decision (*Stonehouse*) goes against the principle that the complainant must assume the burden of proof and it was adduced by the complainant.

[37] According to authors Brown and Beatty, at paragraph 9:1520 of *Canadian Labour Arbitration*, 3rd ed., the employer's decision not to appoint an employee to a position can be based on service requirements. It is incorrect to claim an automatic right of promotion for employees who are involved in union activities just because they are able to satisfy the degree of availability required by the job requirements. According to *Fairall v. McGregor et al.*, PSSRB File No. 161-02-368 (19870910), the employer can take into consideration whether union activities reduce an employee's

productivity. The decision in *Prue v. Bhabha*, PSSRB File No. 161-02-540 (19890801) recognizes that the employer may evaluate the skills of candidates and make a choice. In this instance, Mr. Marceau demonstrated that he was open to assigning the position to the complainant by suggesting that he participate in the selection competition.

[38] The employer is responsible for determining the requirements to perform the duties of a position. In the former *Act*, section 7 states that the former *Act* may not affect the employer's right to determine the organization of the Public Service and to assign duties to positions. According to *Gaudreau v. Harvey et al. and Treasury Board*, PSSRB File No. 1661-02-347 (19860611), I do not have to consider whether the complainant does or does not have the qualifications for the position, as that evaluation falls within the employer's staffing authority.

[39] The decision in *Social Science Employees Association v. Canada (Attorney General)*, 2004 FCA 165, sets out the principle that the complainant must establish that the employer acted in a discriminatory manner with intent and anti-union animus.

[40] The evidence is not sufficient to show that Mr. Marceau intended not to appoint the complainant to the position because of his union activities. Although Mr. Marceau did not deny questioning the complainant's availability because of his union activities, he assessed the operational needs of the service for the short transition period prior to launching the competition to fill the position on an acting basis for two years. Mr. Fontaine recommended Ms. Rouleau's appointment for this transition period. Ms. Rouleau met the criteria of having experience in an AU-3 position and having recent experience in the Appeals Division.

[41] The fact that Mr. Marceau had in the past assigned Mr. Roy and two other employees who had performed union duties to management positions for acting periods shows that he does not have any anti-union animus. A finding of anti-union animus must clearly be based on evidence and cannot simply be deduced.

[42] If the complaint is allowed, the respondent requests that I retain jurisdiction with respect to determining the amount of compensation.

C. Complainant's reply

[43] The evidence shows anti-union animus on the part of Mr. Marceau, who manipulated the competition to favour Ms. Rouleau. Mr. Marceau's autocratic attitude

during the meeting on June 14, 2002, confirms this conclusion. Mr. Allard's testimony shows that Mr. Marceau transferred the complainant to the Audit Division to ensure that Ms. Rouleau was the only person to meet the criteria. The decisions cited by the respondent cannot be applied to this matter.

IV. Reasons

[44] Based on the decision of October 28, 2005 (2005 PSLRB 153), this complaint must be decided on the basis of the rights and obligations arising from the former *Act*.

[45] Paragraph 8(2)(a) of the former *Act* stipulates that no one may discriminate in regard to employment because an employee is a member of an employee organization or is exercising any right under the former *Act*. For the complaint to be allowed, the complainant must show that the employer acted in a discriminatory manner toward the employee because he is a member of an employee organization or because he is exercising a right under the former *Act*. In addition, as pointed out in the Federal Court ruling (2005 FCA 92) that referred this matter back to the Board for a new hearing, the evidence of anti-union animus is very relevant, if not crucial, to the matter to be decided.

[46] This complaint relates only to the appointment made without competition to fill the position on an interim basis in anticipation of an official competition that was scheduled for fall 2002.

[47] The evidence shows that as of June 3, 2002, Mr. Fontaine knew that the complainant was interested in the position of appeals team leader at Sherbrooke. The email describing the two-step procedure to fill the position confirms that the complainant is one of the people interested in the position (Exhibit P-7). Mr. Marceau received a copy of that correspondence and is aware of the complainant's interest in the position.

[48] Ms. Rouleau is the person appointed on an interim basis to the team leader position by Mr. Marceau. The latter explains to the members of the team at the June 6, 2002, meeting that Ms. Rouleau has experience in an AU-3 position in the Agency and recent appeals experience. He states that the appointment does not create a shortage of employees in another sector as Ms. Rouleau is a member of the team. In response to questions from Ms. Bouchard, he states that he did not consider the complainant's application because he is busy with the union. This information is

confirmed by Ms. Létourneau's testimony and was not contested by Mr. Marceau during his testimony.

