IN THE MATTER OF AN ARBITRATION UNDER THE BRITISH COLUMBIA *LABOUR RELATIONS CODE*, R.S.B.C. 1996, C. 244

BETWEEN:

FORTIS BC ENERGY INC. and FORTISBC INC.
(Customer Service Centres)

(the "Employer")

-AND-

MOVEUP – CANADIAN OFFICE PROFESSIONAL EMPLOYEES' UNION, LOCAL 378

(the "Union")

Re: Annual Vacation and Sick Leave Entitlement
Grievances 19-0396 and 19-0373

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| APPEARANCES: | Stephanie Gutierrez, for the Employer |
| | Susanna Allevato Quail, for the Union |
| ARBITRATOR: | Ken Saunders |
| DATES OF HEARING: | July 23 and 26, 2021 |
| DATE OF AWARD: | October 21, 2021 |

## I. INTRODUCTION

1 The Union grieves that the Employer incorrectly calculated "service" for the purpose of determining vacation and sick leave entitlements.

2 The disputed provision appears under Article 19.02 of the parties "Customer Service" Collective Agreement (the "Collective Agreement"). It reads in part as follows:

> 19.02 Part-time Regular (PTR)
>
> …
>
> Sick leave and annual vacation entitlements shall be prorated on the basis of time worked according to service.

3 Article 4.06 of the Collective Agreement defines service as "employment with the Company." This provision reads as follows:

> 4.06 "Service," for the purpose of this agreement shall be established on the basis of employment with the Company, whether or not under the terms of Article 1.01, and shall commence from the date last employed.

4 Vacation and sick leave entitlement are based on "years" and "months" of service respectively. The interpretive dispute arises from the Employer's administration of vacation and sick leave entitlements for part-time employees. The Employer has calculated years and months of service for part-time employees, based on what it calls an "accredited service date." Accredited service is based on hours worked from date of hire, in proportion to full time hours, not the calendar period of "employment with the Company." For example, a part-time or temporary employee working 50 percent of a full-time position takes two years to earn one year of accredited service.

5 The Union submits that the Employer's administration of this provision is inconsistent with the plain meaning of the Collective Agreement. It says the language of the Collective Agreement is clear. There is no past practice under the Collective Agreement demonstrating a mutual intention in favour of the Employer's interpretation.

6 The Employer says it has always calculated service based on time worked for part-time employees. It contends the Union was aware of its longstanding practice in administering an identically worded provision under their Gas collective agreement (the "Gas agreement"). The Employer also says it flagged its interpretation in a 2006

email exchange and an exchange at the 2014 round of Collective Agreement negotiations. The Employer submits its interpretation is supported by the language of the Collective Agreement in light of this extrinsic evidence. In the alternative, the Employer argues the Union is estopped from its asserting it rights until it has a chance to address the matter in the next round of bargaining.

7 The Grievance was submitted for determination based on a partial agreed statement of facts and witness testimony.

8 The Union called now retired Senior Union Representative, Brad Bastien and present-day Union Representative Cindy Lee. Bastien and Lee testified about exchanges at the 2014 round of collective bargaining.

9 The Employer called its Vice President of External and Indigenous Relations, Doug Slater. Slater was Manager of Employee Services for FortisBC at the material time. The Employer also called Sarb Bagri, Manager of Employee Services and Human Resources Information Systems, Bev MacGillivray (former Manager of Payroll and HRIS Systems) and Manager of Customer Experience, Angela Sandrin, nee Davies, (whom I will refer to interchangeably as "Sandrin" for the purpose of this decision).

10 Slater testified about the evolution of the bargaining unit, the Employer's practice in administering Article 19.02 and exchanges at the 2014 and 2017 rounds of collective bargaining, at which he was an Employer spokesperson. Bagri and MacGillivray testified about the Employer's calculation of service under the Collective Agreement and the Gas agreement. Sandrin's testimony focused on a 2006 exchange of email correspondence with Union Representative Jackie Brown, concerning the calculation of service under the Gas Collective Agreement.

## II. BACKGROUND

### 1. Agreed Statement of Facts

11 The parties submitted a partial agreed statement of facts ("ASF"). It describes the historical development of the present-day Customer Service bargaining unit and Collective Agreement.

12 The ASF locates the origins of Articles 4.06 and 19.02 of the Customer Service Collective Agreement in a 1981-1983 Gas agreement with the Union's predecessor. The key point is the language of the disputed provision and the impugned practice continued in every material respect, despite changes in the name and identity of the employer.

13 In 2009, the Employer (Terasen Gas) decided to repatriate the customer service it previously performed from a third-party provider. This initiative was subject to regulatory approval. The parties consequently concluded a voluntary recognition Customer Service Collective Agreement in 2009, based in every material respect on the language of the previous Gas agreement. This agreement was reached in advance of regulatory approval. Terasen hired employees to work under the 2011-2014 Customer Service Collective Agreement in October and November of 2011 further to a plan to "go live" in early 2012.

14 In January 2012—3 years after the disputed language under the Customer Service Collective Agreement was negotiated—the parties agreed to include a group of Electric customer service staff employed under the Electric Customer Service Collective Agreement. This is notable because the Employer administered Article 19.02 according to the Union's interpretation for six part-time Electric employees. The Employer characterizes this as an oversight which first came to its attention in 2017 and which it asked payroll staff to rectify

15 The partial agreed statement of facts is reproduced below for the record.

A. The Employer, the Union and Bargaining Unit Background

1. The Canadian Office and Professional Employees' Union, Local 378 (dba MoveUP) (the "Union") is a bargaining agent within the meaning of the British Columbia *Labour Relations Code* (the "Code").

2. FortisBC Energy Inc. ("Fortis Gas," "Gas," or "FEI") and FortisBC Inc. ("Fortis Electric,""Electric," or "FBC") are affiliate energy utility companies that are wholly-owned, indirect subsidiaries of Fortis Inc., the ultimate parent company.

3. FBC is a regulated electric utility and operates a business which consists of electrical power generation, transmission and distribution to residential, commercial and wholesale customers throughout the southern interior of British Columbia.

4. FEI, previously Terasen Gas Inc. ("Terasen Gas"), BC Gas Inc. ("BC Gas"), and BC Hydro's Gas Division, is a regulated natural gas distribution utility. FEI operates transmission and distribution systems responsible for the delivery of natural gas toresidential, commercial, and industrial consumers throughout much of British Columbia.

5. Both FEI and FBC have mature, longstanding bargaining relationships with MoveUP (previously, the Office and Professional Employees International Union ("OPEIU")) as well as the IBEW.

6. Until recently, between Gas and Electric, there were five bargaining units: MoveUP Gas, MoveUP Electric, MoveUP Customer Service, IBEW Gas, and IBEW Electric. The MoveUP Gas and MoveUP Electric bargaining units and collective agreements merged into one bargaining unit on November 16, 2020. The MoveUP Customer Service unit remains a separate bargaining unit and Collective Agreement from the now merged MoveUP Gas/Electric bargaining unit.

