IN THE MATTER OF AN ARBITRATION

B E T W E E N:

EPCOR Utilities Inc.

The Employer

- and -

Local 1007,
International Brotherhood of Electrical Workers,

The Union

Group Grievance Re: Layoffs in the EPCOR Technologies Business Unit
Grievance File No.: EPCOR 2020-01

# AWARD

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| BEFORE THE BOARD OF ARBITRATION: | Thomas Jolliffe, K.C., Chair<br>Chris Lane, K.C., Employer Nominee<br>Jacob Axelrod, Union Nominee |
| FOR THE EMPLOYER: | Craig Neuman, K.C., Counsel |
| FOR THE UNION: | Dan Scott, K.C., Counsel |
| HEARING DATES: | December 13 and 15, 2022 (via Zoom) |
| BOARD EXECUTIVE SESSION: | April 6, 2023 (via Zoom) |

**Date Award Issued:**
May 24, 2023

My File: 53,598

1. This matter concerns the group grievance brought by the International Brotherhood of Electrical Workers, Local No. 1007 on behalf of 32 bargaining unit members alleging that EPCOR Utilities Inc. violated the Collective Agreement concerning its layoff and recall provisions affecting them. In its grievance document filed on January 17, 2020 the Union has alleged that the Employer "has engaged in improper, arbitrary, unreasonable and bad faith exercise of management rights in improper, arbitrary, unreasonable, and bad faith misuse of the layoff and recall provisions of the Collective Agreement". It disputed the Employer's layoff notices issued due to an alleged shortage or lack of work, which was said to have been followed by its posting for 28 "temporary" Utility Worker positions, eight of the aggrieved employees having accepted temporary positions. It has asserted that they should not have been laid off in that there was work for them to do, but alternatively the Employer should have posted new positions and allowed other bargaining unit members to bid into them. Further the Union asserts therein that there was no legitimate or reasonable basis to lay off the grievors in December 2019 and then create temporary positions in January 2020 said to have circumvented the compensation provisions for permanent employees under the Collective Agreement. In its grievance, the Union has specifically cited Article 11 of the Collective Agreement provision which deals with layoffs and rehires.

2. It bears observing it outside that the immediate business difficulty giving rise to the layoffs centered on certain financial issues being encountered by the EPCOR Technologies Business Component, its integrated service provider offering fibre-optic solutions and underground residential distribution equipment sales. The effects of the seniority driven bumping and displacement situation affected not only employees working in Technologies but also those holding permanent Utility

Worker positions in the EPCOR Distribution and Transmission (EDTI) component, and Meter Reader positions in Water Distribution and Transmission, who received layoff notices. The Union relies on the Employer, despite the layoff notices, nevertheless having posted numerous "temporary" Utility Worker positions that same day resulting in eight of the grievors being successful in their applications for these temporary positions. It alleges that none of the grievors should have been laid off inasmuch as the Employer had work available in their previous position(s). This is to say, there was work for them to perform for which they were qualified, there allegedly being no legitimate or reasonable basis to lay them off and then create temporary positions covering the same work. Alternatively, it should have created and posted new Utility Worker positions and allowed bargaining unit members, including the grievors, to apply for them in normal fashion. They should not have lost their permanent employee status. This layoff was also alleged not to have been for any true shortage of work but to allow the Employer to circumvent the compensation provisions for permanent employees under the Collective Agreement. Included in the Union's proposed remedies is its seeking a declaration that the Employer breached the Collective Agreement, and a make-whole order in all respects, including that the grievors be reinstated as permanent and non-temporary employees effective as of the date of the layoff, and damages. The Parties are agreed that if there is any remedial jurisdiction to be exercised in this matter, the hearing will be bifurcated.

3. The Employer has responded that requiring the layoffs occurring in December 2019 and the consequences for individual affected bargaining unit members as to displacement and bumping rights was nevertheless a legitimate exercise of its management rights under Article 4.01 of the Collective Agreement in having assessed its business requirements. The Employer contends that it needed to

proceed as it did with the layoffs due to ongoing and expected reduced work requirements in its operations, which is to say in its Technologies' business component which required bumping and displacement by exercise of the seniority driven contractual obligations. It relies on there having been proper consultation with the Union, notices issued, followed by the required bumping and displacement process affecting EDTI employees. The Employer also relies on Article 3.07 contemplating its having permanent, part-time and temporary workers in its employment.

4. The Parties provided a detailed Agreed Statement of Facts and Exhibits, entered in evidence, which included a brief introduction, referencing their being Parties to the Collective Agreement, and agreeing that the grievance pertaining to the 32 named employees affected by the layoffs had been properly referred to arbitration, in addition to requesting reservation of jurisdiction to address remedies were that necessary following a determination on the merits. Their Agreed Facts, not considered to be exhaustive in allowing for additional evidence, contained enumerated Headings pertinent to the merits, with the descriptions set out thereunder extending from para. 4 through para. 25. This information is reproduced as follows:

> **Grievance, Referral to Arbitration and Jurisdiction**
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> 4. On January 17, 2020 the Union submitted a group grievance to the Employer on behalf of 32 named employees affected by the layoffs in December, 2019 (Exhibit 2).
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> 5. The grievance has been referred to arbitration. The members of the arbitration board have been properly appointed. The arbitration tribunal has jurisdiction to hear and determine the grievance.
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> **EPCOR Technologies Business**
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> 6. The Employer, EPCOR Utilities Inc., directly, and through other operating

companies, builds, owns and operates electrical, natural gas and water transmission and distribution networks, water and wastewater treatment facilities, sanitary and stormwater systems, and infrastructure in Canada and the United States. Some of its businesses are regulated public utilities.

7. For purposes of the layoff and recall provisions under Article 11 of the Collective Agreement (Exhibit 1), the parties recognize five "Companies" within the Employer:

a) EPCOR Distribution and Transmission
b) EPCOR Corporate Shared Services
c) EPCOR Water Canada
d) EPCOR Technologies
e) EPCOR Drainage Services

8 EPCOR Technologies is an unregulated operating subsidiary of the Employer.

9. Prior to 2019, the primary business of EPCOR Technologies was to perform all street lighting, traffic signals and LRT electrical system work in the City of Edmonton ("the City"), pursuant to an exclusive contract arrangement with the City known as the Transportation Systems Electrical Services Agreement ("TSESA").

10. The last TSESA expired in 2018, and was not renewed by the City.

11. Beginning in 2019, EPCOR Technologies became party to new contract arrangements with the City, known as the Electrical Services Agreement ("ESA"). The ESA retained exclusive rights for EPCOR Technologies to provide LRT electrical system work for the City, but ended exclusive rights for EPCOR Technologies to provide street lighting and traffic signals electrical work for the City.

12. Prior to 2019, other business activities of EPCOR Technologies, besides its primary business of providing services to the City under the TSESA, included the provision of professional services (engineering, drafting and project management) and centralized dispatch of contractors providing specialty services ("jobbing") for the Employer and its affiliated businesses, electrical field services for other customers, and the leasing of fiber optic network capacity and sales of underground residential distribution transformer equipment in the Alberta marketplace.

13. After the end of 2022, EPCOR Technologies will no longer provide LRT or other electrical system work for the City under an ESA, and will no longer

undertake electrical field services for other customers. Its remaining business will be the provision of professional and jobbing services for the Employer and affiliated businesses, and the leasing of fiber optic network capacity and sales of underground residential distribution transformer equipment to other customers.

**Elimination of Positions in EPCOR Technologies**

14. In June, 2019 representatives of the Employer held a meeting with employees working in the EPCOR Technologies business unit. A slide deck was presented and discussed at the meeting (Exhibit 3). Topics discussed at the meeting included an update on operations of EPCOR Technologies in 2019 and anticipated work for the City under the ESA in 2020.

15. On September 23, 2019 representatives of the Employer held a meeting with employees working in the EPCOR Technologies business unit. A slide deck was presented and discussed at the meeting (Exhibit 4). Topics discussed at the meeting included an update on operations of EPCOR Technologies in 2019 and anticipated work for the City under the ESA in 2020. An email with a link to the slide deck presentation was sent to all employees working in the EPCOR Technologies business unit on September 24, 2019 (Exhibit 5).

16. On October 29, 2019 representatives of the Employer held meetings with employees working in the EPCOR Technologies business unit, and with groups of employees in the Union bargaining unit in other business units of the Employer. At these meetings employees were informed that as a result of the declining volume of work in EPCOR Technologies to be performed for the City under the ESA, approximately 40 permanent Utility Worker positions in the Union bargaining unit would be eliminated at the close of the 2019 construction season. An email about these position reductions was sent to all employees of the Employer on October 29, 2019 (Exhibit 6).

17. On December 3, 2019 representatives of the Employer held a meeting with employees working in permanent Utility Worker positions in the EPCOR Technologies business unit. Employees were notified that their positions were to be eliminated, effective December 5, 2019. Employees were provided options to exercise before December 5, 2019, if they had sufficient seniority, to displace more junior employees in the Union bargaining unit with the Employer, in Utility Worker or Meter Reader positions (which were in the same SS1 Classification Code under the Collective Agreement), or to choose to be laid off. A representative example of the notices of position elimination and displacement options issued to the affected employees is attached (Exhibit 7).

**Layoffs of Utility Workers and Meter Readers**

18. On December 5, 2019, notices of layoff were issued to 32 permanent employees in the Union bargaining unit. Four employees in Utility Worker positions in EPCOR Technologies who lacked sufficient seniority, or chose not to displace another employee, received notices of layoff at this time. The remaining 28 notices of layoff were issued to permanent employees in Utility Worker and Meter Reader positions in other business units of the Employer who had been displaced from their positions by more senior Utility Workers whose permanent positions in EPCOR Technologies were eliminated. A representative example of the layoff notices issued to the 32 affected employees is attached (Exhibit 8).

19. An email about these layoffs was sent to all employees of the Employer on December 5, 2019 (Exhibit 9).

20. Representatives of the Employer met with representatives of the Union to inform them of the elimination of permanent Utility Worker positions in EPCOR Technologies before October 29, 2019, and before notices of layoff were issued on December 5, 2019. Union representatives were present at meetings with affected employees that occurred on October 29, and on December 3 and 5, 2019.