[49] On June 7, 2002, Mr. Marceau meets with the complainant and explains the two-step appointment procedure to him. At the time, the position is filled on an interim basis by Ms. Rouleau. The complainant's availability for this period is discussed but is not a major element in the decision that is intended to ensure the continuity of operations in the short term, according to Mr. Marceau's testimony. However, the complainant understood that Mr. Marceau's comments mean that his involvement in the union is an impediment to his appointment to the team leader position. At this meeting, the complainant told Mr. Marceau that he could get out of his union position and Mr. Marceau urged him to apply for the competition scheduled for the fall.

[50] I am not required to evaluate the fairness of Mr. Marceau's decision that determined the requirements that candidates must meet to be able to take on the duties of team leader. That decision falls within the employer's staffing prerogatives, which are excluded from my jurisdiction under section 7 of the former *Act*. However, it is within my jurisdiction to determine whether the reasons given by the employer for its refusal to consider the complainant's application are valid or constitute a pretext to hide the real reason.

[51] The evidence shows that the respondent gave four reasons, in various circumstances, to explain why the complainant's application was not considered. Two of these reasons are that the complainant does not meet the criteria of recent significant experience in an AU-3 position in the Agency and experience with the programs administered by the Appeals Division. A third reason is that the complainant holds a position outside the Appeals Division, namely in the Audit Division. A fourth reason is that the complainant does not have the necessary availability to fill the position in the short term because of his union activities.

[52] As for the experience criteria required, the complainant has held an AU-3 position since April 3, 1995 (Exhibit P-3), and performs his duties as a technical advisor with the Sherbrooke appeals team. The evidence does not show me how, in the respondent's opinion, these elements do not meet the experience requirements for the position to be filled (AU-3 position and programs administered by appeals). In addition, at the June 7, 2002, meeting, Mr. Marceau does not tell the complainant that

he does not meet these experience criteria. It is only in the reply to the feedback on July 22, 2002, that Mr. Marceau tells him that he does not meet these requirements (Exhibit P-9). These elements show that the lack of experience invoked by the respondent appears to be a pretext to cover the real reason not to consider the complainant's candidacy.

[53] The complainant stated that he was informed of the employer's decision (April 1, 2002) to appoint him to the Audit Division only after Ms. Rouleau's appointment to the team leader position for the interim period. The respondent's evidence does not deny this element. Further, the respondent did not show how the complainant's transfer to the Audit Division created an impediment to his appointment to the team leader position for the interim period or would have created problems within the Audit Division. In these circumstances, I believe this reason, given by Mr. Marceau to justify his decision not to consider the complainant's application, appears to be a pretext.

[54] With respect to his availability in the short term, the complainant told Mr. Fontaine (June 3, 2002) and Mr. Marceau (June 7, 2002) that he was prepared to divest himself of his union responsibilities if the position was offered to him. Despite these statements, Mr. Marceau does not check with the complainant about whether he can get out of his union obligations in the short term in order to be able to assume the team leader position for the interim period. Indeed, in contrast, Mr. Marceau tries to convince him at the June 7, 2002, meeting that he would be violating a principle of loyalty to the union if he accepted a management position.

[55] The comments made to the members of the team and to the complainant clearly establish that Mr. Marceau considers the complainant's union activities an impediment to his appointment. The evidence clearly shows that Mr. Marceau did not verify with the complainant his ability to free himself from his union responsibilities in the short term before appointing Ms. Rouleau. Furthermore, he did not check whether the complainant could do so after Ms. Rouleau resigned from the position on June 7, 2002. Thus, by not making these inquiries, Mr. Marceau assumed that the complainant could not divest himself of his union activities and that he did not have the degree of availability needed for the requirements of the team leader position.

[56] Although the complainant's position as PIPSC national president for the Audit-Financial Services group involves a significant amount of time, he is participating

in the legitimate activities of his union, which he is allowed to do under section 6 of the former *Act*. The courts have recognized that the specific prohibition set out in paragraph 8(2)(a) protects this right of participation.

