SEIU-WEST, Applicant v SASKATOON TWIN CHARITIES INC. OPERATING AS CITY CENTRE BINGO, Respondent

LRB File Nos. 113-19 & 114-19; October 15, 2019

Vice-Chairperson, Barbara Mysko; Board Members: Phil Polsom and Gary Mearns

Counsel for the Applicant Union:	Heather Jensen and Michael MacDonald
Counsel for the Respondent Employer:	Steven Seiferling and Jared McRorie

Application for bargaining rights – All employee unit – Employer's objection based on dual roles – Potential conflicts of interest – Appropriateness of bargaining unit – Board determines that proposed unit is appropriate unit for collective bargaining.

Board assesses whether Supervisors are managers or supervisory employees – Supervisors are not managerial – Supervisors do not meet supervisory employee criteria pursuant to clause 6-1(1)(o) – Supervisors are not supervisory employees.

Board approves all-employee unit and grants Order to Tabulate Vote.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On May 3, 2019, SEIU-West [the "Union"] filed three applications for the acquisition of bargaining rights in relation to the employees of Saskatoon Twin Charities Inc. operating as City Centre Bingo [the "Employer" or "City Centre Bingo"]. These are the Board's Reasons for Decision in relation to those applications.

[2] In LRB File No. 113-19, which is the primary application, the Union submits that the following unit of employees is appropriate for the purpose of bargaining collectively:

> *All employees employed by Saskatoon Twin Charities Inc. operating the City Centre Bingo, except the General Manager, Assistant Manager, and Concession Manager, and supervisory employees.*

[3] In the alternative, in LRB File No. 114-19, the Union submits that the following unit of employees is appropriate for the purpose of bargaining collectively, in addition to the bargaining unit excluding supervisory employees:

> *All supervisory employees, employed by Saskatoon Twin Charities Inc. operating the City Centre Bingo except the General Manager, Assistant Manager, and Concession Manager.*

[4] LRB File No. 112-19 was withdrawn on the first day of the hearing.

[5] On May 10, 2019, the Board issued a Direction for Vote in relation to all of the aforementioned applications. The Notice of Vote, by mail-in ballot, set a deadline for the return of the ballot, being May 24, 2019.

[6] The Employer objects to the certification applications, stating that neither of the proposed bargaining units is appropriate. The Employer's primary objection is based on the dual roles of various staff members, which, from the Employer's perspective, create potential conflicts of interest that render the proposed bargaining units inappropriate.

[7] Two amendments to the proposed bargaining unit descriptions were sought, in the event that one or both of the units were deemed appropriate for collective bargaining. First, following the presentation of evidence the Union asked for an amendment of the title, "General Manager", to "Gaming Manager". Second, the parties consented to the exclusion of the Bookkeeper position on the basis of confidentiality.

[8] The parties have not entered into an irrevocable election in relation to supervisory employees.

Argument on Behalf of the Parties:

[9] The Union states that Supervisors, bingo callers, security guards, drivers, daycare workers and concession staff are all "employees" as defined by the Act. None of those positions perform functions of a managerial character, or fit the definition of supervisory employees under the Act. Given this, the Union's primary argument is that the Board should certify the employees of City Center Bingo in accordance with the proposed bargaining unit described in LRB File No. 113-19. In the alternative, if the Board finds that certain employees of City Centre Bingo qualify as supervisory employees, the Board should certify the bargaining units described in both LRB File No. 113-19 and LRB File No. 114-19.

[10] The Employer argues that the prevalence of dual roles and the potential conflicts of interest render the proposed bargaining units inappropriate. Individuals on the gaming side of the operation generally work as Supervisors while filling another role, for example, as callers, bus drivers, or security personnel. Positions that occupy a dual role should be classified as out-of-scope, and the individuals who occupy those positions should not belong to a bargaining unit in another capacity. In the alternative, Supervisors, if properly characterized as supervisory employees, should not be placed in any bargaining unit. Both of the applications should be dismissed because neither one discloses an appropriate bargaining unit.

Evidence:

[11] City Centre Bingo partners with charities to host bingo and related games in a bingo hall located in Saskatoon. There are two sides to its operations: the gaming side and the concession side. On the gaming side, there are Supervisors, bingo callers, security guards, drivers, and daycare workers. For each of the three daily bingo sessions, there is one Supervisor, one bingo caller, one bus driver, one security person (evenings and late nights only), and several concession staff. As the Employer's primary objection pertains to the dual roles of the staff on the gaming side of the operations, the evidence in the hearing focused on that aspect of the Employer's operations.

