

IN THE MATTER OF AN ARBITRATION
AND IN THE MATTER OF A GRIEVANCE DATED JUNE 9, 2020
FILED BY UNIFOR LOCAL 681 ON ITS OWN BEHALF
AND ON BEHALF OF DENNIS SZMERSKI

Between

UNIFOR LOCAL 681

(hereinafter referred to as “Unifor”)

and

MANITOBA HYDRO

(hereinafter referred to as “Hydro”)

AWARD

ARBITRATOR

Blair Graham Q.C.

APPEARANCES

Fred Thiessen and Robert Walichnowski on behalf of Unifor

Odette Fernandes and Deanna Hiebert on behalf of Hydro

INTRODUCTION

The hearing of this grievance took place on May 12, 13, and 14, June 4, 7, 8, 9 and 10, July 13, and August 24 and 25, 2021. The parties agreed that I had been properly appointed as the sole arbitrator of the grievance, that I had jurisdiction to deal with the matters in dispute, and that there were no objections to the arbitrability of the grievance.

The grievance, which is dated June 9, 2020, proceeded pursuant to the terms of a collective agreement between Unifor Local 681 (hereinafter referred to as “Unifor”) and Manitoba Hydro (hereinafter referred to as “Hydro”) which was in effect from December 29, 2016 up to and including December 23, 2020, and from year to year thereafter subject to being terminated on notice by either party to the other (the “Collective Agreement”).

The grievance, filed by Unifor on its own behalf and on behalf of Dennis Szmerski (hereinafter referred to as the “Grievor”) alleges that Hydro breached the Collective Agreement by unfairly, unreasonably, and in bad faith, terminating the Grievor's employment without just cause. However the parties are in agreement that the grievance relates to the temporary layoff of the Grievor for a period of 15 weeks from and after July 13, 2020, rather than the termination of his employment.

The grievance, and the factual context in which it arose, present unique and challenging issues. The layoff of the Grievor occurred in the relatively early stages of the COVID-19 pandemic, following an announcement on April 14, 2020 by the Provincial Government (the “Province”) that it was seeking ways to reduce the cost of non-essential spending across all government reporting entities (including Hydro). The request was made to assist the Province in responding to the financial challenges resulting from the pandemic. In response to the Province's April 14, 2020 announcement, Hydro committed to achieving 86.2 million dollars of cost savings in the fiscal year ending March 31, 2021.

Hydro issued a temporary layoff notification to the Grievor in June 2020. It did so, relying on Article 1 of Section I (entitled "Workforce Adjustment") of the Collective Agreement. Article 1 (entitled "LAYOFF") of Section I states:

Article 1 LAYOFF

- I1.1 When employees are laid off because of lack of work, those employees who have not established seniority shall be laid off first, the order to be determined by efficiency. On further reduction employees will be laid off in classifications on a seniority basis allowing the employees to revert to other classifications in which they had previously established seniority, replacing employees with less Corporation seniority. It is understood that term employees, seasonal employees, and students will be laid off before "regular full-time" employees.
- I1.2 Employees will be recalled in reverse order of layoff. The onus shall be on the employees on layoff to advise the Corporation of any changes of address.
- I1.3 After 3 months' continuous employment, no charge of inefficiency shall be used to retain the services of a junior employee over those of a senior employee in the same classification in case of reduction of staff. All employees with established seniority shall be given 48 hours' notice prior to being laid off on account of reductions of staff.
- I1.4 In event of layoff:
 - I1.4.1 Employees with 5 years' service shall be given 1 weeks' notice per year of service or 1 weeks' pay per year of service in lieu of notice.
 - I1.4.2 Employees with over 1 years' service but less than 5 years' service, shall be given 2 weeks' notice or 2 weeks' pay in lieu of notice.
- I1.5 Where the term 90 days or 3 months appears in Articles E2, C1 or I1, it is recognized that the time period can be extended by Letter of Agreement between the Corporation and Unifor.

One of the determinative issues in this case relates to the construction and interpretation of the Layoff Article. This case is unique and challenging because, although both parties rely on interpretive principles which are well settled and which are commonly applied to the interpretation of collective agreements, the layoff in this case occurred within an unusual factual context, making those interpretive principles difficult to apply.

Similarly an issue arose with respect to the admissibility of certain evidence and documents sought to be introduced by Unifor. Hydro objected to the admissibility of the evidence and documents on the basis of “settlement privilege”. The principles relating to settlement privilege are also well settled. However, whether those principles apply, and if so, how they should be applied to the evidence and documents in question, are confounding issues in this case.

THE EVIDENCE

The evidence in the proceedings consisted of an Agreed Statement of Facts and appended documents, the testimony of seven witnesses (three called on behalf of Unifor, and four called on behalf of Hydro) and 108 exhibits.

Significant portions of the Agreed Statement of Facts are reproduced below because they provide the context for the analysis which follows.

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B. The Parties

7. Manitoba Hydro (“Hydro”) is a provincial Crown Corporation, incorporated under *The Manitoba Hydro Act* (Manitoba). Hydro provides electric service to approximately 593,490 customers throughout Manitoba, and natural gas service to approximately 289,364 customers in Manitoba. It also exports electricity to Ontario, Saskatchewan and the United States. Hydro currently employs approximately 5,000 employees.
8. Hydro’s employees are composed of 6 groups of employees (4 bargaining units and 2 out-of-scope units):
 - a) Corporate Exempt;
 - b) MHPEA (Manitoba Professional Engineers Association – while associated, the members of the group are all governed by individual employment contracts and the association is not certified);
 - c) AMHSSE (Association of Manitoba Hydro Staff and Supervisory Employees);

- d) IBEW, Local 2034;
 - e) CUPE, Local 998; and
 - f) Unifor, Local No. 681.
9. Unifor, Local 681 (“Unifor”) is the bargaining agent for all employees associated with natural gas operating processes at Hydro. Unifor currently represents approximately 220 Hydro employees.
10. Dennis Szmerski (Mr. Szmerski”) is an employee of Hydro and a member of Unifor, some of the details which are:
- a) He was hired by Hydro as a Meter Repair Trainee on November 21, 2011.
 - b) He was promoted to Meter Repair Person on October 22, 2015 and has remained in that classification throughout his employment with Hydro.
 - c) At the material time, his position fell under the following organizational structure:
 - Section: Gas Meters
 - Department: Customer Metering and Electrical Codes
 - Division: Customer Care; and
 - Business Unit: Customer Solutions and experience
 - d) His normal hours of work are 7.00 am – 3.25 pm.
 - e) He is a regular full-time employee.

C. The Collective Agreement

11. Hydro and Unifor are parties to a Collective Agreement for the term of December 29, 2016 to December 23, 2020 (the “Collective Agreement”).
12. Unifor is the sole and exclusive bargaining agent for Hydro employees in a unit defined as in Article A1.4 of the Collective Agreement as:

All employees of Manitoba Hydro, in the Province of Manitoba, who meet the following criteria:

- a. The Substantial Majority of the employee's duties are directly associated with a Gas Operating Process; and
- b. Where the employee is in a support Classification, the Substantial Majority of the employee's duties are providing support to employees in the Unifor jurisdiction, and excluding supervisors and staff specialists, being those represented by the Association of Manitoba Hydro Staff and Supervisory Employees, pursuant to Certificate No. MLB-6391, and those excluded by the Act.

'Gas Operating Process' is defined as a process that directly facilitates the distribution of gas energy, or the construction and maintenance of the gas energy systems at Manitoba Hydro.

'Substantial Majority' is defined as 80% or greater on an annual basis. However, should the job duties of an employee change such that the Substantial Majority are no longer directly associated with a Gas Operating Process, and it becomes evident that such change is being made on a non-temporary basis, it is not necessary to wait for a one-year period to affect the jurisdictional change.

'Support Classification' refers to the following classifications currently (i.e. as of November 30, 2006) within the UNIFOR jurisdiction: Administrative Representative I, Administrative Representative II, Administrative Representative III, Administrative Representative IV, Assistant Dispatcher, C&M Coordinator, Construction Project Coordinator, Construction Representative, Customer Service Analyst, Gas Logistics Coordinator, Gas Maintenance Representative, GTP Coordinator, Planner, Procedural Specialist, Engineering Design Technologist and Drafting Person.

...

D. COVID-19

14. On March 11, 2020, the World Health Organization declared Coronavirus disease 2019 ("COVID-19") a pandemic.
15. On March 13, 2020, the first three presumptive cases of COVID-19 were announced in Manitoba.
16. On March 20, 2020, the Province of Manitoba ("the Province") declared a provincial state of emergency pursuant to The Emergency Measures Act (Manitoba).
17. The Province COVID-19 responses included:

- a) May 4, 2020 – Phase One Response;
- b) June 1, 2020 – Phase Two Response;
- c) June 23, 2020 – Phase Three Response;
- d) July 25, 2020 – Phase Four Response;
- e) August 9, 2020 – Code Yellow;
- f) September 28, 2020 – Code Orange; and
- g) November 12, 2020 – Code Red.

E. Background

- 18. On April 14, 2020, the Province asked that all reporting entities discuss an "all-hands-on-deck" approach in response to the COVID-19 pandemic. The Province reported that it was seeking ways to reduce the cost of non-essential spending across government to redirect resources to front-line health services.
- 19. In response to the Province's April 14, 2020 announcement, Hydro committed to achieving \$86.2 million of cost savings in the 2020-2021 fiscal year ending March 31, 2021.
- 20. Hydro reviewed its business to identify costs what could be portion of those costs came from labour costs. Hydro negotiated various bargaining units as to how the labour portion of the cost saving. realized Those negotiations commenced April 15, 2020, and proximately June 5, 2020.
- 21. During the course of the negotiations, Hydro proposed three unpaid days off to the four bargaining units.
- 22. With the exception of Unifor, the three other bargaining units accepted the three unpaid days off proposed by Hydro.
- 23. On June 5, 2020, 10 regular full-time employees were issued a temporary layoff notice and 2 term positions in the Unifor bargaining unit were not renewed. One layoff notice was later withdrawn.
- 24. No other layoffs were effected at Hydro

F. Layoff of Mr. Szmerski

25. Mr. Szmerski was one of 10 employees that received a temporary layoff notice. On June 5, 2020, Mr. Trevor Buchberger, Manager of the Customer Metering & Electrical Codes Department at Hydro, advised Mr. Szmerski that he was selected for temporary layoff.
26. Mr. Szmerski was one of three employees in the Meter Repair Person classification and he had the least seniority.
27. On June 8, 2020, Mr. Szmerski received a formal temporary layoff notification letter which provided 8 weeks' notice and stated his layoff would commence on August 3, 2020 and end no later than December 3, 2020.
28. On June 19, 2020, Mr. Szmerski received a formal temporary layoff notification amendment letter following receipt of a request by Mr. Szmerski to waive his notice period and commence his layoff early. The temporary layoff notification amendment letter stated his layoff would commence on July 13, 2020 and end no later than November 11, 2020.
29. On July 13, 2020, at Mr. Szmerski's request and the acceptance of the parties, Mr. Szmerski began his temporary layoff early.
30. Mr. Szmerski was recalled early from layoff on October 26, 2020. He was laid off for a total of 15 weeks.

