

In the matter of a labour arbitration hearing;

B E T W E E N:

ONTARIO POWER GENERATION

(“OPG” or “the Employer”)

and

POWER WORKERS’ UNION

(“PWU” or “the “Union”)

Re: Grievance #OPG-NWS-2738

AWARD

Sole Arbitrator: Sheri Price

On behalf of the Employer:

Jonathan Maier, Counsel

Brendan Ballantyne, Labour Relations Consultant

Kerry Jackson, Director, Centralized Functional Area Management

Paul Arthurs, DNGS OSB

On behalf of the Union:

Jodi Martin, Counsel

Catherine Fan, Counsel

Elaine Ledwidge, Staff Officer

Charlie Burge, Chief Steward

Hearing held on June 15 and December 14, 2023 and April 16, 2024

INTRODUCTION

[1] At issue in this grievance is the meaning to be attributed to the words “within Operations and Maintenance” in an October 28, 2021 Letter of Understanding (“LOU”) between the parties, which provided an incentive for employees “within Operations and Maintenance” to volunteer to work a particular shift schedule during a planned outage at Darlington Nuclear Generating Station (“DNGS”).

[2] There is an “Operations and Maintenance” Division at DNGS, which division contains six work groups: Radiation Protection; Tritium Removal Facility (TRF); Chemistry and Environment; Operations; Fuel Handling; and Maintenance. During the hearing, the parties referred to the larger “Operations and Maintenance” entity comprising the six work groups as the “Operations and Maintenance Organization,” the “Operations and Maintenance Department” and the “Operations and Maintenance Division.” For the purposes of this award, I will refer to it as the “Operations and Maintenance Division.”

[3] The Union takes the position that all employees in the Operations and Maintenance Division who volunteered to work and did work the shift schedule in question were entitled to the incentive provided under the LOU, including a number of volunteers from within the Radiation Protection work group. The Employer takes the position that only those employees in the “Operations” work group and the “Maintenance” work group were eligible for the incentive.

[4] The hearing proceeded by way of written and oral submissions. The parties also called the two individuals who negotiated the LOU on behalf of the Union and the Employer to give evidence about the negotiations and the circumstances surrounding them.

BACKGROUND

[5] As noted above, the purpose of the LOU to be interpreted in this case was to provide an incentive for employees “within Operations and Maintenance” to volunteer to work the XYZ shift schedule during a planned outage at DNGS, which lasted from October 1 to December 17, 2021 (“the D2141 outage”). A planned outage involves the shutting down of one or more

nuclear reactors to allow for equipment and other components essential to the generation of nuclear power and its transmission to the power grid to be inspected, maintained, repaired and/or replaced, as required.

[6] The XYZ shift schedule is an outage shift schedule, which provides OPG with 24/7 coverage and results in employees working 60 hours per week, with 40 hours paid at straight time rates and 20 hours at double time. Unlike ordinary shift schedules, OPG cannot assign employees to work an outage schedule, such as XYZ. Instead, it must solicit volunteers, who agree to work the schedule in exchange for the overtime premium and any associated bonus. It is not disputed that utilizing the XYZ shift can reduce the time required to complete an outage, thereby generating a significant monetary benefit for OPG.

[7] In or around June 2021, OPG solicited volunteers from within the Radiation Protection, Fuel Handling and Operations and Maintenance work groups, all of which are within the Operations and Maintenance Division, to work the XYZ shift schedule during the D2141 outage that was scheduled to begin on October 1, 2021.

[8] By the end of June 2021, OPG had received a sufficient number of volunteers from within the Radiation Protection work group. However, no employees in the Maintenance work group or the Operations work group volunteered to work the XYZ shift. In the absence of volunteers to work the XYZ schedule, outage work could still be performed by employees in the Operations and Maintenance work groups, but only on the employees' regular shift schedules.

[9] In August 2021, Kerry Jackson, a director with OPG, approached Martin Wagget, then the PWU sector representative for the Operations and Maintenance Division at DNGS, about negotiating an incentive that might encourage employees to volunteer to work the XYZ shift schedule. Both Mr. Jackson and Mr. Wagget testified as to the circumstances surrounding the negotiation of the LOU and their respective understandings of what the LOU was intended to achieve.

