

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 9841, Applicant v SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent

AND

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Applicant v UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 9841, Respondent

LRB File Nos. 126-21 and 008-22; December 8, 2022

Chairperson, Susan C. Amrud, K.C.; Board Members: Allan Parenteau and Hugh Wagner

For United Steel, Paper and Forestry,
Rubber, Manufacturing, Energy,
Allied Industrial and Service Workers
International Union, Local 9841:

Dan LeBlanc

For Saskatchewan Government
and General Employees' Union:

Perry Erhardt, K.C.
Alanna Bugera, Student-at-Law

Unfair Labour Practice Application – Application granted – Employer did not obtain agreement of Union or Board Order before hiring Director of Communications and Education as out-of-scope employee – Employer did not bargain in good faith with respect to exclusion of Director of Communications and Education from bargaining unit.

Unfair Labour Practice Application remedies – Declaration that unfair labour practices committed – Employer to provide written and verbal apology – Employer to pay amount equivalent to Union dues from date of hire to date of completion of hearing.

Application to amend Certification Order to exclude new position – Board excludes Director of Communications and Education from bargaining unit under both managerial exclusion and confidentiality exclusion.

REASONS FOR DECISION

Background:

[1] **Susan C. Amrud, K.C., Chairperson:** These Reasons address two related applications that were heard by the Board on August 16 to 18, 2022. Both of these applications arise out of the hiring of an out-of-scope Director of Communications and Education ["Director"] by Saskatchewan Government and General Employees' Union ["Employer"]. The first application,

filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 9841 ["Union"] on October 28, 2021, is an Unfair Labour Practice application¹. It alleges that the Employer unilaterally decided that the Director would be outside the bargaining unit, without first obtaining the agreement of the Union or a Board Order, and failed to bargain in good faith with respect to this issue. The second application, filed by the Employer on January 24, 2022, is an Application to Amend² the Certification Order between these two parties, to exclude from the bargaining unit, not just the Director, but a number of additional positions. The Union consents to all of the proposed exclusions, except the Director.

[2] The parties filed an Agreed Statement of Facts and Exhibits. It sets out the following facts. On Thursday June 10, 2021, Rikki Bote, the Employer's Executive Director, sent an email to Kathy Mahussier, the Union's President. Attached to the email was a position description for the proposed Director's position. The email asked for the Union's input on the scope review for the Director's position, before Monday June 14th. At the Union's request, the Employer provided the Union further time to respond. On June 16th, the Union advised the Employer that it did not agree the Director should be out-of-scope of the bargaining unit. The Employer provided an amended position description on June 17th; the only change was to add responsibility for termination and disciplinary action respecting staff. The Union confirmed its position that the Director should remain in the bargaining unit. No further communications occurred before June 28, 2021, when the Employer proceeded to advertise the position. On September 21, 2021, the Employer announced that Kelsay Reimer had been hired as Director, out-of-scope of the bargaining unit.

Evidence:

[3] The Agreed Statement of Facts and Exhibits includes the second version of the position description, which the Employer relied on in recruiting for the Director's position. It describes the Position Role as follows:

A member of the senior management team, reporting to the Executive Director, the Director of Communications provides leadership and management in the planning, development and delivery of internal and external relations initiatives and programs that focus on building relationships with the membership and promote a collaborative, positive workplace within SGEU. The Director of Communications will assist the management team in all communications activities, including crisis communications, as well as supporting a pro-active social media and on-line presence for SGEU.

This position will support culture and renewal initiatives and efforts in the organization, including oversight on implementing, integrating, and sustaining values-based culture

¹ LRB File No. 126-21.

² LRB File No. 008-22.

transformation. The Director of Communications and Education will also oversee creation and implementation of educational and professional development opportunities for SGEU and its membership.

[4] This is followed by a detailed list of Key Accountabilities and Primary Functions, under the headings “Strategic Communications Leadership” and “Leadership”. These functions emphasize the managerial and confidential components of the Director’s job.

[5] Three witnesses gave evidence on behalf of the Employer at the hearing: Reimer, Bote, and Ashley Wilke, Director of Human Resources. Reimer’s evidence spelled out the duties she has been performing in the 11 months since she was hired.