B. Customer Service History

7. Prior to 2001, Gas customer service work was done in house. In 2001, provided customercare services primarily through in-house facilities and resources.

8. BC Gas and the Union's predecessor, OPEIU, were parties to a collective agreement, and the employment relationship between FEI and its customer care representatives was governed by this collective agreement. The language in Article 19.02 of the Collective Agreement that "sick leave and annual vacation entitlements shall be prorated on the basis of time worked according to service" (the "Language") was present in this collective, including dating back to at least the 1981-1983 BC Hydro and OPEIU collective agreement(attached as Appendix A).

9. In 2001, BC Gas (FEI) entered into a partnership with Enbridge Inc. to establish a new entity to provide customer services to utilities including BC Gas. All of BC Gas' customercare services (approximately 150 employees) were transferred to the new CustomerWorksLimited Partnership ("CustomerWorks") on January 1, 2002. All parties agreed that CustomerWorks was the successor employer to BC Gas. Letter of Understanding #28 to the 2002-2007 BC Gas OPEIU collective agreement reflected the parties' adjustment plan(attached as Appendix B). The Language from the 2002-2007 BC Gas OPEIU collective agreement is attached as Appendix C. The CustomerWorks Collective Agreement is attached as Appendix D. In July of 2002, CustomerWorks was acquired by Accenture, and eventually moved outside British Columbia.

10. In 2009, Terasen Gas (FEI) determined that it should again provide customer care services primarily through in-house facilities and resources, and agreed with the Union to create the customer service bargaining unit and agreement, using the CustomerWorks collective agreement as the base template with various modifications. Terasen (FEI) voluntarily recognized the Union as the bargaining agent, and the parties came to a Memorandum of Agreement and voluntary recognition Collective Agreement (2011-2014) for the customer service bargaining unit in 2009, attached as Appendix E.

11. In January 2012, FEI, FBC and the Union agreed to amalgamate the Electric customer service employees into the Customer Service Collective Agreement and bargaining unit ("LOU 2"), attached as Appendix F.

12. In 2014, the parties bargained and entered into a Memorandum of Agreement to renew the Collective Agreement for the 2014-2017 term, which is attached as Appendix G.

13. In 2017, the parties bargained and entered into a Memorandum of Agreement to renew the Collective Agreement for the 2017-2022 term, which is attached as Appendix H.

14. Also in 2017, the BC Labour Relations Board certified the previously voluntarily recognized customer service bargaining unit.

15. The current Collective Agreement (2017-2022) is attached as Appendix I.

## C. Customer Service Centres

16. There are 282 employees within the Customer Service bargaining unit, of which 239 are Gas employees and 43 are Electric employees. Of the Gas Customer Service employees: 156 are Full Time Regular (FTR); 31 are Part-time Regular (PTR); and 52 are Unscheduled Part-time Regular (UPTR). Of the Electric Customer Service employees: 37 are FTR; 4 are PTR; and 2 are UPTR.

17. There are four customer service centre locations: Prince George, Burnaby, Trail and Kelowna. Gas employees work at Prince George and Burnaby, and Electric employees work at Trail and Kelowna.

## D. The Grievor Giselle Bachand and Her Sick Leave Benefits

18. The Grievor, Giselle Bachand, is a full-time regular Senior Billing Analyst working out of the Prince George Customer Service Centre employed by Gas within the Customer Service bargaining unit.

19. She was first hired on a temporary part-time basis on September 8, 2014, and subsequently accepted a full-time regular Customer Service Representative position on October 3, 2016. She has remained a full-time regular employee since then.

20. The Grievor was on sick leave from May 14, 2019, to June 7, 2019.

21. The Grievor's sick leave entitlement was calculated on the basis of her accredited service date of November 9, 2015, and as such was provided with sick leave benefits on the basisof the 3 -4 year bracket in Article 10.02.

22. The Employer calculated the Grievor's accredited service date as set out in Tab 41 of the Employer's Book of Documents.

## III. 2006 EMAIL EXCHANGE

16 The names Jackie Brown and Pat Junnila appear in the following email exchange. Brown was the Union representative responsible for the Employer's bargaining units. I note that Pat Junnila was a Union Shop Steward who later became a Union representative.

17 In cross-examination, Bastien was taken to the following string of emails, beginning with a February 27, 2006, email inquiry from Jackie Brown to Employer representative Angela Sandrin, copied to Manager of Labour Relations, Jeff Marwick. The subject line was "Service versus Seniority."

18 It appears that Brown's email query stems from an email dated February 7, 2006, from Pat Junnila to bargaining unit employee Cindy Lahm. Junnila explained to Lahm that her vacation entitlement is based on service from start date, not seniority based on time worked. Brown's February 27 email inquiry to Davies reads as follows:

> Hi Angela,
>
> An issue is arisen for Cindy Lahm regarding her annual vacation entitlement. She says she's been advised by both Payroll and HR that her seniority and her service have been prorated in accordance with time worked. Only her seniority should have been prorated.
>
> We've been dealing with this issue as an offshoot of an individual grievance where the employee's seniority and service were both deducted as a result of discipline. Jeff has subsequently advised that only the employee's seniority should have been altered, and that service is continuous as defined in Art. 4.06.
>
> Can you please arrange to have Cindy's service corrected, or let me know if you disagree?

> Also, I'm concerned that there may be many more than Cindy that have been treated this way. Is it possible to follow up for all other than FTR's to ensure the records are correct? Thanks.

19 Jeff Marwick emailed Sandrin the same day regarding Brown's query. Marwick asked Davies to respond to Brown. The email reads in material part:

> Angela,
>
> The grievance issue I was dealing with Jackie is different, and it concerns a full-time employee, not a PT employee.
>
> …
>
> With regard to Cindy Lahm, my understanding is Jackie is of the view that PT service should be based on a "date" versus "based on hours worked." If she is correct, it would mean that Ms. Lahm would be entitled to one additional week of AV. [annual vacation]
>
> Initially, our response (not sure that it was covered in the CA) was to say this is contrary to 17 years of past practice. However, we (Karen) have found language in the collective agreement, that appears to support our contention that AV's are based on hours of work. Karen was going to do a little more research in the files on this.
>
> Article 19.02 (F) – Part-time Regular (PTR), clearly states that: *"sick leave and annual vacation entitlements shall be prorated on the basis of <u>time worked</u> according to service*." … (italics in original)

20 Sandrin responded to Brown by email dated March 8, 2006. The email reads as follows:

> Hi Jackie. Sorry to take so long responding to this – I was in training for most of last week and was also away on Monday.
>
> I don't have any details of the grievance you're referring to, but my understanding from Jeff is that the matter you and he have been discussing is slightly different, and in addition it relates to service for a full-time regular employee, rather than a part-time regular employee.
>
> With respect to Cindy Lahm's issue, Article 4.06 does define "service" as the date an employee last became employed. However, Article 19.02 (f) says quite clearly that, for part-time regular

> employees, sick leave and annual vacation entitlements shall be prorated **on the basis of time worked** according to service. Therefore, for vacation entitlement purposes, a part-time regular employee has to work the same number of hours that a full-time regular employee does annually, before that will move up the ladder.
>
> On that basis, Cindy's vacation entitlement has been calculated correctly.
>
> If you'd like to discuss further, let me know.
>
> (emphasis in original)

21 I pause to note there is no record that shows Brown followed up with the Employer. No grievance was filed about this matter. Moreover, the Employer did not adjust Lahm's service date as Brown requested. Sandrin testified in direct examination that to her knowledge (back to 2005), the Employer calculated part-time service based on hours worked in both the Gas and the Customer Service bargaining units.