[10] Briefly stated, Mr. Jackson testified that OPG sought to negotiate an LOU that would provide an incentive for volunteers from the Operations and Maintenance work groups only, as those were the work groups from which OPG needed volunteers. Mr. Jackson provided

evidence that there were internal management discussions and correspondence regarding that objective. However, Mr. Jackson did not recall having any conversations with the Union negotiator, Martin Wagget, about limiting the incentive they were negotiating to the Operations and Management work groups. He testified that he would have used the same words that appear in the LOU, “Operations and Maintenance,” in his discussions with Mr. Wagget.

[11] As noted above, Mr. Wagget was the PWU sector representative for the Operations and Maintenance Division. He was also the Chief Steward for members whose jobs fell within the “Operations” job classification. All other PWU members in the Operations and Maintenance Division were represented by one of five other Chief Stewards, depending on their job classification. Mr. Wagget testified that, on behalf of PWU, he intended to negotiate an incentive that would be available to all employees within the Operations and Maintenance Division. Consistent with this, Mr. Wagget testified that he consulted with the five other Chief Stewards before agreeing to enter into the LOU and advised Mr. Jackson that he was doing so. Mr. Wagget testified that he never had any explicit conversations with his OPG counterpart, Mr. Jackson, about the LOU applying to the Operations and Maintenance work groups only. Moreover, Mr. Wagget testified that PWU would never have agreed to an LOU that gave a bonus to some of its members who volunteered to work the XYZ schedule during the outage, but not to others.

[12] The LOU was finalized and signed on October 28, 2021, approximately four weeks after the outage began. Among other things, the LOU, which applied to employees “within Operations and Maintenance,” provided that each Regular employee who volunteered to work the XYZ schedule would receive one day of paid vacation for each full week that they worked on the XYZ schedule, up to a maximum of 10 paid vacation days. Under the LOU, OPG retained its usual right to limit the number of volunteers accepted to work the XYZ schedule during the outage.

[13] At some point after the LOU was finalized, a dispute arose between the parties about whether only those employees in the “Operations” work group and the “Maintenance” work group were eligible for the vacation incentive or whether all employees in the Operations and Maintenance Division were eligible.

[14] The Union filed the instant grievance alleging a violation of the LOU when the Employer denied employees from the Radiation Protection work group who volunteered to work and did work the XYZ shift schedule during the D2141 outage the vacation incentive provided under the LOU.

CONTRACTUAL PROVISIONS

[15] The LOU to be interpreted in this case was negotiated by the parties pursuant to the terms of the April 1, 2021 to March 31, 2022 collective agreement ("the collective agreement"). The LOU provides as follows (emphasis added):

WHEREAS the XYZ schedule has been used as an outage schedule per Part G, Item 2.1.9 of the collective agreement to perform major outages at OPG's nuclear generating stations;

AND WHEREAS OPG and the PWU (the "Parties") are interested on a trial basis at the Darlington Nuclear Generating Station **within Operations and Maintenance** implementing a non-traditional approach to the XYZ schedule;

NOW THEREFORE, the Parties agree as follows:

1. XYZ is a voluntary outage schedule.
2. Regardless of pay treatment, no time worked on the XYZ schedule will be counted towards the overtime cap.
3. **Each Regular employee who volunteers will receive 1 day of paid vacation (or 1 day Mis/Other Paid Absence for Term employees) for each full week that they work on the XYZ schedule, up to a maximum of 10 paid vacation days (10 days Mis/Other Paid Absence for Term employees) for the D2141 outage.**
4. The provisions of Part A, Item 6 will apply to vacation earned by Regular employees. The vacation earned by Regular employees in #3 will be added to the amount of the current vacation accrual period and used in the appropriate calendar year as defined in Part A, Item 6.2. Similarly, the Mis/Other Paid Absences Term employees accrue, are to be taken in the calendar year associated with the current accrual period. If the Mis/Other Paid Absence is not taken within the applicable calendar year, it will be assigned to an unscheduled day by management by April 30th of the following year. For clarity, in all instances including if the Mis/Other Paid Absence is assigned to an unscheduled day, the time is paid at straight time. Similar to the vacation approval process, an employee can request a Mis/Other Paid Absence on a day in which overtime is required. The fact that overtime is scheduled will not automatically mean the request for a Mis/Other Paid Absence will be denied. In addition, a Mis/Other Paid Absence will not be cancelled because another employee would like to take a vacation day on the same day as the Mis/Other Paid Absence is scheduled.
5. There will be no monetary bonus payment associated with this XYZ schedule as referenced in Part G, Item 2.1.9.5.