[6] She participated in strategic planning sessions with senior management and with the Employer’s Provincial Council. She attended the Provincial Council meeting when strategic planning was being discussed, to be a resource and provide advice. She also met with the Employer’s committee chairs. She leads the communications strategy for the Employer. She directs her staff in accordance with the Employer’s strategy.

[7] She participates in policy development with the other directors, including providing advice respecting how and when new or revised policies will be rolled out to staff.

[8] She is responsible for her department’s budget. She prepared and submitted proposals for the 2022 budget. She participated with the other directors in discussions respecting the development of the 2022 budget for the Employer.

[9] She has hired three staff. She worked with the Director of Human Resources to issue the job posting, pre-screen applicants, prepare interview questions and conduct interviews. She had final say as to who was hired.

[10] She worked at organizing the communications services for the Employer, including performing a communications audit with the assistance of a third-party consultant. She implemented regular staff meetings with her staff. She assigns work to her staff. Following a mid-year review of one of her staff, she extended the person’s probationary period. She reviewed and declined to authorize a request for temporary pay for higher duties. She reviews all requests for time off from her staff.

[11] Her level of autonomy and responsibility is the same as the other directors’, who are all out-of-scope.

[12] Bote and Wilke confirmed Reimer's evidence respecting her role. Their evidence also disclosed that, in April 2021, the Employer made significant changes to its constitution and senior management. The purpose of the constitutional changes was described as being to draw a sharper line between the elected and the administration. The first step in the transformation was the hiring of Bote as Executive Director on May 10, 2021.

[13] The parties signed a collective bargaining agreement on May 30, 2022. The Scope clause at Article 3 reads:

This Agreement shall apply to:

*All employees in accordance with Article 4.1 except the **Executive Director, the Director of Human Resources, the Director of MIS/IT, the Director of Finance, the Directors of Labour Relations, the Director of Disability Management Services, the Executive Assistants, President and the 1st Vice President and any other positions as certified through the Labour Relations Board.***³

[14] Prior to the creation of the Director's position, the employees in the communications department reported to the Director of Membership Information Services/Information Technology/Communications with respect to administrative issues, and to the Employer's President and First Vice-President with respect to communications issues. As a result, the in-scope staff worked relatively independently. After Reimer was hired, she expected requests for communications assistance to go through her. The evidence indicated that not all of the communications staff were comfortable with the new reporting relationship.

[15] The Union called three witnesses, two of whom had worked for Reimer in the Employer's communications department. They testified respecting work they have observed Reimer performing that is also performed by bargaining unit employees, including research, drafting communications to the Employer's members, attending and providing communications support to the Employer's committees and creating print advertisements. Mahussier also testified to her interactions with Reimer in which Reimer was carrying out work also performed by bargaining unit members, including preparing a news release and preparing survey questions to be sent to members of an Employer's bargaining unit.

[16] Mahussier also reviewed the background to the other proposed amendments to the Certification Order. This evidence reflected a continuing practice of the Union reminding the

³ Exhibit U1. Bolded words are new in this agreement.

Employer of its legal obligations if it wanted exclusions from the bargaining unit, and of the Employer ignoring these requirements.⁴

Argument on behalf of Employer:

Unfair Labour Practice:

[17] The Employer relies on *Donovel v Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*⁵ [*“Donovel”*] as setting out the proper procedure to be followed in a situation such as it faced in this matter:

An employer must adhere to the following steps in determining the proper assignment of the work and the position:

1. *notify the certified union of the proposed new position;*
2. *if there is agreement on the assignment of the position, then no further action is required unless the parties wish to update the certification order to include or exclude the position in question;*
3. *if agreement is not reached on the proper placement of the position, the employer must apply to the Board to have the matter determined under ss. 5(j), (k) or (m);*
4. *if the position must be filled on an urgent basis, the employer may seek an interim or provisional ruling from the Board or agreement from the union on the interim assignment of the position. [emphasis in original]*

[18] The Employer admits that it did not follow the proper procedure.

Application to Amend:

[19] The Employer argues that the Director’s position falls outside the definition of employee in clause 6-1(1)(h) of *The Saskatchewan Employment Act* [“Act”]. Because of its managerial and confidential duties, the Director’s position should be excluded from the bargaining unit. The Employer relies on the following evidence of managerial and confidential functions Reimer has undertaken since she commenced employment:

- fully participating as a member of the out-of-scope senior management team;
- preparing and monitoring her department’s budget;

⁴ Exhibits U2 to U5 and U8.