21. In 2020 representatives of the Employer made a presentation to representatives of the Union about the impact of the reduction in work from the City on the EPCOR Technologies business unit, and the need for workforce reductions as perceived by the Employer. The slide deck presentation shared by the Employer with the Union is attached (Exhibit 10).

**Job Posting for Temporary Utility Workers**

22. Between December 22 and 24, 2019, representatives of the Employer and the Union exchanged emails regarding the Employer's plan to use a posting and application process for temporary Utility Worker positions (Exhibit 11).

23. On December 30, 2019 the Employer posted a job posting seeking to recruit up to 28 Utility Workers for temporary positions in the Union bargaining unit, to work in EPCOR Technologies and in the Electricity Operations business unit of the Employer (Exhibit 12). The posting closed on January 6, 2020.

24. 18 employees were selected to fill temporary positions pursuant to this job posting. Nine individuals were employees on the recall list who had been

among the 32 who were laid off on December 5, 2019. The other nine individuals were external hires. The employees selected to fill temporary positions pursuant to this job posting began work in those positions on January 20, 2020.

**Status of Laid Off Employees**

25. Of the 32 employees who were laid off on December 5, 2019, seven employees were not recalled to work and their employment with the Employer has ended, seven employees ended employment after periods of recall to temporary positions, eight employees have had periods of temporary employment and retain current rights of recall to employment with the Employer, and 10 employees were recalled from their layoffs to permanent positions with the Employer (though four of these employees were subsequently laid off again from their permanent positions and have had periods of recall to temporary positions). An EPCOR summary of the work assignment history of the 32 laid off employees, subsequent to December 5, 2019, is attached (Exhibit 13).

5. The pertinent language of the Collective Agreement under the heading "Layoffs and Rehires" is contained in the detailed language of Article 11, and is set out below extending from 11.01 through 11.06:

**11.* Layoffs and Rehires**

11.01 For the purposes of Layoffs and Rehires the following "Companies" will be recognized:

a) EPCOR Distribution and Transmission

b) EPCOR Corporate Shared Services

c) EPCOR Water Canada

d) EPCOR Technologies

e) EPCOR Drainage Services

11.02 Consultation with the Union

The company will notify the Union at with as much advance notice as possible of the pending workforce reductions.

Prior to initiating layoffs, the Company and the Union shall meet to review the layoff process, review seniority lists, discuss which employees may be impacted and identify options for assignment or reversion.

11.03 Workforce Reductions

If the permanent staff of a Company is to be reduced, the Company shall first determine the number of jobs to be reduced within each class code level (e.g. TR3). Except as specifically provided in 11.06, those employees who were last appointed to a class code level to be reduced, shall be the first employees removed from such class code level for the purposes of layoff, provided those remaining in the class are qualified and capable to perform the duties of the remaining jobs in the class code level.

Non-permanent employees within the class code level to be reduced shall be laid off prior to the removal of permanent employees from the class code level.

11.04 Displacement

A permanent employee affected by workforce reduction may exercise displacement rights provided the employee has the required qualification, skills and knowledge to perform the duties of the position and is senior to the employee being displaced.

a) A permanent employee will be eligible to be placed in the following sequence:

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|---|---|
| STEP 1: | Placement in a vacant full time position within the same class code level within any of the Companies defined in Article 11.01. |
| STEP 2: | Displacement the least senior full time employee in the same class code level within the same company. |
| STEP 3: | Displacement of the least senior full time employee in the same class code level within any of the Companies. |
| STEP 4: | Placement in a vacant full time position at the next lower class code level within any of the Companies. |

STEP 5: Displace the least senior full time employee in the next lower class code level within the same company.

STEP 6: Displacement of the least senior full time employee in the next lower class code level within any of the companies.

Further options for placement will continue under Steps 4, 5 and 6 into the next lower class code level until options have been exhausted or the employee elects to be laid off.

b) When an apprentice job is abolished in accordance with 11.02, such employee may, at his option, exercise displacement rights within the class code level, within and between either of the Companies, provided that he is qualified and capable of performing the duties of the job, and provided that such job is within the jurisdiction of Local 1007 I.B.E.W.

11.05 Layoffs

a) An eligible permanent employee, removed from a class for the purpose of layoff, who elects not to revert to a job within his former class exercise displacement rights shall be laid off from the Company.

b) Permanent employees to be laid off from permanent jobs shall receive a minimum of fourteen (14) calendar days' notice of such layoff. In the event that notice is not provided, the Company shall provide the employee with a payment equal to the wages the employee would have earned had he worked his regular hours of work in the fourteen (14) day period. The Union shall be notified when layoffs are contemplated.

c) Permanent employees to be laid off shall be given a general priority throughout the Company for any vacancy for which they are qualified. The general priority shall not override the rehire provisions or the provisions of 10.01. "Promotions".

11.06 Rehire

a) If the permanent staff of a Company is to be increased, permanent employees will be recalled in order of Jurisdictional Seniority, provided they are qualified and capable of performing the duties of the job.

b) Permanent employees in a lower class due to displacement will be eligible to be recalled to their former class code level.

c) Permanent employees laid off from service will have the right to a single recall for a period of 24 months. Where an employee accepts a temporary assignment to a job in his former class his right to recall shall be extended by the duration of the assignment. Such employees removed in accordance with the layoff procedures shall be re-engaged in preference to other applicants.

d) Laid off permanent employees who are rehired within their recall period shall be re-engaged as permanent employees. Such employees shall retain the benefits provided by the current Agreement which were enjoyed prior to layoff, with the exception of seniority, which shall be governed by the provisions of 13.08 d).

6. Further, inasmuch as final argument included reference to the employment definition language of the Collective Agreement, its provisions are set out below:

3.06 Continuous Employment

"Continuous employment" means continuous permanent or probationary employment with the Company.

3.07 Employee

a) "Permanent employee" means any employee who has successfully completed the probationary period of a permanent job and has continued in the employ of the Company.

b) "Part-time employee" means an employee who occupies a job which is assigned working hours which are normally less than eight (8) hours per day or forty (40) hours per week.

c) "Probationary employee" means an employee who is serving a trial period of employment in his initial employment in a permanent job coming within the scope of this Agreement.

d) Temporary employee" means an employee who is filling a seasonal job or a position:

i) on a temporary basis for a term of up to twelve (12) months, or

ii) to replace a specific employee who is ill, injured or on an approved maternity or parental leave for a term of up to eighteen (18) months.

A temporary or provisional employee of the Company shall not be entitled to become a permanent employee by reason fo such employment; however, an employee who has been continuously employed for a period of twelve (12) months, in a job coming within the scope of this Agreement, shall automatically become a permanent employee.

A temporary employee's term may be extended by mutual agreement between the Company and the Union.

e) "Provisional employee" means a person currently engaged in full-time temporary employment who has completed one thousand, nine hundred and forty-four (1,944) hours of temporary service for the Company, within a period of three (3) consecutive years, in a job coming within the jurisdiction of the Union. Temporary service shall only be recognized if the reason for termination is as a result of being laid-off or other reasons approved by the Company. A break in employment of twelve (12) consecutive months, voluntary resignation or termination, shall cancel provisional status.

....

3.12 Permanent Job

"Permanent job" means a permanent job as provided for in the permanent establishment of the Company.

7. Through the Parties' diligent research efforts, they have been able to provide this Board with a comprehensive breakdown of the work histories of the affected bargaining unit members. This documentary evidence, whereby the Parties have organized the grievors' individual situations into six (6) distinct categories was entered as Exhibit 13, and is appended to this Award is in its entirety. By the Union's research, as the situation currently stands, seven (7) grievors were not recalled and have fallen off the employment list; seven (7) grievors returned into temporary employment and eventually left their employment while still temporary; eight (8) grievors were recalled on that same basis and have continued working as temporary employees to the present time; ten (10) grievors eventually moved into permanent employment after initially being returned to work under the bumping process as temporary employees. Four (4) of them were eventually laid off again and

accepted temporary employee status.

8. The Union called two witnesses, starting with David Jarel Worden who is one of the stipulated Category 1 employees displaced from their permanent roles in EPCOR Distribution and Transmission Inc. (EDTI) by EPCOR Technologies' employees with more seniority, and then hired back as a temporary. Mr. Worden testified that he was hired in 2016 into EDTI and by the fall of 2019 held the permanent employee status of utility worker/relief operator which involved installing power equipment and materials above ground, including poles and switching equipment, working out of one of the Employer's local service centres. By his description, at the time of taking on permanent status he was not concerned about a possible slowdown, indicating that his assigned work kept him busy every day during the months leading up to his layoff.

9. In his testimony, Mr. Worden recalled attending a town-hall type meeting organized by management near the end of October 2019 where the layoff possibility was mentioned going forward. He was not clear about whatever the reasons might be, as communicated, his not having seen any slowdown in assigned work. He recalled being notified by his foreman on the morning of December 5, 2019 that he was being laid off that day. At that point he was entitled to 14 days' pay due to there having been no adequate notice under the Collective Agreement. He said he was made aware that he was being displaced by a more senior person who would be moving into his position from another department. He testified that later the same day, about 4:00 p.m., by his recollection, he received a telephone call from his manager to offer him a temporary position back in EDTI. Mr. Worden testified that there was no application necessary, no interview, for the temporary

employment opportunity being offered. By his recollection, he was told "just keep doing what you are doing". He accepted what was offered, starting his temporary employment performing EDTI utility work the next day, as he put it: "doing the same work, same locker, same foreman, same location." Mr. Worden testified that as far as he could see, there was no slowdown in their assigned work at that point, with each day seeming normal enough when compared to how he had been working previously with various pieces of equipment.