22 Bastien testified that he was unaware of the 2006 Brown-Sandrin email exchange. Accordingly, he could not comment on the matter. He testified he was the senior Union representative responsible for servicing Fortis units from 2004 until his retirement.

23 Lee began work as a Union representative in March 2014. The first time she saw the 2006 Brown-Sandrin email exchange was in preparation for the present proceeding. She is unaware of a grievance regarding the calculation of service prior to the grievance at hand.

24 Lee observed that part-time seniority accrual under Article 4.1(c) was changed from "time worked" to "date of hire" in the 2014 round of bargaining for the Customer Service agreement. The events leading to that change will be discussed in more detail below.

25 Lee also observed the language of Article 4.06 and 19.02 (as it pertains to service) remains the same as between the Gas agreement and corresponding provisions under the Customer Service Collective Agreement.

26 Slater testified that until negotiated changes to the Customer Service Agreement in 2014, service and seniority were calculated based on hours worked under the Gas agreement and the Customer Service Collective Agreement. Slater noted a slight exception in that seniority is held "bargaining unit wide," while service is held on a "company-wide" basis. Slater further explained the intention of "company-wide"

service accrual is to preserve service despite changes in the corporate identity of the Employer through the course of mergers and acquisitions.

27 Part-time service is calculated as a percentage of the full-time equivalent ("FTE") of 1958 hours per year. Slater testified that service is calculated for part-time employees in the Customer Service bargaining unit based on time worked (in terms of hours) as he understands the correct operation of Articles 4.06 and 19.02. Slater added this practice continued through successive collective agreements, beginning many years ago under the Gas agreement. By this practice, an employee that works 50% of the time takes approximately two years to accumulate one year of service subject to loss time due to discipline or layoff. Slater entered the 2014 round bargaining with this understanding of how service is calculated. He described this calculation as a matter of "common knowledge within the company."

28 Slater testified in direct examination that he was unaware until preparation for this hearing that the Employer had calculated service for part-time Electric employees (of whom there were six) based on date of hire. This fact did not attract management's attention until the six part-time employees still on the electric payroll were moved onto the Gas payroll system in early 2018. Accordingly, this fact was never discussed in the 2014 or 2017 rounds of bargaining.

29 Sarb Bagri testified regarding the Employer's payroll practice in calculating service for Gas part-time customer service employees. She explained that a part-time employee's service is calculated based on total hours worked from their date of hire, adjusted as a proportion of regular full-time hours. This calculation results in what is known as an "accredited service date." Thus, if a part-time employee works 50 percent of the time, it takes them two calendar years to advance one year of service. Bagri testified the Employer followed this practice as far as she can recall and was initially trained to do this by a long-standing employee.

30 Bev MacGillivray also testified regarding the Employer's practice in calculating service for Gas part-time customer service employees. In 2015 MacGillivray was assigned the administration of payroll and HRIS systems for Electric and Gas. Those two payroll systems were managed separately to that point. MacGillivray also worked on the merger of the Electric and Gas customer service employees into a single unit beginning in late 2017. Shortly thereafter MacGillivray learned that service was calculated differently in the Electric and Gas units.

31 The matter initially came to light after MacGillivray sent an email dated February 16, 2018, to Sonja Herchak. Herchak was a payroll employee responsible for administering the Electric payroll. MacGillivray instructed payroll to calculate part-time "accredited service dates" based on hours worked, for employees transferring from temporary or part-time regular to full-time regular status. Herchak resisted this direction on the ground that service should be calculated by date of hire, according

to the Canadian Payroll Association and statute. MacGillivray responded that it made no sense that the practice on the Gas and Electric side would differ, that the Collective Agreement was determinative, and she would seek clarification from labour relations. MacGillivray did not follow through to a resolve and the question lay unanswered. The Employer characterized this in argument as a mistake that fell through the cracks.

32 MacGillivray added in direct examination that to her knowledge—as far back as 1999—the Employer had calculated part-time service for the Gas payroll based on hours worked—by determining an "accredited service date." Thus, part-time employees had to work 485 hours to achieve the "three months of service" required to access paid sick leave under Article 10.01.

3. 2014 Bargaining

33 I now turn to the discussions leading to a change to seniority calculation in 2014 negotiations for the Customer Service Collective Agreement. The Employer says that an exchange at the bargaining table evinces a mutual understanding that service is calculated based on hours worked.

34 Bastien was the Union spokesperson in collective bargaining for the 2014 – 2017 Customer Service agreement. He also acted as the senior representative responsible for all of the Union's collective agreements with the Employer. Bastien also oversaw other Union representatives who serviced those units.

35 Bastien explained in cross-examination that employees did not ratify the initial settlement to renew the expired 2011-2014 Customer Service Agreement. That led to additional discussions to find a way forward to ratification. The first recorded discussion was a May 9, 2014, phone call. The second was a May 22, 2014, bargaining session.

36 Slater was the chief spokesperson for the Employer. Slater identified notes he took at a May 9, 2014, telephone conversation between himself, Employer representative Rita Ludwig and Bastien. Slater sought to understand why a majority of employees did not vote to ratify the collective agreement and what might be done to achieve employee ratification. Bastien outlined employee concerns. It was agreed to meet on May 22, 2014, to bargain a resolve.

37 Bastien identified the Union's bargaining notes (taken by Cindy Lee) of bargaining exchanges at the May 22, 2014, session. He testified in direct examination that apart from what is documented in the notes, there were no additional discussions regarding the calculation of employee entitlements for part-time vacation or sick leave time. He also testified there was no specific discussion regarding the

calculation of part-time employees' service based on time worked versus length of the employment with the company. He testified that there was "minimal to no discussion" about whether service was based on "date of hire" versus "time worked."

38 Cindy Lee testified in direct examination that her notes of the bargaining exchanges accurately reflected discussions albeit she was only present to observe the last two days of bargaining. She added that apart from exchanges across the table, there were no additional discussions regarding the Union's proposal to move from "time worked" to "date of hire" seniority for part-timers.

39 The parties met on May 22, 2014, to conclude an agreement for ratification.

40 A key issue blocking ratification was that temporary employees accrued seniority based on hours worked and could subsequently "leapfrog" part-time employees for the purpose of shift bidding. The Union proposed seniority based on date of hire to address this.