⁵ 2006 CanLII 62948 (SK LRB) at para 28.

- participating in strategic planning sessions with senior management and with the Employer's Provincial Council; she attended the Provincial Council meeting when strategic planning was being discussed, to be a resource and provide advice;
- hiring three new employees; she had final say respecting their selection;
- conducting a probationary review for a new employee;
- approving work rotations for her staff;
- exercising final authority and discretion on work assignments for her staff;
- handling confidential information respecting strategic planning, senior management, budget and personal information of staff.

[20] The Employer relies on *Saskatoon Co-operative Association Limited v United Food and Commercial Workers*⁶ ["Saskatoon Co-op"]:

The authority and duties of the position would create an insoluble conflict between that person's responsibilities to the Employer and their interests as a member of the bargaining unit. The necessity of the requested exclusion is clear. There is no question whether this person is "exercising a significant influence over the livelihood or economic destiny of" the members of the bargaining unit: see: SK Health-Care Assn v Saskatchewan Insurance, Office & Professional Employees' Union, Local 397, [1993] 1st Quarter Sask Lab Rep 137 at 147, citing Ottawa General Hospital, (1984) OLRB Reports, Sept 1199 at 1203.

[21] The Employer argues that the evidence of Reimer, confirmed by Bote and Wilke, establishes that the Director has primary responsibility to exercise authority and perform functions of a managerial character. The position is of a managerial nature and has authority over confidential matters. The Director exercises significant influence over the economic interests of the members of the bargaining unit.

Argument on behalf of Union:

Unfair labour practice:

[22] The Union argues that the Employer committed an unfair labour practice when it posted and filled a new purportedly out-of-scope position, without either Union agreement or a Board Order. In this respect, it referred first to *SGEU v Wascana Rehabilitation Centre*⁷ ["Wascana"]:

Accordingly, where a new position is created in an "all-employee" unit, it remains in the bargaining unit unless excluded by order of the Board or agreement of the parties. Filing an amendment application pursuant to Section 5(k) of the Act does not have the same effect as an order. Therefore, if the Employer wishes to exclude a new position from the scope of the bargaining unit, it must be done in one of the following ways:

⁶ 2020 CanLII 71339 (SK LRB) at para 38.

⁷ 1991 CarswellSask 545; [1991] 3rd Quarter Sask. Lab. Rep. 56 at para 12.

1. *it may be excluded through the process of collective bargaining;*
2. *if attempts at bargaining have failed, it can apply for an amendment to the certification order pursuant to Section 5(j), (k) or (m) of The Trade Union Act.*

[23] The Union referred to a number of subsequent decisions in which the Board confirmed that this continues to be the proper process for employers to follow in this situation.⁸ It noted that in *Saskatchewan Mutual Insurance Company v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 8933*⁹, the Court of Appeal for Saskatchewan confirmed the continued application of these rules (which it referred to as the *Battlefords* principle):

Battlefords has been understood to stand for the proposition that an employer cannot act unilaterally by determining that a new position lies outside the scope of an all-employee bargaining unit. It must negotiate with the union on the matter and, if it fails to acquire the union's agreement, then it must apply to the Board to determine the matter.

[24] The Union argues that the Employer committed an unfair labour practice when it filled the Director's position without either Union agreement or a Board Order.

[25] The Union further argues that, in the limited bargaining the Employer undertook with respect to the Director's position, it bargained in bad faith. This is demonstrated by its amendment of the position description after the Union initially advised that it would not consent to the position being outside the bargaining unit. A failure to disclose relevant information is tantamount to disclosure of misleading information.¹⁰ It argues that the amendment to the position description to add authority to hire and fire was not done to accurately describe the Director's anticipated responsibilities. It was a contrivance added for the purpose of enhancing the Employer's argument for exclusion. Alternatively, if the amended position description is accurate, the original position description provided to the Union was misleading.

Application to Amend:

[26] The Union argues that the majority of the Director's work is non-managerial, bargaining unit work. A position description that includes a single line regarding the power to hire, fire and discipline is insufficient to come within the managerial exclusion. The relevant search is not for

⁸ *Saskatoon Co-op; Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v Battlefords and District Co-operative Limited*, 2015 CanLII 19983 (SK LRB); *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 496 v Beeland Co-operative Association Limited*, 2018 CanLII 91973 (SK LRB); *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 8933 v Saskatchewan Mutual Insurance Company*, 2019 CanLII 43212 (SK LRB).