[12] Brian Williams ["Williams"], who is now retired, worked his last shift at City Centre Bingo in March, 2019. He worked as both a caller and a Supervisor. As a Supervisor he was responsible to oversee the charities and their personnel (employees and volunteers) during the sessions. Charity personnel generally outnumber the City Centre Bingo employees. Williams would introduce the charity representative, count the bingo float, issue and return the bingo paper, provide assistance to the caller, cash out at the end of the session, and deal with "anything that would arise" during the session. If a customer complained about the calling speed, Williams would tell the caller to slow down. Likewise, the caller would ask him to handle a customer who was creating problems.

[13] Williams' role in the hiring process was limited. He would take a resume from an applicant, and leave it in the office, and that is all. During a session, if he observed an issue with an employee, he was encouraged to "write them up". Williams did not decide whether to mete out discipline, did not deliver discipline, and was not informed of the nature of any discipline that ensued. In 22 years, he wrote an employee up only once, and was not informed of the consequences.

[14] Security personnel patrol the hall and the parking lot, and generally make themselves visible. If Williams observed that a security person needed to spend more time in the parking lot, he would advise accordingly. Williams testified that security personnel do not switch roles with the Supervisor.

[15] There is a separate phone line for contacting the bus driver and requesting a pick-up and drop-off at the bingo hall. If issues arose with the bus driver, the Supervisor would ask for the bus driver's explanation, and would leave a note for the manager. It would not be up to the Supervisor to take sides.

[16] Gordie Ouellette ["Ouellette"] has worked as the Gaming Manager at City Centre Bingo since January, 2019. Prior to this, he served on the Board of Directors for about seven years. Next in line to Ouellette is the Assistant Manager. The Assistant Manager is responsible for the schedule, which is subject to Ouellette's approval, and for ensuring that "products" are available for Supervisors. Once or twice a week, the Assistant Manager steps into the role of Supervisor. Supervisors report to the Gaming Manager.

[17] Ouellette arrives early in the morning to deal with signage, cash, marketing, and issues of maintenance. Ouellette will check the black book, which is where the Supervisor logs pertinent information from the previous session. Although he leaves by 4 or 5 pm, his phone is always on, and so his "day never ends". The caller and the Supervisor are present when he leaves. Although he is not typically present on nights, Ouellette does drop in from time to time. If the Supervisor needs assistance and cannot be assisted by phone, Ouellette will come in personally. He does come in on the weekends.

[18] The callers are responsible for ensuring that the program runs smoothly and on time. The bus drivers are responsible for bus inspections. Security personnel report incidents to the Supervisor and the Supervisor decides whether to contact the police.

[19] Ouellette suggested that Supervisors act in management's stead, including by directing the work of other employees. He provided the example of a Supervisor who corrects the caller's speed to ensure that the game runs smoothly. Still, incident reports are necessary as Ouellette needs to be aware of everything that transpires. If, for example, the Supervisor has tried to correct the caller's behavior, Ouellette reviews the incident as recorded in the report and addresses it the following day. Ouellette could not recall an instance, during his tenure as Gaming Manager, in which a Supervisor had sent another employee home during a scheduled shift.

[20] Although Supervisors can be cross trained as bus drivers, callers, or security personnel, on a given shift they should be scheduled as one or another – not both. They do not switch off in the middle of a shift unless there is an exceptional circumstance, for example, involving illness.

[21] City Centre Bingo relies on a maintenance person who also works as a bus driver. The Supervisor calls maintenance on an emergency basis to deal, for example, with leaky pipes.

[22] The job descriptions entered into evidence were modified in April or May of 2019, but until that time, were very close to the actual job duties of the positions in question. Nonetheless, they are living documents and will change. Ouellette testified that his job description matches his main job functions.

[23] Robert Dybvig ["Dybvig"], who serves as President, provided candid and useful testimony for purposes of assessing the positions in issue. Dybvig observed that, in the past, Supervisors had been performing tasks that were more appropriately performed by management. This is because management was abdicating its role and Supervisors were stepping in to fill the void. On one occasion, Supervisors were found to be "raising the riot act" with an employee over his work performance, and according to Dybvig, this behavior was highly inappropriate. This type of initiative was management's role.

[24] Supervisors are not expected to be involved in hiring. Dybvig could recall one instance in which a Supervisor had recommended hiring, and then later firing, a bus driver. Nor are Supervisors generally involved in major purchases. He could recall one instance in which a Supervisor was involved in the purchase of a bus.