41 Slater's speaking notes at the May 22 session record that the Employer would set a part-time seniority date as of the date of ratification (to minimize disruptions) and going forward as of the date of hire (with a random method to place persons hired the same day). It is important to note that Slater sought to clarify that this move would not impact the calculation of service. Slater testified that he told Bastien when this proposal was first raised that "service and seniority calculation would have to be split." Slater testified he was "keenly aware" there were monetary implications to changing the service calculation. Changing service to "date of hire" would drive increases to wages, sick leave and annual vacation entitlement—thus reducing labour productivity. The Employer's labour costs are subject to regulatory scrutiny.

42 I note that bargaining notes taken by Employer representative Nick Melemenis also record Slater's comment that "service and seniority would have to be split," during discussions concerning the Union's seniority proposal. Slater testified that Bastien did not object to or question this characterization. Rather, Bastien reassured Slater that moving to date of hire seniority would have no impact on the Employer. Slater testified there was "no discussion or intent to change the calculation of service."

43 The Union counter proposed on the basis that the seniority of all part-time employees be based on date of hire. The Employer agreed. This was implemented by removing the application of Article 4.01(c) as it calculated part-time seniority based on time worked.

44 Bastien was taken to Union notes taken by Union Representative Cindy Lee (at the May 22 session) recording an exchange between Bastien and Employer representative Doug Slater. The exchange concerned the Union's proposal to move

to part-time seniority based on date of hire. In that exchange, Bastien explained the proposal was significant regarding shift bidding. He explained to Slater the proposal was a "union issue. Does not change things for you." Slater is recorded to have replied, "you'd have to separate service and seniority." Bastien is recorded to respond, "if you shift bid." Slater responded, "put a stake in the ground" (determine seniority for existing part-timers as of date ratification)

45 Lee acknowledged in cross-examination that the Union proposal was only focused on seniority calculation and that seniority was a "Union issue" as opposed to service, which was an "Employer issue." Slater explained in direct examination that seniority determines the order in which employees access non-monetary rights (such as scheduling). Service is used to access monetary benefits such as sick leave, annual vacation and length of service increases.

46 In cross-examination, Slater agreed that Article 18.02(f) sets out the schedule B salary increases based on hours worked: "Part-time regular employees and temporary employees shall accrue service for salary progression purposes on the basis of accumulated hours worked…." He explained that part-time employees advance on the scale based on paid hours—as set out under Article 18.02 (f). Slater disagreed when it was put to him that Article 4.06 defined service based on the date of hire. He testified that he understands service to be based on employment with the company. Slater explained his view that Article 4.06 is intended to protect service in the face of changes to the identity of the employer and the movement of employees to different bargaining units. In his view, service is always accumulated based on hours worked based on the language of Article 19.02 — "Sick leave and annual vacation entitlement shall be prorated on the basis of time worked according to service," and based on Article 4 of the pre-2014 collective agreement — "seniority for the purpose of this agreement shall be established based on length of service with the company." Slater also pointed to Article 4.01. He acknowledged that Article 19.02 does not apply to full-time regular employees, so it does not apply to all employee categories.

47 Lee testified that she had no knowledge about past practice regarding the calculation of service.

48 Bastien agreed that the bargaining notes in evidence accurately reflect what was said at the table. Counsel for the Employer put to Bastien in cross-examination that he did not contest or question Slater's comment that service would have to be separated from seniority. Bastien testified he was uncertain about whether Slater's comment pertained to shift bids and added, "he could have made that comment, does not necessarily mean I have to agree with that comment. Based on what I see on these notes, we were talking about the shift bid which was a huge issue to us."

49 It was further put to Bastien in cross examination that the message he conveyed to Slater was the Union proposal did not impact the calculation of service as he is recorded to say, “It is a Union issue. Does not change things for you.” Bastien testified “when you say no impact on the employer, if you went to hire date [to calculate part-time seniority], on the ‘time off’ side, it does not change anything. And on the compensation side it does not change anything. And I believe the Employer agreed there would be no fundamental change for them.” Bastien disagreed there was discussion about the proposal’s impact on service as it only impacted seniority. When counsel asked if Bastien thought the Union proposal changed seniority *and* service accrual to date of hire, he testified that the Union proposal only moved seniority accrual to date of hire. Bastien added “I can’t remember specifically what we discussed, if it was date of hire on seniority and date of hire on service.” When counsel again put to Bastien that Slater’s comment meant the Union’s proposal separated service from seniority, Bastien testified, “Doug made a comment at the table. Just because someone makes a comment at the table doesn’t mean that I acknowledge it, that I agree with it or that I disagree with it.”

4. The 2017 Round

50 Cindy Lee was the Union’s chief spokesperson in the 2017 round of bargaining.

51 The Union challenged the Employer’s treatment of temporary employees in that round. Specifically, it sought to restrict the use temporary employees in place of part-time regular employees. That led to the creation of a new category of employee titled Unscheduled Part-Time Regular (“UPTR”). Once implemented, temporary employees were converted to UPTR status. Unlike Temporary employees, UPTR’s now enjoyed benefits such as vacation the same as PTRs—except UPTRs must work 975 hours to qualify. There was no discussion at the bargaining table to the effect that service would be calculated differently for UPTRs than Part-Time Regular employees (apart from their exclusion from Article 19.02).

## IV. POSITIONS OF THE PARTIES

### A. THE UNION’S POSITION

52 The Union submits that Article 19.02 is unambiguous in that sick leave and annual vacation entitlements are prorated based on “time worked according to service.” The Union argues that the plain meaning of these words excludes the Employer’s interpretation that the service is prorated based on time worked. Rather, it is the entitlement that is prorated.

53 The Union submits that service is a defined term under Article 4.06 and is calculated by hire date, not by hours worked. It submits that had the parties intended to alter the definition of service for the purpose of Article 19.02 they would have used clear

language to do so, given the significant impact of service on the calculation of employee entitlements: *City of Vancouver and Vancouver Firefighters Union, Local 18*, [2016] B.C.C.A.A.A. No. 21, at para. 93.

54 The Union adds that where the parties intended to depart from the definition of service under Article 4.06, they used specific language. For example, in Article 18.02(f), the parties specifically provide that part-time regular and temporary employees shall accrue service "for salary progression purposes on the basis of accumulated hours worked." The Union submits that Article 18.02(f) achieves the exact result regarding wage progression that the Employer seeks to achieve in the present case for the calculation of sick leave and vacation entitlement. The Union further observes the parties did not include a reference to service based on hours worked concerning part-time sick leave entitlement under Letter of Understanding No. 11

55 The Union submits that the Employer's interpretation is inconsistent with Article 14.05. That provision creates a scheme to define vacation entitlement for part-time employees as they progress through successive "Years of Service." Under that provision, part-timers may choose either a "vacation entitlement" or "Vacation Pay" as a percentage of "Vacationable earnings." The Union observes that Article 19.02 says that vacation "entitlements" are prorated, not the percentage of vacation pay. The Union submits in part:

> 38. Slowing the rate at which a PTR employee progresses through the grid pro-rates both entitlements and vacation pay. Nothing in Article 19.02 or anywhere else in the Collective Agreement gives the Employer the right to prorate vacation pay in this manner.