⁹ 2021 SKCA 137 (CanLII) at para 55.

¹⁰ *Moose Jaw Firefighters' Association No. 553 v City of Moose Jaw*, 2019 CanLII 98484 (SK LRB).

some managerial responsibilities, but for whether the position's primary responsibility is to exercise managerial functions. The Board needs to consider whether the duties listed in the position description are legitimate or contrived.

[27] The Union referred to *SEIU-West v Saskatoon Twin Charities Inc. (City Centre Bingo)*¹¹:

[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.

... [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.

[28] Exclusions on the basis of managerial duties should be made on as narrow a basis as possible. In assessing the Director's position, the central question is whether the authority attached to the position and the duties performed by the Director are of a kind and extent that would create an insoluble conflict between the responsibilities that the Director owes to the Employer and the interests of the Director and the other members of the bargaining unit. Exclusion from the bargaining unit of persons who do not genuinely meet the criteria prescribed in the Act deny them access to the benefits of collective bargaining and potentially weaken the bargaining unit.¹²

[29] The Union argues that the Employer led insufficient evidence to bring the Director's position within this narrow exclusion. The Employer did not prove that the Director's primary responsibilities are managerial. The evidence indicated that Reimer spends about six hours per week meeting with her direct reports. Much of that time is non-managerial in nature. With respect to hiring, while the Union acknowledges that Reimer signed two letters of offer, it argues that

¹¹ 2019 CanLII 98487 (SK LRB).

¹² *Saskatchewan Institute of Applied Science & Technology v SGEU*, 2009 CanLII 72366 (SK LRB).

hiring is a weak indicator of managerial duties. With respect to scheduling of staff, the Union submits that Reimer's direct involvement is limited, and most of this work is done by the Director of Human Resources. With respect to firing and discipline, the Union submits that these duties are undertaken by elected leadership of the Employer, with Reimer having limited power in this regard. An in-scope position is not made managerial simply by sprinkling a few management-type responsibilities into it.

[30] Next, the Union argues, the Director's position does not fall within the confidentiality exclusion. The Employer's onus to establish the confidentiality exclusion goes beyond reasonable speculation. It requires proof of direct impact on the bargaining unit.¹³ The Employer must prove that the Director's primary duties include activities that are confidential in relation to labour relations, business strategic planning, policy advice or budget implementation or planning and have a direct impact on the bargaining unit.

[31] The Union argues that Reimer has no role with respect to labour relations. The parties recently reached a new collective agreement, and she was not part of the bargaining committee. She also played no role in communicating the Employer's proposals to employees in the bargaining unit.

[32] The Union acknowledges that Reimer attended a strategic planning session with the Employer's Provincial Council. However, it argues that this is not sufficient to satisfy the confidentiality exclusion. The strategic planning was primarily about the direction of the Employer and its reputation and impact in the public; it did not relate to the Union. Further, the evidence indicates that in-scope employees have attended these sessions in recent years, emphasizing that the Union is not the primary topic of conversation and the materials discussed are not confidential.

[33] There is no evidence regarding Reimer providing policy advice directly related to the Union.

[34] With respect to budget implementation and planning, the Union notes that while Reimer makes suggestions for the communications department's budget, final budgetary decisions rest with the Employer's members. Reimer is not empowered to cut budget lines or abolish positions. Any flexibility she may have in spending has no effect on the bargaining unit.

¹³ *United Food and Commercial Workers, Local 1400 v Verdient Foods Inc.*, 2019 CanLII 76957 (SK LRB).

[35] While the Union acknowledges that Reimer attends meetings with out-of-scope employees, attendance at those meetings is not sufficient to transform an in-scope position into an out-of-scope position. While she likely hears some confidential information at those meetings, this is not part of her primary responsibilities.

[36] The Employer has not led sufficient evidence to meet its onus of demonstrating that the Director's primary responsibilities are either managerial or confidential.

Relevant Statutory Provisions:

[37] The following provisions of the Act are applicable in this matter:

6-1(1) *In this Part:*

...