[25] Management is responsible for scheduling. When Dybvig assumed the role of Gaming Manager, he had to cross check staff hours with rate of pay. Unless immediate action is required, Supervisors are expected to contact the Gaming Manager, or the next-in-line manager, prior to sending someone home. If the Supervisor makes the wrong call, the manager can correct that decision, for example, by paying the staff member for the entire shift.

[26] The job descriptions generally or broadly reflect the functions of the positions. The Supervisor job description describes the main functions as being to: supervise charities working the bingo; supervise Nevada ticket sellers and ball sellers; coordinate all special games with the caller; be courteous and polite to staff, customers and charities, to make them feel comfortable and welcome; and other duties as assigned by the manager from time to time.

[27] In describing the work performed, the job description states that a Supervisor: meets with the caller prior to each bingo session and makes sure the caller is aware of any special games being played that program and of any upcoming promotions that should be announced; informs the caller of any extra payouts during the program; supervises charity workers to ensure the smooth operation of a successful bingo session; and completes the report on charity performance following each session, when applicable. Much of the remaining work pertains to a Supervisor's interactions with the bingo players as well as the charity.

[28] The bingo caller job description describes the main functions as being to: announce numbers and promotions for the bingo programs; coordinate prize payouts with the charity running the bingo; inspect all bingo equipment prior to the start of the program; be courteous and polite to customers and charities, to make them feel comfortable and welcome; and other duties as assigned by the "GM" or his designate.

[29] The bus driver is expected to report any incidents to the Supervisor on duty and/or the manager. The security personnel are expected to notify the Supervisor and/or police depending on the severity of a situation. Both the bus driver and security person are expected to take on "other duties as assigned by the manager from time to time".

Relevant Statutory Provisions:

[30] The following provisions of the Act are applicable:

> ***6-1****(1) In this Part:*
> *(a)* ***"bargaining unit"*** *means:*
> *(i) a unit that is determined by the board as a unit appropriate for collective bargaining; or*
> *(ii) if authorized pursuant to this Part, a unit comprised of employees of two or more employers that is determined by the board as a unit appropriate for collective bargaining;*
> *. . .*
> *(c)* ***"certification order"*** *means a board order issued pursuant to section 6-13 or clause 6-18(4)(e) that certifies a union as the bargaining agent for a bargaining unit[.]*
> *. . .*
> *(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;

(ii) a person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining; and

(iii) any person designated by the board as an employee for the purposes of this Part notwithstanding that, for the purpose of determining whether or not the person to whom he or she provides services is vicariously liable for his or her acts or omissions, he or she may be held to be an independent contractor; and includes:

(iv) a person on strike or locked out in a current labour-management dispute who has not secured permanent employment elsewhere; and

(v) a person dismissed from his or her employment whose dismissal is the subject of any proceedings before the board or subject to grievance or arbitration in accordance with Subdivision 3 of Division 9;

. . .

(o) ***"supervisory employee"*** *means an employee whose primary function is to supervise employees and who exercises one or more of the following duties:*

(i) independently assigning work to employees and monitoring the quality of work produced by employees;
(ii) assigning hours of work and overtime;
(iii) providing an assessment to be used for work appraisals or merit increases for employees;
(iv) recommending disciplining employees;
but does not include an employee who:
(v) is a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs;
(vi) acts as a supervisor on a temporary basis; or
(vii) is in a prescribed occupation;

6-4*(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
(2) No employee shall unreasonably be denied membership in a union.

. . .

6-9*(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.*
(2) When applying pursuant to subsection (1), a union shall:

(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and

(b) file with the board evidence of each employee's support that meets the prescribed requirements.

. . .

6-11*(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:*

(a) if the unit of employees is appropriate for collective bargaining; or

(b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.

(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.
(3) Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.

(4) Subsection (3) does not apply if:

(a) the employer and union make an irrevocable election to allow the supervisory employees to be in the bargaining unit; or

(b) the bargaining unit determined by the board is a bargaining unit comprised of supervisory employees.

(5) An employee who is or may become a supervisory employee:

(a) continues to be a member of a bargaining unit until excluded by the board or an agreement between the employer and the union; and

(b) is entitled to all the rights and shall fulfil all of the responsibilities of a member of the bargaining unit.

(6) Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.

(7) In making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:

(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and

(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:

(i) the geographical jurisdiction of the union making the application; and

(ii) whether the certification order should be confined to a particular project.