56 The Union characterizes the Employer's approach to the calculation of vacation entitlement as "double proration" as it slows advancement on the "years of service" grid while simultaneously reducing the value of the corresponding entitlement to vacation or to vacation pay.

57 The Union submits that the 2006 email exchange between Brown and Sandrin is not useful as an aid to interpretation under the test established in *International Association of Machinists, Local 1740 and John Bertram & Sons Co. Ltd*. (1967), 18 L.A.C. 362 (P.C. Weiler) ("John Bertram"). The Union advances this submission on three main grounds.

58 First, the Union submits that the language of the collective agreement unambiguously supports the Union's interpretation. Hence, there is no ambiguity to be resolved utilizing extrinsic evidence.

59 Second, there is no consistent practice. The evidence shows a mixed practice. Part time employees under the Gas collective agreement had service prorated by hours worked while part time employees who moved from the Electric unit accrued service based on date of hire.

60 Third, Brown's 2006 email exchange with Sandrin pertained to the administration of the Gas agreement, not the Customer Service Agreement which did not come into existence until 2009, and into force in 2011. The Union submits that it would be inappropriate to apply a practice endorsed by a Union representative under one unit because the same language was "repurposed" for a different collective agreement for a new bargaining unit. The Union submits in part, that such a result would require each Union representative to know how every other Union representative has handled the administration of that provision. It adds that such a result would "rigidify" industrial relations by stifling resolutions at the lower reaches of the grievance process for fear that conduct may set a precedent. The Union submits that Bastien cannot reasonably taken to have known what Brown did concerning her administration of service under the Gas agreement. The Union further submits that it would be unsound policy to impose a past practice concerning the administration of identical language under different collective agreements, albeit between closely related parties.

61 The Union contends that Brown's conduct in administration of the Gas agreement cannot be taken as an unequivocal representation that the Union would not rely on its legal rights under the different and then non-existent Customer Service agreement.

62 The Union submits that Bastien's silence in the face of Slater's comment in 2014 bargaining—to the effect that the Union's seniority proposal would separate service from seniority—is insufficient to support a claim that the Union acquiesced to the Employer's interpretation. The Union submits, in part, that agreement cannot be established based on silence "… in response to an oblique comment in the midst of bargaining on an only tangentially related topic." The Union adds there was no evidence the Employer specifically spelled out its interpretation of service in that round of bargaining.

63 Finally, the Union objects to the Employer's practice of using an "accredited service date" for employees who move from part-time regular to full-time regular status. The Union submits that even if the parties intended to modify the meaning of service for part-time regular employees, this could not have any bearing on the calculation of service for full-time regular employees. It points out that sick leave and vacation entitlements for full-time regular employees are not prorated. The Union further observes that the application of Article 19.02 is restricted to part-time regular employees. Accordingly, the Union seeks an order that full-time employees whose

service was based on accredited service date be made whole for any consequential reduction in sick pay or vacation entitlement.

## B. THE EMPLOYER'S POSITION

64 The Employer submits that Article 19.02 entitles part-time employees to sick leave and annual vacation based on service calculated as time worked from date of hire. The Employer also says the entitlements to sick leave (Article 10.02) and to vacation (Article14) are based on accumulated service, not one's date of hire.

65 The Employer advances this interpretation based on its reading of the entire Collective Agreement with the aid of extrinsic evidence concerning the historical development of the bargaining unit and the Collective Agreement. It also relies on extrinsic evidence of longstanding past practice and bargaining exchanges.

66 Regarding the historical development, the Employer submits the disputed language was in place under the parties' Gas agreement. The parties later chose to base the Customer Service Collective Agreement on the language of the Gas agreement. The disputed language remained in all material respects.

67 The Employer submits that the concept of service must be read in harmony with the entire Collective Agreement, including Articles 4, 10, 14, 18 and 19. I will address each in turn.

68 The Employer submits that Article 4.01 (a) to (c) of the 2002-2004 CustomerWorks agreement linked the accumulation of seniority to service. Seniority was based on length of service: Article 4.01(a). It was only after the completion of three months service, that full-time regular and part-time regular employees began to accrue seniority—calculated from the date of employment: Article 4.01(b). Part-time employees accumulated seniority based on time worked (until 2014 when it was changed to date of hire): Article 4.01 (c). Article 4.06 read as follows:

> 4.06 "Service," for the purpose of this agreement shall be established on the basis of employment with the Company, whether or not under the terms of Article 1.01, and shall commence from the date last employed.

69 The Employer submits that read in this context, the definition of service under Article 4.06: "…simply provides the service will be recognized not only within the bargaining unit but outside the bargaining unit (given the various historical mergers and acquisitions and multi-bargaining unit structure) and determines the point at which

service commences. From that commencement point, service accumulates on the basis of time worked."

70 The Employer goes beyond Article 19.02 to assert that service is prorated, in the manner it has established by "accredited service date". It points to Article 10.01 which establishes eligibility for sick leave "after accumulating three months of service with the Company." It notes the language does not say "three calendar months" or "within three calendar months of the date of hire."

71 Regarding, Article 10.08, sick leave entitlements are reinstated "after one month's service in the case of a new disability, and after three months service in the case of the same or a related disability". The Employer says it "is evident that 'service' here is not based on date of hire, since employees are not eligible for sick leave benefits in the first place until they have accumulated three months of service."

72 The Employer points to the stipulation under Article 18.02 (f) that "part-time regular employees… shall accrue service or salary progression purposes on the basis of accumulated hours worked." The Employer submits that this language accords with an underlying principle that "service is based on time worked." The Employer proceeds to argue that the same principle underpins Articles 19.03 and 19.04 which stipulate benefit entitlement thresholds for Temporary employees and UPTR's — based on hours of accumulated service.

73 The Employer contends that when read in context, the reference to "service" under Article 19.02 must mean proration based on time worked given that sick leave and annual vacation are service-based entitlements. The Employer argues that the Union's interpretation based on date of hire, attribute "no meaning" to the word "service" under Article 19.02, as it separates the entitlement from time worked. It cites *BCNU v COPE, Local 15*, 2006 B.C.C.A.A.A. No. 238 (Germaine) as authority for the proposition that if a benefit is earned by service, "whether the employee comes within the scope of the benefit may entail consideration of whether there is a 'reasonable nexus' between work performed and the benefit": at para. 15. The Employer submits that Article 19.02 accords with this approach in that sick leave and vacation entitlement is "prorated based on time worked according to service."

74 The Employer submits that apart from a small group of six employees on the Electric side (which it characterizes as a mistake) the Employer has consistently calculated service according to an "accredited service date" based on hours worked from date of hire. The Employer submits this practice is extrinsic evidence pointing to the parties' mutual intention, particularly given that the origins of the relevant language can be traced as far back as the 1981 to 1983 BC Hydro and OPEIU collective agreement.