6. Nothing in this LOU shall change the pay and time balancing treatment that normally applies to employees who work the XYZ schedule.
7. If the employee does not work the amount of time they were committed, any incomplete week will result in the amount referenced in #3 not being provided.
8. OPG, in its sole discretion, may limit the amount of volunteers accepted to work the XYZ schedule for any given outage as per Part G, Item 2.1.9
9. This LOU will end with the completion of the D2141 outage unless extended by the Parties.
10. This LOU is expressly without prejudice or precedent and shall not be referred to or relied on in any matter except to enforce its terms. Except as noted in this LOU, which expires upon the completion of the D2141 outage, nothing in this agreement affords Term employees any entitlement(s) beyond those already identified in the Nuclear Staffing Agreement.

[16] As can be seen above, there are several references in the LOU to Part G, Item 2.1.9 of the collective agreement. That provision states:

Part G – Item 2.1.9 (Outage Schedules)

1. Notwithstanding any other provision of the collective agreement, all classifications can volunteer to work shift in support of outages.
2. Volunteers may be required to work 8, 10, or 12 hour outage shift schedules up to a maximum of 60 hours per week.
3. While working outage shift schedules all employees will be paid a weekly minimum of 40 hours per week. All hours scheduled in excess of the individual's regularly scheduled hours per week will be paid at appropriate premium overtime rates. Any outstanding time-balance will be paid out upon completion of the shift assignment at double time.
4. Outage shift schedules will be developed in consultation, in advance (in June of each year) with the Union, but the final decision on the schedules to be worked rests solely with the Company.
5. A bonus will be paid to all those employees that volunteer to work an outage shift schedule. The amount of bonus and the conditions surrounding eligibility will be determined by management and communicated prior to soliciting for volunteers.
6. The Company will solicit volunteers on a seniority basis with the requisite skills/qualifications to staff outage shift schedules.

BRIEF SUMMARY OF PARTIES' SUBMISSIONS

[17] The Union argues that the plain and ordinary meaning of the words in the LOU favour its interpretation that employees in the whole Operations and Maintenance Division, including Radiation Protection work group employees, who volunteered to work and did work the XYZ shift schedule during the D2141 outage, were entitled to the incentive provided in the LOU. The Union submits that, in order for the Employer's interpretation to prevail, there would need to be some language in the LOU limiting its application to the Operations and Maintenance work groups. In the absence of any such limiting language, the Union submits that the words "within Operations and Maintenance" in the LOU must be taken as referring to the whole Operations and Maintenance Division.

[18] The Union also submits that its interpretation should be accepted because it is consistent with the collective agreement in effect at the time the LOU was negotiated. In particular, the Union points out that Part G, Item 2.1.9.5 of the collective agreement required the Employer to offer an across-the-board incentive to "all" employees who volunteered to work an outage schedule in the form of a discretionary bonus. That collective agreement provision specifically states, "A bonus will be paid to all those employees that volunteer to work an outage shift schedule..." Mr. Wagget testified that, historically, a monetary bonus, fixed at \$1000 per week, had been paid at DNGS under Part G, Item 2.1.9.5. However, a few years ago, OPG stopped offering a bonus, despite the clear terms of Item 2.1.9.5, which led to a lack of volunteers. With the October 28, 2021 LOU, the parties agreed to try a "non-traditional approach" whereby employees who volunteered to work the XYZ shift would receive paid vacation days in lieu of a monetary bonus. Given that Item 2.1.9.5 of the collective agreement requires that a bonus be paid to "all" employees who volunteer to work an outage schedule, the Union submits that the vacation incentive must be available to "all" employees in the Operations and Maintenance Division who volunteered to work and did work the XYZ shift during the D2141 outage.