10. Nevertheless, by Mr. Worden's description, he was well aware there was a difference in his working situation as a temporary employee in terms of benefits associated with the job, which is to say no Local Authorities Pension Plan, no medical and health benefits such as those attaching to permanent employment, and no inclusion in the Employer's short term incentive program. He was also making less money by reference to the negotiated wage rates. One difference, he said, was his being involved in training two other bargaining unit members who had moved over from the Technologies' side of the EPCOR operations to work alongside him in EDTI, which he described would be a difficult task for anyone needing to train incoming employees on utility operations, or learn them. Some of these incoming coworkers had no line experience and had never before operated any equipment, including derrick digger equipment (radial arm digger) in placing power poles, quite unlike anything they previously had to deal with elsewhere. By his recollection, not all of the incoming workers displaced from another department, such as those coming from Technologies, were ultimately successful.

11. By Mr. Worden's description, as his temporary employment progressed, he worked a series of contracts; meaning at the end of each contract duration he would be "briefly" laid off, as he described it, and then called back to work, without there ever being any change in his duties. He acknowledged that one break in service may have been as long as two months. He recalled applying for two equipment operator jobs at a higher rate, for which he felt qualified, but lost out to coworkers who presumably may have had higher seniority. In April 2022, he decided to leave his employment with EPCOR, thinking by that time that it was "a lost cause" for his ever coming back to work on a permanent basis. He decided to restart his career aspirations and moved on to other employment at that point.

12. In cross-examination Mr. Worden acknowledged that the EPCOR handout entitled "Essential Information" and "Technologies Update" dated October 29, 2019 could have been mentioned to him at the meeting called by management about that time to discuss the information it was willing to share with employees. This document describes EPCOR's Technologies' corporate situation for this unregulated business unit whereby it serves a variety of clients, the biggest customer being the City of Edmonton in providing electrical services such as street lighting, traffic lights and LRT. This work since 2019, according to the handout, was being distributed between Technologies and some other local contractors. EPCOR was wanting to provide a forecast to employees of work which could be expected going forward, as reported in its information release document:

> Earlier this month, we received the forecast and took a close look at our overall workload for the rest of this year and for 2020. While we have sufficient work to keep everyone busy today, the volume of new capital work for 2020 is about one third of what Technologies has traditionally performed for the City of Edmonton. As a result, we are making the difficult decision to reduce the size of our Technologies

workforce. This reduction will impact approximately 40 IBEW 1007 positions, specifically Utility Worker roles.

13. By Mr. Worden's recollection, there was no information shared at this meeting about being immediately brought back to work into temporary employment which in his case resulted in working a series of temporary contracts on returning to EDTI.

14. The second Union called witness, Nick Trudel, was another Category 1 employee displaced on December 5, 2019 from his permanent employment as a Utility Worker at EDTI. Prior to his layoff, he was mostly handling specialized equipment in securing utility poles and transformers, largely aerial work, as a relief operator. He too had "heard about the possibility of layoff" and knew that he could be affected on the basis of his six years' seniority. He recalled receiving a telephone call from his manager at between 4:30 and 5:00 p.m. that day offering a temporary Utility Worker position starting the next day, which he accepted. He recalled being told that it was "an emergency rehire", in that they required people to run equipment which meant his returning to the same North Service Centre where he had been working, and where he has continued to perform utility related duties at EDTI through to the present time, such as operating the derrick digger for utility poles' placement and some line work which included dealing with energized circuits. He said that his assigned work has never slowed down, and has included additional duties associated with training incoming "bumper" coworkers from Technologies.

15. Mr. Trudel described his longest period without work since taking on temporary employee status was for three weeks covering time taken off for the marriage of his youngest daughter. Most

lately, by his description, in October 2022 he accepted a temporary Equipment Operator III position at EDTI working at the same service centre location, at the prescribed full job rate for that category, which he still holds. He said he was not told why it had to be a temporary position, having no information about the numbers of permanent EO IIIs which might be required at this point or going forward. Some of his coworkers transitioning into this work required specialized training. As with his coworker Mr. Worden, Mr. Trudel's transition into temporary employment status has impacted him monetarily, being at a lesser wage rate until moving into the EO III work, without LAPP coverage and no STIP involvement after the final 2019 payment, nor the medical or health benefits' coverage of a permanent employee. In terms of possibly returning to permanent employment at some point, he remarked that he only has "hopeful thoughts", being aware that some of his coworkers performing the same work in EDTI have more seniority, also those who may be expecting to transition into the work as vacancies occur. He acknowledged that by his understanding EPCOR could be looking at laying off more of its Technologies' employees, and it might well be that some of them will be bumping into EDTI work similar to the situation occurring in December 2019.

16. The first witness to testify on the Employer's behalf, Elena Solonynko has held a Human Resources Consultant's position at EPCOR since 2019, having become well aware from the point of taking up her HR duties of its planning towards requiring a reduced workload for Utility Workers, the SS1 classification, in the unregulated Technologies' business unit due to the City's choice of involving other local contractors to perform work otherwise contracted to it. The adjustment process needing to be implemented due to the declining work opportunities, by her description, started in early 2019. It required initiatives to be undertaken such as not backfilling vacancies, or opening

vacancies on retirements, and posting transfers away from Technologies. Examples were referenced, as placed in evidence, of voluntary position transfers for the affected Utility Workers into other classifications from early 2019. There was an example offer letter entered in evidence inviting early retirement for those affected Technologies' employees having reached 55 years of age on the basis, as stated therein: "....there is a need to reduce positions in the SS1 class code". This approach resulted in the retirement of only three employees.

17. Ms. Solonynko testified about her involvement in implementing the first round of layoffs, as described in the memorandum distributed to Technologies' employees, having attended a meeting with Union representatives and all affected employees occurring on December 4. At that time they received the memorandum outlining their options.

> **SUBJECT: Layoff options and required choice**
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> At the end of October, EPCOR announced a reduction in permanent Utility Worker positions in Technologies. As a result, your permanent Utility Worker position has been eliminated. As per the terms of Clause 11.04 of the collective agreement, based on your seniority you will have the option to displace a less senior full-time Utility Worker or Meter Reader across EPCOR.
>
> You can choose to displace either a Utility Worker or Meter Reader position. If you choose to displace to only one position (either Utility Worker or Meter Reader) and that is not the position that you would displace based on seniority, you will be laid off. You will not know the position you are displacing prior to making your election. It should be noted that your election is binding.

18. The memorandum went on to provide space for checking off one's choice, whether to displace a Utility Worker or meter reader, meaning away from Technologies, or only one of them, or to choose layoff. The offered class code for both was SS1 in Electrical and Water System Support. The affected Technologies employees each received a copy of the memorandum, which is to say 40

positions, there being eight vacancies. It ultimately resulted in 32 displacements commencing December 5, causing bumping and layoffs of Utility Workers in EDTI in accordance with one's seniority standing. A template of the layoff letter was entered in evidence under the bolded subject heading: "End of Permanent Employment", which included recognizing payment of 14 days' wages in lieu of notice under Article 11 and advising that health benefits would cease immediately in the application for continued coverage during layoff. Ms. Solonynko summed up the expected subsequent state of the IBEW workforce as "smaller", including that there would be no re-introduction of lost work or an increase in the size of Technologies.

19. Nevertheless, by Ms. Solonynko's explanation, Utility Workers were still needed at that point in both areas, just not as many. In her testimony, she reviewed Exhibit 13 setting out the work history of the 32 grievors divided into the six categories, detailing their individual situations category by category, including the situation facing Mr Worden and Mr. Trudel considered to be permanently displaced, but both immediately brought back to work as temporary employees. Their seniority rights remained applicable in terms of accessing possible moves into other positions and taking vacancies were they to become available, seniority and skill set permitting. The Employer issued postings for full-time temporary Utility Worker positions, posted jointly for Technologies and EDTI, with a January 6, 2020 deadline. The postings for temporary positions continued into February and March 2020, even later in some cases due to requirements materializing during the construction season. The Utility Worker posting of December 30, 2019 announced the Employer's need to hire 28 full-time temporary Utility Workers in Technologies for up to 11 months, paid at the announced rate for Provisional employees in accordance with the Collective Agreement, and in Electricity Operations

responsible for the electrical transmission and distribution systems, with described duties such as loading and unloading of material, assisting equipment operators, working with concrete, making landscaping repairs, completing construction associated duties, using various tools, receiving training to relieve equipment operators both in aerial and underground work and responding to emergency call-out situations, with other related duties. It was the continuation of those duties expected of Utility Workers in EDTI.

20. Ms. Solonynko acknowledged in testimony that by January 20, 2020 a number of employees had been hired back into temporary employment who had applied on the posting. In that respect, one need only consult the Exhibit 13 outline of individual situations as events unfolded. She was aware that the hiring of temporary employees, by definition could not exceed 12 months – see Article 3.07(d) defining temporary employee as an employee filling a position "on a temporary basis for a term of up to twelve (12) months" thereby avoiding their taking on permanent employment status. She agreed that the practice was to have a break in employment "resulting in the clock (resetting) for further assignments". In cross-examination, she was directed to the situations involving certain employees who accepted a series of temporary assignments with periodic short-lived breaks, their continuing to work until the present time, as detailed in Exhibit 13. This would include employees who were laid off from their permanent positions on December 6, without sufficient seniority to displace anyone, thereby losing their group benefits and needing to access individual plans at that point were they so inclined. She indicated not being aware of the "intricacies" of the cost difference between group and individual plans. She is aware that some employees following layoff were only brought back for seasonal work, and the work of some positions in Technologies was eliminated

altogether, followed by more layoffs in the next round.

21. The Employer's second and final witness, Mansur Bitar, an electrical engineer, was the Director of EPCOR Technologies Business Unit from 2018 to 2022. Mr. Bitar's duties included overseeing Technologies' operations and growth of business where possible, and overall working to ensure the sustainability of the business unit. The senior managers and project managers reported to him. Mr. Bitar briefly described the organization and corporate responsibilities of this unregulated business unit, not a utility, under its contracts with the City of Edmonton. It includes ownership of certain assets such as fibre and cable, both aerial and underground, transformers and related equipment such as utility poles, needed to fulfil its commitments on successfully bid contracts. In 2019 its employees were represented by more than one bargaining unit which included IBEW members.