75 The Employer further contends that the 2006 Brown-Sandrin email exchange discloses a consensus in favour of its interpretation, given that the parties directly turn their minds to the interpretive question at hand and no grievance was filed. The Employer argues that its practice under the Gas agreement is relevant as it is undisputed that the parties' predecessors based the disputed provisions of the Customer Service Collective Agreement on the Gas collective agreement: ***Paul's** Restaurants Ltd. (Laurel Point Inn) and UNITE HERE, Local 40*, BCLRB No. B37/2011.

76 The Employer also submits that the exchange between Slater and Bastien in the 2014 round of bargaining discloses the parties' mutual intention. Until 2014 the accrual of part-time service and seniority were aligned as they were based on hours worked. The Union sought to change the accrual of seniority to "date of hire." The Employer submits that Bastien's silence in the face of Slater's assertion that this proposal would "separate" service from seniority, demonstrates a common understanding that service was calculated based on hours worked. Otherwise, Bastien would have corrected Slater the Union's seniority proposal effectively aligns the calculation of seniority with the calculation of service. Further, the Employer says it reasonably relied on Bastien's response that the Union's proposal would have no impact on the Employer.

77 The Employer argues that if the Union's interpretation is sustained by the language, it is estopped from asserting its rights given what it contends is the Union's unequivocal representations, both by it silence in 2014 negotiations and its lack of action in the face of the Employer's long-standing practice in calculating part-time service: *ICBC v. OPEIU, Local 378* [2002] B.C.C.A.A.A. No. 109 (Hall), at paras. 39-40 ("ICBC"); *West Fraser Mills Ltd*, BCLRB No. B199/2006 ("West Fraser"). The Employer submits that the Union's representations effectively denied it an opportunity to bargain different or clarifying language, and to address consequential monetary impacts.

78 The Employer further submits that if the Union is successful, declaratory relief is sufficient, or in the further alternative, that given the grievances are of a continuing nature, any period of compensation should reach back no further than the time-period for filing the grievances at hand.

C. The Union's Reply

79 The Union asserts that across the board the Employer has invented a practice of using hours when the Collective Agreement says months. The Union says this is the first time the Union has learned that it is the Employer's practice to count the time under Article 10.08 for the reinstatement of sick leave benefits in hours worked rather than months.

80 The Union says the threshold for sick leave eligibility in the Collective Agreement is expressed in hours for temporary employees only, and in months for everyone else. The fact that the Employer has interpreted months to mean hours worked for all purposes does not demonstrate that this is how the collective agreement provides for eligibility.

D. Supplementary Submissions

81 At the close of submissions, the Union raised an arbitration award: *CustomerWorks and Office and Professional Employees' Union Local 378 (Shokar Grievance)*, (Unreported) (Greatbach) ("CustomerWorks"). This award concerned the denial of sick leave benefits. The grievance concerned entitlement to paid sick leave benefits for ongoing partial day absences, and when sick leave entitlements are refreshed.

82 The language of Article 10.08(a) considered in CustomerWorks, tracks Article 10.08(a) in the Customer Service Collective Agreement. It read as follows:

> (a) If an employee has received 15 weeks of paid sick leave benefits and returns to active duty, the employee will have their entitlement as at the previous July 1st, reinstated after one month's service in the case of a new disability, and after three months' service in the case of the same or a related disability.

83 In *CustomerWorks*, the Union argued that an employee actively at work who exhausted their 15 weeks of paid sick leave benefits, would have the benefit reinstated after either the one-month or three-month threshold is met. The Employer argued that the employee must have returned to their pre-disability job and hours before having their sick leave entitlement reinstated.

84 Arbitrator Greatbach reviewed the language in 10.08(a) and concluded from the fact that the parties had used different terms (active duty, and service), the words mean different things. She accepted the Employer's assertion that "active duty" meant at work and not disabled.

85 In reaching her conclusions, Arbitrator Greatbach spoke to the definition of service under Article 4.06—the same language in the present agreement. She offered the following opinion:

> The plain meaning of "period of service" in Article 10.02(a) can be determined by looking at the definition of "service" in Article 4.06. The actual words used lead me to the conclusion that the meaning of "period of service" is a measure of the amount of time from the "date last employed" with the Company.

86 The Union says that this decision supports its position that service simply means period of employment, pointing out that "if active duty means actively at work, performing duties, then service cannot mean the same thing, i.e. time worked."

87 The Union goes on to also assert that the parties are presumed to know the jurisprudence around this language when they used the exact same words in the current agreement as that found in *CustomerWorks*.

88 The Employer says the issue of whether service in Article 4.06 is defined based on hire date or hours worked was not before Artbitrator Greatbach in *CustomerWorks*. Alternatively, to the extent that the award can be read as interpreting service as based on hire date it is wrong. The Employer says, "the full picture was neither considered nor analyzed." The Employer adds that *CustomerWorks* was issued in 2003. It says the Union did not raise this award in the 2006 Brown-Sandrin email exchange, in which the Union tacitly agreed to the Employer's calculation of service.

## V. ANALYSIS AND DECISION

89 The issue for determination is whether the parties mutually intended that service for part-time employees (including periods of part-time employment) be calculated based on a calendar period of employment, or the Employer's method of calculating an accredited service date.

90 This difference lies to be resolved by applying the established canons of interpretation. The following re-statement of principles appears in *Pacific Press*:

> The object of interpretation is to discover the mutual intention of theparties.
>
> The primary resource for an interpretation is the collective agreement.
>
> Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
>
> Extrinsic evidence may clarify but not contradict a collective agreement.
>
> A very important promise is likely to be clearly and unequivocally expressed.
>
> In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.

> All clauses and words in a collective agreement should be given meaning, if possible.
>
> Where an agreement uses different words, one presumes that the parties intended different meanings.
>
> Ordinarily words in a collective agreement should be given their plain meaning.
>
> Parties are presumed to know about relevant jurisprudence.

91 The parties also point to extrinsic evidence regarding the exchange of bargaining proposals.

92 Extrinsic evidence of bargaining history may be considered along with the language of a disputed provision, both to determine if the language is ambiguous and to resolve any resulting ambiguity. If there is no finding of ambiguity, the disputed interpretation must be resolved on the language chosen by the parties: *Nanaimo Times*, at paras. 28-32. The goal is to decipher the parties' mutual intention for the disputed language from an objective standpoint in light of the extrinsic evidence, including the exchange of bargaining proposals: *Nanaimo Times*, paras. 28-30.

93 This approach to collective agreement interpretation stems from a recognition that the parties negotiate language against a backdrop of surrounding circumstances and to achieve a purpose that operates harmoniously with the scheme of the Collective Agreement. The parties' mutual intention behind the words of the Collective Agreement must be interpreted not only in view of their ordinary grammatical reading, but also in view of the entire agreement and surrounding circumstances reasonably known to the parties when the language was negotiated.