[19] In the alternative, the Union submits that the wording "within Operations and Maintenance" in the LOU is truly ambiguous in the sense that there is no way to tell, based on the plain and ordinary meaning of the words alone, whether they refer to the "Operations and Maintenance" division or the "Operations" and "Maintenance" work groups. There is no

dispute that, when contractual language is ambiguous, an arbitrator may have regard to extrinsic evidence that clarifies the ambiguity. In the case at hand, however, the Union submits that the extrinsic evidence does not assist in clarifying the meaning of the LOU. The two individuals who negotiated the LOU on behalf of the Employer and the Union testified as to their own subjective intentions and understandings. However, the evidence shows that Mr. Jackson and Mr. Wagget never discussed with one another whether the LOU would apply to the Operations and Maintenance Division or just to the two work groups in question. In the circumstances, the Union submits that the extrinsic evidence of negotiating history fails to show that the parties had a mutual shared intention about the employees to whom the LOU was to apply. On the contrary, the evidence reveals that the parties had different subjective understandings about what the LOU was intended to achieve.

[20] In the face of truly ambiguous contractual language, and in the absence of evidence of the parties' mutual intention to assist me, the Union submits that I should have resort to contra proferentem rule to construe the contract against the drafter, which it submits was the Employer. In particular, the Union points out that the Employer sent the Union a draft of the LOU in August 2021 that contained the wording "within Operations and Maintenance" in the preamble. Although the LOU went through some amendments, the preamble was never changed and the version of the language initially proposed by the Employer is what ended up in the final version that was signed on October 28, 2021.

[21] Applying the contra proferentem principle in the case at hand, the Union submits that the vague, ambiguous language in the preamble – "within Operations and Maintenance" – should be construed against OPG and the Union's interpretation should prevail. There are sound reasons for adopting and applying the contra proferentem rule in the labour relations context, the Union argues, because it will encourage parties to draft their agreements with greater clarity and specificity and discourage the use of vague language.

[22] For its part, the Employer submits that its interpretation that the LOU applies only to the Operations and Maintenance work groups should be preferred based not only on the language in the LOU but also the context in which it was negotiated.

[23] The Employer emphasizes that, by the time the LOU was finalized on October 28, 2021, the D2141 outage had already been underway for four weeks. At that point, the employees in the Radiation Protection work group who had volunteered for the XYZ shift during the outage – mostly in June 2021 – had already begun to work the XYZ Shift. In other words, Radiation Protection employees had volunteered to work and started to work the XYZ shift without having been offered the incentive the LOU provided. The Employer submits that this contextual evidence supports its interpretation that the vacation incentive offered in the LOU was not intended to be available to employees from the Radiation Protection work group. Rather, the purpose of the LOU was to provide an incentive for employees from the Operations work group and the Maintenance work group, which were the work groups from which the Employer still needed volunteers. According to the Employer, an interpretation of the LOU that extends the vacation incentive to employees who had already volunteered to work and started to work the XYZ shift without being offered any additional incentive (i.e. beyond the overtime pay that came with working the XYZ shift) would be inconsistent with an objective understanding of the language and the purpose of the LOU, and the much narrower problem that it had intended to solve.

[24] The Employer also relies on Mr. Jackson's email to the managers of the Operations work group and the Maintenance work group on October 28, 2021, the same day the LOU was signed with the Union. Mr. Jackson wrote that the LOU was "intended for in-house DNGS Operations and Maintenance only and is **not intended for other work groups** that might use an XYZ schedule..." (emphasis added) The Employer submits that this is further support for its interpretation that the LOU was not intended to apply to employees from the Radiation Protection work group. The Employer notes that the manager of the Radiation Protection work group was not copied on Mr. Jackson's email.

[25] The Employer also submits that the LOU contains forward-looking language, the use of which supports its interpretation that the incentive was intended to be available only to those employees who volunteered after the LOU was negotiated. If the parties had intended to provide the incentive to those who had already volunteered and had been working the XYZ shift schedule from the beginning of the outage, the Employer submits that they could have and would have included "backward-looking" language to account for that.