22. Mr. Bitar described the competitive framework within which this business unit seeks to survive and prosper, with overall costs considered to be a crucial element of its success. However, in the non-exclusive electrical services area involving IBEW bargaining unit members, its forecasted earnings and profitability were not achieved with the combined City sourced revenues dropping by half from 2018 to 2019. He addressed the negative implications of EPCOR losing the exclusive contract with the City to perform all street lighting, traffic signal and LRT maintenance work, with its built-in payment of overhead costs which had assisted EPCOR in maintaining its full complement of permanent employees in permanent positions, despite the work fluctuating seasonally. There followed a non-exclusive contractual relationship with the City, its no longer providing for built-in

cost coverage, meaning EPCOR needed to move toward reducing the complement of employees going forward, and turning more to temporary and seasonal employees. By October 2019, he said, management knew that Utility Worker positions in Technologies were going to be eliminated, as occurred with the displacement activities occurring in December 2019.

23. Mr. Bitar, in his testimony, dealt with the Technologies' January 2020 presentation to IBEW representatives, including its having referenced a detailed document setting out this business unit's mission, vision and purpose, and presenting a Business Overview going forward into 2021, such as Contribution by Area–Historical, Budget Overview, Budget Efficiencies, Budget Development Initiatives, Revenue Details such as sources of new commercial revenue, and plan for growth strategy. This included insourcing contracts which were currently let out to third-party contractors, consolidation of its services, possible acquisitions, with its long term vision including abandoning lines of business that are highly price competitive in working toward achieving a 5% annual growth rate. From Mr. Bitar's perspective, the Business Overview details presented to the Union during this meeting were alarming in describing the difficulties faced by Technologies. They were broken down as follows:

> Technologies historically focussed on construction and maintenance of street lighting, traffic signal and LRT electrical work, primarily for City of Edmonton, other commercial customers
>
> - Other field work for affiliates, primarily hydrovac services across EPCOR and civil/construction work EDTI. Engineering services mostly for EDTI going forward
> - Work for City of Edmonton drastically curtailed starting in 2019 as a result of the ESA agreement (by about75%, reflected in 2021B)

- Loss of both City of Edmonton revenue and relatively high margin has resulted in negative profitability in the near term
- Return to profitability will require both aggressive growth and cost reductions, primarily labour

24. Mr. Bitar went on to present his views on the various areas needed to be explored and developed in improving Technologies' business outlook, including by reducing non-competitive work such as its "dwindling" fieldwork. By his analysis, surviving as a profitable unit required its developing other business aspects such as providing engineering services, construction projects, outsourcing certain aspects, all needing to be explored in order to avoid facing the possibility of an ongoing drastic reduction in its work due to what would otherwise be a negative bidding forecast going forward. As he succinctly put it: what was required was "more and different delivery" of its business product. By his assessment, it included exploring all options for Technologies to achieve overhead savings, examples given including reducing labour costs, in order to "have a fighting chance going forward" at developing long-term competitiveness and profitability. It was determined that Technologies need to eliminate approximately 40 Utility Worker positions as one of the planned business initiatives, with transfers through displacement to other units where possible by exercise of seniority, also no further filling of vacancies, offering early retirements, and even eliminating various senior management roles. As it stands, all the Meter Reader positions were eliminated in the Technologies unit, the SS1 category. Nevertheless, the combined City revenue stream's "precipitous decline", as he put it, continued into 2020 with the additional forecasted third-party revenues not materializing, and again in 2021 and 2022, due to unsuccessful bids. He testified that the expectation was for all field operations to cease for Technologies' commercial services in early 2023, there being

no IBEW bargaining unit members involved in that area.

25. By Mr. Bitar's description, the layoffs can be summarized as being about the business necessity of reducing costs, while acknowledging here were some ongoing construction projects and other work requiring temporary employees, including seasonal builds for the Trans Ed Partners' operations consisting of a number of major construction companies, and continuing non-exclusive contract bids for street lighting, and traffic lights, but not necessarily successful. He said that the developing extent of this business Trans Ed Partners' connection was not known in December 2019 when the layoffs occurred. No doubt, numbers of temporary work situations were offered to qualified laid-off employees as jointly applicable to Technologies and EDTI, and accepted subsequent to the layoffs, which is to say subsequent to the decision made to eliminate permanent Utility Worker positions. Those taking temporary positions were needed both for the utility work they were qualified to do and also in assisting the cross-training of other employees who had avoided layoff by reason of seniority, including that by April 2020 some were needed for the seasonal construction work which had been obtained. Nevertheless, according to Mr. Bitar, the field operations long associated with operating the technologies' business unit was said to be ceasing going into January 2023 with no plans for its return in the future.

26. In Mr. Bitar's describing what he understood to be a continuing need for temporary seasonal work by SS1 categorized employees to fulfil contractual obligations, he acknowledged that "sometimes" permanent employees take temporary assignments and then revert back to their home position. It could be a situation of a permanent SS1 taking an available SS2 equipment operator's

assignment for a time and then returning to his previous Utility Worker role as a permanent employee once that assignment was ended. The bargaining member would thereby not give up the employee benefits associated with permanent employment during the time period of the assignment, not taking on the status of a temporary employee as a result of accepting a temporary assignment. He acknowledged the apparent contrast with one being laid off and returning to work on the basis of accepting temporary employment, but the need for permanency was not thought to be continuing. Further, he does not doubt that there were various Utility Workers at EDTI or Technologies on the receiving end of the displacement, without enough seniority to avoid layoff, who were offered immediate temporary employment. Some accepted, with subsequent periodic short breaks in service, and some are still working in that same capacity, or were moved into other temporary employment with EPCOR, or have eventually quit, now that we are some three years past their displacement from permanent employment in early December 2019. Mr. Bitar recognizes that while he was not involved in the HR calculations as to the exact displacement figures or where individual affected employees might be sent, he recognized there would be a need to bring some Utility Workers back to work to perform EDTI work and train the incoming Technologies' employees as needed.

27. In his testimony, Mr. Bitar referenced the email chain occurring in late December 2019 where Senior Manager, Human Resources, Glenna Rauch, acknowledged that EPCOR would be utilizing seasonal Utility Worker positions going forward and would commit itself to using the recall list first to hire them, before looking elsewhere, meaning hiring them into periods of temporary employment as a distinctly different approach than recalling them into their permanent Utility Worker positions when needed. In one of these late December 2019 e-mails she also reported to the Union: "the intent

of posting and adding structure to the process (via an interview) is not to facilitate hiring externally over internally, as it is very likely the majority hired will be people off the recall list. This completely makes sense as they are trained and have Provisional status...". In her portion of the email chain with the Union's representative there was no specific mention of ensuring compliance with Article 11.06, indeed no express reference by her to any contract language. At the same time, the email chain indicates that without itself expressly referencing Article 11.06, the Union was objecting to there being any competition for the temporary work at all. Presumably it wanted it offered to the laid-off employees as a matter of course, permanent status intact. Indeed, the Union representative dealing with Ms. Rauch indicated his view of the Company's approach: "I think it is ridiculous". By Mr. Bitar's own calculations, at the time he knew they would need some Utility Workers at least through to the middle of 2020 based on the contracts they already had with the Trans Ed Partners for construction work, which lasted through to the end of 2020 and in some areas continuing into 2021. As matters developed, he is aware that Technologies never hired another permanent Utility Worker. He went on to say that the loss of benefits sustained by those employees, laid-off, and returning into temporary employment, was not a factor in the EPCOR management decision to eliminate the SS1 category in Technologies, while admittedly being aware that some EDTI Utility Workers were needed for cross-training those employees who have been able to bump into EDTI permanent positions from Technologies, but not presenting a permanent employment situation by his assessment. He is also aware that there had always been numbers of seasonal temporary Utility Workers hired from year to year.

**Argument - Union**

28. Mr. Scott submitted that firstly one must ask the question whether it was necessary for the Employer to layoff the numbers of EDTI or Technologies permanent employees it did when there was relatively long-term work available starting the next day; and secondly whether there was any management right under the Collective Agreement to lay off permanent employees in order to bring them back into temporary positions doing the same work they had been performing. The Union contends that the layoffs were excessive, even with certain Technologies' duties and meter readers' work to be ended. Utility Workers were continuing to be needed, doing what they always had done, which was obvious from the testimony of affected bargaining unit members Worden and Trudel.

29. In dealing with the issue of implementing the layoff of the 32 affected permanent employees, the Union does not doubt that the evidence from Director Bitar described the financial difficulties being encountered by the EPCOR Technologies' component at the time of the layoffs in December 2019 and expected to continue thereafter due to competition issues. The Union would have to acknowledge at this point there can be no doubt about there being a financial crisis ongoing at the Technologies' component which precipitated layoffs in response to its decreasing revenues. However, its concern remains with the breadth of the layoffs' decision and whether it was necessary to the extent it was implemented which led to a cascading effect amongst the EDTI worker component due to the seniority driven bumping and displacement rules. The Union relies on the significance of several bargaining unit members being called back to work the same day following receipt of the layoff notice, or shortly following. Their service records, as disclosed in the appended outline, show a lengthy working connection thereafter for many of them. In his submissions, Mr.

Scott reviewed the five categories of affected employees, including those brought back to work at EDTI immediately or within the next month, or some returning to Technologies, or returning to Meter Reader with Water, as temporaries, or those resolved to move on to other employment, or were not recalled. It would indicate to the Union that a different approach could have been utilized in moving employees within its operations where they were best needed as opposed to resorting to the layoff procedure in the first place. Even so, the Union contends that with layoffs occurring, the majority of affected employees were recalled to work in temporary employment, which is to say their labour was still required, but with only six rehired as permanent employees in different roles (not SS1). They no doubt had wanted to maintain their employment relationship and, by the Union's assessment of the contractual requirements, should not have lost their permanent employee status covering the work they were performing, whether or not they felt compelled to accept a temporary assignment as a way of returning to work.