[57] Under similar circumstances, the Board found in *Stonehouse* that the respondents violated the prohibition to discriminate against the complainant because they did not inform her that the time devoted to her union activities constituted an impediment to appointment. Nor did they give her an opportunity to reduce those activities. I concur with the reasoning of Board members Mitchell, Edwards and Steward that can be applied in this instance. In this instance, the complainant's non-availability in the short term is merely a pretext to hide Mr. Marceau's real reason for not considering the complainant for the position. Unlike the situations in *Fairall* and *Prue*, the evidence did not show that the employee's absences negatively impacted his performance. In *Prue*, the respondent denied that the complainant's union activities impacted the decision, which is not the case in this matter. The decision in *Gaudreau* also cannot be applied to this case because the court in that instance stated that there was no evidence to show that the employee's application was refused because he performed union duties.

[58] Unlike the circumstances in *Social Science Employees Association*, the complainant adduced evidence showing that anti-union animus motivated Mr. Marceau's decision not to consider the complainant's application. On three occasions, Mr. Marceau expressed anti-union animus by referring to the complainant's union activities as a reason to refuse to consider him for the position. These occasions were during the meeting with the appeals team on June 6, 2002, during the meeting with the complainant on June 7, 2002, and then during a meeting with Mr. Allard. The message he sent to those to whom he was speaking on these occasions was clear and meant that an employee's involvement in the legitimate activities of his union constitute an impediment to appointment to a manager position. The fact that, on other occasions, Mr. Marceau appointed to management positions persons who had assumed union responsibilities does not show that, in the specific circumstances of this case, his decision was not motivated by anti-union animus toward the complainant.

[59] That Mr. Marceau refused to sign a union membership card at Mr. Roy's request or that he stated in Mr. Painchaud's performance appraisal that his union activities did

not fit with his auditor functions does not allow me to confirm and does not reinforce my finding that Mr. Marceau was motivated by anti-union animus in his refusal to consider the complainant's application in June 2002. In my opinion, these events are too far removed from the relevant period of this complaint to be related to it and no evidence allows me to link them to the events that gave rise to this complaint. In short, the evidence shows that Mr. Marceau was motivated by anti-union animus when he refused to consider the complainant's application on the grounds of involvement in union activities.

[60] Based on a review of all of the evidence and arguments adduced by the parties, I find that Mr. Marceau acted in violation of the prohibition set out in paragraph 8(2)(a) of the former *Act* by discriminating against the complainant in refusing to consider his application for the position of appeals team leader in the Sherbrooke office for the interim period, on the grounds that he was exercising a right conferred under the former *Act*.

[61] The violation applies to the interim period for which Ms. Rouleau was appointed, without a selection process, namely the period from June 10 to December 27, 2002 (Exhibit P-5). Ms. Rouleau's notice of acting appointment states that the position is classified at the AU-4 group and level. The classification of the appeals team leader position held by Mr. Fontaine was also considered to be at the AU-4 in the organization chart of the Appeals Division (Exhibit P-1). Mr. Marceau's decision not to consider the complainant's application meant that the complainant did not receive compensation at the AU-4 group and level for the interim period from June 10 to December 27, 2002. As corrective action, the complainant must be paid an amount equal to the salary he would have earned had he been appointed appeals team leader for the entire period at issue.

[62] I cannot act on the complainant's request to recommend to the employer his appointment to a team leader position. Firstly, my understanding of section 7 of the former *Act* is that it is not within my jurisdiction to appoint a person to a position or to assign him duties. Secondly, I have no information that such a position is vacant or of the specific requirements that might be associated with such a position and a recommendation for appointment in such circumstances would be purely hypothetical and could not be implemented.

[63] Furthermore, the complainant withdrew of his own accord from the competition launched in September 2002 to fill the team leader position for a two-year acting period. No evidence was adduced to show that that process was also tainted by discrimination in violation of the prohibitions set out in the former *Act*. Accordingly, a recommendation to appoint the complainant to a team leader position would exceed this complaint, the evidence for which was limited to the interim period during which Ms. Rouleau was appointed without competition.

[64] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[65] The complaint is allowed.

[66] I order the employer to pay the complainant an amount equal to the salary associated with the position of appeals team leader (AU-4 group and level) for the period from June 10 to December 27, 2002.

[67] If the parties are unable to reach agreement on the amount to be paid by the employer under this decision, I retain my jurisdiction to determine the amount and do so for a period of 30 days following release of this decision in both official languages.

February 8, 2007.

P.S.L.R.B. Translation

**Léo-Paul Guindon,
Board Member**