[26] The Employer points to the following as examples of “forward-looking” language in the LOU:

- a. In the preamble, the Employer submits that the use of the word “implementing” indicates that the LOU is forward-looking in scope;
- b. In para. 3, the LOU provides that each Regular employee “who volunteers” will receive the vacation incentive. (The Employer emphasizes that it does not say that employees who had *already* volunteered prior to the outage and the negotiation of the LOU would be eligible);
- c. In para. 4, the LOU says that the vacation “earned” pursuant to para. 3 “will be added” to employees’ current vacation accrual period;
- d. Para. 7 says that if there is an incomplete week because an employee “does not work” the amount of time they were committed, it “will result” in the incentive not being provided;
- e. Para. 8 states that, in accordance with Part G, Item 2.1.9, OPG “may limit” the amount of volunteers accepted to work the XYZ schedule for any given outage. (As OPG had already exercised that discretion with respect to Radiation Protection volunteers before the LOU’s execution, OPG says that the inclusion of this provision shows that the LOU was focussed on what would happen after the LOU’s execution.)

[27] Overall, when the terms of the LOU are considered in their grammatical and ordinary sense, having regard to the agreement as a whole, and with appropriate consideration of the relevant contextual evidence, the Employer submits that I ought to find that the LOU was aimed at solving a specific problem – a lack of volunteers from the Operations and Maintenance work groups; it did not purport to further enrich employees in the Radiation Protection work group who, at the time of the LOU’s execution, had already volunteered for and, in many cases, already started working the XYZ shift, without having been offered any additional incentive for doing so.

ANALYSIS AND DECISION

[28] There is no dispute between the parties as to the well-established principles of contract interpretation, which apply in the case at hand. An arbitrator must interpret the words used in a contract according to their plain and ordinary meaning, in the context of the provision in

which they are found and the contract as a whole. The arbitrator's task is to give effect to the parties' mutual intention, as expressed in the words chosen by them to reflect their agreement. It is not the arbitrator's role to rewrite the agreement by reading in words that are not there or reading out words that have been included in order to achieve what the arbitrator might think of as a desirable outcome. The context in which contractual provisions were negotiated may also be considered insofar as the context might assist in determining the parties' intention in selecting the wording they did to reflect their agreement.

[29] As noted above, both parties argue that the plain language of the LOU supports their respective interpretations. The Employer argues, in the alternative, that extrinsic evidence of negotiating history and other contextual evidence supports its interpretation. The Union argues that extrinsic evidence is unhelpful because it does not reveal that the parties had a shared understanding of what the language meant. The Union submits that if I am unable to determine what the language means based on its plain and ordinary meaning because it is truly ambiguous, then I should apply the rule of the contra proferentem against the drafter of the relevant language, which it submits was the Employer, and give effect to the Union's interpretation.

[30] At the outset, I agree with the Union that extrinsic evidence regarding the circumstances surrounding the negotiation of the LOU is of no assistance in the case at hand.

[31] It is well established that evidence regarding the context in which collective agreement language was negotiated may be admitted to enable the arbitrator "to read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract." (*Creston Moly Corp. v. Sattva Capital Corp.*, [2014] 2 SCR 633 ("*Sattva*"), at para. 47; *Halton Recycling Ltd. d.b.a. Emterra Environmental v. Labourers' International Union of North America, Local 183*, 2019 CanLII 11765 (Price)).

[32] Although an arbitrator may thus consider the circumstances surrounding the negotiation of an agreement when interpreting its terms, it is important to bear in mind that such contextual evidence cannot override the language used by the parties in the agreement itself. In *Sattva*, above, at para. 57, the Supreme Court of Canada emphasized that:

While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement ... The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract ... While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement... [authorities omitted]

[33] As is clear from the above passage, contextual evidence is only admissible and relevant if it assists the adjudicator in determining what both parties to the agreement intended, as expressed in the words of the contract. Subjective evidence about what one party understood or intended is inadmissible for the purpose of interpreting the agreement. As the Supreme Court explained in *Sattva*, above, at para. 58

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

[34] In the case at hand, I agree with the Union that the evidence of negotiating history does not assist me in interpreting the LOU. Evidence of negotiating history might assist if it revealed that the parties had a shared understanding about what the wording in the agreement meant. However, the evidence here shows that the Employer had one understanding of what the LOU was intended to achieve, and the Union another. In other words, the evidence reveals only the subjective intentions of one party or the other. As noted above, subjective evidence about what one or another party believed language meant cannot assist in construing contractual language because it does not show what the parties mutually intended.