30. At the same time, whatever the extent of allowable layoff on the factual circumstances presented, Mr. Scott submitted, one's job status was undoubtably of great importance to the affected employees. Were they to become temporary employees upon their re-engagement as a permissible status change, they would no longer have the rights and benefits attaching to permanent employment, although the Employer acknowledges their right of recall remained intact were permanent work made available. As it stood, in their newly accepted positions, it meant having no LAPP, no STIP payment after 2019, no health insurance, and performing their assigned duties at the lowest Step A wage rate once brought back to work as temporary employees. They would have no protection under Article 11.03 dealing with workforce reductions in that they are to be laid off prior to the removal

of any permanent employees from their class code level. They would be doing the same work as previously performed, yet holding a much lesser employment status.

31. In these factual circumstances presented in evidence the Union urges the Board to consider that permanent employees' losing their status and becoming temporary employees in the manner imposed on the affected employees is not contemplated nor allowed under the Collective Agreement resulting from layoff when they are rehired within the stipulated recall period. As it was, most of them can be seen as having continued doing the same work upon their shortly being re-engaged. It led counsel to firstly address the significance of Article 11.06 (c) as containing crucial language, in that it provides the right to a single recall for a period of 24 months, and where an employee accepts a temporary assignment to a job in his or her former class the right to recall shall be extended by the duration of the assignment. What was said to be contemplated under the Collective Agreement is employees taking temporary assignments but during that period of time they remain permanent employees on assignment. Secondly, for purposes of rehire, they have not lost that residual employment status in that Article 11.06(d) provides: "Laid-off permanent employees who are rehired within their recall period shall be re-engaged as permanent employees..." , thereby retaining the benefits they enjoyed prior to layoff with the exception of seniority as governed by Article 13.08 (d). This provision provides for loss of seniority by reason of continuous layoff for 24 consecutive months or its lasting in excess of the person's seniority at the time of layoff. The importance of this language is plain enough in that Article 13.03 requires that a temporary employee has no seniority until becoming permanent, or is a provisional employee, meaning someone who has been engaged in full-time temporary employment for at least 1944 hours within three consecutive years without

a break of 12 consecutive months. This language is about establishing one's employment status, not contemplating one's rehiring to require a step-down in status during their layoff period, which would be contrary to Article 11.06.

32. Mr. Scott submitted that there is no contract language which contemplates laid-off employees losing their earned permanent employee status on returning to work within what would be the contractually mandated recall period. Whether or not the Employer would like to treat them as new hirees entering temporary employment under Article 3.07 (d), its handling of the affected employees ignores their negotiated right under Article 11.06 (d) to be treated as permanent employees recalled from layoff, to perform whatever bundles of duties they are assigned for whatever period of time they are required before the next layoff were one to occur. The Collective Agreement, it was said, does not contemplate re-engagement from layoff during the recall period into other than their earned permanent status. He cited the testimony from Senior HR Manager, Ms. Rauch, in the late December 2019 email chain with the Union, by way of the explanation provided for management's approach. She had mentioned that it made sense to hire off the recall list as opposed to hiring externally. But she made no express mention of Article 11.06(c) dealing with recall rights of permanent employees which provides the right to a single recall for a period of 24 months and where accepting a temporary assignment has that right to recall extended by the duration of the assignment. She had further stated that "such employees removed in accordance with the layoff procedure shall be re-engaged in preference to other applicants" which presumably was her focus. However, she failed to observe or comment in this email chain on para.(d) requiring that the laid-off permanent employees rehired within the recall period "shall be re-engaged as permanent employees", having

retained all the benefits they enjoyed prior to layoff with the exception of seniority as governed by Article 13.08 (d). It sets out various reasons for losing seniority such as dismissal for just cause, voluntary resignation, appointment to a job outside the scope of the Collective Agreement for more than 12 months, continuous layoff for a period of 24 consecutive months or in excess of the person's seniority, and failing to report for work within three calendar days after being notified to return to duty following the layoff unless providing a reason satisfactory to the Employer. None of these seniority breakers should be applied to the affected employees who were invited to return to work and upon accepting were moved into temporary status, said to be contrary to their contractual rights during layoff.

33. Mr. Scott's review of case law focussed on the significance of seniority driven contractual rights whereby arbitrators have consistently recognized their crucial value to bargaining unit employees as confirmed and remarked upon in such cases as *Northern Telecom Canada Ltd. and U.A.W., Loc. 1525 (1983), 9 L.A.C. (3d) 224* (M.G. Picher). The Arbitrator observed there to be "a general presumption in favour of seniority rights", opining that "absent a clear and express restriction of seniority rights, a collective agreement that confers individual rights based on seniority should be construed so that doubtful language is interpreted in a way that preserves and enhances those rights". As have many other arbitrators in dealing with seniority-based issues, she quoted the famous description from *U.E.W., Local 512 and Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161 (Reville) at p. 162:

> Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective

> agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective government with the utmost strictness whenever it is contended that an employee's seniority has been forfeited, truncated, or abridged under the relevant sections of the collective agreement.

34. The Union takes the labour relations' consensus to be succinctly summarized by Arbitrator Surdykowski, in *Hamilton (City) and Canadian Union of Public Employees*, 2012 CanLII 81962 (ON LA) in a case requiring consideration of layoff, recall, replacement and "bumping" rights, at para. 29:

> It is well-established that as a matter of labour relations principle provisions which diminish or erase seniority rights must be strictly construed in favour of bargaining unit employees, such that if two or more interpretations are equally plausible the one which has the least negative effect on seniority rights is the one that should be adopted.

35. The Union's case law brief contains other like-minded arbitrator comments speaking to the issue of interpreting collective agreements so as not to forfeit, truncate, or abridge contractual seniority rights on other than clear and express language, including in dealing with a factual situation where the employer called in drivers from another operation outside the applicable seniority list to dispatch loads when its local drivers were available: see *Dufferin Concrete and TC, Local 879 (Boardman)* 2014 CarswellOnt 5518 (Kirkwood); counsel also citing *Premier Concrete and TC, Local 879,* 1993 CarswellOnt 6366 (Newman) where the company violated seniority rights by failing to recall a driver from layoff to deliver one load of concrete from its yard covered by the collective agreement while utilizing a non-bargaining unit truck driver from another yard to do the work. The company was considered to have taken an initiative that inhibited or frustrated the exercise of

seniority rights by the aggrieved employee and could point to no clear language indicating that it was acting consistent with the provisions of the collective agreement. In the current factual circumstances, the Union relies on specific language guaranteeing the rights of recall to a permanent position.

36. In *Archer Memorial Hospital v. U.N.A., Local 29* (1992) 24 L.A.C. (4th) 176 (McFetridge), the employer for budgetary reasons reduced its workforce, resulting in the aggrieved employee losing her status as a full-time employee and becoming a part-time employee with reduction in shifts. At the same time the employer hired additional casual employees, alleged to be a violation of seniority recall rights. The Arbitrator agreed in stating at para. 31: "If recall rights are not available to employees who have been cut back from full-time to part-time hours, the employer would be able to finesse its seniority obligations simply by assigning part-time work to employees who would otherwise be entitled to early recall…". In the current circumstances, the Employer maintains that the recall rights are intact were permanent positions to materialize during the recall period.

37. Nevertheless, in setting out what was said to be a closer comparison with the facts at hand, Mr. Scott cited *USW, Local 9316 and NARL Refining Limited Partnership (Brown),* 2018 CarswellNfld 342 (Buffett) where an employee was not brought back to work while others with less seniority were recalled. The Arbitrator observed that the collective agreement did not provide for recall rights to disappear if the job classification itself was done away but the duties associated therewith or the classification still existed and its work needed to be done. In *Teamsters, Local 938 v. Lakeport Beverages,* 2004 CarswellOnt 66, two laid-off seniority rated employees were advancing

their right to be recalled to perform available work which was being performed by seasonal employees. The company took the position that although it had to recall the seniority rated employees it wanted to pay them the same rate as seasonal employees whose work they were taking. In upholding the grievance the Arbitrator remarked "in our view, it was a clearly irrational interpretation of the collective agreement to read it so that it has the effect of converting seniority employees into seasonal employees". The same company in *Teamsters, Local 938 v. Lakeport Beverages (2005),* 143 L.A.C. (4th) 149 (Ont CA) laid off 68 seniority rated employees due to a downturn in the business and thereafter proposed to hire over 70 seasonal employees to meet its increased summer demand. It advised the union that it would be recalling seniority rated employees before hiring new employees but was proposing to recall them as seasonal employees and pay them a seasonal wage rate to which the union objected. The Ontario Court of Appeal quashed the arbitrator's decision that the company had not violated the collective agreement by recalling seniority rated employees as seasonal employees, in its determining that "seasonal employee" was an employment status, not an employment classification and that laid-off seniority rated employees could not be recalled as seasonal employees. They could be recalled to different job classification and paid the corresponding rate: "But this does not have the effect of transforming the employee's job status and depriving that employee of previously acquired collective agreement rights". Likewise, the Union holds to the view that bringing permanent employees back during their layoff to do the same work which was still required to be done, however it chose to classify their work, could not be a matter of converting their established employment status into temporary employees, especially keeping in mind the plainly worded language of Article 11.06.

38. Said to be even closer to the factual circumstances of the matter in hand, Mr. Scott cited *Renfrew County District Catholic School Board v. C.O.P.E., Local 103*, 2004 CarswellOnt 6148 (Brown) where 16 permanent educational assistants were declared and laid off at the end of the school year, 14 of them being full-time and two half-time. During the next school year they were all invited to apply for "temporary" assignments filling in for other educational assistants on various kinds of leave. Twelve accepted the offer to work as "replacements", continuing to work either full-time or part-time hours as previously scheduled. The union objected to their being treated as temporary employees while re-engaged for whatever period of time they were kept working. In *Renfrew* the glossary of definitions distinguished between temporary and permanent employees, not dissimilar to the definition language in our current Collective Agreement at Article 3.07(d).

39. At para. 13 the Arbitrator noted the union's position dealing with the difference between permanent and temporary employment as defined, stating:

> The collective agreement at hand distinguishes between temporary and permanent employment and treats someone properly classified as a temporary employee less favourably than someone properly classified as a permanent one. The union concedes a true temporary employee should be paid at the applicable start rate and is not entitled to benefits. The gist of the union's argument is that the twelve education assistants at issue retained the status of permanent employees while holding temporary positions.