6‑12*(1) Before issuing a certification order on an application made in accordance with section 6‑9 or amending an existing certification order on an application made in accordance with section 6‑10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.*

(2) Notwithstanding that a union has not established the level of support required by subsection 6‑9(2) or 6‑10(2), the board shall make an order directing a vote to be taken to determine whether a certification order should be issued or amended if:

(a) the board finds that the employer or a person acting on behalf of the employer has committed an unfair labour practice or has otherwise contravened this Part;

(b) there is insufficient evidence before the board to establish that 45% or more of the employees in the proposed bargaining unit support the application; and

(c) the board finds that sufficient evidence of support mentioned in clause (b) would have been obtained but for the unfair labour practice or contravention of this Part.

(3) Notwithstanding subsection (1), the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same union.

6‑13*(1) If, after a vote is taken in accordance with section 6‑12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:*

(a) certifying the union as the bargaining agent for that unit; and

(b) if the application is made pursuant to subclause 6‑10(1)(b)(ii), moving a portion of one bargaining unit into another bargaining unit.

(2) If a union is certified as the bargaining agent for a bargaining unit:

(a) the union has exclusive authority to engage in collective bargaining for the employees in the bargaining unit and to bind it by a collective agreement until the order certifying the union is cancelled; and

(b) if a collective agreement binding on the employees in the bargaining unit is in force at the date of certification, the agreement remains in force and shall

> *be administered by the union that has been certified as the bargaining agent for the bargaining unit.*

Analysis:

Preliminary Matter

[31] At the outset of the hearing, the Employer indicated that some employees missed out on receiving voting packages due to the Employer's own inaccurate records. For this reason, the Employer applied to the Board for an order that voting packages be provided to eligible employees, through delivery to City Centre Bingo, or on the basis of conditions as deemed appropriate by the Board.

[32] The Union properly characterized the Employer's preliminary application as a thinly veiled Objection to Conduct of Vote, which failed to satisfy basic requirements in form or timeline. Regulation 23(11) imposes the following requirements on a party who seeks to file an Objection to Conduct of the Vote:

> *(11) An employer, other person or union directly affected by the vote that intends to object to the conduct of the vote or the results from the counting of the ballots shall file an application in Form 23 (Objection to Conduct of the Vote) within three business days after the conduct of the vote or the counting of the ballots, as the case may be.*

[33] Neither the form nor the timeline were observed in the current case.

[34] The Employer argued that the Board has the ability, pursuant to section 6-23(e) of the Act, to receive evidence about employees who have been denied the opportunity to vote. Section 6-23(e) permits the affected union or an affected employee to make an application, further to which the Board may require that the employer and the union give all eligible employees an opportunity to vote. Section 6-23(e) does not contemplate an employer-led application. The Board must assume that the absence of any reference to an employer-led application is a deliberate omission from the section. Section 23(e) does not indirectly cure the Employer's failure to directly satisfy the requirements for an Objection to Conduct of Vote, or allow an employer-led objection in some other form.

[35] Furthermore, counsel for the Union argued that the Board has absolute discretion to refuse to hear post-application evidence pursuant to section 6-107 of the Act. Section 6-107 contemplates evidence which may, through its admission, encourage an Employer to insert itself into an organizing drive, or another process, for the purpose of influencing, manipulating, or

manufacturing evidence on the application for the acquisition of bargaining rights. Section 6-107 serves the important function of allowing the Board to protect the integrity of its process in assessing the application before it.

[36] Ultimately, the Employer decided not to pursue the presentation of evidence in relation to these preliminary concerns, and the matter was rendered moot.

Substantive Matters

Onus of Proof

[37] The Union bears the onus to demonstrate, on a balance of probabilities, that the proposed bargaining unit is an appropriate one for purposes of section 6-11 of the Act. Once the Union has discharged its initial onus, the evidentiary burden shifts to the Employer to demonstrate that the proposed exclusions should be made: *Workers United Canada Council v Amenity Health Care LP*, 2018 CanLII 8572 (SK LRB) [“*Amenity Health Care”*], at paragraph 58. It is by now well-established that the evidence presented must be sufficiently clear, convincing and cogent.

Appropriateness of Bargaining Unit – General

[38] The question of whether a bargaining unit is appropriate calls upon the Board to make a discretionary determination: *Amenity Health Care*, at paragraph 62.