94 So extrinsic evidence may identify reasonably held assumptions that reveal the parties' mutual intention behind the disputed language. Extrinsic evidence can be a useful aid but only insofar as it discloses the parties' mutual intent behind the language, not to contradict it. The statutory mandate of an arbitration board is to determine grievances under the "*provisions of the Collective Agreement*" and with regard to the "real substance of the matters in dispute and the respective merit of the positions of the parties to it under *the terms of the collective agreement*…": Section 82 of the *Labour Relations Code,* RSBC 1996 c. 244 (emphasis added). The following excerpt from *Nanaimo Times* is worth reciting in this regard:

> On the other hand, if an arbitrator concludes that when the language of thecollective agreement is considered with the extrinsic evidence, there is some doubt about the meaning of the provision in dispute, the arbitrator is entitled to use extrinsic evidence to resolve the

> ambiguity or doubt, even in the face of collective agreement language that appeared clear when read in isolation*: Finlay Forest Industries Ltd*., BCLRB No. B137/94. However, even in these circumstances, an arbitrator is not bound to base his or her decision on the extrinsic evidence simply because the language is somewhat equivocal. The arbitrator is trying to decipher the meaning which the parties mutually intended *for the disputed contract language, and should not forget the actual language in concentrating on a mass of extrinsic material:* [citations omitted]
>
> …
>
> *The fundamental point, as we have emphasized, is that arbitrators approach their interpretive task with a full appreciation of the circumstances relevant to the disputed contract language.* The arbitrator may then determine how, if at all, the extrinsic evidence is of assistance. For example, the collective agreement language may not admit of ambiguity, such that the extrinsic evidence is properly disregarded; alternatively, where ambiguity is found, the evidence may be used as an aid to interpretation.
>
> (*Nanaimo Times,* paras. 30 and 32, emphasis added)

95 As noted above, the primary resource for interpretation is the language of the Collective Agreement read in context and with due regard for the purpose of the provision. Therefore, I begin by considering the words of Articles 19.02 and 4.06 which are reproduced for convenience as follows:

> 4.06 “Service,” for the purpose of this agreement shall be established on the basis of employment with the Company, whether or not under the terms of Article 1.01, and shall commence from the date last employed.
>
> 19.02 Part-time Regular (PTR)
>
> …
>
> Sick leave and annual vacation entitlements shall be prorated on the basis of time worked according to service.

96 I find that on the plain meaning of the preceding two articles, read together, and in conjunction with the entirety of the Collective Agreement it is vacation and sick leave entitlements that are prorated. It is only those “entitlements” that are subject to pro-ration based on time worked, not service which is defined by Article 4.06. Article 4.06 unambiguously dictates that service for purposes of the Collective Agreement

"shall be established on the basis of employment with the Company." Reading these provisions in context and with the extrinsic evidence, I conclude that the disputed language does not admit ambiguity. I do not find that it is the parties' mutual intention that service as defined in Article 4.06 is to be prorated.

97 Article 4.06 is written so that the definition of service applies unless the parties specifically provide otherwise. As noted in *Pacific Press*, "A very important promise is likely to be clearly and unequivocally expressed." To this point, I accept the Union's submission that if the parties intended for service to be calculated or accumulated based on time worked, they would have said as much in clear language. For example, Article 18.02(f) specifically states that part-time regular and temporary employees, accrue service for salary progression purposes "on the basis of accumulated hours worked." Article 18.02(f) reads as follows:

> Part-time regular employees and Temporary employees shall accrue service for salary progression purposes on the basis of accumulated hours worked….

98 The Employer presented evidence that in addition to using its "accredited service date" to locate an employee on the sick leave and annual vacation grids, the accumulation of service based on hours worked was also used to determine the eligibility for sick leave under Article 10.01—which occurs "after accumulating three months of service with the Company." Article 19.02 provides for the proration of certain entitlements for part-time regular employees. I find that proration can only mean a reduced benefit proportional to the work performed, and cannot impact initial eligibility, as asserted by the Employer. The same result applies to the one month and three-month thresholds for the reinstatement of sick leave entitlements.

99 The parties used specific language to express eligibility in terms of hours of accumulated service. As noted above, they did so in the definition of "Temporary" employee under Article 19.03. That article establishes eligibility for a payment in lieu of sick leave and benefits after 485 hours of accumulated service. Similarly, during the 2017 round of bargaining, the parties introduced a new employee category, Unscheduled Part-time Regular (UPTR) with a new definition: Article 19.04. This article specifically identifies that "UPTR employees will be eligible for any benefits under Article 8 and 10 after their completion of 975 hours of accumulated service."

100 I note the initial eligibility established in Article 10.01 accords with the Union's interpretation, as it speaks to service in terms of a calendar period: "A regular employee becomes eligible for paid sick leave benefits after accumulating three months of service with the Company". It does not say "after 485 hours" either for full-time regular, or part-time regular employees.

101 A further implication beyond prorating sick leave and annual vacation entitlements for part-time regular employees is revealed when employees transition from part-time regular to full-time. I accept the Union's contention that even if I were to accept the Employer's proration of service to determine the proration of sick leave and annual vacation entitlements for part-time regular employees, such proration has no place in calculating entitlements for full-time employees.

102 I accept the Employer's submission that the service-related entitlements are notionally connected to the performance of work. However, that argument does not overcome or directly respond to the fact the parties specifically chose to establish service in terms of employment with the company.

103 For all the above reasons, I find that evidence of past practice does not assist as an aid to interpretation as the language is unambiguous when considered on its own and in overall context. Ultimately, I must maintain fidelity to the language chosen by the parties as the mutually intended definition of "service" under Article 19.02.

104 Accordingly, the language of the Collective Agreement provides that a part-time regular employee's sick leave and vacation pay are paid or accumulated on the basis of the hours they work relative to a full-time employee. For vacation, it is based on vacationable hours, and for sick leave it is based on the method of calculations described in LOU #11. Service, on the other hand, as defined in Article 4.06, is based on employment with the Company, and is based on the date last employed, and not on the Employer's calculation of "accredited service date."

105 I now turn to assess the Employer's estoppel argument. This position rests on undisputed evidence of the Employer's long-standing practice in using an "accredited service date", the 2006 email exchange between Brown and Sandrin, and the exchanges in bargaining between Slater and Bastien.

106 Arbitrator Hall set out the elements of the doctrine of estoppel in *ICBC* as follows:

> The purpose of the modern doctrine of estoppel is to avoid inequitable detriment. An estoppel may arise where: (a) intentionally or not, one party has unequivocally represented that it will not rely on its legal rights; (b) the second party has relied on the representation; and (c) the second party would suffer real harm or detriment if the first party were allowed to change its position. The requirement of unequivocal representation or conduct is a question of fact, and may arise from silence where the circumstances create an obligation to speak out. The notion of reliance must be assessed from the perspective of the party raising the estoppel. In the labour relations context, the element of detriment may be satisfied by a lost opportunity to negotiate: *Versatile Pacific Shipyards*, supra, at pages 270 – 71.