(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.

6-7 Every union and employer shall, in good faith, engage in collective bargaining in the time and in the manner required pursuant to this Part or by an order of the board.

6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:

...

(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;

...

(h) to require as a condition of employment that any person shall abstain from joining or assisting or being active in any union or from exercising any right provided by this Part, except as permitted by this Part;

...

(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.

6-103(2) Without limiting the generality of subsection (1), the board may do all or any of the following:

...

(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act;

6-104(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:

...

(e) fixing and determining the monetary loss suffered by an employee, an employer or a union as a result of a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;

...

(g) amending a board order if:

- (i) the employer and the union agree to the amendment; or
- (ii) in the opinion of the board, the amendment is necessary;

...

(i) subject to section 6-105, determining for the purposes of this Part whether any person is or may become an employee or a supervisory employee as defined in clause 6-1(1)(o) of this Act as that clause read before the coming into force of The Saskatchewan Employment Amendment Act, 2021.

Analysis and Decision:

Unfair Labour Practice:

[38] There is no question that the Employer committed the unfair labour practice alleged by the Union when it hired Reimer as an out-of-scope employee without first engaging in collective bargaining with the Union respecting whether the Director's position should be excluded from the bargaining unit then, failing agreement, before making an application to the Board for a determination respecting whether the position met the criteria for exclusion. The process is well-established, and the Employer knew of its requirements. The Employer admitted as such.

[39] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 544 v Battlefords and District Co-operative Limited*¹⁴ ["Battlefords"] the Board confirmed that the determinations in *Wascana* and *Donovel* continue to apply:

Wascana has not been overturned or otherwise distinguished by this Board. In Wascana, the Board described two methods whereby a position could be excluded from the bargaining unit. Those were:

1. *It may be excluded through the process of collective bargaining;*
2. *If attempts at bargaining have failed, it [the employer] can apply for an amendment to the certification order pursuant to section 5(j), (k), or (m) of The Trade Union Act.*

[40] The Employer's obligations were clear. Yet the Employer proceeded to post, and then fill, the position in contravention of those obligations. The Employer committed an unfair labour practice by posting the position of Director, and then hiring the Director and treating the position as out-of-scope of the bargaining unit, before obtaining the Union's agreement or a Board Order.

¹⁴ *Supra* note 8 at para 58.

[41] In *Battlefords*, the Board succinctly described the process the Employer and Union were to undertake:

[85] The duty to bargain collectively requires that the parties meet and bargain in good faith, making a genuine attempt to find a resolve to their disagreement over the status of this position. However, the duty to bargain collectively does not, as a corollary, require that the parties reach an agreement. They must only try to achieve a resolve to their disagreement.

[42] The Employer breached its duty to bargain in good faith. It did not engage in collective bargaining with the Union about the proposed new positions. It changed the Director's position description following receipt of the Union's objection to the position being placed outside the bargaining unit. While the Board accepts Bote's evidence that she did this to clarify and elaborate on the Director's managerial duties, that did not excuse the Employer from its obligation to bargain with the Union in good faith.¹⁵ There was no genuine attempt to bargain on the part of the Employer.

[43] The only issue in this matter is what is an appropriate remedy. That issue will be discussed later in these Reasons.

Application to Amend:

[44] Pursuant to subclause 6-104(2)(g)(ii) of the Act, on an Application to Amend a Board Order, the Board is to determine if an amendment is necessary. The first step in that determination is to decide whether the Employer has demonstrated that a material change in circumstances has occurred since the latest Certification Order between these parties was issued on October 26, 2017¹⁶. The Union did not challenge the Employer's application on this ground. The Board finds that the creation of the new Director position satisfies the requirement of a material change in circumstances¹⁷.

[45] The second step in the determination of whether an amendment is necessary is for the Board to decide whether the new position falls outside the definition of employee in clause 6-1(1)(h) of the Act. The onus is on the Employer to provide sufficient evidence for the Board to reach a conclusion that the Director's primary responsibilities are managerial and/or confidential.

¹⁵ *Moose Jaw Firefighters' Association No. 553 v City of Moose Jaw*, *supra* note 10.

¹⁶ LRB File No. 011-17.

¹⁷ *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*, 2022 CanLII 45399 (SK LRB).