[35] Neither does evidence about the circumstances surrounding the negotiations assist me. In support of its interpretation, the Employer emphasizes that it already had enough

volunteers from the Radiation Protection work group months before negotiations for the LOU even began. It makes no sense, the Employer says, to have created an incentive for the Radiation Protection work group, where one was not needed. Rather, the Employer says that the LOU was intended to cover only the Operations and Maintenance work groups from which the Employer needed, but had not had, volunteers.

[36] The problem with the Employer's argument is that, as noted above, the only surrounding circumstances that are relevant and admissible are objective background facts that were known or ought to have been known to *both* parties at or before the time of contracting. In this case, there is no evidence that the Union negotiator, Mr. Wagget, knew or ought to have known that the Employer already had a sufficient number of Radiation Protection volunteers before negotiating the LOU with the Union. In fact, Mr. Wagget's uncontradicted and unchallenged evidence was that he did not know that the Employer had no need for volunteers from Radiation Protection at the time the LOU was being negotiated. In the absence of evidence that the Union knew or ought to have known that the Employer did not need volunteers from the Radiation Protection work group at the time the LOU was negotiated, this is just more evidence of one party's subjective intention that does not assist in construing the words of the LOU.

[37] This leaves me with the wording of the parties' agreement.

[38] In the case at hand, I find that a plain language interpretation of the wording of the LOU favours neither the Union's nor the Employer's interpretation of the words "within Operations and Maintenance." The words "within Operations and Maintenance" read in isolation could just as easily refer to the Operations and Maintenance work groups as they could the Operations and Maintenance Division.

[39] Of course, words in a contract are not to be interpreted in isolation. They are to be read harmoniously in the context of the provision in which they appear and the contract as a whole. Ultimately, this is the principle that leads me to conclude that the vacation incentive in the LOU applies to all employees from the Operations and Maintenance Division who volunteered to work and who did work the XYZ shift schedule during the D2141 outage. In particular, I rely on the fact that Part G, Item 2.1.9.5 of the collective agreement states:

A bonus will be paid to all those employees that volunteer to work an outage shift schedule. The amount of bonus and the conditions surrounding eligibility will be determined by management and communicated prior to soliciting for volunteers. (emphasis added)

[40] Although the parties mostly referred to the paid vacation days that employees were eligible to receive under the LOU for volunteering to work the XYZ shift as an “incentive” (although Mr. Wagget referred to it as a “bonus” at one point in his testimony), in my view, it was a “bonus” within the meaning of Part G, Item 2.1.9.5. It was not a monetary bonus – the LOU explicitly stated that no “monetary” bonus would be paid – but it was a bonus all the same. The Employer was therefore required, under Part G, Item 2.1.9.5 to provide the vacation incentive to “all those employees” that volunteered to work the XYZ outage shift schedule.

[41] As I see it, the Employer urges an interpretation of the LOU that would directly conflict with Part G, Item 2.1.9.5 of the parties’ collective agreement, because it would not result in “all those employees” who volunteered to work the XYZ shift receiving the vacation incentive, but only some of them. As an arbitrator, my task is to give effect to all of the provisions of the parties’ agreement by reading them harmoniously with one another. I cannot give effect to an interpretation of the LOU that would directly contravene another provision of the parties’ contract. The Employer’s interpretation that the incentive provided under the LOU was limited to volunteers from two specific work groups must be rejected for that reason.

[42] By contrast, the Union’s interpretation of “within Operations and Maintenance” would result in “all those employees that volunteer[ed] to work an outage shift schedule” receiving the vacation incentive provided for under the LOU, consistent with Part G, Item 2.1.9.5. The Union’s interpretation is therefore harmonious not only with the wording of the LOU, but also the collective agreement pursuant to which it was negotiated and of which it is effectively part. I prefer the Union’s interpretation for this reason.

[43] During the hearing, the Employer flagged the fact that the Employer did not comply with the second sentence in Part G, Item 2.1.9.5, which requires management to determine the bonus to be offered to employees for volunteering to work an outage schedule and to communicate it to them “prior to soliciting for volunteers”. Clearly, the Employer did not do

that, as it started soliciting volunteers in June 2021, months before the vacation incentive was determined through negotiation with the Union and communicated to employees. Yet, no grievance was filed by the Union. I take the Employer's point, but in my view the fact that the Union did not grieve the failure to comply with the second sentence in Item 2.1.9.5 is not a reason to embrace an interpretation of the LOU that conflicts with the first sentence.

