October 4, 2017

United Food and Commercial Workers
Local 1400
1526 Fletcher Road
SASKATOON, SK
S7M 5M1

Attention: Mr. Adam North

Miller Thomson
600 -2103 11th Ave
REGINA, SK
S4P 3Z8

Attention: Mr. Jonathan Martin

Dear Sirs:

RE: LRB File No. 126-17

Background:

[1] The United Food and Commercial Workers, Local 1400 ("UFCW") applied to the Board to be certified to represent a group of employees employed by the Canadian National Institute for the Blind ("CNIB"). The CNIB challenged the inclusion of certain employees whom they alleged were management employees or supervisory employees.

[2] At the hearing of this matter on September 25, 2017, the parties were in agreement that there were (3) three employees who were potentially impacted. These employees were:

> Manager, Vision Rehabilitation Services;
> Program Lead, Community Engagement; and
> Registrar/Adminitrative Assistant.

[3] The parties were in agreement that each of these (3) three employees ought to be excluded from the bargaining unit. They agreed that the first two above named

employees were managerial and should be excluded pursuant to section 6-1(1)(h)((i)(A) or (B) of *The Saskatchewan Employment Act* (the "*SEA*"). The third above named employee was agreed to be a "supervisory employee" as defined in section 6-1(1)(o) of the *SEA.*

[4] The only issue between the parties was how the bargaining unit should be described. UFCW argued that the positions should be excluded by name from an "all employee" unit description. CNIB argued that the managerial employees were excluded by the definition of "employee" by virtue of section 1(1)(h)((i)(A) or (B) of the *SEA* and that supervisory employees, as defined in section 6-1(1)(o) of the *SEA* could not be included within a bargaining unit which included employees who were supervised by such "supervisory employees" pursuant to section 6-11(3) of the *SEA.*

[5] No evidence was presented at the hearing and counsel spoke to the agreements set out above. CNIB presented written and oral argument. UFCW took the position that they opposed the arguments presented by CNIB, but provided no reasons for their opposition.

[6] For the reasons which follow, we agree with the submissions of the CNIB.

Discussion and Analysis

[7] Section 1(1)(h)((i)(A) and (B) of the *SEA* read as follows:

> *(h)* ***"employee"*** *means:*
>
> *(i) a person employed by an employer other than:*
>
> *(A) a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character; or*
>
> *(B) a person whose primary duties include activities that are of a confidential nature in relation to any of the following and that have a direct impact on the bargaining unit the person would be included in as*

> *an employee but for this paragraph:*
>
> *(I) labour relations;*
>
> *(II) business strategic planning;*
>
> *(III) policy advice;*
>
> *(IV) budget implementation or planning;*

[8] It is clear in the definition of "employee", that managerial employees or employees whose activities are confidential in nature, or those employees engaged in labour relations, business strategic planning, policy advice or budget implementation or planning are not included within the term "employee" for the purposes of the *SEA*. Therefore, those managerial or confidential employees do not form a part of any bargaining unit described as an "all employee" unit.

[9] The Board recognized the "ying and yang" interplay between management and employees in its decision in *Saskatoon Public Library Board v. CUPE, Local 2669*[1]. At paragraph 18, the Board says:

> *The Wagner Act model represented in the SEA is an adversarial model that reflects the prevalent ying vs. yang between management of an enterprise and the labour utilized by that enterprise. It provides for managerial and confidential exclusions from the bargaining unit so that there will be some balance between the two (2) conflicting entities. Inserted between those parties is a trade union who represents the employees within the appropriate unit and who is the exclusive bargaining agent for that group of employees. In addition, the SEA requires that both parties negotiate for a collective agreement in good faith.*

[10] This balance of management and employees represented by a trade union is historically referred to as the Wagner model of collective bargaining and has been the model used in Saskatchewan since the passage of the first *Trade Union Act.*

[1] [2017] CanLII 6026 SKLRB

[11] In *SJBRWDSU v. Battlefords and District Co-operative Limited*[2], the Board cited, with approval, their earlier decision in *Wascana Rehabilitation Centre*[3] *Wascana* establishes that when positions are placed in an "all employee" unit description, the onus falls upon the employer to establish that when new positions are created that they would fall within the class or classes of exempted employee. At page 3 of the *Wascana* decision, the Board says:

> *Assigning new positions into the bargaining unit until the Board orders otherwise is consistent with the Board's practice of placing the onus, in exclusion applications, on the employer. In addition, it coincides with the reasoning which prompted all boards to adopt the "all-employee" description of the bargaining unit over the enumerative or classification list method. One of the critical considerations why the "all-employee" method of unit description replaced the enumerative or classification method was to avoid the endless applications which arose every time the employer re-organized, changed position titles or created new positions. "All-employee" units accommodate these changes without the necessity of an application to the Board. The only time an application to the Board is required is when the employer wishes to have a new position excluded.*
>
> *Finally, assigning new positions into the unit, pending the Board's order, is also consistent with both orderly collective bargaining and the objects and philosophy of The Trade Union Act. It serves the interests of all parties in that it avoids the necessity of an employer having to risk an unfair labour practice in order to have the exclusion issue of a position determined. To countenance an approach that would allow unilateral exclusions from an existing certification order would inevitably lead to industrial instability because if effectively encourages parties to ignore their contractual, as well as their statutory rights and obligations. Where the Board has a choice between to practices: on based upon unilateral action and one based upon respect for the Board's order, until changed in accordance with the provisions of The Trade Union Act, the Board will obviously prefer the latter.*

[2] [2015] CanLII 19983 (SKLRB)
[3] [1991] 3rd Quarter Sask. Labour Report 56, LRB File No. 234-90

[12] *Wascana* also noted that there were two processes whereby a position could be excluded from the bargaining unit[4]. Those are:

1. Through the process of collective bargaining; or
2. By amendment of the certification order by the Board.

[13] UFCW has not provided any rationale for the Board to deviate from its usual description of an "all employee" unit.

[14] Additionally, we are precluded by section 6-11(3) from including "supervisory employees" within the scope of a unit comprised of employees who are supervised by those "supervisory employees". For the reasons noted in *Wascana*, *supra*, the Board has adopted the practice of excluding supervisory employees as a class from any newly created bargaining unit. We see no reason to depart from that practice in this case.

[15] A Notice of Vote was issued by the Board on June 26, 2017. That vote has not been tabulated by the Board as a result of these proceedings. We hereby direct that the vote shall be counted (excluding any votes cast by the Manager, Vision Rehabilitation Services, the Program Lead, Community Engagement, or the Registrar/Adminitrative Assistant) and a report filed by the Agent of the Board appointed to conduct the vote in accordance with Section 23 of *The Saskatchewan Employment (Labour Relations Board) Regulations*. That report, when filed, will be considered by an *in camera* panel of the Board who will consider the issuance of an appropriate order in respect of this application.

[4] See paragraph [68]

[16] This is a unanimous decision of the Board.

Yours truly,

Kenneth G. Love, Q.C.
Chairperson