[39] The first issue is whether the proposed unit, as set out in LRB File No. 113-19, is appropriate for collective bargaining. The Board is guided in its deliberations by a primary objective of the Act, as set out in section 6-4, and reinforced by section 2(d) of the *Charter*:

> *6-4(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> *(2) No employee shall unreasonably be denied membership in a union.*
>
> *…*
> *2. Everyone has the following fundamental freedoms:*
> *…*
> *(d) freedom of association.*

[40] On an application for the acquisition of bargaining rights, the Board is charged with assessing whether the proposed bargaining unit discloses a unit which is “appropriate”. The question before the Board is whether the proposed bargaining unit stands a good chance of forming a sound basis for a collective bargaining relationship: *Canadian Union of Public*

Employees v Northern Lakes School Division No. 6422 [1996] SLRBD No 7, [1996] Sask LRBR 115 (SK LRB) 17 at paragraph 10, as cited in *Amenity Health*, at paragraph 63. The Board is not charged with determining whether the unit, as set out in LRB File No. 113-19, is the optimal, or most appropriate, unit.

[41] This Board has a longstanding policy of favoring broadly-based, inclusive bargaining units, a policy that aligns with the statutory objective of ensuring the right to organize and engage in collective bargaining. Other, related reasons for larger units were described by former Vice Chairperson Hobbs in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v O.K. Economy Stores (A Division of Westfair Foods Ltd.)* 24 [1990] Fall Sask Labour Rep 64, LRB File No 264-89 ["*O.K. Economy*"], at page 66:

> *In Saskatchewan, the Board has frequently expressed a preference for larger and few bargaining units as a matter of general policy because they tend to promote administrative efficiency and convenience in bargaining, enhance lateral mobility among employees, facilitate common terms and conditions of employment, eliminate jurisdictional disputes between bargaining units and promote industrial stability by reducing incidences of work stoppages at any place of work (see [United Steel Workers of America v Industrial Welding (1975) Limited, 1986 Feb. Sask. Labour Rep. 45]). ... This does not mean that large is synonymous with appropriate. Whenever the appropriateness of a unit is in issue, whether large or small, the Board must examine a number of factors assigning weight to each as circumstances arise.*

[42] In determining whether a proposed bargaining unit is appropriate, the size of the bargaining unit is not the sole determinative factor. The Board in *O.K. Economy*, at page 66, listed a number of other, pertinent factors:

> *Those factors include among others: whether the proposed unit of employees will be able to carry on a viable collective bargaining relationship with the employer; the community of interest shared by the employees in the proposed unit; organizational difficulties in particular industries; the promotion of industrial stability; the wishes or agreement of the parties; the organizational structure of the employer and the effect that the proposed unit will have upon the employer's operations; and the historical patterns of organization in the industry.*
>
> *The Board recognizes that there may be a number of different units of employees which are appropriate for collective bargaining in any particular industry.*
>
> *As cited in North Battleford Community Safety Officers Police Association v City of North Battleford, 2017 CanLII 68783, at paragraph 57.*

[43] Although these factors are not rigid criteria, they are useful guideposts in the assessment of whether a given bargaining unit is appropriate. To the extent that they are pertinent to the current case, the Board will proceed to consider the aforementioned factors, in turn. In this case,

as with *Amenity Health Care*, at paragraph 87, the Board has determined that community of interest and viability are pertinent for purposes of assessing appropriateness.

Appropriateness of the Proposed Bargaining Unit

[44] First, the Board will consider the community of interest shared by the employees in the proposed unit. First, all employees of City Centre Bingo have the same employer and share common management and a common Board of Directors. All employees work at a common discrete worksite. Although the bus drivers work offsite, they share the primary worksite with the rest of the staff. There is no evidence of intermingling with other, external branches of the operation.

[45] The staff at City Centre Bingo generally work as a team to accomplish the objective of assisting charities in raising funds to support their respective causes. While they draw on a variety of skills in the pursuit of that objective, many staff are capable of stepping into other roles as a result of the flexible approach to cross training. While there is some separation between the concession staff and the gaming staff, the concession's operations are dependent on the existence of the games. The security personnel work to ensure the safety of the premises for the benefit of customers, charity personnel, and all staff. Even the bus drivers, who possess a specific set of skills, function for the purpose of delivering customers to the games, and by extension, to the concession. They may also be cross trained.

[46] Next, the Board will consider whether the proposed unit of employees will be able to carry on a viable collective bargaining relationship with the employer. The size of the proposed unit poses no particular issue with viability. The unit is not exceptionally small. Nor is its workforce particularly transient. Even the fast food service industry, in a particular case, may not be sufficiently transient to defeat the appropriateness of a bargaining unit: *Amenity Health Care*, at paragraph 93. There are no pertinent concerns about the cohesion or the stability of the workforce.