107 I find there has been a long-term and widespread practice of calculating service by accredited service date. The Union submits it was unaware of that practice. However, that assertion directly collides with Brown's knowledge of the Employer's interpretation as evidenced by her email exchange with Sandrin in 2006. Brown did not file a grievance despite the fact she was aware of the broader impact of the Employer's interpretation. In her email dated February 27, 2006, Brown concluded "Also, I'm concerned that there may be many more than [employee] that have been treated this way. Is it possible to follow up for all other than FTRs to ensure the records are correct?" I find it reasonable to infer that Brown knew the language at issue had widespread implications for part-time employees yet did not contest the Employer's practice. I note that Pat Junnila was a Union Shop Steward at the relevant time. Junnila later became a Union representative. Although not copied on all of the email correspondence between Brown and Sandrin, it is fair to infer Junnila was aware of these facts as she initially raised the matter.

108 Brown acted at all material times as representative of the Union in her dealings with the Employer. She raised the same question posed by the Union in the present matter and did not file a grievance to dispute the Employer's practice albeit under a different agreement. Further, the language at issue and the impugned practice continued for decades over the historical development of the parties' collective bargaining relationship, culminating in the present-day Customer Service Collective Agreement. The language at issue was imported from the Gas agreement. It is not reasonable to infer the Union and Employer made this decision without regard to its longstanding administration. Nor do I find the importation was a heedless decision to repurpose the Gas language. The parties are sophisticated actors in a mature bargaining relationship. In 2009 the parties chose to adopt the language at issue from the Gas agreement to serve the same purpose under the 2011-2014 Customer Service Collective Agreement. Moreover, I find the calculation of service was a matter not easily or likely overlooked by Union and Employer negotiators given its mutual monetary impact

109 Given these unique objective circumstances, I conclude that responsible Union officials knew (as did Brown), or could reasonably be taken to have known, of the impugned Employer practice when the Customer Service Collective Agreement was negotiated in 2009. At that point, Bastien had acted as Senior Union Representative for the Fortis bargaining units since 2004. I find the Union remained silent in the face of that practice and in circumstances it was obliged to speak up if it intended to rely on its strict rights under the disputed language. The Employer reasonably relied on that silence as a representation it could continue the same practice under the Customer Service Collective Agreement.

110 I do not find the fact service was calculated from date of hire for a group of about six Electric employees materially detracts from the preceding conclusions. I have reached that conclusion in light of the following circumstances. To begin, the

evidence shows the parties took the disputed language from the Gas agreement in 2009 (albeit the Electric language is materially the same). MacGillivray learned of the Electric practice early 2018—long after the 2009 negotiations. Further, MacGillivray initially asked Electric payroll staff to align the service calculation to the Employer's practice of assigning an accredited service date. She did so based on her understanding of the past practice under the Gas agreement. The payroll staff (not Union representatives) acted on an understanding of Canadian Payroll Association professional standards and statutory considerations. They could not find applicable Collective Agreement language to justify a change. MacGillivray subsequently conveyed the need to proceed by the Collective Agreement. She sought clarification from labour relations to determine the path forward and told staff it did not make sense that the Gas and Electric agreements were administered differently. MacGillivray did not affirm the correctness of the Electric practice under the the Customer Service Collective Agreement. She failed to follow up. MacGillivray retired in mid 2018. The question appears to have laid unresolved until payroll raised it again in 2019. I note the Union filed the grievances at hand on July 18, 2019, and October 1, 2019, respectively.

111 I also conclude the parties' 2014 collective bargaining exchange provides independent support for the above conclusion.

112 In 2014, Doug Slater responded to the Union's proposal to change the calculation of seniority for part-time regular employees from hours worked to date of hire. Slater responded to this proposal to the effect that in moving seniority to date of hire, "you'd have to separate service from seniority."

113 The impetus for the Union's proposal was to address concerns about seniority for the purpose of shift-bidding. Nonetheless, I find Slater's observation that the Union proposal meant "you'd have to separate service from seniority," is significant.

114 As noted above, Bastien testified: "I can't remember specifically what we discussed, if it was date of hire on seniority and date of hire on service." I prefer Slater's positive recollection regarding this point of discussion, to the extent it deviates from or adds to Bastien's testimony. When Employer counsel put to Bastien that Slater's comment meant the Union's proposal separated service from seniority, Bastien testified, "Doug made a comment at the table. Just because someone makes a comment at the table doesn't mean that I acknowledge it, that I agree with it or that I disagree with it."

115 In my view, it would have been reasonable for the Employer to expect a reply, if indeed the Union did not agree that its proposal would separate the basis of service and seniority, or if it did not understand the point of Slater's comment. Slater and Bastien are experienced labour negotiators. It is fair to infer each was acutely aware that any connection between the Union's seniority proposal and service entitlement

raised the spectre of monetary impacts. Understood in this context, Slater's comment that the two entitlements would be "separated" or "split" is not a minor or tangential concern. In view of that background awareness, it is reasonable to infer that Slater's comment touched on the potential financial impact of the Union's proposal. Hence Bastien's comment to the effect that seniority for the purpose of shifts bids is strictly a Union issue of no relevance to the Employer and Bastien's testimony, "When you say no impact on the Employer, if you went to hire date [to calculate part-time seniority], on the 'time off' side, it does not change anything. *And on the compensation side it does not change anything. And I believe the Employer agreed there would be no fundamental change for them*."

116 Further, I find that Slater's comment that the Union's proposal (which moved seniority accrual to date of hire) would effectively "separate" or "split" service and seniority, would have made no sense to Bastien if he thought the calculation of the two entitlements would, in fact, now be aligned. In these circumstances, and assessed objectively from the Employer's standpoint, Bastien's silence in response to Slater's comment further confirmed it was reasonable to rely on the impugned practice.

117 I also conclude the Employer would be prejudiced as its reliance on the Union's representations effectively denied it an opportunity to bargain different or clarifying language, and to address consequential monetary impacts.

118 I will briefly address the parties' submissions regarding *CustomerWorks*. One of the issues in dispute concerned the refresh of sick leave benefits under Article 10.08. I find the award turned on the meaning of "returns to active duty," not on the definition of service. Arbitrator Greatbatch offered her view of the meaning of service under Article 4.06. However, it appears the issue at hand—namely, the distinction between hours worked and time lapsed since the "date last employed" was neither argued nor specifically considered.

## V. CONCLUSION

119 In summary, I find that the definition of service under Article 4.06 for part-time regular employees is based on the period of employment with the Employer since the date last employed. It is this period that is to be used to determine where an employee sits on the grid of sick leave entitlements and annual vacation entitlements.

120 I also find that the Union is estopped from enforcing this interpretation until the conclusion of bargaining for a renewal of the parties' April 1, 2017 - March 31, 2022, Collective Agreement. This period will restore the Employer's lost opportunity to bargain different or clarifying language, and to address consequential monetary impacts in the collective bargaining process.

121 I retain jurisdiction to address any remaining issues concerning the implementation of this award.

Ken Saunders, Arbitrator