[46] The managerial exclusion is well-described in *Saskatchewan Polytechnic v Saskatchewan Government and General Employees' Union*¹⁸ [*"Sask Polytechnic 2022"*]:

[77] Pursuant to subparagraph 6-1(1)(h)(i)(A), a position falls outside the definition of employee if its primary responsibility is to exercise authority and perform functions that are of a managerial character. There is no definition in the Act of "managerial character". Instead, the Legislature has left it to the Board to determine the meaning of that phrase. In doing so, the Board draws on its extensive case law considering this issue.

[78] As explained by the Board in Saskatoon Public Library, it is necessary to consider the purposes of the exclusion in assessing whether it applies to the position in question:

[65] The determination of whether the ACI Analyst and SEP Analyst positions meet the criteria to be excluded under the managerial exclusion requires a careful review of the stated purposes of the exclusion: to promote labour relations in the workplace by preserving clear identities for the parties to collective bargaining; to avoid muddying or blurring the lines between management and the bargaining unit; and to ensure that persons who can affect the economic lives of other employees are not placed in an insoluble conflict of interest by including them in a bargaining unit.

[47] *Sask Polytechnic 2022* adopted the following as the principles and factors to be considered on a managerial exclusion:

1. *The determination of whether a position falls to be excluded is primarily a factual one.*
2. *Exclusions on the basis of managerial responsibility should be made on as narrow a basis as possible.*
3. *A person to be excluded must have a significant degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of other employees. A high degree of independence to make decisions of a purely professional nature is not sufficient.*
4. *The job functions which the Board considers central to the finding of managerial status includes the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as directing the workforce, training staff, assigning work, approving leaves, scheduling of work, and the like are more indicative of supervisory functions, which do not, in themselves, give rise to conflicts which would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit.*
5. *In assessing managerial authority, the Board considers the actual authority assigned to a position and the use of that authority in the workplace.*

¹⁸ *Ibid* at para 79.

6. *The authority bestowed on a managerial employee must also be an effective authority; it is not sufficient if the person can make recommendations, but has no further input into the decision-making process.*¹⁹

[48] *Sask Polytechnic 2022* held that, to be excluded on the basis of managerial duties, “there must be an insoluble conflict between the responsibilities owed to the Employer and the interests of the persons and colleagues as members of the bargaining unit”²⁰.

[49] The Board finds that the Director has a significant degree of decision-making authority in relation to matters that affect the terms, conditions and tenure of employment of other employees. The Board finds that *University of Regina v University of Regina Faculty Association*²¹, relied on at paragraph 82 of *Sask Polytechnic 2022*, is particularly applicable here:

[26] In the Early Childhood Intervention case, the Board first examined the duties and responsibilities that were expected to be performed by the new position to determine whether the performance of those duties and responsibilities would place the incumbent into an insoluble conflict with members of the bargaining unit and the extent to which those duties would be regularly performed. In doing so, the Board looked beyond the position’s job title and beyond the words set out in the draft job description and considered the evidence as to why the position was created and the operational deficit it was intended to rectify. The Board then reflected on whether or not it was satisfied that the duties and responsibilities assigned to the position were genuine and necessary. In doing so, the Board looked for indications that management had not merely “sprinkled” the proposed new position with managerial duties and/or functions of a confidential nature for the purpose of obtaining an unnecessary exclusion (for a position that would otherwise have fallen within the definition of “employee”). In that case, the Board was satisfied that the duties and responsibilities of the disputed position were intended to rectify legitimate operational deficits within the employer’s management structure.

[50] The evidence of both Employer and Union witnesses disclosed that, when Bote commenced work as Executive Director, she found a significant operational deficit within the Employer’s management structure. The communications department was lacking leadership and direction. While the Director of Membership Information Services/Information Technology/Communications signed off on the timecards for the communications staff and performed other similar administrative functions, he played no role in assigning them work, reviewing their work, organizing their work or providing leadership in communications. He had no communications education or experience. The reason the Director’s position was created was to fill this gap. The duties and responsibilities assigned to the Director’s position are genuine and necessary.

¹⁹ *Ibid* at para 79.

²⁰ *Ibid* at para 83.

²¹ 2014 CanLII 4554 (SK LRB).