[47] The questions of organizational difficulties and patterns of organizing in particular industries are not pertinent, as the Union has not suggested that organizational difficulties have stood in the way of organizing an all-employee unit.

[48] At this stage the question of employee wishes is pertinent if, for example, the proposed unit is unusual but is nonetheless representative of the employees' wishes.

[49] The Employer suggests that the proposed units are unusual due to the dual roles of numerous employees, a matter that the Board must address, firstly, by assessing the nature of those roles. The Union objects to the very premise of the Employer's argument, stating that there is nothing unusual about the workplace at all.

[50] The Employer's main argument is that the proposed unit is inappropriate due to the potential for conflicts of interest as occasioned by the existence of dual roles. The potential for conflicts of interest, according to the Employer, arises because there are numerous staff who work in both supervisory or managerial roles and other, non-supervisory, or non-managerial roles.

[51] The Employer is, first and foremost, attempting to exclude certain positions, which it characterizes as managerial or supervisory, from the proposed bargaining unit(s). It is on the basis of this characterization, and the associated potential for conflicts of interest, that the Employer launches its argument that the proposed units are inappropriate. However, the Employer is not entitled to unilaterally shift the evidentiary burden in its favor by cloaking with concerns about appropriateness what is, firstly, a question about the proper characterization of certain positions. The Employer continues to bear the evidentiary burden to demonstrate that the positions are managerial or supervisory employees, such that they should be excluded from the proposed bargaining unit(s).

[52] Therefore, the Board must first determine whether the positions in question are managerial or are supervisory employees. If the positions are managerial or are supervisory employees, then the Board may address the contention that the dual roles render the proposed bargaining units inappropriate.

Managerial Exclusions

[53] The Employer has suggested that Supervisors qualify as managers under the Act. For a position to qualify as managerial, it must have as a primary responsibility to exercise authority and perform functions that are of a managerial character: *Saskatchewan Polytechnic v SGEU*, 2018 CarswellSask 260, 23 CLRBR (3d) 90, at paragraph 59. Managerial positions are to be excluded from a bargaining unit for two major purposes, as outlined by the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v Battlefords and District Co-operative Limited,* 2015 CanLII 19983 (SK LRB) ["*Battlefords"*], at paragraph 116:

> *…Firstly, it excludes management domination of the union and its activities by precluding involvement of management within the bargaining unit. Secondly, it provides management with sufficient resources to meaningfully engage in collective bargaining.*

[54] The question of whether a position should be excluded is a factual determination. Exclusions on the basis of the managerial exceptions should be made on as narrow a basis as possible, so as not to unduly restrict the extension of bargaining rights to those who choose to be represented by a union. Managerial exclusions should not be granted so liberally as to frustrate the objective of extending access to collective bargaining as widely as possible: *Battlefords,* at paragraph 118. The Board must be alert to the possibility of denying access to collective bargaining and to the potential for weakening the bargaining unit in doing so.

[55] The Board must look beyond position titles or descriptions, and instead consider the true function of the position. The purpose of the managerial exclusions is to "promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining (and to avoid muddying or blurring the lines between management and the bargaining unit)": *Saskatchewan Institute of Applied Science & Technology v SGEU*, 2009 CarswellSask 897 (SK LRB), at paragraph 56.[1] In assessing a position, the Board has held that the central question is whether the duties would create an insoluble conflict between the responsibility owed to an employer and "the interests of that person and his or her colleagues as members of a bargaining unit": *City of Regina v Canadian Union of Public Employees and Regina Civil Management Association*, [1995] 3rd Quarter Sask Labour Rep, at pages 158-9.

[56] The Employer argues that Supervisors engage in discipline, on their own accord, with respect to other workers on the gaming side of the operations. Dybvig's testimony, however, suggests that there are significant constraints on Supervisors' ability to use discipline. Supervisors are expected to call a manager prior to sending someone home, and only in exceptional circumstances, are expected to exercise their own discretion. If, in those circumstances, a Supervisor has made the wrong decision, management can lessen the impact of that decision by choosing to pay the affected employee's appropriate wages. While the Employer characterizes these decisions as belonging to Supervisors, it is clear that the ultimate responsibility for discipline lies with management.

[57] Supervisors do play a role in correcting the behavior of other employees. For example, Supervisors may correct the bingo caller when he is calling the game too quickly or too slowly.

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[1] Citing, *Hillcrest Farms Ltd. v Grain Services Union (ILWU — Canadian Area)*, [1997] Sask LRBR 591.