40. In his examining the various status related provisions of the collective agreement Arbitrator Brown observed that its language contemplated persons moving up the ladder from temporary to permanent status, but not having been referred to any provision addressing the situation of an employee moving in the opposite direction, as he put it. It led him to conclude that the parties could

not have expected a downward change in status to occur. In dealing with the School Board's contention that the elimination of an employee's permanent position, resulting from a declaration of redundancy, terminated that person's permanent status at least during any subsequent appointment to a temporary position, the Arbitrator found its position to be at odds with the collective agreement language. It provided a permanent employee on layoff the right to recall based on seniority. He observed that seniority was tied to permanent employment, and determined that inasmuch as a temporary employee has no seniority, then "laid-off employees who retain seniority for the purpose of recall must also retain the permanent status which is a pre-requisite for having seniority in the first place". At the same time, the Union does not view the language in *Renfrew* to be as plainly and clearly worded as Article 11.06 (c) and (d) which expressly deal with rehiring during the recall period, requiring re-engagement as permanent employees.

41. Accordingly, Mr. Scott submitted, there should have been no change in status imposed on the affected employees agreeing to take temporary work with EPCOR while on the recall list. They never should have been viewed as having lost their permanent employee status on re-engagement during the recall period. It would have otherwise taken clear contract language, such as taking a temporary assignment while on the recall list would cause one to become a temporary employee for all purposes. As it was, the clear language Article 11.06 expressly protected their seniority rights associated with permanent employment when recalled during a recall period of 24 months subsequent to layoff, with a declaration sought to that effect and a reservation on the fullness of remedy to be applied following the second part of the bifurcated hearing.

**Argument - Employer**

42. The Employer answers the Union's case by asserting firstly that it acted in good faith in exercising its management rights as it did under the Collective Agreement on December 5, 2019, in that management had properly considered EPCOR's current business needs in connection with the declining competitive situation facing the Technologies' component. It reasonably resulted in the layoffs and the consequential bumping and displacement process which was triggered based on employees' seniority rights extending across more than one business component. Mr. Neuman submitted that the totality of evidence should satisfy the Board there was a valid assessed need to reduce the size of its workforce at that point, as carefully explained in testimony by Director Bitar and through the supporting documentation entered in evidence. Certainly, there were no ulterior motives shown to exist nor any alternative made apparent to EPCOR's reducing the size of its workforce for the crucial financial reasons as candidly detailed by Director Bitar. The Employer takes there to be no convincing evidence to the contrary indicating that from a valid business point of view there was a viable alternate path to reducing its workforce as it did which was not initiated and carried out to circumvent any collectively bargained restraints. The Union had been adequately informed and consulted with, meetings held and information provided. This Board is urged to find that there was no violation of the Collective Agreement in that the evidence on the need for taking the business decision respecting layoffs in December 2019 was said to be compelling.

43. The more obvious issue, from the Employer's review of the evidence, in considering the interplay between the posting provisions and seniority rights following the layoffs, is whether in providing access to temporary positions as it did, management violated the affected employees' recall

rights under the Collective Agreement. Mr. Neuman submitted that the Employer's offering temporary employment while awaiting the possibility of permanent placement materializing for some, properly hired them into a new employment relationship on the basis of accepting the temporary work as offered – the posted temporary employment opportunities as confirmed in the documentary materials. Not only does it assert the position taken by the Union respecting recall rights not to have merit, but further takes it to be "new argument". It was said not to have been captured in the grievance to suggest that laid-off employees have somehow retained their permanent status upon returning to work as opposed to accepting a change in that status by accepting employment into temporary positions. The Employer contends that the Union's current position that somehow laid-off employees accepting temporary employment should be treated as permanent employees, is too vague a generic reference, standing outside the filed grievance as submitted.

44. Further, the Employer asserts that it cannot be discounted that the onus rests with the Union to prove that the overall management approach to the urgent business situation presented was somehow illegitimate keeping in mind that offering the temporary positions reasonably reflected its understanding of its reduced manpower requirements on an ongoing basis. Counsel cited Brown and Beatty, *Canadian Labour Arbitration (5th ed)* at topic 3:28 with its reference to an employee alleging improper layoff bearing the onus of proving that allegation, and that where a position is abolished the union bears the onus of establishing that the abolition was somehow motivated by bad faith or discrimination or union activity. Mr. Neuman submitted that where a union contends that an employer is setting out to convert available permanent work into temporary positions, it likewise bears the onus of proof. In support, he cited *United Nurses of Alberta and Alberta Health Services*,

(unreported June 22, 2015, Tettensor) where the union had said that it was not "necessary" to reduce the nursing workforce by eliminating 12 registered nurses, its pointing to the employer's increased use of licensed practical nurses. The pertinent contract language dealing with providing layoff notification commenced with the words: "In case it becomes necessary to reduce the working force, or eliminate positions...". The Board's majority decision determined that the evidence established the management action to eliminate nursing positions to have been taken for legitimate business reasons, and done in good faith, it having decided upon a different staff mix for the reasons outlined in evidence, which is to say fewer RNs and healthcare aids, while adding more LPNs. Accordingly it was considered necessary, by proper management decision-making, to eliminate positions, determined to have been exercised "in a professional, fair and reasonable manner". The case did not deal with bringing the same employees back to work as temporaries. Counsel submitted that the evidence from Director Bitar was clear enough that from what management knew at the time, December 2019, the ongoing financial situation required eliminating up to 40 Technologies' positions which set in motion the seniority-based bumping and displacement language of the Collective Agreement. Mr. Neuman pointed out that it is not the same factual situation as dealt with by arbitrator David Jones in *City of Edmonton and I.B.E.W, Loc. 1007,* [1987] A.G.A.A. No. 8, said to provide a contrast with the situation at hand, where the City had reclassified existing bargaining unit positions downward with revised position descriptions without posting them. The Arbitrator accepted that inasmuch as a collective agreement defined "job" as a specific set of duties assigned to a particular individual, any change resulted in a new job which was vacant from the moment it was created and was required to be posted in the usual course of events. In *AGT Ltd. and I.B.E.W., Loc.348*, [1995] C.L.A.D. No 1222 (Sims) the issue centered on there being vacant clerical positions. The Board's

majority award accepted the company position that it was within his rights to fill a vacant position arising through the internal job posting in accordance with company-wide seniority as opposed to being forced to recall any laid-off employees, which is to say there was recognition that an employee laid-off from one classification did not have an automatic preference over more senior employees for a vacancy coming available in another classification. Arbitrator Sims quoted Arbitrator Springate from *Consumers Gas Co. and Aluminum, Brick & Glass Workers, Loc. 200G* (1984), 16 L.A.C. (3d) 111 where he followed the established case law that an employee laid-off from one classification did not have an automatic preference over more senior employees for a vacancy in another classification, with some cases indicating that there were no absolute right to be recalled to a vacancy in the class in preference to more senior employees. However there was no juxtaposition as between temporary and permanent employees under review. The difficulty here in finding any parallel is that ours was not a situation of the affected employees just being bumped out of their positions by more senior employees, but rather they were offered, and some accepted, temporary positions as opposed to being recalled as permanent employees to perform the available work. The reference to *Consumers Gas* was presumably offered as a rebuttal to any argument that EPCOR should not have turned to using temporary work at all, as distinct from offering it to laid-off employees when it became available, being a different issue than whether those employees coming back to do temporary work should not have lost their permanent employee status by accepting it.

45. In that respect, the Employer takes a different view of Article 11.06 than the Union, in asserting that fitting laid-off employees into available temporary employment was not a matter of recall and did not use up their right of recall whenever that might occur within 24 months. Rather they

were being hired into a new employment relationship which they accepted. At that point they should no longer be taken as holding permanent employee status for purposes of the jobs in which they were working. Its language, Mr. Neuman submitted, should not be interpreted as indicating that an announced and accepted temporary employment opportunity requires a resumption of their permanent employment status at that point. Article 11 should not be taken as preventing the Employer from offering available work on a re-engagement basis while these employees remained laid off from their permanent employment. The evidence should be considered convincing that there was no permanent work for them to be recalled into.

46. Further, inasmuch as the definition of "temporary employee" , under Article 3.07(d) includes a person hired on a temporary basis for a term of up to 12 months, the Employer contends that they should not be considered permanent employees at the point of rehire. In addition to the definition language of Article 3.07 separates out permanent employment status from temporary employment, Article 3.12 provides a definition for "Permanent job": it "means a permanent job as provided for in the permanent establishment of the Company". Those laid-off are no longer employees in the sense of having a position and being paid for their work within the permanent establishment of the Company. Upon rehire as temporary employees, their pay and whatever entitlements they have should be seen to flow from their "new status" at that point in time. Accordingly, the Employer asserts that it was fully compliant with the procedures set out in Article 11, in that the layoffs were reasonable, done for valid business reasons, thereafter offering temporary employment as opposed to recalling anyone at that point from layoff into permanent employment which was said not to be required by reference to the available work. It was described by counsel as a "good-faith exercise following a

business case for staffing reductions in the area" in submitting that there was no onus resting with the Employer to show why it could not create new positions in other areas or commit itself to recalls into full-time permanent employment.