[51] With respect to the managerial exclusion, the evidence indicates that Reimer signed hiring letters and had final say about who was hired. She extended the probationary period for one employee. She denied temporary pay for higher duties for an employee. When faced with a difficult decision respecting scheduling over the Christmas break, she sought advice and assistance from the Director of Human Resources; the Board views this as someone learning her job, rather than her not having the authority that the position description states she has.

[52] The amount of time spent performing managerial duties or the number of direct reports is not necessarily determinative of the issue. The nature of a position's power over in-scope employees may be sufficient even though it exercises that power infrequently. In *Sask Polytechnic 2022*, the Board found, with respect to this issue:

[97] In this respect, the job description can provide valuable insight. The Board made a similar observation in SPCA:

[44] In Saskatchewan Indian Federated College Inc. v. University of Regina Faculty Association, [2001] Sask. L.R.B.R. 657, LRB File No. 049-01, the Board concluded that, while an evaluation of the work actually performed by an incumbent is more important than a job description (for the purposes of assessing whether an employee is performing functions of a managerial character), job descriptions can provide valuable insight into what duties and responsibilities the employee in a disputed position is expected to perform, particularly if the occasion to perform relevant managerial duties has not yet arisen during the period of time the incumbent has occupied the disputed position.

[53] The Director is a member of the senior leadership team. She reports directly to the Executive Director. Parallel positions in the organizational structure, the other directors, are all out-of-scope of the bargaining unit. The directors are all responsible for managing staff, budgeting, strategic planning and policy development. The Director's autonomy and authority in this regard are equivalent to the other out-of-scope directors. The requested exclusion is consistent with current reporting relationships.

[54] The Director has a sufficient degree of decision-making authority in relation to matters that affect the terms, conditions and tenure of employment of other employees to require the position to be removed from the bargaining unit on the basis of the managerial exclusion. The Board does not agree with the Union's suggestion that the Director's duties could be performed by an in-scope supervisor. The Board would also note that the duties the Director assumed were previously performed by persons outside the bargaining unit.

[55] Turning next to the confidentiality exclusion, the Board must be satisfied that the Director's primary responsibilities relate to one or more of the four categories listed in subparagraphs 6-1(1)(h)(i)(B)(I) to (IV) of the Act and have a direct impact on the bargaining unit.

[56] In *Saskatoon Public Library Board (Saskatoon Public Library) v Canadian Union of Public Employees*²², in excluding three positions from the bargaining unit, the Board stated:

They represent the kind of internal resources that are necessary to enable the Employer to make informed and rational decisions regarding labour relations, strategic planning, policy and budget planning and implementation. In reviewing their job descriptions, it is necessary to consider the reason they will have access to the information and how it will be used by the employee, to determine whether it will have a direct impact on the bargaining unit. The Board must also respect the intention of the Legislature, in elaborating on the description of the confidentiality exclusion. The Legislature has established that the kind of work described in subparagraphs 6-1(1)(h)(i)(B)(II) to (IV) can also have a direct impact on the bargaining unit. The Board is satisfied that the primary duties of these three positions will have a direct impact on the bargaining unit.

[57] While the evidence did not indicate that Reimer has played a role with respect to labour relations, it is clear, as outlined earlier in these Reasons, that her primary duties include activities of a confidential nature in relation to strategic planning, policy advice and budget implementation and planning.

[58] The Union argues that Reimer's work on strategic planning should be disregarded because it is about the Employer, not the Union. This comment misses the point that decisions the Employer makes about how it will operate has the potential to affect its employees' work and tenure.

[59] The communications staff provided their opinions about how Reimer spends her time, but in the end had to admit that their knowledge was limited. The Board is satisfied that the Employer has met its onus of proof in this matter, and that the Director should be excluded from the bargaining unit.

Remedy:

[60] The goal of the Board in granting a remedy is to place the parties in the position in which they would have been if the Employer had not contravened the Act. The remedy must serve a labour relations purpose. There must be a rational connection between the breach, its consequences and the remedy ordered.

²² 2019 CanLII 128791 (SK LRB) at para 80.

Unfair Labour Practice:

[61] The Union seeks:

- a declaration that the Employer committed an unfair labour practice by filling the Director's position on an out-of-scope basis without first obtaining either Union agreement or Board Order;
- a declaration that the Employer did not bargain in good faith with respect to the issue of whether the Director's position should be excluded from the bargaining unit;
- an Order that all dues payable regarding the Director's position be remitted to the Union, in an amount equivalent to the amount that would have been payable from the date Reimer was hired to the date the position is removed from the bargaining unit;
- a written and oral apology.