This function is a component of the team approach to facilitating bingo programming. Supervisors are also expected to create incident reports, which are an aptly named avenue through which Supervisors report the facts of noteworthy incidents to managers. Although discipline may result, Supervisors do not as a rule recommend discipline through the issuance of the reports. Even if Supervisors do recommend discipline, they do not have a reasonable expectation that management will follow their recommendations. The incident reports relay factual information. The decision as to whether to discipline an employee is not up to Supervisors.

[58] Supervisors' authority consists of writing incident reports, providing corrective comments in the moment, and sending employees home, generally after having received authorization to do so, from management.

[59] The Employer suggests that Supervisors are responsible for the entire operation after 6 pm, but the evidence does not provide unqualified support for this assertion. After he leaves the premises, the Gaming Manager continues to keep his phone on, responds to questions over the phone, and comes into the hall if his presence is needed. Management comes in over the weekends. Supervisors are expected to call management in certain circumstances. Supervisors are expected to report everything pertinent in the form of incident reports, to ensure that management is fully informed. If incidents arise with the bus driver, Supervisors are expected to report to management. If a security incident arises, then it makes sense that Supervisors ensure appropriate actions are taken, out of necessity.

[60] The Board agrees with the Union's observation that, simply because a role is "important" does not mean it is managerial. For example, even if it were the case that Supervisors were regularly procuring buses, that function alone would not necessarily justify a managerial exclusion. Many positions will be important to an employer's operations, but will be important employees, as opposed to important managers, because they do not exercise managerial functions.

[61] To the extent that it is relevant, the Board observes that Supervisors have no power to hire or fire, other than an incidental influence exercised in isolated cases, and have no or only limited ability to influence labour relations.

[62] The Board agrees with the Employer that it must take into account the "potential" for conflicts of interest, instead of focusing only on existing, ongoing conflicts. However, the Board has found that Supervisors do not have a sufficient degree of decision making authority in relation

to matters that affect the terms, conditions, or tenure of employment of other employees. The Board is not concerned that, by extending collective bargaining rights to Supervisors, it would risk muddying or blurring the lines between management and a bargaining unit. The power to send someone home, in this case, is not dispositive. Even if the actions of the Supervisor form part of a grievance, the ultimate responsibility for the Supervisor's action or for subsequent disciplinary action, rests with management.

[63] The Employer addresses the confidentiality exclusion only summarily, or in relation to its overall argument that the Board must consider the managerial exclusion with a view to avoiding conflicts of interest. Even so, there is no basis to conclude that Supervisors' primary duties include activities of a confidential nature in relation to labour relations, business strategic planning, policy advice, or budget implementation or planning, and have a direct impact on the Supervisors' proposed bargaining unit.

Supervisory Employees

[64] The Board will next turn to its assessment of whether Supervisors are supervisory employees. First, the act of bestowing a position with the title "supervisor" does not automatically transform a non-supervisory employees into a supervisory employee.[2] To find otherwise would be to invite employers to unilaterally designate employees as supervisory without subjecting those positions to the necessary rigor of the statutory requirements.

[65] The Employer argued that the Supervisors' supervisory responsibilities in relation to the charity workers and volunteers are relevant to a determination pursuant to clause 6-1(1)(o). This cannot be so. The definition of "supervisory employee" reads:

> ***6-1****(1) In this Part:*
> *...*
> *(o) "supervisory employee" means an employee whose primary function is to supervise employees and who exercises one or more of the following duties:*
>
> > *(i) independently assigning work to employees and monitoring the quality of work produced by employees;*
> > *(ii) assigning hours of work and overtime;*
> > *(iii) providing an assessment to be used for work appraisals or merit increases for employees;*
> > *(iv) recommending disciplining employees;*

[2] See, for example, *Amenity Health*, in which the Board found that the shift supervisors did not qualify as supervisory employees.

[66] In making an assessment pursuant to clause 6-1(1)(o), the Board must consider whether the primary function of the employee is to supervise fellow employees: *Amenity Health* at paragraph 115. “Fellow employees” are those employed by the employer whose workplace is subject to the certification application, which in this case is City Centre Bingo. Charity volunteers and workers are not employees of City Centre Bingo. The supervision of these unrelated volunteers and other workers is not indicative of whether an employee is properly characterized as a supervisory employee.

[67] The Board will proceed to consider each of the four duties set out at 6-1(1)(o) of the Act.