47. Mr. Neuman submitted it was irrelevant that as circumstances developed, with the seniority driven bumping and displacement taking place, there was work made available in duties they had previously performed. With the overall business loss situation still unfolding through to the end of 2022, and thereafter, certainly more positions were being eliminated in the Technologies' business component. There could be no anticipation at the point of the grievance filing that the temporary jobs which had been accepted by some of the laid-off workers constituted permanent work. It was not expected in December 2019 and is not subject to hindsight at this point. Management, as evident from Mr. Bitar's testimony, did not know in December 2019 whether or not it would have relatively steady work going forward for the temporaries it had hired from the group of laid-off employees. By example, Mr. Trudel was offered a temporary position that same day as his layoff inasmuch as someone was needed at that point on the equipment with which he was familiar, also instruction required for the incoming workers from the Technologies'. There was no rule against extending one's temporary employment with suitable breaks as needs might develop going forward. The Employer asserts there has been no pattern developing since that time of needing permanent jobs, with the business situation affecting the Technologies component still declining. Were any recalls to be necessary into permanent employment situations within a stated recall period, that right has been preserved by Article 11 on a seniority driven basis, which should not be seen to prevent laid-off employees in the meantime from accepting re-engagement as temporaries with that employment status

attaching to them while such employment continues or there are subsequent rehirings on the same basis. Mr. Neuman submitted that any recall reference to Article 11 should be inextricably tied to the need for permanency of the work about which there was no compelling evidence showing this to be the case going forward, and where a number of the ex-employees were canvassed and did accept temporary employment on the basis of the available work as understood at the time the grievance was filed. Accordingly, the Employer seeks that the grievance be dismissed in its entirety.

**Union – Reply**

48. Mr. Scott submitted that the grievance should be read as having reasonably raised the issue of Article 11.06 indeed specifically referenced that Article in the filed document. It requires a liberal interpretation as to the issues reasonably raised thereby. It is the Employer's overall approach to its recall requirements under this specific contractual language, with its express requirements, which lies at the core of the grievance. Mr. Scott urged this Board not to lose sight of the Employer's undeniable approach to the financial problem presented which was to convert the SS1 Utility Worker employees into temporary employment status workers as opposed to placing them into available assignments by reference to their contractual recall rights as permanent employees, an effort on its part to avoid the obligations set out in Article 11.06 (c) and (d) when work was needed to be performed and they were enlisted to perform it. It was no doubt thereafter continuing to be performed, which the Union contends should have triggered the recalls, not bringing the affected employees on board as new hires having only temporary employee rights and entitlements at the point of their re-engagement. The point was that these workers never lost their earned status under the Collective Agreement as permanent seniority rated employees for purposes of rejoining active employment when appropriate work was

available for them. They should have been recalled on that basis whether or not management had it in mind that their return might only be short lived and possibly subject to further layoffs.

49. Mr. Scott submitted that at the same time the established pattern of this supposed new employment should not be overlooked, meaning its being relatively long term with periodic breaks in employment so as to avoid taking them on strength again as permanent employees with all that would entail, although some of them eventually were accepted into permanent positions. Some of them continued working as temporaries, and others moved on to other employment. Effectively, the Employer's contractual breach came down to transitioning/converting laid-off permanent employees into temporary employment on being brought back to work following layoff exercise of their seniority driven recall rights. The Union asserts that the management approach taken is simply not contemplated by the Collective Agreement, however it might like to link the factual circumstances to its tabled case law, which was said to be distinguishable on the facts. It should not be interpreted as persuasive, given the comprehensive recall language of Article 11.06, including para. (d) which states that "laid-off permanent employees who are rehired within their recall period shall be re-engaged as permanent employees" thereby retaining the contractual rights and entitlements enjoyed prior to layoff. Mr. Scott submitted there should be nothing unclear about that requirement which does not contemplate rehiring them into a different employee status as temporary employees, when work becomes available.

50. Further, in dealing with the reference in the Employer's argument to Article 3.07 Mr. Scott submitted that this language must be read in the context of the Collective Agreement taken as a

whole. It is not unusual for Collective Agreements to have definition clauses distinguishing permanent from temporary employees, and setting out how one achieves permanent status. This language does not detract from the applicability of Article 11.06 inasmuch as the affected employees' employment status had been secured for layoff purposes as permanent, otherwise the Employer would never have to recall anyone as opposed to simply changing their status to something lesser. Mr. Scott again cited *Renfrew, supra,* where a number of laid-off permanent employees were invited to apply for temporary assignments which on their acceptance was determined not to have occasioned any downward change in their seniority achieved status, and this would be without the express language of Article 11.06 protecting their permanent employee status on rehire. The contract language defining permanent employees differently than temporary is a reality in most collective agreements, he said, and should not be interpreted as indicating any intention that bargaining unit members should lose their continuing seniority driven status upon returning to work. They would always be subject to further layoff were the assignment requiring their re-engagement no longer needed to be worked.

**Conclusion**

51. Firstly, in dealing with the Employer's position that the grievance document does not adequately cover the substance of the current complaint, namely the Union's asserting in its submissions at hearing that Article 11.06 (c) and (d) have been breached, it is necessary to observe, as have many arbitrators, that the requirements for commencing and pursuing a grievance are set out in the Collective Agreement. Article 14, under the heading Dispute Resolution Process, is not untypical in stipulating under 14.03: "Grievances arising from the interpretation, application, operation or alleged violation of this Agreement, including any dispute regarding the jurisdictional

allocation of jobs, shall be initiated by an employee, or a representative of the Union...". Thereafter, at Articles 14.04 through 14.07 are set out the various steps of problem solving, consultation phase at stage one, and formal grievance phase at stage two, before sending the grievance to arbitration. There is a requirement at Article 14.07(c) to notify the Employer of "the nature of the grievance, the cause or causes of this Agreement upon which the grievance is based on the remedy requested". There was no evidence before this Board that the Employer disputed the reference to arbitration at any point on the basis of misunderstanding the principal issue in contention, or sought any better particulars over what was known concerning the Union's complaint to better explain the reference in the grievance that it was relying on Article 11 dealing with layoffs and rehires. It was asserting in its January 17, 2020 filed grievance that the bargaining unit members individually named in the group grievance had received layoff notices under Article 11, and were laid off due to an alleged shortage or lack of work, followed by a posting of 28 "temporary" utility work positions which were filled by eight of the grievors. In addressing the nature of the grievance it is alleged that the Employer had "engaged in improper, arbitrary, unreasonable, and bad faith exercise of management rights and improper, arbitrary, unreasonable, and bad faith misuse of the layoff and recall provisions of the collective agreement." The grievance went on to specifically allege that the Employer "had work for the grievors in the previous position(s)" or "alternatively should have posted new Utility Worker positions and allowed other bargaining unit members, including the grievors, to apply for those positions". Further, it asserted there was no legitimate or reasonable basis to lay off the grievors when it did and then create temporary positions, and that the grievors were laid off not for a true work shortage but to allow the Employer "to circumvent the compensation provisions for permanent employees under the Collective Agreement". It seeks therein a declaration and compensation on the

basis that the Collective Agreement has been breached, with the only reference to contractual language being Articles 11 (layoffs and rehires) and 14 (dispute resolution process).

52. It has long been recognized, since *Blouin Drywall Contractors Ltd.* (1975), 57 D.L.R. (3d) 199 (Ont. C.A.) that arbitration cases should not be won or lost on a technicality of form, with arbitrators generally looking to solve issues of vagueness or difficulty in appreciating the issues at hand through directing particulars to be provided, although certainly it would not rest with the Union to alter the substance of the grievance or raise any new claims. We have not only the grievance document itself but also the Agreed Statement of Facts and Exhibits which addresses the issues raised by the grievance on a factual basis under various headings such as those dealing with elimination of positions, layoffs of Utility Workers and Meter Readers, job posting for temporary Utility Workers, and status of laid-off employees. It was stated therein that the Parties reserve the right to tender additional evidence at the arbitration hearing, and that we reserve jurisdiction to address remedies if necessary following our determination of the merits. By the time of hearing the Parties had also drafted and agreed upon the detailed document, appended to this Award, titled "Work Histories of Grievors" which carefully describes how each of the Utility Workers and Meter Readers were slotted into the varying factual categories following their layoff, which is to say how they fitted into the allegations contained in the filed grievance.

53. On the issues and allegations contained in the filed grievance and follow-up documents, this Board cannot conclude that this is a case where the Union is attempting to inject new claims or alter the substance of the grievance. In our view the grievance has remained arbitrable in the form it was

initially presented on the face of the grievance documentation, with there being no application for an adjournment seeking better particulars or some further explanation of the issue at hand. In all, this Board concludes that there is no sustainable objection based on the grievance document and evidence concerning the claims made therein presented at hearing. In our view there has been no alteration of substance, no new claim raised not covered by the grievance document. The hearing was correctly open to whatever arguments were made on the merits of the alleged violation of Article 11.06.

54. Secondly, in dealing with the management decision respecting the SS1 Utility Worker positions in Technologies as at December 6, 2019, it involved eliminating employees from their permanent roles in this business component, leading to the layoffs of 32 permanent workers employed as Utility Workers in EDTI or Technologies, or as Meter Readers with Water D&T. Deemed necessary by EPCOR, it caused application of bargaining unit wide seniority and the contractual bumping process contemplated thereunder. Employees had already been informed of what would occur due to the declining volume of Technologies' work to be performed for the City under what had been its exclusive contractual relationship which had come to an end. Employees had been provided options needing to be exercised, including displacing more junior employees in the bargaining unit which were in the same SS1 Classification Code. The agreed facts indicate that employees in Utility Worker positions in the Technologies' component who lacked sufficient seniority, or chose not to displace another employee, received notices of layoff. The remaining 28 notices were issued to permanent employees in Utility Worker and Meter Reader positions in other units who had been displaced by more senior Utility Workers whose positions had been eliminated. There is no doubt about the management representatives consulting with the Union concerning the elimination of

permanent Utility Worker positions in Technologies, and the path that was going to be followed in reducing the workforce. E-mails were sent to all employees concerning the reduction in utility work position specific to Technologies, and the layoff notices under Article 11 issued to those displaced in their role by a more senior employee, which is to say the affected Utility Workers and Meter Readers.