[44] In deciding this case, I have also considered but am not persuaded by the Employer's argument that the wording of the LOU is forward-looking in nature and that the parties must therefore have intended the incentive to be available only to those employees who volunteered to work the outage after the LOU was signed.

[45] As a general observation, I would not agree that the language of the LOU is "forward-looking" in nature. Rather, the LOU is written in the present tense that is typically used in collective agreements.

[46] In any event, I do not agree that the use of the word "implementing" in the LOU's preamble suggests that the incentive was not available to employees who volunteered for the XYZ shift before the LOU was signed. The use of the word "implementing" signifies that the vacation incentive became available with the finalization of the LOU that created it. However, I do not see how the use of the word "implementing" indicates one way or the other whether eligibility for the incentive was tied to the date on which volunteers came forward.

[47] As for para. 3, I cannot accept the Employer's assertion that it contains forward-looking language ("employee who volunteers") that restricts eligibility for the vacation incentive to those who volunteered after the LOU was signed. On the contrary, I find that para. 3 extends the vacation incentive to all "Operations and Maintenance" employees who volunteered and were selected by the Employer to work the XYZ schedule during the D2141 outage, regardless of when they volunteered. I say that because, in para. 3, the parties agreed on a vacation incentive "for the D2141 outage" without limitation. Paragraph 3 does not say that the vacation incentive is only available for *part* of the D2141 outage, i.e. the part that remained after the LOU was signed. As the Union points out, the LOU places a number of conditions on eligibility for the vacation incentive. Among other things, the incentive was available for "each full week" worked by volunteers on the "XYZ schedule" up to a "maximum" of 10 paid vacation days, etc. If the parties had also intended to make the vacation incentive available

only for the portion of the D2141 outage that remained after the LOU was signed, they easily could have included express language to that effect. The fact that the parties chose not to do so indicates that no such limitation was intended. Instead, a plain language interpretation of the words “for the D2141 outage” leads me to conclude that the incentive was available for the whole D2141 outage, including the portion preceding the signing of the LOU.

[48] As for paras. 4 and 7 of the LOU, these address details about the allocation and use of the vacation, once earned, and the consequences of not working to the full extent committed; they do not speak to eligibility to earn the vacation incentive in the first place. Paragraph 8 merely reiterates that, under Part G, Item 2.1.9 of the collective agreement, OPG has the discretion to limit the number of volunteers “for any given outage”. There is no language in para. 8 that could lead to the conclusion that the LOU only applied to the portion of the D2141 outage that remained after October 28, 2021.

[49] For the foregoing reasons, I find that those employees from the Operations and Maintenance Division who volunteered to work, were selected to work and did work the XYZ shift schedule during the D2141 outage, including employees from the Radiation Protection work group, were covered by the LOU and eligible for the vacation incentive in accordance with the terms of the LOU.

[50] In light of the above, it is not necessary for me to address the Union’s alternative argument that the contra proferentem rule ought to be applied to construe the language. The contra proferentem rule is to be used only as a “last resort”, where the ordinary interpretative principles have been exhausted and two equally reasonable interpretations of the language remain. As I have been able to interpret the provision in question based on a reading of the LOU in the context of the contract as a whole, it is not appropriate or necessary to apply it in this case.

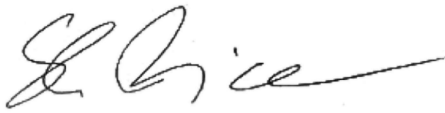
DISPOSITION

[51] For the reasons set out above, I find that the October 28, 2021 LOU applies to the Operations and Maintenance Division, including Radiation Protection employees, and that any Radiation Protection employees who volunteered to work, were selected to work and did

work the XYZ shift schedule during the D2141 outage were entitled to the benefits provided under the LOU, in accordance with its terms. The grievance is allowed accordingly.

[52] As agreed by the parties at the hearing, the issue of remedy is remitted to them. However, I remain seized to determine the appropriate remedy, in the event that the parties are unable to agree.

Dated at Toronto this 7th day of August, 2024

A handwritten signature in black ink, appearing to read 'S. Price', written over a horizontal line.

Sheri Price
Sole Arbitrator