[62] In asking for these Orders, the Union emphasizes that the Employer is a union and therefore was clearly aware of its obligations in this matter. It refers to *Saskatoon Co-op*:

[49] Still, the Board is quite concerned about the Employer's apparent disregard for its obligation to collectively bargain. The Union suggests that a mere declaration would render the obligation to negotiate meaningless, and would encourage the Employer to take a similar approach in future cases. This is a mature bargaining relationship in which the parties should be fully aware of their respective responsibilities. The Employer seems to treat the Union as a "reactionary force infinitively crying foul" when the Employer acts unilaterally.

...

[51] The Board has the power pursuant to clause 6-103(2)(c) to make any orders that are ancillary to the relief requested if the Board considers that the orders are necessary or appropriate to attain the purposes of the Act. For these reasons, the Board finds that it is appropriate to order that the Employer provide to the Union, both verbally and in writing, an apology for its failure to comply with its obligation to collectively bargain in this case. The Employer was willing to provide an acknowledgment of its failure to collectively bargain in these proceedings. The Board is hopeful that, by extending an apology to the Union, the Employer will open a discussion with the Union about how the parties can improve their relationship in the longer term.

...

[53] The Union has also requested an order that all dues payable regarding the position be remitted to the Union. Clause 6-104(2)(e) of the Act gives the Board authority to order the payment of an amount representing monetary loss:

(e) fixing and determining the monetary loss suffered by an employee, an employer or a union as a result of a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board by one or more persons, and

requiring those persons to pay to that employee, employer or union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;

[54] Given the clear exclusionary basis for this position, the Board does not agree that this request is appropriate. Here, any damages would serve only a punitive purpose.

[63] The Employer does not object to the Board issuing the requested declarations or an Order that it apologize; it concedes that an Order that it pay the requested Union dues may also be appropriate.

[64] The Board finds that, in this matter, an order to pay Union dues for the Director position is appropriate. In an all-employee bargaining unit, new positions are, by default, in the bargaining unit, meaning Reimer has been a member of the Union since the date of her hire. The Board has determined that dues should be paid from October 11, 2021, the date Reimer commenced her employment, until August 18, 2022, the date the hearing in this matter concluded. By the date the hearing concluded, the Employer had taken the necessary steps to prove that the Director's position should be removed from the bargaining unit.

[65] Accordingly, with these Reasons, the Board will issue an Order:

- 1) declaring that the Employer committed an unfair labour practice by hiring a Director of Communications and Education and treating the position as an out-of-scope position without first obtaining the agreement of the Union or a Board Order;
- 2) declaring that the Employer committed an unfair labour practice when it failed to bargain in good faith with respect to the issue of whether the Director's position should be excluded from the bargaining unit;
- 3) directing the Employer to provide a written and verbal apology to the Union for committing these two unfair labour practices, within 30 days of the date of these Reasons;
- 4) directing the Employer to pay to the Union an amount equivalent to the Union dues that would have been deducted and remitted in relation to the Director position from October 11, 2021, the date the position was filled, until August 18, 2022, the final day of the hearing in this matter, without deducting that amount from the incumbent in the position.

Application to Amend:

[66] The current Certification Order between these parties lists the exclusions from the bargaining unit as follows:

President, Secretary Treasurer, Director of Human Resources & Operations, Director of MIS/IT, Financial Controller, Directors of Labour Relations, Director of Disability Management Services and Executive Assistants.

[67] With these Reasons the Board will issue an Order updating the list of exclusions in the Certification Order to read as follows:

Executive Director, Director of Human Resources, Director of MIS/IT, Director of Finance, Directors of Labour Relations, Director of Disability Management Services, Director of Communications and Education, Executive Assistants, President and First Vice President.

[68] The Board appreciates the excellent written and oral advocacy demonstrated by counsel in this matter, and their willingness to focus on the issues actually in dispute between the parties.

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

DATED at Regina, Saskatchewan, this **8th** day of **December, 2022**.

LABOUR RELATIONS BOARD

Susan C. Amrud, K.C.
Chairperson