55. The evidence provided at hearing, principally consisting of the documentary materials and the description of the business situation facing the Technologies' component was explained by Director Bitar in his testimony, carefully outlining the ongoing financial difficulties which were reviewed by management in reacting to the markedly declining business situation. It serves no purpose to recapitulate the evidence in any detail at this point other than saying it was compelling in the Employer's presenting a solid business case for its eventual determination put into effect on December 6, 2019 that elimination of the Technologies's positions was appropriate in the financial circumstances presented. The logical inference is that their decision concerning position eliminations and invoking Article 11 layoffs was made for valid business reasons. There was no persuasive evidence to the contrary. The seniority driven displacement of permanent employees at that point, in our view, cannot realistically be disputed, whether or not by the Union's assessment the Employer could possibly have gotten by with a less comprehensive approach, meaning less detrimental to the working lives of the affected employees who lacked sufficient seniority to avoid being displaced following the issuance of the layoff notices. The fact that thereafter there was a seniority driven bumping and displacement scenario unfolding does not discredit the Employer's decision concerning eliminating the Technologies' positions as its business driven decision.

56. Thirdly, it is necessary to consider whether the Employer breached the Collective Agreement by reference to its obligations under Article 11, and in particular 11. 06(c) and (d) specific to recall and rehire in the 24 months subsequent to lay off. Unquestionably, at the point of their displacement all the affected employees held permanent employee status which is to say they held a permanent job as provided for in the permanent establishment of the Company referenced by Article 3.12. They had successfully completed their probationary period of a permanent job and had continued in the employ of the Company on that basis. Their status at the point of layoff had been earned by each of the affected employees whose names and situations are described in the appendicised exhibit setting out the work histories of the grievors. Article 3.07 defines "permanent" and "temporary" employee, and differentiates them for purposes of the rights and obligations contained in this Collective Agreement, as with similar language in many collective agreements. In our view, this definition language does not contemplate an employee losing their earned status as a permanent employee and the seniority driven rights attaching thereto for purposes of applying specific provisions elsewhere contained in the Collective Agreement at point of layoff, and flowing for whatever period of time as might be addressed in contract language. For example Article 11.05 (c) dealing with permanent employees facing layoff requires that they "shall be given a general priority throughout the company for any vacancy for which they are qualified", with Article 11.06 thereafter specifically dealing with the right to a single recall for a period of 24 months, including that the right to recall be extended after accepting a temporary assignment; and under para. (d) requiring that laid-off permanent employees who are rehired within the recall period "shall be re-engaged as permanent employees". In our view this language does not contemplate that laid-off permanent employees who are returning to work, initially in a temporary assignment if that is what is available and accepted, lose their permanent

employee status by accessing an opportunity to return. That possibility cannot be taken from the specific language of Article 11.06 and in our view would have the effect of artificially lessening their employee rights, even tending toward writing out the Article 11.06 rehire provisions from the Collective Agreement which specifically addresses coming back to work as permanent employees. Were the Employer's position to be accepted it could simply avoid their secured return-to-work status by never offering anything other than temporary employment status to laid-off employees. Their earned permanent status continues to be defined by Article 3.07, as established, in that they have not lost the continuity of their employment relationship during the recall period of 24 months. Being laid off did not somehow encompass their being thereafter treated as temporary employees during the recall period, at the Employer's choosing. In our view, the case law presented at hearing, including the Arbitrator's reasoning in *Renfrew* strongly supports the Union's position. The case law tabled on behalf of the Employer in our view can be distinguished on the facts and issues presented, and the contract language under review. It can be observed that in *Renfrew* where stepping the employees down from permanent status following layoff for purposes of recall, found to be at odds with the collective agreement, did not contain contract language nearly so strong or specific as with the language of Article 11.06. This specific provision in our view, governs the situation at hand and requires that the laid-off affected employees be considered as having returned to work with their permanent status intact into temporary assignments, for whatever period of time until the next layoff, were that to occur. It does not contemplate returning these laid-off permanent employees having their status converted to temporary employee.

57. At this point, the Award is to issue as declaratory in nature, in that the Employer violated the Collective Agreement, and in particular Article 11.06, by bringing the affected employees listed in the attached Appendix back to work into temporary assignments during the recall period without recognizing their continuing employment status as permanent employees for purposes of their returning to work. The Parties are agreed that the hearing should be bifurcated on any further outstanding remedial issues related to this declaration, and this Board remains seized over all continuing aspects arising and in the event any further declaration, clarity or remedy is required.

58. I am authorized by the Board to issue this award as a majority decision. Union nominee Mr. Jacob Axelrod concurs with his written concurring reasons attached to this award. The Employer Nominee Mr. Chris Lane, K.C., dissents with his written dissent also attached.

DATED and issued at Calgary, Alberta, this 24th day of May, 2023.

Thomas Jolliffe, K.C., Chair

"Dissenting"
Chris Lane, K.C., Employer Nominee

"Concurring with reasons"
Jacob Axelrod, Union Nominee

**Concurring Reasons of Union Nominee, Jacob Axelrod:**

I concur that the Employer breached the Collective Agreement by bringing grievors into temporary assignments during recall periods without recognizing their status as permanent employees.

I also would have sustained the grievance in respect of grievors Jessie Forgie, Stuart Gibb, Nicholas Trudel, David Jarel Worden and Ryan Woroshuk on the basis that their particular layoffs from permanent jobs were not reasonable exercises of management rights. The evidence established these five grievors, within at most three days of their initial layoffs, were all rehired into the same kind of roles within the same companies of EPCOR as they had worked in prior to receiving layoff notices. These five grievors all proceeded to work in those roles almost continuously for at least the next two years, with only a couple relatively brief interruptions in their active employment. There were no clear operational reasons in evidence for why these five grievors' roles needed to be repeatedly temporary in nature, notwithstanding they all worked almost uninterrupted for over two years immediately after their initial layoffs. These circumstances lead me to infer that, in substance, the Employer retained the need for permanent roles in respect of the work these five grievors performed after their initial layoffs, which indicates these grievors' layoffs from permanent jobs were unreasonable.

Jacob Axelrod
May 23, 2023

DISSENT OF THE EMPLOYER'S NOMINEE, CHRIS LANE, K.C.

I have had the benefit of reading the Award of the Chair, and the concurring reasons of the Union's nominee, and find I am unable to agree with the following findings:

1. The Union's grievance is capable of being read as capturing the argument that permanent employees who are laid off and accept a temporary assignment must be treated as permanent employees during that assignment; and,
2. With respect to the merits of this argument, that these employees must in fact be treated as permanent employees during their temporary assignments.

My reasoning on these issues follows.

*Interpretation of the Grievance*

With respect, I don't believe the Award fully engages on this issue. In support of the finding that the grievance does capture the argument in question, the Award cites references in the grievance to words like "layoff", "temporary work" and "Article 11". However, nowhere does the Award set out a transparent line of reasoning that explains how the grievance language raises the argument that permanent employees who resumed work in temporary assignments should have permanent employment status restored when doing so.

While I accept that arbitrators shouldn't apply an overly-technical approach to interpreting grievances, the language in a grievance should give the reader a good indication of the grievor's basic position. Just as there are good reasons why grievances shouldn't be expected to be "perfect", there are compelling reasons why they must be written in a fashion that allows the employer to understand what the case is about, and prepare to respond to it. I believe that the Employer could not have reasonably taken the grievance to have raised the argument in question.

Sometimes grievances are written vaguely, such that an employer should seek proper particulars; however, in this case; the grievance is clear on its face and raises specific arguments. That is not the case here. In this case, the grievance states that employees should not have been laid off in the first place, that temporary jobs shouldn't have been posted, and that those jobs should have just been given to the laid off employees. At no point does it state that when the displaced employees accept temporary positions, they should be afforded their rights as permanent employees.

As a result, I would have rejected the ability of the Union to raise this argument.

*The merits of the argument*

On the merits of the argument that laid-off permanent employees accepting temporary employment should be treated as permanent employees, the Award states at paragraph 56 when dealing with the wording of Article 11.06:

> This language does not contemplate that laid off employees who are returning to work, initially in a temporary assignment if that is what is available and accepted, lose their permanent employee status by accessing an opportunity to return.

I don't view this issue the same way. For me, the question is "what gives persons who accept a temporary position the ability to claim rights as a permanent employee?"

According to Article 3.07(d) of the Collective Agreement, anyone who is in a temporary position is, by definition, a temporary employee. The Award finds that the language in 3.07(d) does not "contemplate" the present situation, where a permanent employee accepts a temporary recall. I cannot accept that interpretation. The definition is clear that any person filling a temporary position is a temporary employee; and so of course that person cannot be treated as a permanent employee. If the parties had wanted to carve out an exception for an employee taking a temporary position during a layoff, they could have done that.

The Award cites Article 11.05(c) of the Collective Agreement in support of its position on this issue. This Article gives permanent employees a right to general priority for vacancies. I do not believe that this provision has any bearing on whether a permanent employee has a right to accept a temporary position and be treated as a permanent employee in that position.

I also do not believe my interpretation conflicts with the general rights of employees to maintain their seniority rights, including where a temporary employee has become a permanent employee. These general rights are of course subject to being displaced by contrary language in the collective agreement.

Articles 3.07(d) and Articles 11.05 and 11.06 of the Collective Agreement should be interpreted as providing a right for a permanent laid-off employee to be considered as a "permanent employee" for the purposes of recall rights, while treating them as a "temporary employee" when accepting a temporary position. So, while they have the ability to return to a permanent position, which unquestionably means they have rights as a permanent employee, if they choose to take a temporary position, they must be treated as a temporary employee under 3.07(d).

Finally, I would like to comment on the statements in the Award, at paragraph 56, that accepting the employer's position would allow it to circumvent recall rights by only ever offering temporary work to laid off employees. First, the Union can, and did, raise as part of its grievance that these were not truly temporary positions. So, the Union certainly has a remedy if they believe the employer is abusing this process. Second, there was no evidence that the Employer abused their ability to characterize a position as temporary in nature; absent such bad faith, the employer has to post permanent positions and, subject only to the right of someone more senior applying for and getting the job, they must place a laid off employee into that job. Therefore, following the Employer's interpretation could not lead to the ability of the Employer to lawfully string together temporary assignments when it believes it has a permanent job to fill.

In conclusion, while I agree with the Chair that the Employer's layoffs were proper, I would have found that the grievors who accepted temporary positions were properly treated as temporary employees during those assignments. As a result, I would have dismissed the grievance.

Chris Lane, K.C.
May 23, 2023