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To provide the necessary background relating to the dispute between the parties relating to the admissibility of certain documents over which Hydro claimed "settlement privilege", the following facts are relevant:

1. At the beginning of the pandemic Hydro established a working group which came to be called the "Bargaining Unit Working Group" (the "BUWG") consisting of representatives of Hydro and representatives of each of the four certified bargaining units representing Hydro employees, namely AMHSSE, IBEW Local 2034, CUPE Local 998 and Unifor Local 68. The objective/purpose of the BUWG was expressed in the following terms:

"Manitoba Hydro is establishing a working group with all bargaining units, human resources and legal services to ensure effective, timely and consistent approaches and

responses to employee issues and concerns related to the rapidly evolving COVID-19 pandemic.”

2. As a result of the Province’s April 14, 2020 announcement and Hydro’s commitment to achieve cost savings in the 2020-2021 fiscal year, some of which were to come from a reduction in labour costs, Hydro commenced negotiations with its various bargaining units with respect to how the labour portion of the cost savings would be realized.

3. Hydro did so by convening a series of meetings of the BUWG. At least 16 such meetings of the BUWG took place between April 15 and June 5, 2020. The meetings were joint meetings in the sense that at each meeting representatives of Hydro were present together with representatives of all the above-noted bargaining units. The meetings were concluded virtually.

4. One of the meetings, namely the meeting of May 5, 2020, was described by Hydro as being a “without prejudice” meeting and proceeded on the understanding that the materials presented by Hydro at that meeting would not be shared. All the attendees at that meeting agreed to proceed on that basis.

5. Most if not all the meetings were recorded (without Hydro’s knowledge or consent) by a representative of one of the bargaining units (not Unifor). Transcripts of the 15 meetings held between April 22 and June 5, 2020 were prepared based on those recordings. The transcripts are lengthy. They were not professionally prepared and are not complete (comments by various people were noted in the transcripts as being “inaudible”). The transcripts likely provide a reasonable record of the discussions which took place at each of those 15 meetings, but they are not a verbatim transcription of the discussions.

6. The transcripts relating to the meetings of May 5, 11, 13 and June 5 were introduced into evidence by consent as part of the Agreed Statement of Facts.

7. Unifor has also commenced proceedings against Hydro before the Manitoba Labour Board, alleging that Hydro committed unfair labour practices against Unifor in the spring of 2020. In its Reply filed in those proceedings, Hydro referred to several of the discussions which occurred at the BUWG meetings in April, May, and June 2020.

THE CLAIM FOR SETTLEMENT PRIVILEGE

In asserting its claim for settlement privilege with respect to the discussions and negotiations which occurred during the BUWG meetings in April, May and June 2020, and with respect to the transcripts prepared based on the recordings of those meetings, counsel for Hydro referred to authorities which have held that settlement privilege applies in the labour relations context (see *Taan Forest Limited Partnership v. USW Local 1-1937, re: 2016 CarswellBC 1475*) and that the privilege extends beyond documents and communications expressly designated as being “without prejudice” (see *Sable Offshore Energy Inc. v. Ameron International Corp. 2013 SCC 37 (SCC)*).

More fundamentally, counsel for Hydro asserted that the three elements necessary to establish settlement privilege are all present in the circumstances of this case namely:

- 1) that litigation (or in this case an arbitrable grievance) had either been commenced or was within the contemplation of the parties;
- 2) that the communications had been made with the express or implied intention that they would not be disclosed, and;
- 3) that the purpose of the communications was to effect a settlement.

Counsel for Unifor responded in part by referring to comments made by Arbitrator Larson in *Fortis BC Inc. v. IBEW Local 213, re: 2014 CarswellBC 3763*, which emphasized the importance of drawing a distinction “between disputes relating to contract formation and those that arise out of existing contractual rights”. Arbitrator Larson correctly observed that “a litigious dispute cannot arise in the absence of existing contractual or other rights. If there is no contract, there is nothing to litigate”.

Counsel for Unifor argued that in this case, the first prerequisite for settlement privilege is missing, because litigation (arbitration) was not contemplated at the time the discussions and negotiations were ongoing. Those discussions and negotiations did not relate to the layoff of the Grievor or any other employee within Unifor's bargaining unit. Rather the discussions and negotiations related to the potential formation of a contract collateral to the Collective Agreement (or to an amendment to the Collective Agreement) permitting Hydro to take steps to realize the labour cost savings it had promised the Province it would achieve. According to Unifor, the grievance relating to the layoff of the Grievor was not within the parties' contemplation, and had not "crystallized", until Hydro decided to proceed with layoffs on or about June 5, 2020. The communications over which Hydro is claiming privilege all preceded that date and therefore cannot be covered by settlement privilege.

Counsel for Hydro ably replied to that argument by acknowledging that in April and May 2020 Hydro was negotiating a collateral agreement with the four unions in question but emphasized that nonetheless the Collective Agreement was in full force and effect, and at all times governed the relationship between Hydro and Unifor. From the outset of the discussions, everyone present recognized that layoffs were "on the table", and that if no agreement could be reached and if layoffs occurred, grievances under the Collective Agreement would very likely result. Therefore, grievances challenging any layoffs were always within the contemplation of the parties. The first prerequisite necessary for settlement privilege to operate has accordingly been fulfilled.

The dispute over the issue of whether arbitration was contemplated during the discussions and negotiations of the BUWG illustrates one of the unique features of this case. Negotiations relating to the formation of a collective agreement would not usually give rise to settlement privilege, because neither litigation nor arbitration would normally result from a failed negotiation (instead a strike, or lockout or other industrial action might ensue). However in this case grievances were always possible if the BUWG failed to agree on what steps Hydro could take to realize labour cost savings. On the other hand, it is also true that layoffs of the Grievor and other employees in the Unifor bargaining unit

were probably not explicitly contemplated by the parties, until specific individuals, including the Grievor, had been identified as likely to be laid off, and Unifor had been so advised. Those events did not occur until the latter half of May 2020.

In the unique factual context of this case, I have concluded that it is more probable than not that a potential arbitration was within the contemplation of the parties during their discussions in the spring of 2020. Accordingly, I have concluded that the requirement that litigation/arbitration was within the contemplation of the parties has been fulfilled.

I have also concluded that the requirement that the purpose of the communications was to bring about a settlement, has also been fulfilled. I recognize that the primary purpose of the discussions and the meetings was to enter into an agreement, collateral to the Collective Agreement, which would have enabled Hydro to take the steps necessary to realise the cost savings which Hydro had committed to achieving. However if such an agreement had been reached with Unifor, layoffs (which had always been “on the table”) would not have occurred and any potential grievances would have been avoided. In other words issues relating to potential grievances in response to layoffs would have been effectively settled.

The remaining requirement, namely that the communications must have been made with the express or implied intention that they would not be disclosed or relied upon if settlement negotiations failed, is challenging to apply in the factual context of this case.

The discussions which took place among the members of the BUWG In the spring of 2020 were exceptional. They were unlike negotiations relating to the settlement of a specific grievance or potential grievance. They were also unlike negotiations for a collective agreement, which would typically involve only one bargaining unit. The discussions which occurred involved Hydro, and four bargaining units. If the discussions were successful, they would have resulted in one or more collateral agreements or amendments to multiple collective agreements.

The BUWG framework document (Exhibit 1) referred to Hydro and the bargaining units working collaboratively and openly and that communication to employees and the public “will be co-ordinated where possible”. The framework document did not refer to communications being confidential or privileged.

Significantly, the meetings were attended by several representatives of each bargaining unit. It would have been understood, or should have been understood, that some or all of the representatives in attendance would be reporting on the matters discussed to their respective executive bodies or to other members of their respective bargaining units. Equally significantly it would have been understood by many of those in attendance that some communication relating to the details of the discussions and negotiations might be necessary at the conclusion of the negotiations, either to members of the bargaining units or to the media or to the public at large. The possibility that such communications would be necessary existed whether the negotiations were successful, unsuccessful, or partially successful.

It is also noteworthy that some aspects of the issues being discussed by the BUWG were being commented upon by Hydro in the various “Hydrograms” available to all its employees. I understand that the statements in the Hydrograms did not divulge details of the ongoing discussions, or the specifics of the proposals being exchanged. Nonetheless, the evidence in these proceedings falls significantly short of establishing that the communications at the BUWG meetings occurred with the intention that they would not be disclosed, if efforts to reach a collateral agreement were unsuccessful.

To the contrary, the evidence indicates that the parties, including Hydro, felt free to be able to refer to the discussions at the meetings in defence of their respective positions if the negotiations failed to produce an agreement. Indeed that is what Hydro did when defending the unfair labour practice allegations made by Unifor in the Manitoba Labour Board proceedings. Furthermore, there is nothing in the evidence which demonstrates that the parties, while the discussions were ongoing, ever specifically turned their minds to the issue of what information could be disclosed, and in what forum, if the negotiations

failed to produce an agreement (except in one instance, which will be commented upon below).

The one exception relates to communications with respect to information shared by Hydro at the May 5, 2020 meeting, which were expressly described as being “without prejudice”. Interestingly Hydro has waived its claim for privilege over those communications by agreeing that the transcript of that meeting could be entered into evidence in these proceedings. However Hydro's actions (by specifically referring to those communications as being “without prejudice”, and by not doing so with respect to the communications at any of the preceding or subsequent meetings) support the conclusion that Hydro did not intend that any of the communications (other than those on May 5, 2020) would not be disclosed if the discussions failed to produce an agreement.

In summary, the evidence falls significantly short of establishing that the communications at the BUWG meetings in April, May and June 2020 were made with the express or implied intention that they would not be disclosed if the discussions did not produce an agreement.

Therefore, I have concluded that settlement privilege does not apply to those communications, and that the transcripts of the discussions occurring at the meetings in April, May and June 2020 will be admitted into evidence in these proceedings. Other evidence with respect to the communications at those meetings will also be admitted into evidence.

If I am incorrect in my conclusion that settlement privilege does not apply to those communications, I have also concluded that Hydro, by its subsequent actions, waived whatever claim to settlement privilege it might have had. Hydro waived any such privilege in at least two ways.

Firstly, Hydro made extensive reference to the discussions occurring at the BUWG meetings in the spring of 2020 in its Reply to Unifor's unfair labour practice allegations in

the proceedings before the Manitoba Labour Board. Hydro submits that doing so did not constitute a waiver of its settlement privilege because:

- a) it was necessary for Hydro to refer to those discussions to properly defend the unfair labour practice allegations. Furthermore documents and communications which may not be privileged in one proceeding may nonetheless be privileged in another proceeding, involving different issues;
- b) Hydro's references to settlement proposals and to the positions of the parties during the BUWG meetings in the spring of 2020 were kept at a "high level". No details of the actual negotiations were disclosed, and the disclosures which were made in the Labour Board proceedings focused on communications which also appeared in various Hydrograms and were therefore already publicly available.

I do not accept either of those submissions. Although a document may be privileged in one proceeding and not in another, involving different issues, I was not referred to any case or authority in which a party was able to retain privilege over documents or communications which had been voluntarily disclosed by that party in a separate proceeding. Furthermore the references to the communications in question in the Reply filed in the Labour Board proceedings (a publicly available document) were extensive. They were not simply limited to information which had been mentioned in various Hydrograms. The Reply contained more than 20 paragraphs directly or indirectly referring to discussions between Hydro and its various bargaining units in the spring of 2020, including information with respect to the positions being taken by the participants in those discussions.

I am therefore satisfied that the multiple references in Hydro's Reply in the Labour Board proceedings to the discussions occurring within the BUWG in the spring of 2020 constituted a waiver of whatever settlement privilege Hydro may have had with respect to those communications.

Secondly, Hydro agreed through the Agreed Statement of Facts that some of the communications occurring within the BUWG In the spring of 2020 could be entered into evidence and considered in these proceedings. Hydro asserts that by doing so, it was only agreeing to waive privilege with respect to those specific documents, not the discussions and negotiations as a whole. The documents in question are the transcripts of four meetings occurring on May 5, May 11, May 13, and June 5, 2020. The transcripts of each meeting are relatively lengthy, being between thirteen and thirty-four pages in length. Some of the transcripts refer, at least generally, to discussions occurring at earlier meetings. In such circumstances a claim that any waiver of privilege was limited, is not well founded. This is particularly so when Hydro did not expressly reserve its rights to claim privilege over the remainder of the transcripts, when agreeing to the admission of the transcripts in question.

In terms of assessing whether privilege with respect to certain communications has been waived, when the party claiming privilege in a particular proceeding has otherwise disclosed some or all of the potentially privileged information, fairness to both parties in that proceeding is a legitimate and important consideration. Parties asserting privilege cannot do so in a tactical or self-serving fashion, by disclosing and relying on the communications when it advances their purposes and interests to do so, while resisting disclosure when such disclosure may damage their interests. Similarly parties should not be permitted to selectively disclose some information while withholding the balance of information of the same nature and character.

Given all the foregoing, Hydro's reliance on some of the BUWG's communications in the Labour Board proceedings and Hydro's willingness to have some of the transcripts of the BUWG's discussions and negotiations admitted into evidence in these proceedings, constitutes a waiver of any privilege which Hydro may have had relating to the communications occurring within the BUWG in the spring of 2020.

I will therefore consider the transcripts of the meetings of the BUWG in April, May and June 2020, and other evidence relating to those communications, as evidence in these

proceedings. I will comment on the weight which has been attached to that evidence in a separate section of this Award.

INTERPRETATION OF THE COLLECTIVE AGREEMENT

The Parties' Positions

A critically important issue in this case is the interpretation of the relevant provisions in the Collective Agreement.

Hydro's Position

Hydro submits that the provision most important to the determination of this grievance is the layoff provision in Article 1 of Section I (Workforce Adjustment) in the Collective Agreement. Hydro asserts that Article 1 (Layoff) is a stand-alone provision relating to layoffs and can be properly and reasonably interpreted without reference to Article 2 of Section I. Article 2 deals with workforce adjustments caused by technological change, or redeployments caused by job reclassifications or positions being declared redundant. The full text of Article 2 of Section I is attached as Appendix "A" to this Award.

Hydro points out that although there is no definition of the word "layoff" or the phrase "lack of work" in the Collective Agreement, the arbitral authorities are very clear that the phrase "lack of work" encompasses a variety of financial and other circumstances beyond a simple reduction in the amount of work required to be performed to provide products or services to an employer's customers. According to Hydro it has been established by the arbitral authorities that budgetary restrictions (whether imposed internally or externally) or a desire to increase operating efficiencies, or various other business purposes, can all equate to a "lack of work", justifying layoffs. Hydro acknowledges that a desire to cut costs unaccompanied by another legitimate business purpose does not constitute a lack of work.

Hydro submits that it responded reasonably to the Province's directive to seek ways to reduce the cost of nonessential spending as a result of the financial impacts of the pandemic. Hydro examined its operations to find cost savings, including but not limited to labour cost savings. After extensive negotiations with its bargaining units, Hydro determined that layoffs would be required to achieve the required cost savings. Following an analysis of the work that was not being performed, or would not be performed, as a result of the pandemic, temporary layoffs occurred. The layoffs were implemented in accordance with Article I 1 of the Collective Agreement.

Hydro accordingly argues that no breach of Article I 1 of the Collective Agreement has occurred. The Grievor's temporary layoff was the result of a temporary lack of work (as that phrase has been interpreted by the arbitral authorities) directly resulting from the pandemic.

Unifor's Position

Unifor's arguments relating to the interpretation of the Collective Agreement (as distinct from their arguments relating to bad faith) are more nuanced. At the risk of greatly oversimplifying Unifor's interpretive arguments, they are essentially threefold.

Firstly, Unifor says that the specific wording of Article I 1 does not support Hydro's arguments, and that the cases relied upon by Hydro do not support its interpretation of Article I 1.

Secondly, Unifor argues that the Grievor's layoff was not caused by a lack of work but was caused by Hydro's commitment to the Province to reduce costs. Unifor asserts that Hydro, having made that commitment and having failed to obtain Unifor's agreement to other types of labour cost savings, proceeded to create a "lack of work" to justify the layoff of the Grievor and other employees.

Thirdly, the layoff Article cannot be interpreted in isolation. Article 1 must be interpreted in the context of the Collective Agreement as a whole, and with particular reference to Article 2 of Section I (“Technological Change and Redeployment”). According to Unifor, interpreting Article 1 in that way reveals that Hydro's interpretation of Article 1 is not correct. The Grievor's situation in July 2020 involved a temporary redundancy. Unifor submits that he ought to have been afforded the substantial rights and protections available pursuant to Article 2, rather than being laid off pursuant to Article 1.

In support of their interpretive arguments, Unifor also submits that evidence is available which should be admitted to assist in the interpretation of the Collective Agreement. Relying on the concepts of “surrounding circumstances” and/or the “factual matrix”, Unifor urges me to consider various statements by Hydro representatives during the BUWG meetings in the spring of 2020 and to examine the workforce adjustment provisions in Hydro's Collective Agreements with the IBEW, CUPE, and AMHSSE. Those three collective agreements were all in force when the BUWG meetings were taking place.

Hydro submits that the workforce adjustment provisions in the other collective agreements are not admissible and should not be considered because there is no ambiguity in the Collective Agreement and because the provisions of collective agreements, to which Unifor is not a party, are neither relevant nor helpful to the interpretation of the Collective Agreement in this case.

ANALYSIS

The Case Law

In the absence of a definition of “layoff” in the Collective Agreement, the parties have referred to various definitions in the case law. The Supreme Court of Canada in *Canada Safeway Ltd. v. RWDSU Local 454* (1998) 160 DLR (4th) 1, defined layoff in relatively simple terms as “an interruption of work short of permanent dismissal.”

Hydro points out that the *Canada Safeway* case dealt with a dispute over whether a reduction of work, short of a cessation of work, could be considered a “constructive layoff” and whether a layoff had in fact occurred when the employee continued to work the usual number of hours. Accordingly Hydro prefers a definition whereby “layoff” means “a reduction in the working forces, whether temporary or permanent, brought about as a consideration of prevailing economic or business considerations” (see *Great Atlantic and Pacific Co. of Canada v. UFCW, local 175 2007 CarswellOnt 8807*).

I have reviewed various other arbitral authorities which define or describe a layoff and most definitions are similar to the definition in *Great Atlantic and Pacific*. I accept that definition for the purpose of this analysis, while noting that the interpretation of the phrase “lack of work” will be significantly more important to the determination of this grievance.

Hydro is correct when it submits that the arbitral authorities generally establish that the phrase “lack of work” has not been confined to circumstances in which external demand for an employer’s products or services has been reduced. The following statement by arbitrator Moore in *Insurance Corp. of British Columbia v. COPE Local 375, re: 2015 CarswellBC 3846*, reflects the reasoning in most of the arbitral authorities:

“50. First, in my view, a shortage of work is not only defined by the external demand for an employer’s product or service. It is also a function of the amount of work the employer can offer to the employees based on other business considerations. For example, where an employer is facing economic pressures and, as a result, has to reduce staff, there may be a shortage of work by virtue of the fact that the employer does not have the need or ability to continue to employ the same complement of employees....”

Counsel for Hydro strenuously submits that Article 1 1 of the Collective Agreement is a stand-alone provision and need not be interpreted in conjunction with Article 2. Implicit in that submission is that the two Articles were intended to deal with different sets of circumstances. According to that reasoning, Article 2 was intended to deal with the specific type of workforce adjustments caused either by technological change (paragraph 2.1) or by displacements of employees due to job reclassifications or redundancies (paragraph 2.2 and following); Article 1 was intended to be a more general or “catch-all”

provision to deal with other workforce reductions, namely those caused by a lack of work, broadly defined.

To properly interpret Article I 1, it is necessary to determine how broadly or how narrowly the parties intended Article I 1 to apply.

Hydro maintains that Article I 1 was intended to address any type of layoff, not caused by a technological change or by an organizational change resulting in redundancies. As noted previously, Hydro emphasizes the case law which recognizes that a “lack of work” may encompass all types of legitimate business considerations, justifying a reduction in workforce. Hydro submits that the direction from its owner (the Province) to reduce costs, including labour costs, in the face of the financial challenges resulting from the pandemic, was a legitimate business consideration.

In addition to other interpretive arguments, Unifor insists that the cases relied upon by Hydro, when read carefully, do not support Hydro's arguments, and that the case which is the most factually analogous to this case is *BC Ferry Services Inc. v. BCFMWU* 2020 CarswellBC 2762. The *BC Ferry* case is strongly supportive of Unifor's position.

I have carefully reviewed all the cases relied upon by Hydro in support of its interpretive arguments relating to the phrase “lack of work”. I have also carefully reviewed the *BC Ferry* case.

The cases relied upon by Hydro support its position that the phrase “lack of work” must be interpreted broadly to encompass other business considerations in addition to a reduction in demand for an employer's products or services. However the cases are also notable in that they either involve:

- a) collective agreements with very broad management rights provisions providing the employer with much latitude in organizing or reorganizing its workforce (see for example *New Brunswick v. N.B.N.U.* 2005 CarswellNB 821); or

- b) the elimination of positions through the inability of the employer to pay as a result of budgetary cutbacks (see *Canada v. Gonthier* 1980 CarswellNat 770); or
- c) reorganizations (both large and small) creating redundancies, through the permanent loss of positions (see *Insurance Corp. of British Columbia and COPE Local 378, re: 2015 CarswellBC 3846*).

None of these circumstances is present in this case.

The Collective Agreement in this case does not contain a broad management rights clause. It states simply:

“A 2.2. Management Rights

Nothing herein contained shall affect the right of the Corporation to hire employees without interference from Unifor, and, subject to the provisions of this agreement, to discipline or dismiss employees for just cause without such interference. It is understood and agreed that this agreement does not take away or limit any of the management rights and functions of the Corporation.

It is further understood and agreed that the Corporation, in administering the Collective Agreement, must always act reasonably, fairly, and in good faith and in a manner consistent with the Collective Agreement as a whole.”

Furthermore this case does not involve an inability on the part of Hydro to pay its employees nor does it include the reclassification of positions or the permanent loss of any positions.

In terms of the *BC Ferry* case relied upon by Unifor, the union in that case successfully challenged the layoff of hundreds of casual and regular employees due to a significant decline in ferry traffic caused by the COVID-19 pandemic. The arbitrator determined that the employer did not have an inherent or residual right to temporarily lay off ferry service employees. However *BC Ferry* is distinguishable from this case because the employer’s primary arguments were that the relevant layoff provisions did not apply to temporary layoffs and that the applicable Management Rights clause encompassed a specific right to lay off employees. Those were not the arguments advanced by Hydro in this case.

Therefore, none of the specific cases referred to by either of the parties provides a clear path to determining the outcome of this case. The cases relied upon by Hydro are nonetheless important in establishing that the phrase “lack of work” should be interpreted to include a broad range of business considerations. Conversely the *BC Ferry* case is notable for its unequivocal finding that there is no residual right of management to lay off employees. *BC Ferry* held that the right to lay off employees is a right founded in the collective agreement.

Interestingly Hydro’s counsel indicated they were taking no position with respect to whether Hydro enjoyed a residual management right to lay off employees. Rather than deciding whether or not Hydro had a residual right to lay off employees, I think the better approach is to interpret the provisions of the Collective Agreement recognizing that Hydro is constrained by a general duty of fairness, reasonableness and good faith in administering the Collective Agreement.

Interpretive Principles

When interpreting the relevant provisions of the Collective Agreement, two basic interpretive principles must be kept in sharp focus. Those principles are:

- 1) the purpose of the interpretive exercise is to determine the mutual intention of the parties who have agreed upon the language in the Collective Agreement;
- 2) the starting point of the exercise is to examine the words themselves. Words are to be given their plain and ordinary meaning, and the intention of the parties is to be derived from the words of the Collective Agreement to the extent possible.

The words of Article I 1 are frustrating. The Article is clear in delineating the process which is to be followed once a decision to lay off employees has been made. The Article is less clear in articulating the conditions or circumstances which permit layoffs to occur. By using the phrase “because of lack of work”, the Article suggests that there must be a causal connection between a lack of work and the layoff, but the words themselves provide no guidance as to what constitutes a lack of work.

As noted elsewhere the Collective Agreement contains no definition of either “layoff” or “lack of work”.

The Management Rights provision at paragraph A 2.2 does not refer to “layoffs”, nor does it provide Hydro with specific powers to adjust the workforce or to make organizational and staff changes in response to the business environment. Paragraph A 2.2 does contain an acknowledgement that the Collective Agreement does not take away or limit the management rights and functions of Hydro, but that phrase must be interpreted by recognizing that management may never have had the inherent right to lay off employees and that Hydro is obliged to administer the Collective Agreement reasonably, fairly and in good faith.

Inasmuch as the words of Article I 1 of the Collective Agreement do not provide a clear indication of the mutual intention of the parties as to the circumstances in which Article I1 will apply, it is necessary to consider what other provisions of the Collective Agreement, or what other evidence, may be considered when interpreting the Article.

It is undoubtedly correct that other provisions of the Collective Agreement can and should be considered. When interpreting provisions in a collective agreement, an interpretation in which the various provisions are construed harmoniously is to be preferred over an interpretation in which the provisions conflict or are inconsistent with each other. Unifor strongly urges a consideration of Article I 1 when interpreting Article I 2, for at least three reasons, namely:

- 1) they are related articles in the same section They should be interpreted harmoniously, in a way in which the two articles are consistent with each other, and operate in combination with each other;
- 2) to reinforce the proposition that Unifor had successfully negotiated significant protections against layoffs by specifically obtaining significant rights and

protections against workforce adjustments resulting from technological changes and reclassifications and reorganizations in Article I 2. It would therefore be illogical to conclude that Unifor would have agreed that Hydro had a general right of layoff resulting from “lack of work”, broadly defined, in Article I 1;

- 3) to demonstrate that the layoff in this case was effectively a temporary redundancy, and that Hydro breached the Collective Agreement by not providing the Grievor with the benefits and protections contemplated by subparagraphs 2.2 to 2.9 of Article I 2.

I have carefully considered Article I 2. I recognize that Unifor’s interpretive arguments based on Article I 2 have merit. However I cannot unreservedly accept Unifor’s contention that the redeployment provisions in Article I 2 applied to the Grievor’s layoff because I am not convinced that a temporary layoff constitutes a redundancy. Hydro’s interpretive arguments are also logical. Unfortunately neither party’s arguments provide a satisfactory answer to the question of what the parties intended when using the phrase “laid off because of lack of work”.

Extrinsic Evidence

Given the foregoing, is this an appropriate case to consider extrinsic evidence as part of the interpretive process?

There are at least two bases upon which extrinsic evidence may be considered as an aid to the interpretation of the applicable provisions in the Collective Agreement.

The authorities are clear that extrinsic evidence is admissible for that purpose if the provisions in question are ambiguous. Neither party argued that the provisions are ambiguous. Both parties submitted that the relevant provisions are clear. However they both argue in favour of conflicting interpretations which produce dramatically different results.

I accept that arguability is not synonymous with ambiguity. However, when I consider Article A 2.2 (Management Rights) and Article I 1 (Layoff) and Article I 2 (Technological Change and Redeployment) and the absence of definitions of “layoff” and “lack of work” in the Collective Agreement, I am inclined to think that the relevant provisions in the Collective Agreement are ambiguous. I am so inclined because it is difficult to determine what level of protection the parties intended to provide when using the phrase “... are laid off because of lack of work”, particularly in view of the measures the parties agreed upon in Article I 2 with respect to technological changes and redundancies.

It is not clear whether the parties intended the phrase “lack of work” to be a broad catch-all category, or whether they intended the phrase to be interpreted narrowly to a very limited set of circumstances, not covered by Article I 2.

I have also considered whether the concepts of “surrounding circumstances” and/or “factual matrix” are applicable in this case and permit the admission of extrinsic evidence to assist in the interpretation of the Collective Agreement.

These related concepts became very important in the general law of contract in Canada as a result of the Supreme Court of Canada’s decision in *Sattva Capital Corp. v. Creston Moly Corp.* [2014] 2 S.C.R.633. *Sattva* was a case involving a commercial contract. It summarized the current approach to the interpretation of contracts by stating at paragraphs 46 and 47:

“The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract - often referred to as the factual matrix - when interpreting a written contract....

Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine “the intent of the parties and the scope of their understanding” ... To do so, a decision-maker must read the contract as a whole, giving the words their ordinary and grammatical meaning, consistent with the surrounding

circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning...

The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement..."

In describing what constitutes the "surrounding circumstances", the Supreme Court also noted some important limitations at paragraph 58:

"The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at/or before the date of contracting..."

The Supreme Court was also careful to make it clear that it was not abolishing the parol evidence rule. The parol evidence rule precludes the admission of evidence, outside the words of the contract, which will vary or contradict a contract that has been reduced to writing. An ambiguity must still exist before admitting and considering extrinsic evidence, unless such extrinsic evidence falls within the surrounding circumstances associated with the formation of the contract.

In determining whether or not specific items of extrinsic evidence fall within the "surrounding circumstances", it is useful to consider what the Supreme Court said in *Sattva* about the purpose of looking at surrounding circumstances. The Court said at paragraph 57 of its decision:

"The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intention of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, Courts cannot use them to deviate from the text such that the Court effectively creates a new agreement..."

Other cases have noted that what the Supreme Court said in *Sattva*, relating to the interpretation of contracts in general, describes the process which labour arbitrators had been utilizing for several years (see *Alberta Union of Provincial Employees v. Alberta Health Services* 2020 Carswell Alta 13). In that case the Alberta Court of Appeal also provided further guidance relating to the factors which should be present before evidence can be admitted and considered as part of the surrounding circumstances. The evidence should consist of:

- a) facts which are uncontroversial to the parties;
- b) fact known to the parties at the relevant time;
- c) facts capable of affecting how a reasonable person would understand the language of the document.

As noted above, I am inclined to think that the relevant provisions in the Collective Agreement are ambiguous. Nonetheless I have also assessed three specific items of extrinsic evidence to determine whether that evidence is admissible as comprising part of the surrounding circumstances.

The three items of extrinsic evidence which I assessed were:

- 1) a proposal made by Hydro in November 2016 during the negotiations which resulted in the current Collective Agreement;
- 2) the workforce adjustment provisions in the three Collective Agreements between Hydro and IBEW, CUPE, and AMHSSE;
- 3) statements made by Sharon Harrald, as reflected in transcripts based on recordings of the BUWG meetings of April 22 and May 22, 2020.

The November 2016 proposal made by Hydro sought changes to the then existing provisions relating to Article I 1 (Layoff) and Article I 2 (Technological Change and Redeployment).

The effect of Hydro's proposal would have been:

- 1) to eliminate the phrase “because of lack of work” in Article I 1; and

- 2) to include language in Article I 2 giving Hydro discretion to continuously adjust the workforce in response to the changing business environment and changing customer expectations; and
- 3) to broaden the scope of the redeployment provisions to cover business changes including, but not limited to, organizational, technological and staff rationalization changes.

The proposal for change was rejected by Unifor and not pursued further by Hydro. The result was that those articles remained unchanged in the current Collective Agreement.

Hydro's 2016 proposal, although rejected by Unifor, would clearly be admissible as extrinsic evidence (specifically as “negotiating history” evidence) if Articles I 1 and I 2 are found to be ambiguous.

To determine whether Hydro's 2016 proposal can be considered part of the surrounding circumstances or part of the factual matrix, it is useful to ask whether the fact that the proposal was made and rejected leads to a better understanding of the mutual and objective intentions of the parties as expressed in the words of the current Collective Agreement.

The fact that the proposal was made by Hydro and rejected by Unifor does provide insight into the mutual and objective intentions of Hydro and Unifor with respect to those Articles. Hydro wanted to remove the causal connection between a lack of work and a layoff and wanted to expand its discretion and latitude with respect to adjusting the workforce for a variety of reasons. Unifor's rejection of that proposal reflected its belief that the phrase “because of a lack of work” was a limitation of Hydro's right to lay off employees. Unifor's unwillingness to give Hydro a broad discretion to adjust the workforce was indicative of its conviction that the wording which then existed (and which remains in the Collective Agreement) placed important restrictions on Hydro's ability to lay off employees.

Interestingly, evidence of Hydro's 2016 proposal and Unifor's rejection of that proposal, plus Hydro's acceptance of the status quo, also fulfill the three factors identified by the Alberta Court of Appeal in the *Alberta Union of Provincial Employees* case for the admissibility of evidence as “surrounding circumstances”. The facts are uncontroversial; they were known to the parties at the relevant time (when the Collective Agreement was being negotiated) and are capable of affecting a reasonable person's understanding of the provisions in question.

Accordingly, whether the relevant provisions of the Collective Agreement are ambiguous (as I think they are), or whether the 2016 proposal by Hydro and its rejection by Unifor are admitted as part of the surrounding circumstances, I have concluded that it is permissible, reasonable and necessary to consider Hydro's 2016 proposal, Unifor's rejection of the proposal and Hydro's acceptance of the status quo, as evidence to assist in the interpretation of the relevant Collective Agreement provisions.

I have not relied upon the other items of extrinsic evidence referred to above when interpreting the relevant Collective Agreement provisions. Specifically I have not relied upon the comparable provisions in the collective agreements between Hydro and CUPE, IBEW and AMHSSE, nor the statements of Sharon Harrald at the BUWG meetings of April 22 and May 22, 2020.

I have not considered the comparable provisions in the other collective agreements because I am unclear when those three collective agreements were finalized relative to the conclusion of the Collective Agreement between Hydro and Unifor. Furthermore, evidence relating to the provisions of the other three collective agreements, cannot be evidence of the intention and objectives of Unifor (who was not a party to those agreements). Therefore such evidence is not helpful in determining the mutual intentions and objectives of the parties as reflected in their Collective Agreement.

With respect to the statements of Ms. Harrald, they were made significantly after the provisions in question were negotiated, and therefore would not have been known to the

parties at the time and accordingly cannot be reasonably considered as part of the surrounding circumstances.

Union counsel strongly urged me to consider and rely upon those statements, indicating that they can be determinative of the outcome of these proceedings. The transcript of the April 22, 2020 meeting indicates that Ms. Harrald said:

“So you know, absolutely our goal is to avoid permanent layoffs. I mean, within our Collective Agreement language there is no option, pardon me, to do temporary layoffs if that is what is asked of us by the government.”

The transcript of the May 22, 2020 meeting indicates that Ms. Harrald said:

“... you’re right Mike, and you can write this down that I said it. And it, we obviously have no shortage of work. This is a reduction to achieve some cost savings. So, I mean, we said that before, and we continue to, to debate it. And, and it isn’t because there isn’t enough work to go around that we’re doing this workforce reduction. It, it is a workforce reduction to achieve cost savings.”

Although those words appear strongly supportive of Unifor’s position, I have not relied upon them because I do not consider them admissible either as extrinsic evidence to assist in the interpretation of ambiguous provisions or as part of the surrounding circumstances.

Moreover they are less definitive than they may at first appear. Ms. Harrald was speaking to a group which included representatives from all four bargaining units, and she may have been speaking generally to the overall situation of Hydro, and not referring to the work available in specific departments or working units.

Therefore in terms of extrinsic evidence, I have only considered Hydro's 2016 proposal and Unifor's rejection of that proposal in my interpretation of the relevant Collective Agreement provisions.

The Interpretation of the Relevant Articles

The Articles which require consideration as part of the interpretive process are Article A 2.2 (Management Rights) Article I 1 (Layoff) and Article I 2 (Technological Change and Redeployment). The characteristics or elements of each of those Articles which are most germane to this interpretive exercise are outlined below.

- 1) The management rights clause is limited. It does not contain express language dealing with layoffs, nor does it provide Hydro with a general discretion to adjust the workforce in response to changes in the business environment.
- 2) The management rights clause contains an express acknowledgement that Hydro is obliged to administer the Collective Agreement reasonably, fairly and in good faith. If such a provision had not been included in the Collective Agreement, it would have been deemed to be included by SS. 80 (2) of the *Labour Relations Act*.
- 3) Hydro had attempted without success in the 2016 negotiations to include in Article I 2 an explicit statement providing it with discretion to “continuously adjust its workforce in response to the changing business environment”. It is reasonable to infer that Hydro made such a proposal recognizing that the wording of the prior Collective Agreement did not provide it with such a discretion. The acceptance by Hydro of Unifor's rejection of the proposal is a strong indication that both parties recognized that neither the management rights clause nor section I (the Workforce Adjustment provisions) in the current Collective Agreement provide Hydro with a general discretion to adjust its workforce in response to a changing business environment.
- 4) Article I 1 (Layoff), by using the phrase “when employees are laid off because of lack of work”, means that there must be a causal connection between the layoff and a lack of work. Hydro's attempts in 2016 to remove the phrase “because of lack of work” were not successful. Hydro's attempts to remove the phrase and Unifor's refusal to

remove it are strong indicators that both parties understood that the phrase “when employees are laid off because of lack of work” was a limitation on Hydro’s ability to lay off employees.

I recognize that the negotiations in 2016, like all collective bargaining negotiations, undoubtedly involved “give and take” and that Hydro may have sought and received concessions from Unifor in other areas (such as the Voluntary Departure Program which was then being discussed and implemented). However that does not detract from the interpretive principle that the words which the parties have ultimately chosen to express their agreement are of critical importance, and that an arbitrator's task is to give those words the meaning that the parties would have mutually intended at the time the Collective Agreement was finalized.

5) There are two important features of Article I 2. Firstly, it addresses the rights of both parties in relation to workforce adjustments caused by technological change or by job classifications or reclassifications, or by positions being declared redundant. Secondly, it provides significant protections (in the form of extensions of employment, reassignments and retraining) to employees affected by such changes. Those two features are important when interpreting Article I 1 (Layoff). The two Articles are part of the same section of the Collective Agreement (Workforce Adjustment) and to the extent possible they should be interpreted harmoniously.

It would make no sense for the parties to have negotiated detailed provisions providing substantial protections to employees affected by the type of workforce adjustments mentioned in Article I 2, while agreeing to a general provision relating to layoffs caused by a lack of work, broadly construed. This is particularly so when Hydro's attempts in 2016 to remove the phrase “because of lack of work” from Article I 1 and to include a broad discretion to continuously adjust the workforce in Article I 2 had been specifically rejected by Unifor.

It is not necessary for me to decide whether Article I 2 would have been the appropriate provision to apply to the Grievor's circumstances in the summer of 2020, and I specifically decline to do so. Nonetheless it is necessary to consider Article I 2 when determining what the parties intended by Article I 1 for the reasons outlined above.

All of the foregoing leads me to the conclusion that a reasonable interpretation of Article A 2.2, Article I 1 and Article I 2, is that Hydro and Unifor had negotiated provisions which were intended to provide very substantial employment protections to Unifor's members, and to limit the adverse impact of a layoff for so long as work remained available. Accordingly the phrase "lack of work", in the context of this Collective Agreement, is to be interpreted narrowly to apply in a limited set of circumstances. A desire on the part of Hydro to cut costs, unaccompanied by another legitimate business purpose, does not constitute a lack of work.

I have reached this conclusion while being mindful of the case law which has generally held that the phrase "lack of work" is to be interpreted broadly to encompass various business considerations in addition to a reduction in demand for an employer's products or services. As noted elsewhere in this Award, those cases either involved collective agreements with broad management rights clauses, the elimination of positions as a result of the employer's inability to pay, or reorganizations resulting in the permanent loss of positions. This case involves none of those things.

I have also reached the conclusion that Hydro and Unifor intended the phrase "lack of work" to have a narrow meaning, but not to provide a guarantee of employment. The very existence of an article entitled "Layoff", which contemplates layoffs because of a lack of work, demonstrates that layoffs may occur in certain circumstances in addition to those specifically covered by Article I 2.

To determine whether the layoff of the Grievor was one of those circumstances requires an assessment of some additional evidence and a consideration of the nature and extent

of Hydro's obligation to administer the Collective Agreement reasonably, fairly, and in good faith.

ADDITIONAL EVIDENCE

The parties introduced extensive evidence relating to a variety of other topics outlined below.

- 1) Some of the discussions at the BUWG meetings.
- 2) The analyses undertaken by Hydro to identify workforce labour cost savings related to the COVID-19 pandemic, which involved the creation of various “Workforce Review Templates” (the “templates”) relating to Departments and business units within Hydro involving all bargaining units, including Unifor. The individuals preparing the templates were asked, among other things, to consider whether there was work within the Departments which had been reduced because of the pandemic and whether there was work within the Departments which could be deferred or reduced to achieve COVID-19 related cost savings. The templates were also intended to identify business risks which could arise from any layoffs. On May 10th, 2021, immediately prior to the commencement of the hearing, in response to a motion brought by Unifor, I ordered production of two of the templates (relating to the Customer Solutions and Experience business unit and the Operations business unit) subject to strict conditions. Those conditions restricted Unifor’s ability to use or disclose the templates, or the information contained therein, except for the purposes of this arbitration. The order of production relating to the templates was also granted on the basis that the issue of their admissibility as evidence would be decided later.
- 3) The work undertaken generally in the Department in which the Grievor was employed (the Customer Metering and Electrical Codes Department).

- 4) The work undertaken by the Grievor, as a Meter Repair Person, and a description of other work which the Grievor might have been able to perform.
- 5) The specific analysis undertaken by Hydro in reaching the decision that the Grievor should be laid off.
- 6) Details relating to the actual layoff of the Grievor.

It is not necessary to summarize all of that copious evidence. However specific items of evidence relevant to the outcome of the grievance will be identified and commented upon.

On April 14, 2020 the Province made its request of all reporting entities, including Hydro, to stop all non-essential spending. On April 21 Hydro submitted a response to the Province outlining scenarios whereby it could achieve substantial savings in the period which had been identified by the Province, namely May 1 through Aug 31, 2020. Hydro then awaited the Province's response.

By May 1 the Province and Hydro had apparently agreed that the cost savings to be realized by Hydro would be \$86.2 million for the four-month period. Further discussions between the Province and Hydro resulted in a target of \$11 million being set for work-related or labour-related savings (as part of the total of \$86.2 million in cost savings).

In a Hydrogram message dated May 11, 2020, to Hydro employees, Jay Grewal, the President and Chief Executive Officer of Hydro, announced that as a result of the above-noted developments, Hydro would have no choice, other than to issue temporary layoff notices to approximately 600 to 700 employees.

By May 11, 2020, the BUWG had already met at least six times. At those meetings Hydro had identified layoffs as a possibility, but had promised they would be a last resort. A

prevailing theme at the meetings had been a desire on the part of all parties to work diligently towards achieving a resolution which would avoid layoffs.

Notwithstanding Ms. Grewal's May 11, 2020 Hydrogram message, the BUWG continued to meet frequently in an attempt to achieve substantial labour-related cost savings in order to avoid layoffs.

During the month of May, Hydro was concurrently undertaking the work and analysis associated with the Workforce Review Templates. Sometime in mid-May Hydro's analysis relating to work within the Grievor's Department had identified the Grievor as a potential candidate for layoff. Shauna Young, a Labour Relations Advisor employed by Hydro, who was actively involved in the layoff analysis, testified on behalf of Hydro that the Grievor's name had been brought to her attention on or about May 19, 2020. Following her review of the analysis which had been done, she met with Victor Diduch, the Vice-President (and acting President) of Unifor's local, on May 29 and gave him a list of employees within the bargaining unit who would likely be laid off, including the Grievor.

On June 5, 2020, Trevor Buchberger, Manager of the Customer Metering and Electrical Code Department at Hydro, advised the Grievor that he had been selected for temporary layoff.

While those developments were occurring, discussions with the BUWG were ongoing. Various alternatives were being explored by Hydro and its bargaining units to avoid layoffs. Those alternatives included proposals by Hydro of an across-the-board salary reduction of 8% for all Hydro employees (both unionized and non-unionized) and a subsequent proposal of three days off without pay. One or more of the unions made other proposals, all of which were unacceptable to Hydro.

Ultimately three of the four bargaining units accepted Hydro's proposal that each of their members would be subject to three days off without pay. AMHSSE was the first union to accept the proposal on or about May 30, or in early June 2020. CUPE and IBEW accepted

that proposal within the first week of June 2020, by which time layoff notices had already been issued.

All three of those unions accepted the proposal of three days off without pay, after putting the proposal to their members for a vote.

Unifor did not accept the three days off without pay proposal, partly because it felt the proposal would have a disproportionate negative affect on its members, who comprised the smallest bargaining unit at Hydro. However Mr. Diduch testified that the primary reason for Unifor's rejection of the three unpaid days off proposal was Unifor's belief that, of the four bargaining units, it had the strongest collective agreement language protecting its members from layoff, and that there was no legitimate lack of work affecting its members.

Unifor rejected Hydro's proposal of three unpaid days off without putting the proposal to a vote of its members.

The Grievor's employment position was that of a Meter Repair Person. Exhibit 86 in the proceedings was a job posting including a detailed description of the Grievor's duties. The Grievor in his testimony provided a clear and concise summary of his duties in a typical year. During the late spring, summer and early fall, he normally worked in the shop full-time, performing meter repairs on various types of diaphragm meters. Hydro also utilizes rotary and turbine meters. Although the Grievor could do some basic work on rotary and turbine meters (such as cleaning and painting) his level of certification or training did not permit him to do more sophisticated repair work on those types of meters.

In the late fall, winter and early spring months, the Grievor's work would consist of travelling to various locations across a large area of Manitoba doing Pressure Factor Metering (PFM). This aspect of his job requires a flow of gas before it can be undertaken, which is why the Grievor's PFM work was generally performed in the winter months.

In terms of meter repair work in the shop, the meters generally come from residences and small businesses. After they have been in use for a period of time, the meters are brought into the shop to be repaired and recalibrated to ensure they are accurately measuring the flow of gas and that customers are being properly charged for the quantities of gas they are using. The government regulator who oversees those activities is Measurement Canada. Meters are typically brought to Hydro's repair shop pursuant to a "Meter Exchange Program".

In March 2020 Measurement Canada temporarily suspended the requirements for meter replacement and reverification. Utilities, such as Hydro, with meters due for replacement or reverification were encouraged to suspend the removal of meters from residences and other public places while COVID-19's effects were ongoing. One of the reasons for encouraging the suspension of such activities was to protect the health and safety of the workers who would otherwise be required to enter the residences and businesses to remove and replace the meters. In March 2020 Hydro suspended its Meter Exchange Program out of concern for the health and safety of its employees. It had not been specifically ordered to do so by Measurement Canada.

The number of meters to be replaced in a given year fluctuates significantly from year to year. However the quantities are substantial and in most years a Meter Repair Person, such as the Grievor, would not be able to complete all the repairs assigned to him or her. The excess would be added to the repairs to be done in the ensuing year.

Although in the Grievor's department, located in Winnipeg, PFM work is done in the fall and winter, it is possible for that work to be performed in the spring and summer. At least one other business unit at Hydro, performing PFM work in another area of the Province, does PFM work throughout the year.

The Grievor was identified as an individual who would be laid off due in large part to the suspension of the Meter Exchange Program. As a result of the program's suspension the number of meters being removed from homes and small businesses was significantly

reduced, resulting in a significantly smaller number of meters being sent for repair or recalibration to the Hydro repair shop. This in turn resulted in a significant decline in the amount of work available to a Meter Repair Person. The Grievor testified that he remained busy doing meter repair work throughout the spring of 2020 right up to the starting date of his layoff (July 13, 2020). Witnesses for Hydro testified that he remained busy because of the backlog which had developed prior to the suspension of the Meter Exchange Program. Hydro also entered into evidence various documents indicating that the number of meters repaired and recalibrated in 2020 was significantly less than in 2019, and that the reduction was outside the range of normal annual fluctuations. No Meter Repair Person had ever previously been laid off as a result of a reduced number of meters requiring repair in a given year.

The Grievor was recalled from layoff on October 26, 2020, which was approximately two weeks earlier than had previously been indicated. He was immediately assigned PFM work, which he continuously performed up to the date that he testified in these proceedings (June 7, 2021).

During the nine-month period ending December 31, 2020, Hydro remained profitable and its consolidated net income was substantial and compared favourably to the same period in 2019.

Within the above-noted factual context, Unifor argues strenuously that Hydro has breached the Collective Agreement and specifically Article I 1. It also argues that Hydro has acted in bad faith.

I will comment on Unifor's bad faith arguments in a separate section of this Award. However in terms of interpreting the relevant Collective Agreement provisions and determining whether Hydro acted reasonably and fairly in administering the Collective Agreement, it is appropriate to deal now with four additional arguments by Unifor which are interpretive arguments relating to the specific facts of this case.

Three of those arguments relate, at least in part, to the Workforce Review Templates. I have determined that the information contained in the templates is relevant to the contentious issues in these proceedings. The templates are admissible evidence in these proceedings.

1. Unifor argued that it is clear that the layoff of the employees was not caused by a lack of work because the layoffs were announced, and employees were identified for layoff, before Hydro had commenced (let alone completed) its analysis of COVID-19's impact on its operations, including its work on the templates. I do not accept that argument because it is not a correct characterization of the evidence.

It is true that Ms. Grewal announced impending layoffs in the Hydrogram of May 11, 2020 and that at that time Hydro's analysis of its operations and the pandemic's impact on available work had only just started and was far from being completed. The individuals to be laid off had not been identified by May 11.

However Hydro was continuing to engage in serious discussions with all its bargaining units through the BUWG meetings in May in an effort to avoid layoffs, while at the same time having managers undertake the analysis of its operations and prepare the templates. This was a reasonable process given the request from the Province to achieve substantial cost savings and that the amount of the labour cost savings required had not been finalized until early May. Hydro was seeking to avoid layoffs, while at the same time developing contingency plans in case layoffs became necessary.

2. Unifor also argued that the layoffs were not the result of a legitimate lack of work, because part of Hydro's analysis involved identifying work which could be deferred as a result of the pandemic. Unifor suggested that Hydro looked for work which could be deferred once layoffs became likely based on the initial lack of progress in the BUWG discussions, rather than proceeding with layoffs only once a lack of work had actually developed.

Once again, I do not accept this argument, at least as it applies to the layoff of the Grievor. The lack of work relied upon by Hydro in the case of the Grievor was the reduction in meter repair work resulting from the suspension of the Meter Repair Program. The program was initially suspended temporarily on March 13, 2020. The temporary suspension was extended thereafter and lasted for many months. On the basis of the evidence in the proceedings, I am satisfied that the lengthy suspension of the Meter Exchange Program was implemented by Hydro out of a sincere concern for the health and safety of its employees, who otherwise would have been required to attend in private homes and at small businesses and to interact with their owners and occupants. At the time those decisions were made by Hydro there was widespread concern and alarm among the public related to the contagious nature of COVID-19 and the severity of its effects. Mr. Korchak, the Winnipeg Natural Gas Operations Department Manager, testifying on behalf of Hydro, recalled that many Hydro employees in the spring of 2020 were “very uptight” about interactions with customers and were reluctant to deal directly with customers without adequate personal protective equipment.

In short, it has not been established that the Meter Exchange Program was suspended to artificially create a lack of work in order to justify layoffs.

However Unifor’s other two interpretive arguments are more persuasive.

3. Any analysis of layoffs resulting from a lack of work and any assessment of whether an employer has administered a collective agreement in relation to layoffs reasonably and fairly, will necessarily involve determining whether or not the employer, having identified a possible reduction in work, has made efforts to find other work which an affected employee may be able to usefully perform without materially compromising operational efficiencies.

Mr. Buchberger was asked in cross-examination whether Hydro could have found other work for the Grievor during the planned period of layoff, such as PFM work. Significantly, Mr. Buchberger replied: “That is not what I was asked to do. I was asked to report on

disruptions to our operations which could result from COVID and to identify people impacted by those disruptions.”

Later in his cross-examination, Mr. Buchberger was asked whether in doing his analysis of layoffs he had looked for other work which the affected employees could have done. Again Mr. Buchberger answered that the request he received was not to look for other work but to analyze work which had been impacted by COVID.

Given my conclusions that the relevant provisions of the Collective Agreement provided employees with substantial protection against layoffs while work remained available, those answers are consequential. They demonstrate that at a critical stage of Hydro's analysis relating to the impacts of COVID, instructions to managers were to look for the specific effects of COVID on work levels, but not to assess the overall availability of work which potentially affected employees could reasonably perform.

In this case, I am not critical of Hydro for not assigning work to the Grievor which was work that he would not normally perform, or which would have necessitated extra training (such as pipeline inspecting, service line cut-offs, or leak surveys). I am also not critical of Hydro for not changing its contracting-out practices to provide work to the Grievor. Doing any of those things may have had a material negative affect on its operational efficiencies. However assigning PFM work to the Grievor in the summer months was a more realistic possibility given that Hydro does PFM work during the summer in other areas of the Province. Significantly, it appears that Hydro did not consider the possibility of the Grievor continuing to work on whatever number of meters were still awaiting repair or recalibration, supplemented by some PFM work.

The fact that such possibilities were not considered, and that Hydro's managers were not instructed to consider alternatives, involving other work which could be done by affected employees, means that Hydro was not administering the Collective Agreement provisions relating to a lack of work reasonably and fairly.

4. The remaining Unifor argument to be considered also addresses Hydro's obligation to administer the Collective Agreement reasonably and fairly. Unifor submitted that there was no causal connection between Hydro's stated objective of realizing \$11 million in labour cost savings and the layoffs which ultimately occurred. Unifor advanced this argument broadly, insisting that Hydro produced no evidence to establish the reasonableness and legitimacy of either the overall savings objective of \$86.2 million or the labour cost savings component of \$11 million. However Unifor also made the point more narrowly and more effectively, by pointing out that Hydro did not update its calculations as to what labour cost savings were still required after reaching settlements with AMHSSE and latterly with CUPE and IBEW.

The evidence establishes that by May 29, 2020 the \$11 million labour savings target had changed. The target had been reduced by retirements. Corporate exempt employees (such as professional engineers) had agreed to take three days off without pay. Therefore, by May 29, 2020, only \$4.3 million in reductions were left to be achieved in order for Hydro to meet its stated objective.

AMHSSE reached an agreement in principle with Hydro on May 30, 2020, or in the first few days of June. Discussions were ongoing with the other three unions. CUPE and IBEW reached an agreement with Hydro to take three days off without pay shortly after June 5, 2020.

Surprisingly, there was no evidence introduced indicating that Hydro did a calculation to determine how much of the remaining \$4.3 million in savings, which was left to be achieved on May 29, had in fact been realized as a result of the agreements which had been reached with AMHSSE, CUPE, and IBEW. Certainly no such calculation was ever provided to Unifor.

In the absence of such a calculation there is no basis upon which to conclude that any layoffs within Unifor's bargaining unit were necessary to achieve the labour cost savings which Hydro had identified. Even assuming that some layoffs were still required to meet

Hydro's objective for labour cost savings, the absence of a reasonable calculation providing a revised target figure deprived Unifor (and Hydro) of the opportunity to look for other ways of achieving the target, and avoiding layoffs, even at the eleventh hour.

Ms. Harrald, testifying on behalf of Hydro, explained that by late May and early June, Hydro had determined that there were only two options, namely three unpaid days off, or layoffs. She stated: "We came down to those two options, and the only path forward was layoffs."

I have no doubt that Ms. Harrald was being candid and truthful about Hydro's position when making that statement. However given the provisions of the Collective Agreement, such an approach was simply not consistent with Hydro's obligation to administer the Collective Agreement reasonably and fairly.

To establish that it had administered the Collective Agreement reasonably and fairly within the factual context of this case, Hydro was obliged to demonstrate a causal connection between its objective of achieving a specific amount of labour cost savings and the layoffs which occurred. It has not done so.

In reaching this conclusion I have been influenced by the reasoning in two cases relied upon by Unifor namely, *Brandon (City) v. BP FPA 2020 MB QB 73* and *District of Summerland and IBEW, local 213 Re: 2020 CarswellBC 2999*.

In the *District of Summerland* case, Arbitrator Love wrote:

"277 It is not for this arbitration board to tell the employer how to manage its business, but in my view in assessing reasonableness there must be a rational connection between the employer's goal and its actions in order for the layoff to be reasonable and lack arbitrariness. There is no rational connection between the objective of reducing labour costs and the decision to layoff the Grievor."

I accept that reasoning and find it applicable in this case. Justice Grammond's analysis in *Brandon (City)* was similar and concluded that some evidence, however minimal, was

required in order to properly assess whether the actions and decisions of the employer in that case were fair and reasonable.

The lack of evidence relating to an updated calculation of the labour cost savings still left to be achieved after the other unions had reached agreement with Hydro to accept three days off without pay, means that Hydro has failed to establish a causal connection between its objective of achieving a specific amount of labour cost savings and its actions in laying off the Grievor and others. In the absence of such evidence I am not satisfied that Hydro has administered the Collective Agreement reasonably and fairly.

INTERPRETIVE CONCLUSIONS

In addition to the foregoing, there are some notable and conspicuous facts which demonstrate that the layoff of the Grievor was not because of lack of work as that phrase was understood by the parties. Those facts are that:

- a) Hydro was profitable and its consolidated net income was substantial during the period in question;
- b) The Grievor had never previously been laid off, even in years when the volume of meters to be repaired or recalibrated had dropped to below average levels;
- c) The Grievor was called back to work from layoff earlier than expected, at a time when COVID-19 infection rates were higher than when he was laid off, and he remained continuously at work from the date of his recall to the date of his testimony at the hearing.

I have concluded that the layoff of the Grievor was part of an attempt by Hydro to cut costs in order to achieve a labour cost savings target which had been set in response to the Province's April 14, 2020 request, and not because of a lack of work.

In summary, in interpreting the relevant provisions of the Collective Agreement and determining whether Hydro administered the Collective Agreement reasonably and fairly, I have made the determinations outlined below:

- 1) Article I 1 (Layoff) and Article I 2 (Technological Change and Redeployment) provide very substantial protections to Unifor's members and severely limit the circumstances in which layoffs may occur while work remains available;
- 2) the phrase "lack of work" in Article I 1.1 of the Collective Agreement is to be interpreted narrowly. A request or direction from the Province to cut costs while work remains available does not constitute a lack of work within the meaning of that phrase in Article I 1 of the Collective Agreement;
- 3) Hydro did not administer the Collective Agreement reasonably and fairly in relation to the Grievor's layoff in at least two respects:
 - i) Hydro neglected to adequately consider what other work might have been available for the Grievor to perform notwithstanding a reduction in the number of meters needing repair and recalibration in 2020;
 - ii) Hydro has not proven that there was a causal connection between its objective of achieving a specific amount of labour cost savings and the layoff of the Grievor and others in the Unifor bargaining unit;
- 4) the layoff of the Grievor was part of an attempt by Hydro to cut costs in order to achieve a labour cost savings target which had been set in response to the Province's April 14, 2020 request, and not because of "lack of work";
- 5) by laying off the Grievor, Hydro breached Article I 1.1 of the Collective Agreement

BAD FAITH

I have concluded that Hydro breached the Collective Agreement and did not administer the Collective Agreement reasonably and fairly in relation to the layoff of the Grievor. Unifor argues that Hydro's conduct goes beyond a breach of the Collective Agreement and that Hydro was acting in bad faith and that its actions relating to the layoff were improperly motivated.

The parties disagree as to the onus which Unifor must meet in order to prove bad faith. Hydro suggests that Unifor must prove a subjective intent on the part of Hydro to harm the Grievor or Unifor. Unifor says it is sufficient for it to demonstrate that otherwise proper motives were tainted by some impropriety. Although a precise formulation of what is required of Unifor to discharge the onus is difficult to articulate, it is clear that compelling evidence of some malfeasance is necessary. An employer who makes honest mistakes or errors should not be found to have acted in bad faith (*see Hamilton- Wentworth Community Care Access Centre v. OPSE U local 274, 2004 CarswellONT 2804*).

I have concluded that Unifor has not discharged the onus of establishing bad faith in this case. Although Hydro's layoff of the Grievor was in breach of the Collective Agreement, its actions were not undertaken in bad faith.

The most salient of Unifor's bad faith arguments are summarized and commented on below.

1. Unifor maintains that Hydro was consistently less than transparent in explaining to the unions participating in the BUWG how the overall cost savings figure of \$86.2 million and the labour cost component of \$11 million were arrived at. Unifor also points to certain evidence indicating that there may have been deceit on Hydro's part as to whether the figures of \$86.2 million and \$11 million were decided upon by Hydro, or whether those figures were imposed on Hydro by the Province.

Unifor also suggests that Hydro could have resisted the Province's request for cost savings by arguing, as it had in the past, that further cuts would have jeopardized the safety of its employees and Hydro's ability to properly serve its customers.

I do not accept any of those arguments. The Province is Hydro's owner. Hydro is indebted to the Province. The Province was seeking assistance in responding to the worst public health crisis in a century and was trying to position itself to meet the financial challenges resulting from the pandemic. It was not unreasonable for Hydro to heed its owners call and to promptly and meaningfully respond to the Province's request.

The nature of Hydro's response and the details of that response were matters within the purview of Hydro's senior management and arguably its Board of Directors. There was no obligation on the part of Hydro to share those details with its bargaining units, and not doing so did not constitute bad faith.

Insofar as whether the targeted figures of \$86.2 million and \$11 million came from Hydro or the Province, I recognize that there are apparent inconsistencies between statements made by Ms. Grewal, or attributed to her, at one or more BUWG meetings, and a statement made by her on June 11, 2020 while appearing at a Legislative Assembly Standing Committee on Crown Corporations. I am not overly troubled by the apparent inconsistency, having reviewed and considered each of the statements in their entirety and the contexts in which they were made. More importantly, I am unwilling to attribute a deceitful intent to Hydro or Ms. Grewal, recognizing that the savings figures were arrived at after the Province had made its request, Hydro had responded to the request, and following further discussions between Hydro and the Province.

2. Unifor hints at duplicity on the part of Hydro in relation to initial information provided to the BUWG that any cost savings realized would be directed to front line workers responding to the pandemic. This information likely had its genesis in the Province's Treasury Board PowerPoint presentation (Exhibit 10). Such information may have influenced the unions to constructively participate in the BUWG discussions. However

that issue was discussed at a number of BUWG meetings and Hydro attempted to clarify the misapprehensions which had understandably arisen. Those attempts included having Aurel Tess, the Chief Financial Officer of Hydro, attend at a BUWG meeting to make a presentation and respond to questions.

3. Unifor was critical of several aspects of Ms. Harrald's participation in BUWG meetings and of portions of her evidence given at this hearing. Rather than commenting on each criticism, I will simply say that I have reviewed the transcripts of the BUWG meetings and considered her evidence at the hearing; my assessment is that Ms. Harrald conducted herself professionally in both forums with a view to serving Hydro's best interests. She was candid, forthright and sometimes blunt, both in her statements at the BUWG meetings and in her testimony. While I disagree with the position which she articulated (that by early June 2020 Hydro had only two options), I reject the proposition that, by taking that position, either she or Hydro were acting in bad faith. Unifor's criticisms of Ms. Harrald are unwarranted.

4. Unifor characterized the layoffs as punitive, submitting that Hydro was motivated by ill-will towards, or frustration with, Unifor for refusing to accept Hydro's offer of three days off without pay. However I consider it equally likely that Hydro believed that layoffs were required of employees within Unifor's bargaining unit in order to achieve the objective of \$11 million in labour cost savings. Hydro may also have thought that the layoffs were a logical and foreseeable consequence of Unifor's unwillingness to make any of the other concessions which Hydro had proposed to avoid layoffs. Furthermore my assessment of all the evidence is that Hydro believed it was entitled to layoff the Grievor and others pursuant to Article I 1 of the Collective Agreement. I have concluded that Hydro was mistaken in that regard, but a mistaken belief does not amount to bad faith.

5. Unifor also asserted that Hydro's claim for settlement privilege (as more particularly described in an earlier section of this Award) was not only ill-conceived but was part of an overall plan to narrow the scope of the grievance and to frustrate the grievance process. I disagree. Although I have determined that the claim for settlement privilege

was not well founded, it was not frivolous nor was it without substance. I am satisfied that the claim for settlement privilege was reasonably made as part of a legitimate strategy to vigorously defend Hydro's interests in these proceedings. Neither the claim for settlement privilege nor the timing of when the claim was made amount to bad faith.

When assessing Unifor's allegations of bad faith I also found it necessary to consider the circumstances in which this grievance arose. The background events occurred in the initial stages of the COVID-19 pandemic, a grave public health crisis which generated an atmosphere of uncertainty and fear. Hydro was faced with a request from its owner which it felt it could not ignore. Both Hydro and Unifor were functioning in a complex, rapidly changing environment which they had never previously experienced. Hydro and Unifor made concerted efforts to avoid the layoff of employees, while trying to protect the interests of the organizations and individuals they were representing. All the witnesses who testified in these proceedings were impressive and gave their evidence conscientiously and truthfully. A finding of bad faith is not appropriate or warranted in the circumstances.

DECISION AND ORDER

As noted in the Interpretive Conclusions section of this Award, I have concluded that:

1. Article I 1.1 and Article I 2 of the Collective Agreement provide very substantial protections to Unifor's members and significantly limit the circumstances in which layoffs may occur while work remains available;
2. The phrase "lack of work" in Article I 1.1 of the Collective Agreement is to be interpreted narrowly. A request or direction from the Province to cut costs, while work remains available, in the absence of another legitimate business purpose, does not constitute a lack of work within the meaning of that phrase in Article I 1.1 of the Collective Agreement;

3. Hydro did not administer the Collective Agreement reasonably and fairly in relation to the Grievor's layoff in at least two respects as more particularly described elsewhere in this award;
4. The layoff of the Grievor was part of an attempt by Hydro to cut costs in order to achieve a labour cost savings target which had been set in response to the Province's April 14, 2020 request and not because of lack of work;
5. By laying off the Grievor, Hydro breached Article I 1.1 of the Collective Agreement, but was not acting in bad faith.

The parties have asked that I reserve jurisdiction on the issue of remedy, which will be addressed separately, subsequent to the issuance of this Award.

Accordingly, I hereby order that:

1. The Grievance dated June 9, 2020 is allowed.
2. I hereby retain jurisdiction to determine all issues relating to the remedy or remedies which are to be granted in these circumstances and will make myself available to the parties at their convenience for a further hearing on this issue, if such a hearing is necessary.
3. I will also retain jurisdiction to determine any other issue which may arise with respect to the implementation of this Award.

Dated this 22nd day of March, 2022.



Blair Graham, Sole Arbitrator

Appendix A

Article 2 TECHNOLOGICAL CHANGE AND REDEPLOYMENT

Technological Change

- 12.1 The Union and Company agree that certain changes in equipment or procedures or customer needs may necessitate changes in work procedures and/or conditions of work. Where the changes necessitate, the Company will provide the required training so that the existing employees will be able to fill the new job requirements. Where the anticipated changes are of such significance that retraining will not alone address the problem, the Company and Union shall meet and discuss the proposed changes. Employees affected shall not suffer layoff, loss of income or benefits, as a result of such changes.

Redeployment

- 12.2 On occasions where an employee may become displaced from his/her job as a result of a job classification and/or position in the organization potentially being declared redundant:
- 12.2.1 Departmental Management will meet with the Chief Steward and the Departmental Steward(s) to discuss the business situation regarding: the need to redeploy unionized employees into bargaining unit work; and/or the need to redeploy unionized employees into non-bargaining unit work; and/or the need to redeploy salaried employees into bargaining unit work.
 - 12.2.2 Once the need to redeploy employees has been discussed, Departmental Management, the Chief Steward and Human Resource Placement Coordinator will meet to begin planning to prepare potential redeployment candidates for alternate work in the organization. This may include providing training courses, job shadowing opportunities, and/or career planning guidance.
 - 12.2.3 Once the timeline to redeploy employees is known, Departmental Management, the Chief Steward and Human Resource Placement Coordinator will determine the parties that need to be involved and make arrangements to determine who the potential redeployment candidates are, and discuss potential redeployment opportunities.

- 12.3 Every effort will be made to locate a permanent reassignment for the affected employee(s) as soon as possible:
- 12.3.1 Affected employees are encouraged to apply for all existing job vacancies, inside and outside of the bargaining unit, and if not reasonable,
 - 12.3.2 The Company will offer affected individuals, who meet job requirements after a period of retraining and/or job shadowing, as agreed to by the Company and Union, any newly created and/or modified jobs within the bargaining unit, and/or posted bargaining unit vacancies for which no bargaining unit employee meets the minimum job requirements, and if not reasonable,
 - 12.3.3 The affected employees will be allowed to revert to other classifications in which they had previously established seniority, replacing employees with less Company seniority, who would then become redeployment candidates, and if not reasonable,
 - 12.3.4 If mutually agreed by the Union and the Company the affected individuals, who meet the job requirements, will be given preference for current job vacancies within the bargaining unit, and if not reasonable,
- 12.4 If the above efforts are unsuccessful in locating a permanent reassignment for the affected employee(s):
- 12.4.1 Every effort will be made to extend the employment for bargaining unit employees who are displaced from their positions, by assigning available temporary placements, work or projects within the scope of the bargaining unit, for which they meet entry level requirements.
 - 12.4.2 Failing available work as described in Article 12.4.1, every effort will be made to extend the employment for bargaining unit employees who are displaced from their positions, by assigning available temporary placements, work or projects within the scope of the bargaining unit, for which they do not meet entry level requirements. Such assignments may include a period of job shadowing, training programs, college courses, etc.
- 12.5 Upon discussion and agreement among the parties, the provisions of the Collective Agreement, will continue for bargaining unit employees who are temporarily assigned out of scope work, on a without prejudice basis. The above excludes access to the grievance procedure for matters related to hours of work, work schedules, job duties or work location.

- I2.6 If during a transfer evaluation period of 90 days, employees prove unsatisfactory, the Company shall revert them to restart the redeployment process as described in Article I2.3. Employees may decide to restart the redeployment process during the first 30 days of the new permanent assignment.
- I2.7 Where a bargaining unit employee is redeployed to a lower paying job his/her existing wage rate will be green-circled. This protection provides for salary progression and general salary adjustments based on the former classification as long as the employee remains in the classification they were placed or one of equal pay.
- I2.8 Employees who are redeployment candidates are eligible to apply for posted vacancies and will not be subjected to the one year provision in Article E1. 1 or the five and ten year provision in Article B1.5.1.
- Employees who have been redeployed into their current positions, and have ten years company seniority, are eligible to apply for posted vacancies and will not be subjected to the five year provision in Article B1.5.1.
- I2.9 Employees who are redeployed from a bargaining unit position to a non-bargaining unit position are eligible to apply for posted vacancies and will be granted 1 day seniority with the bargaining unit for purposes of applying for the vacancy, provided there are no existing redeployment candidates.
- Employees who are redeployed from a bargaining unit position to a non-bargaining unit position will carry their existing entitlement under Article F3.2 of the Collective Agreement, but will not accrue further days.
- I2.10 Failing availability of assignments, reduction in staff will occur as per the terms and conditions of the Collective Agreement.
-