[68] The first duty is a conjunctive duty that consists of independently assigning work to employees and monitoring the quality of work produced by employees. The Employer suggests that Supervisors assign work, monitor the quality of work produced by other employees, and can assign hours of work depending on need. However, Supervisors work as a part of team that ensures the smooth functioning of the gaming side of the operation. The respective roles of the various gaming-side employees are well-defined. On a given shift, Supervisors may respond to issues that arise with security or with the bingo caller, for example, but their responses are not akin to independently assigning work to those employees.

[69] Likewise, Supervisors may redirect other employees where, for example, they observe issues with the bingo calling or problems with the security function, but this redirection is not akin to monitoring the quality of their work. Just as a Supervisor may redirect a caller’s speed, a caller may ask a Supervisor to deal with an uncooperative customer. Supervisors’ corrective role in relation to other employees is not a duty, the exercise of which, is demonstrative of Supervisors’ primary function being to supervise employees.

[70] Supervisors’ responsibilities for creating incident reports and keeping log books represent a form of monitoring, which is relevant only as it relates to fellow employees. The Board observes that these functions are more akin to monitoring operations and relaying that information to management, than to monitoring the quality of work produced by employees. Furthermore, to meet the definition of supervisory employee, Supervisors must be found to be both independently assigning work to employees and monitoring the quality of work produced by employees. Based on the evidence presented, the Board has found that they do not.

[71] The second duty is assigning hours of work and overtime. Supervisors have previously created schedules in circumstances in which management has been abdicating its

responsibilities. The act of requesting other employees to stay late in the absence of management is not akin to assigning hours of work or overtime. Even if it were, it is not a duty, the exercise of which, is demonstrative of a primary function being to supervise employees. Supervisors will, at the most, fill gaps on an *ad hoc* basis, as needs arise. The responsibility for scheduling, and the overall assignment of hours and overtime, falls to management.

[72] The third duty is providing an assessment to be used for work appraisals or merit increases for employees. There is no evidence that Supervisors are involved in providing such assessments. The incident reports are not assessments for this purpose. The incident reports are meant to relay information to ensure that management is aware of pertinent happenings, as they arise. The incident reports are not performance reviews and do not amount to formal input into performance reviews for the purpose of work appraisals or merit increases. To interpret the incident reports in this manner would be to overextend their reach.

[73] The last duty is recommending disciplining employees. Although they create incident reports, Supervisors do not generally recommend discipline, and do not have a reasonable expectation that management will follow their recommendations, if they do. The incident reports relay factual information. The Board agrees with the Union's characterization of the incident reports as facilitating Supervisors' role as conduits of information. Although Supervisors occasionally send employees home, they do so typically after consulting with management. Greater authority is exercised only on an exceptional basis. Recommending discipline is not a duty, the exercise of which, is demonstrative of a primary function being to supervise employees.

[74] On the whole, the Board finds that Supervisors do not meet the definition of supervisory employee pursuant to clause 6-1(1)(o) of the Act. Having found that Supervisors are neither managers nor supervisory employees, it is unnecessary for the Board to exclude Supervisors from the proposed bargaining unit in LRB File No. 113-19. Having determined that Supervisors are not properly excluded from that proposed bargaining unit, it is unnecessary to consider the Employer's concerns with potential conflicts of interest arising from the existence of dual roles.

[75] In summary, the Board finds that the proposed unit, as described in LRB File No. 113-19, stands a good chance of forming a sound basis for a collective bargaining relationship.

[76] The Board makes the following Orders pursuant to sections 6-1(1)(o), 6-9, 6-11, and 6-103 of the Act:

a. That the following unit qualifies as an appropriate bargaining unit for collective bargaining:

   All employees employed by Saskatoon Twin Charities Inc. operating the City Centre Bingo, except the Gaming Manager, Assistant Manager, Concession Manager, Bookkeeper, and supervisory employees pursuant to clause 6-1(1)(o) of the Act;

b. That the Application for acquisition of bargaining rights, in LRB File No 114-19, is dismissed;

c. That the ballots held in the possession of the Board Registrar pursuant to the Direction for Vote issued on May 10, 2019 be unsealed and the ballots contained therein be tabulated in accordance with *The Saskatchewan Employment (Labour Relations Board) Regulations*; and

d. That the results of the vote be placed into Form 21, and that form be advanced to a panel of the Board for its review and consideration.

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

[78] The Board is grateful to counsel for their submissions in this case. The Board has considered all of the authorities filed, even if not cited in these Reasons.

DATED at Regina, Saskatchewan, this **15th** day of **October, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson