IN THE MATTER OF AN ARBITRATION

BETWEEN:

Power Workers' Union, Local One

(the "union")

and

Toronto Hydro - Electric System Limited

(the "company" or the "employer")

Regarding: Policy Grievance 2011-067- PSPL Classification Wage Rate

Before: Arbitrator Brian McLean

Hearings were held in Toronto between April 14, 2015 and February 26, 2018

Appearances (at various times):

For the Union: Ryan Newell, Stephanie Hobbs, Mark Wright, Dave Philpott, Sherry Stanley, Deb Inrig, L. Bernard, Suzanne Hotson, James Middleton, Mary Helmuts and John Camilleri.

For the Employer: Sven Poysa, Helia Ralph, Graham Buitenhuis, Elena Kaminsky Michael Lorito, Adam Lingenfelter, J. Martin, and N. Shaw.

AWARD

Introduction

This matter is a "grievance" filed by the union with respect to a new job (or reclassification of an old job) created by the employer pursuant to Article 10.09 (a) of the collective agreement which reads:

> Where a new job is established, or where existing job duties are changed such that an employee is incorrectly classified, the appropriate classification, wage rates, wage ranges and progressions shall be negotiated and the applicable conditions of this agreement shall apply. If no agreement is reached on the wage rate and/or progression the matter may be submitted to arbitration. If a wage increase results, the same shall be retroactive to the date that the job duties were changed, or the new job created.

There is no dispute that Article 10.09(a) applies to the circumstances before me and that I have jurisdiction to determine the wage rate for the new job. I do note that the "grievance" does not allege a breach of the collective agreement but arises because the parties, following negotiation, were unable to agree on the wage rate for the new job. In that sense, the matter before me is more akin to an interest arbitration rather than a rights arbitration.

The new job at issue is called the Power System Planning and Logistics (the "PSPL") classification (initially it was called the Customer & Power System Logistics Dispatcher). In essence, in 2008 the employer discontinued a position called the Customer Service Dispatch ("pre-2008 CSD") and moved the duties of the pre-2008 CSD to another classification, the Customer Service Representative (Dispatch) (the "CSRD"). In 2011, the employer added the job duties formerly performed by the pre-2008 CSDs (and then later performed by the CSRD) to another classification- the Trouble Dispatcher classification- to create the new PSPL position. While, on the surface, that seems simple enough, the situation is complicated because the

employer had over time had a few similar classifications performing somewhat similar jobs at sometimes differing wage rates and the parties called evidence about these positions as comparators. There is no dispute that employees in the pre-2008 CSD classification were paid less than Trouble Dispatchers before 2008.

In short, the employer takes the position that when lower rated/paid job duties, like those performed by the pre-2008 CSDs, are added to a higher paid position, like the Trouble Dispatcher, the wage rate of the higher paid position should not change. It relies on what it asserts is the practice between the parties in such circumstances and the general law. Initially, (and perhaps at the end) the union relied on the same practice, but asserted that the job duties which were transferred to the Trouble Dispatch position to create the new PSPL position were, at the time of the transfer, actually performed by a higher rated position, the CSRD position, and that the rate of the CSRD should therefore apply. The union also asserts that the addition of duties to the Trouble Dispatcher increased the complexity of the duties performed by employees in the position, increased the volume of work for such employees, and increased the knowledge required for those employees, all of which should lead to a higher wage rate. Moreover, the employer derived economic and efficiency benefits from the addition of duties to the Trouble Dispatcher position and the employees ought to share in those benefits.

The PSPL position involves, broadly speaking, two main types of duties: dispatch and customer service. In general, "dispatch" refers to a process where a Toronto Hydro employee receives a call from a police officer, fire fighter, or ambulance worker ("PFA"); a Toronto hydro employee; or a member of the public or customer about an issue and then directs (dispatches) another Toronto Hydro employee (or crew) to attend at a location to perform a function. For example, if a wire is down, a dispatcher would dispatch a crew or crews to attend at the location of the downed wire and fix the problem. "Customer service" is dealing with customer complaints or enquiries and attempting to resolve those customer issue using a variety of tools and means. Issues range from billing issues to power being cut off. It is not disputed that PSPL employees

perform a narrower range of customer service duties than customer service employees, as will be discussed below. In addition, PSPL employees have important functions relating to the protection of Toronto Hydro work crews (confined space duties) which are not really part of the dispute before me.

Pre-2008 CSDs worked in the customer service department in a call centre along with customer service representatives ("CSRs"). CSRs are a significantly higher paid classification than CSDs (both pre and post 2008) because, as will be explained below, CSRs are trained to perform a full range of customer care duties and they use judgement in resolving customer issues. The customer service duties of the CSDs were much more limited.

The boundaries between customer service employees, dispatchers and, to some extent clerks, have not necessarily been clearly delineated. This appears to stem primarily from historical reasons, the way the company staffs during business hours and the way it assigns job duties in the early evening and overnight, Toronto Hydro being a 24/7 operation. Finally, Toronto Hydro, regulated by the Ontario Energy Board, is itself an everchanging organization, evolving to meet new customer needs, legislative and regulatory changes, and business realities. The clearest example of this kind of change is the fact that Toronto Hydro is itself the product of an amalgamation of five predecessor electrical utilities which were, prior to amalgamation, organized on a municipal basis. While the five predecessor utilities employed similar types of employees there were an untold variety of differences. The various job classifications were "harmonized" during a lengthy mediation process as the parties agreed which employees of the predecessor utilities would fall into which new classifications at the new amalgamated Toronto Hydro. Again, not surprisingly, the outcome was not perfect and besides, since amalgamation, the business has changed, with the result that the company has continued to reconfigure its employee classifications largely with the agreement of the union. The case before me is, to a degree, a continuation of that process and the process of attempting to deliver the best customer service at the best price.

The Facts

At the hearing of this matter the parties called several witnesses who gave detailed evidence about a wide range of topics relevant to the dispute, including the precise job duties, as they existed from time to time, of the classifications which are at issue before me. On the whole, I do not find it necessary to set out this detailed evidence, but only the conclusions (which are generally not disputed) I have drawn from it.

During the hearing one or the other parties sought to lead evidence of events or facts which occurred after the filing of the grievance. Objections were raised with respect to the admissibility of such evidence which rulings I deferred to this award. Again, I will not set out in detail the evidence which is disputed, but only say that, in general, it was not particularly helpful to resolve these disputes. I have only considered such post grievance evidence where it sheds light on the facts as they existed in 2011 at the time the grievance was filed and, as noted, that was rare.

The factual starting point is the situation that existed at the company before 2008. Prior to 2008, the company employed two types of dispatchers relevant to this dispute: Trouble Dispatchers and pre-2008 CSDs. The Company also employed numerous Customer Service Representatives ("CSRs") and Office Clerks. The top wage rates payable to each of these classifications at that time is central to the employer's case and are set out here:

Customer Service Representative- 35.17/hour

Senior Office Clerk 1- $33.13/hour

Trouble Dispatcher -$32.68/hour

Customer Service Dispatch (Pre-2008 CSDs)- $30.98/hour

Trouble Dispatchers were part of the outside bargaining unit. They worked in the control room alongside the employees who managed the entire electrical system. Their primary function was to receive "trouble" calls from members of the PFA services about electricity "emergencies" such as downed power wires. They would respond to these calls by investigating the location and nature of the problem and then by dispatching an appropriate "trouble crew" to deal with it. Not surprisingly, most trouble calls came during stormy weather and the job of a Trouble Dispatcher was busy and stressful during such events. Trouble calls can also come during non-storm periods when, for example, a car knocks over a power pole or a tall truck runs into wires. That being said, the Trouble Dispatcher job involves relatively less work during calm periods.

Another important Trouble Dispatcher function was to ensure that employees who went into electrical "vaults" or other confined spaces were kept safe. While this required a high degree of care and attention, it was not stressful unless some sort of problem occurred. There is no dispute that in performing their duties Trouble Dispatchers essentially never dealt with members of the public. They only dealt with PFA, Toronto Hydro employees, and the employer's contractors.

Pre-2008 CSDs were a hybrid of customer service functions and dispatcher functions. They handled three types of calls: water heater calls, power calls and street lighting calls during the day. In water heater calls, which were the bulk of the calls received, the pre-2008 CSD received calls from the public about the employer's then water heater business and dispatched Toronto Hydro Field Service Representatives or contractors to address water heater issues. Similarly, the pre-2008 CSDs received calls from the public regarding street lighting issues and referred the matter to a Trouble Dispatcher who would dispatch a crew or dispatch a crew directly.

Power calls involved the public calling about flickering lights, power outages, wires down and "dig ins". The pre-2008 CSD would enter a ticket into the company's "Outage Management System" and could dispatch a crew or refer the matter to a Trouble Dispatcher who dispatched Toronto Hydro "trouble crews" to deal with these issues. During periods of high demand, like severe storms, pre-2008 CSDs also assisted Trouble Dispatchers with dispatching field service crews to make an affected area safe for the public.

Finally, and importantly for the purposes of this case, pre-2008 CSDs processed credit-card payments and arranged for electricity service re-connects (for example, when a customer paid a bill after having service disconnected for non-payment). Processing credit card payments required answering a customer's telephone call and looking up information (i.e. the amount owed) in the employer's customer management software system and then processing a credit card payment for that amount on a point of sale machine. The pre-2008 CSD also opened mail from customers and separated out cheques which would be given to accounting employees.

The company had and has a telephone customer service management system for dealing with customer telephone inquiries. The object of the system is for the customer to be routed to a customer service employee who can best deal with the customer's issue. The telephone system uses voice prompts to route the customer to the appropriate employee for assistance. For example, when the customer calls she will hear a message saying, for example, "if you have an electricity outage, press one". If the customer presses "one" the call will then be directed to an employee capable of dispatching a crew to deal with the outage. It also means that generally, unless the customer presses the wrong button, employees will not get calls about inquiries they cannot handle. Pre-2008 CSDs were part of the call center and therefore the impact of the telephone management system was that those CSDs generally only received calls about issues they could handle, as described above.

In 2007 Toronto Hydro sold its water heater business and contracted out its street lighting calls. In addition, Toronto Hydro updated its computerized interactive voice system for incoming electricity outage phone calls which meant that customers did not necessarily have to speak with a "real person" in order to resolve some issues. The pre-2008 CSDs were underutilized following these events. Accordingly, around 2007 the employer decided not to hire any more employees as pre-2008 CSDs so that classification would eventually, through attrition, be eliminated. Lauren Kirk, the-then manager of the call centre (where pre-2008 CSDs worked), testified that although the calls had greatly decreased, the company still needed the pre-2008 CSDs to handle power outage and reconnect calls on a 24/7 basis. However, they had to decide what to do with the CSDs to make their job more productive.

The employer met with the union to discuss its plans regarding the employees in the pre-2008 CSD position. The employer wanted those employees to be productive while the position was eliminated through attrition. The employer gave a presentation to the union about the creation of a new classification, the CSRD position. Copies of the overhead slides, titled "Customer Service Dispatch Redesign" were put into evidence and it is not disputed that the slides reflect the employer's position at the meeting with the union. The employer first noted that there had been a significant reduction in the customer service dispatch queue and identified the reasons for that which have been discussed above. In the employer's view, this created problems both for it and the pre-2008 CSDs: inconsistent skill sets among the CSR resource pool during high volume periods; lack of valuable work and new learning opportunities impacting the morale of pre-2008 CSDs; limited advancement opportunities for pre-2008 CSDs; and reduced vacation flexibility due to scheduling requirements.

The slides identified that call volumes from outside had been reduced by about 50% and call volumes between pre-2008 CSDs and field staff had declined by 89% as a result of the loss of the water heater calls. The company noted the benefits of the creation of a new position, including a wage increase due to the application of the shift premium and a longer work week.

The parties entered into minutes of settlement in or about November 2008 in which they agreed to add duties of the Senior Office Clerk 1 Level position to the duties of the pre-2008 CSDs. CSDs would continue to perform dispatcher duties and the new Clerk duties during regular business hours and after regular business hours. Due to the adding of the Senior Clerk Level 1 duties the wage rate of the (now) post-2008 CSD position was increased to the Senior Clerk Level 1 rate of $33.13/hour for a 40-hour week. In addition, post-2008 CSDs would earn a 6% shift differential. The employees in the pre-2008 CSD classification would be grandfathered into the post-2008 CSD position. There were no employees in the pre-2008 CSD classification and it was essentially defunct.

Senior Office Clerk 1 employees perform a wide variety of clerk functions including responding to customer inquiries. The employer's evidence was that its goal in adding Senior Office Clerk Level 1 duties to the CSDs was to give itself maximum flexibility to add additional Clerk duties as the need arose. Initially, the employer contemplated that post-2008 CSDs would be responsible for the processing of customer residence moves in Toronto Hydro's billing system. According to Lauren Kirk, Toronto Hydro's Call Centre Manager: because the post-2008 CSDs were doing additional Senior Officer Clerk Level 1 work and could be assigned any work of either the pre-2008 CSD classification or the Senior Office Clerk Level 1 classification, the parties agreed that they would be compensated at the higher of the two wage rates for these positions, being the Senior Office Clerk Level 1 rate.

The minutes of settlement provided that the pre-2008 CSD was being "reclassified" as a new classification. In addition, the parties were to identify the "skills gaps" for employees in the new classifications (the post-2008 CSD and the CSRD position discussed below) and receive training to fill those gaps. The grandfathered pre-2008 CSDs would work 40 hours per week providing 24/7 coverage.

In addition, in the 2008 minutes of settlement the parties agreed to the creation of a new position, the Customer Service Representative Dispatch -Shift ("CSRD"). The intent was that CSRD employees would perform the more complex tasks of a call centre CSR during the day and on night shift would perform some of those complex tasks, but also the less complex tasks of the pre-2008 CSDs such as answering customer power outage calls. In effect, the CSRD was a shift CSR who could also perform the dispatch functions performed by the pre-2008 CSD. (At least since amalgamation, CSRs (a different classification than those at issue in the November 2008 minutes of settlement) also answer customer power outage calls during periods of high demand). The primary function of the CSRD employees was said to be to provide customer service while fulfilling a wide range of responsibilities including "billing, collections, payment processing and all forms of customer enquiries including emergency response and no power/part power calls." The position would be in the inside bargaining unit and would be first offered to CSRs. The position would receive the same pay as CSRs, that being $35.17/hour at the time, the top rate of the positions under consideration.

After the 2008 minutes of settlement there were then three classifications performing a dispatch function on a 24/7 basis:

CSRD-Shift

Post-2008 CSDs

Trouble Dispatcher

Although the post-2008 CSDs were, in theory, capable of being assigned all Senior Clerk Level 1 functions, as a practical matter, it appears on the evidence, that the Clerk duties they actually performed were quite limited. Adam Lingenfelter, the current supervisor of the PSPLs who had previously supervised CSDs, testified in examination in chief that CSDs received inbound calls

from customers complaining about power issues, identified the nature of the problem, inputted the problem into the company's outage management system, and then created a ticket in that system and dispatched and through that system, a crew to fix the problem, which could occur quickly or take longer depending on the nature of the problem. In addition, the post-2008 CSD could update the telephone system so that customers who called in complaining about a power outage would receive information, such as the expected time the power would be restored, without speaking to a live person. Mr. Lingenfelter also gave evidence that in slow periods the CSDs might be assigned the task of opening returned mail.

After the call centre had closed for the day (4:30 or 5pm), post-2008 CSDs would also take customer calls in order to take payment for unpaid bills by credit card. If power had been cut off and full payment was made then the CSD would make a ticket to ensure the customer's power was restored as soon as possible. It was not unusual for post -2008 CSDs to receive calls from angry customers.

During the business day, the utilization of post-2008 CSDs was quite high. However, after hours and weekends, other than during storms and other high intensity periods, CSDs received very few calls and there was no supervisor on site to assign other work. In Mr. Lingenfelter's view, the duties of the post-2008 CSD were less complex than the PSPL and the CSRD.

Mr. Lingenfelter also gave evidence about the CSRD classification. CSRDs performed the full range of duties which could be performed by CSRs, except that they did them on a 24/7 basis. They also received calls from customers which might require them to dispatch crews as a CSD did. The company's telephone system ensured that they got the more sophisticated calls. It was a hybrid position between the duties of the pre-2008 CSDs and the CSRs. CSRDs and CSRs have a full working knowledge and access to the company's billing system where as the CSDs and the PSPLs had limited scope of training in that system. I need not detail the evidence that

was given about the various tasks that CSRs and CSRDs did that were not performed by CSDs and PSPLs. Suffice it to say that the list is lengthy and undisputed. Post-2008 CSDs and PSPLs were only trained to perform the limited billing tasks they were responsible for.

In cross examination, Mr. Lingenfelter acknowledged that the vast bulk of duties performed by Senior Clerks were not given to the post-2008 CSDs in 2008. Prior to 2008 they already were responsible for opening mail from customers to remove cheques and opening returned mail. Ms. Kirk testified in cross examination that the Clerk functions they performed were: opening returned mail, processing credit card payments, filling out change of address ("moves") forms in "Banner" (the employer's then customer service software package and the predecessor to CC&B), which arrived to Toronto Hydro in the mail or over the telephone. Ms. Kirk agreed that the responsibility of post-2008 CSDs *vis-a-vis* Banner were data entry tasks. Between 2008 and 2011 the post-2008 CSDs did a lot of moves in Banner which allowed CSRs to perform the more complex customer service work. He testified that power outage calls were a small part of the CSDs work. Following 2011 the remaining CSDs were assigned work in the CC&B program dealing with landlord and tenant issues. Ms. Kirk testified the form in CC&B was relatively complex. Issues arose because it might be unclear whether the landlord or tenant was responsible for power, or even whether only one or more tenants who shared a residence were responsible. Nevertheless, it is data entry.

<u>The Introduction of the PSPL position and the Grievance</u>

I now turn to the events which give rise to this grievance. In 2011 the employer concluded that customer service could be improved by adding the duties which had been performed by the pre-2008 CSD classification, and which were then performed by the CSRDs, into the Trouble Dispatcher classification.

Prior to the creation of the PSPL classification, the pre and post-2008 CSD and CSRD employees were physically located in separate sections of the same building from Trouble Dispatchers. Unlike Trouble Dispatchers, they did not have direct access to the employer's control room (the nerve centre of the electrical system in Toronto), which resulted in delays in providing certain information (such as information on local outages) to customers. As a result, the pre and post-2008 CSD and the CSRDs would often first have to communicate with Trouble Dispatchers before being able to give information to customers. Since Trouble Dispatchers were not always immediately available, such as in times of significant power outages, operational delays and inefficiencies resulted which negatively impacted Toronto Hydro's ability to reliably provide information to customers. By adding certain duties that were performed by employees in the pre-2008 CSD position- namely inbound customer power calls, processing credit card payments and arranging for power reconnects- to the Trouble Dispatcher in order to create the PSPL classification, information gathering and communication would, the employer believed, reliably occur in real-time without the lag referred to above. The employer decided it needed to make this change in order to improve its customer service. As an aside, it would also save the company money by reducing the number of 24/7 dispatch employees.

The Employer Advises the Union of the Change to the Trouble Dispatcher Classification

By letter dated March 15, 2011 Helia Ralph, the then Manager Employee Labour Relations of Toronto Hydro, advised John Camilleri, the President of the union, that the company intended to reclassify the Trouble Dispatcher position as follows:

> Re: Classification Conditions Article 10.09 (a)- Outside Collective Agreement
> Reclassification of Trouble Dispatcher to Customer & Power System Logistics Dispatcher

> This is to advise you of the reclassification of the Trouble Dispatcher position. The revised Job Description is attached for your information. We have evaluated the position and the wage rate remains unchanged. Accordingly, the wage rate of the Customer & Power System Logistics Dispatcher is $28.26 to $35.71 (2011 wage rates) per hour based on a forty (40) hour work week.
>
> The Employer will proceed with the reclassification and Job Description changes as permitted by the Collective Agreement.
>
> Please advise concerning your availability to meet to further discuss this matter.

In April 2011 the employer met with the union and delivered a similar kind of presentation as it had for the creation of the CSRD-shift position. This presentation was titled: "Trouble Dispatch Reclassification to Customer & Power System Planning & Logistics Dispatcher".

The first slide was tiled: Why the Change? It identifies three reasons for the change:

> 1.One of our 5 strategic pillars is the customer. We have a Customer Satisfaction project which is making changes in several ways to improve Customer Service and Outage Management. We must improve our response time to outages. Handoffs from one group to the other increase the chance for error and impacts on Customer Service and our Reliability PGRs
>
> 2. We also must improve our efficiency as the OPEX budget is limited. We are currently incurring the costs of staffing two groups on a 24/7 365 basis.
>
> 3. In order to modernize the utility we need to maximize the effectiveness of our Capital Work Program. To do that we need better coordination and switching effectiveness. In order to protect our Brand we need increased professionalism on Dispatch. Our new CPSPL model will ensure the right resource is assigned to the right call at the right time.

Following the meeting, the parties entered into minutes of settlement dated May 26, 2011 which resolved some of the issues in connection with the reclassification of Trouble Dispatchers to Customer & Power System and Logistics Dispatcher (later renamed the PSPL). Under the

minutes of settlement, the incumbents in the post-2008 CSD classification were grandparented in their classification of post-2008 CSD. However, they would no longer work a shift schedule and would therefore lose the shift premium. They were to continue to perform their limited Senior Office Clerk Level 1 duties and maintained their wage rate, excluding the shift premium. Similar agreements were made for CSRD employees who also lost their shift premium. The outcome was that PSPLs would be the only classification providing 24/7 dispatching. In addition, the minutes of settlement confirmed the process by which the PSPL position would be filled and that employees in the post-2008 CSDs and the CSRDs would be given first consideration for the new position.

The union agreed not to grieve the "reclassification of the Trouble Dispatcher position to the PSPL position". That agreement did not, however, prohibit the union from filing the grievance before me regarding the wage rate of the PSPL position. In June the company posted the new PSPL position, seeking eight employees. One effect of the creation of the PSPL position was that the company no longer had to schedule so many dispatch employees on a 24/7 basis; the number of such employees was reduced from three to two.

On the employer's evidence the creation of the PSPL classification was not a "harmonization" of the post-2008 CSD (or CSRD) classification and the Trouble Dispatcher position because the Senior Office Clerk Level 1 work stayed within the customer care department and PSPLs could not be assigned the broad range of duties that could be assigned to CSRDs. It also did not involve any harmonization of the CSR and CSRD positions, as none of the complex customer care work was, on the employer's evidence, transferred to the PSPL classification. The only duties that were added to the Trouble Dispatcher position (to create the PSPL) were certain duties performed by the pre-2008 CSDs, namely inbound customer power outage calls and processing credit card payments at night and on weekends (shifts) and arranging for reconnections. I note those duties had been transferred to the CSRDs on the creation of the CSRD position.

According to the employer, immediately prior to the creation of the PSPL classification, power outage calls comprised approximately 20-25% of the work performed by the post-2008 CSDs. At the time of the PSPL creation there were eight to ten post-2008 CSDs left and only two of them transferred to the PSPL position because the transferred duties represented only 20-25% of the workload of the group. Post-2008 CSDs were required to apply for the PSPL position while the old Trouble Dispatchers were automatically moved into the new position. Of the CSDs who applied only one was hired as a PSPL.

As a frame of reference for the situation which existed in 2011, at around the time the within grievance was filed, wages for the relevant classifications were as follows:

CSD-$36.21/hour

CSR $38.43/hour

CSRD- $38.43/hour

TD/PSPL $35.71/hour

Mr. Camilleri testified that the union is claiming that a wage rate of $41.83 is appropriate. The union examined three positions the CSRD, the Dispatcher and the Trouble Dispatcher and thought that given the added duties, the new position should receive the same wage rate as the CSRD, that being $41.83 per hour. The union believed that the fact that the Trouble Dispatcher would now have to speak with customers merited that wage rate.

Past Practice Evidence

As discussed above, Toronto Hydro, as it currently exists, is a company created by the amalgamation of six predecessor utilities which occurred in 1999. The six predecessor utilities had their own collective agreements with the union with differing job classifications and wage schedules. Following amalgamation, the parties had extensive discussions about how to harmonize the various classifications and wage rates. In the end, the parties agreed to merge all like predecessor positions into one classification at the highest wage rate and lowest hours of work among those positions.

The Union's Objection to Past Practice Evidence

Central to the employer's case is the argument that the parties have a longstanding practice when job classifications are harmonized of setting the rate of pay at the highest rate of those classifications. The union first objects to this evidence on the grounds that it is not proper extrinsic evidence because the employer is not making an estoppel argument and does not argue that there is an ambiguity that requires evidence of past practice to be clarified. I disagree with the union. This is not an interpretation case; the parties do not disagree about what the collective agreement means. If it was, the union's objections might be appropriate.

This is a case about determining the appropriate rate of pay for a particular job. It amounts to an interest arbitration where the goal is to replicate what the parties would have done in bargaining. In such circumstances it is entirely appropriate to receive evidence of past practice which may suggest what the parties would have done in bargaining. Indeed, in its opening statement the union said that it was relying on this very same past practice evidence, the difference being that in its view the duties transferred to the PSPL came from the CSRD and not the pre-2008 CSD and therefore the CSRD rate should apply.

All of the examples of the harmonization "practice" were settlements in which the parties agreed that the settlement was made without prejudice or precedent. In the normal course, it would be inappropriate to rely on such settlements when the whole purpose of making them without prejudice and precedent must have been to avoid the very thing which the parties seek to do in this case. To do otherwise would be to discourage future settlements on a variety of issues. That being said, there is agreement on what the practice on harmonizations is and to ignore that agreement in these unusual circumstances would be doing a disservice to the parties since, undoubtedly it governs the way they handle harmonization situations as both union and company witnesses confirmed. As will be seen, the difficulty with the practice evidence relied on by both parties is that the circumstances before me are not a harmonization.

Decision

In this case, my task in establishing an "appropriate rate" is complicated by the fact that the collective agreement offers little guidance in outlining the factors to be weighed in any determination of "appropriate". The parties have not negotiated a particular job evaluation tool and there is no evidence or submission before me to suggest that the company has a job evaluation plan which it consistently uses to value positions and determine wage rates.

Most arbitrators in my position under other collective agreements have adopted an approach to the task of determining an appropriate rate is one which, to the extent possible, seeks to replicate what the parties themselves might have agreed upon had their discussions referenced in Article 10.09(a) of the collective agreement been successful. In applying this replication principle, I accept that it is not the role of an arbitrator tasked with establishing "an appropriate rate" to impose his/her own notion of social justice or what is "fair." What is "fair" is too subjective and here the parties have a different view of what wage rate would be "fair". I also take nothing from the fact that the parties were unable to agree on a wage rate. My task is not

to order a compromise based on the parties' bargaining positions but to objectively determine an appropriate rate. Many arbitrators in this situation have accomplished this by analyzing the parties existing wage and classification scheme (which have been freely negotiated) and comparing the wage rate, skills and responsibilities in existing jobs with those of the new PSPL position. I am satisfied that is an appropriate way to proceed in this case as is described below.

In *Brown and Beatty* the authors state this in a summary of the caselaw on setting an appropriate wage rate:

> Where, however, an agreement provides that disputes about how much a new job should be paid may be referred to arbitration, arbitrators have generally attempted to replicate what the parties might have agreed to in a free collective bargaining environment, rather than imposing their own notions of social justice. To that end, consideration is given to such factors as the skill, responsibility and supervision required in the new job compared to that required in existing jobs. … Indeed, whenever wages and other terms and conditions of employment are fixed by arbitration, the governing principle is market replication and the most important criteria are comparative.

The employer argues that the parties have over many years harmonized job classifications on over 150 occasions and in all but two or four of them have adopted the highest wage rate of the classification. The union does not disagree with this assertion.

However, the vast majority of the instances occurred at amalgamation. It is not at all clear to me that amalgamations made when the employer was merging with other electrical utilities has much, if any relevance, to the matter before me. It would simply have been impractical to adjudicate each of the classification mergers on a case by case basis. That is obviously why the parties agreed to take a practical approach and to settle on the basis they did. Moreover, the

harmonizations at amalgamation appear to be "pure" harmonizations, as the parties merged like jobs from each of the local utilities and attached the highest wage rate (and lowest hours) to the new merged classification. Following that process, none of the predecessor classifications continued to exist. As noted above, the difficulty is that the circumstances before me are not a harmonization.

A harmonization occurs when two job classifications are merged, that is that employees in the resultant job classification perform all of the duties which were performed by the employees in the two or more predecessor merged classifications. Based on that definition of harmonization it is clear that the PSPL classification was not created via a harmonization but as a result of a reclassification and indeed, this was the evidence of the employer's witnesses. In this regard the examination in chief of Helia Ralph, given by way of a will say statement is decisive. I quote it directly:

> 13. The creation of PSPL was, in Toronto Hydro's view, an instance of reclassification, not harmonization.

Further comment is made in Paragraph 16 of Ms. Ralph's will say: "In Toronto Hydro's view, this was a reclassification, not a true 'harmonization', since not all duties of the post-2008 CSD position were added to the 'old' TD position. Only certain duties that had been performed by the pre-2008 CSD position were added. In addition, the post-2008 grandfathered CSD position continued to exist". This evidence was consistent with that given by Lauren Kirk who said in her will say: "The creation of the PSPL classification was not a harmonization…".

If the creation of the PSPL position is a reclassification and not a harmonization then it is not at all clear that the harmonization practice evidence is relevant, and even if it is relevant, to what degree it is.

Again Ms. Ralph's will say evidence is instructive. First in paragraph 10 she discusses the rationale (at least from Toronto Hydro's perspective) of the harmonization practice:

> Toronto Hydro's rationale in adopting this approach was that even though the harmonized classification would have a greater variety of duties, the employee in the new classification typically worked the same number of hours, so the expanded duties did not on their own merit a higher wage rate. Instead, when two classifications were harmonized, the wage rate for the new classification was determined by reference to the rate that previously applied to the most complex, "higher rated" tasks of the previous positions- i.e. the higher of the two previous rates.

Then in paragraph 12 Ms. Ralph turns to reclassifications:

> In addition to job 'harmonisations' (i.e. the merging of two or more previous classifications), Toronto Hydro also historically implemented 'reclassifications', both before and after amalgamation-although the practice was much more prevalent before amalgamation. 'Reclassifications' involved adding new duties or responsibilities from one or more classifications to another existing classification, without fully merging the two (or more) classifications. When a reclassification occurs, Toronto Hydro reviews the duties that were added to the existing classification to determine what, if any, adjustment to the wage rate is merited in the circumstances. It is my recollection and belief that in any reclassification involving the addition of 'lower rated' duties, the wage rate of the 'reclassified' position remained unchanged (i.e. even though additional duties were added, the wage rate did not increase if those additional duties were determined by Toronto Hydro to be 'lower rated' duties). Toronto Hydro's rationale for this approach was similar to that for harmonizations (as discussed above).

I make a couple of observations about this evidence. First, the evidence for a "practice" with respect to reclassifications is much less strong than with respect to harmonizations. In this regard, Ms. Ralph noted that most reclassifications had occurred some time ago, prior to amalgamation, and there are no specific examples given. More crucially, Ms. Ralph does not

say that the practice was between it and the union; she states that "Toronto Hydro's practice …".

I conclude there is insufficient evidence of relevant practice with respect to reclassifications to make it clear that the "practice" that Ms. Ralph described is what the parties would have done in negotiations. I also conclude that the practice respecting harmonizations is not relevant to the determination of the issue before me.

The employer's alternate or supplementary argument is that, regardless of the practice, that the arbitral jurisprudence supports its position in any event. In this regard the employer relies on *Walker Exhausts v. U.S.W.A., Local 2894* , 2004 CarswellOnt 3223 (Samuels) which involved the amalgamation of two jobs. The union sought an increase to the newly created position on the theory that employees in the new classification could now effectively do the tasks of both jobs. The arbitrator dismissed the grievance stating:

> 21 The Union asks for a premium over the higher of the single rates, because there is a combination of processes. In my view, this argument is incorrect. The reason it is incorrect can be illustrated by taking the Union's position to its extremes.
>
> 22 Suppose one started with a combined process that involved 50% of the time spent on the machine operator's former tasks, and 50% of the time on the Welder's former tasks, and one paid a premium because of the combination. Then the job slowly transformed worth more and more time spent on the Welder's former tasks and less and less of the time spent on the Machine Operator's former tasks (which were originally valued at a lower rate than the Welder rate). Still the Union would say there should be a premium because of the combination. And then take this movement to its conclusion, with the job becoming solely the former tasks of the Welder. Now the Union would have to acknowledge that, when the last vestige of the lesser-valued work was gone, suddenly

> the job was worth less than the combination, and would have to revert back to the Welder's rate, because there were only Welder tasks left. The job would now be composed solely of the higher-valued Welder tasks, but, in the Union's argument, would be worth less than when it was combined with lesser-valued tasks. In my view this doesn't make sense.

The employer also relied on *Woodbridge Foam Corporation and IUUAAAAIWA* 2 C.L.A.S. 126 where the arbitrator, faced with a combination of two jobs, one higher rated than the other, and much the same arguments as the parties made before me had a slightly different take on the issue:

> 11 The Board concludes that we cannot accept either the Union's position or the Company's position as automatically determining a matter of this kind. The fact that the duties of two jobs are combined does not always result in a job that is worth more than each of the pre-existing positions. Nor is it necessarily true that as long as the combined job pays as much as the rate of the best paid of the pre-existing positions, there is no ground for complaint. Each case must be judged on its merits. There are instances where combining two positions produces a job that is not worth rating higher than one of the pre-existing positions. In general, but not always, it would be the more highly rated of those positions. There are other instances where the new position should be rated higher than either of the pre-existing jobs.
>
> 12. The onus is on the Union to establish that the position ..is worth more than the rate paid to jobs in the [higher rated] classification.

Again, I find these cases to be of limited assistance. They both deal with amalgamations which are analogous to harmonizations. That is not the case before me.

My conclusion regarding the employer's harmonization argument applies equally to the Union's position that because from at least 2008-2011, CSRDs at least sometimes performed some or all of the work which was transferred to the PSPL position, the PSPL position now attracts the CSRD rate. Were this a harmonization, and the CSRD and TD positions were merged (harmonized) into a new position that might be the outcome, but as noted, this is not a harmonization. On a reclassification, where new duties are added to an existing position, the task before me is not simply a mechanical one, which is the implication of the position taken by both parties, it is an evaluative one.

In my view, the primary proper avenue to determine the appropriate rate is, to review the PSPL position and determine how and where it fits into the existing wage scale, having regard to the rates that parties have negotiated for various jobs on the wage grid. This approach replicates a free collective bargaining outcome because it assesses what a job is worth in the context of the parties' existing wage grid.

In doing so I note that this was not a situation where the employer merely sprinkled duties to the Trouble Dispatchers and retained the Trouble Dispatcher job title. The changes were significant enough in management's mind to warrant the creation of a whole new classification through a reclassification. The learning curve associated with employees becoming proficient in the PSPL classification is, on the evidence, reasonably significant.

The starting point to my analysis is the union's claim that the PSPL's ought to have been paid at the rate of the CSR/CSRD. I disagree with that assertion; in my view the PSPL is, under the parties' wage scheme, not as valuable a position as the CSR/CSRDs. In coming to that conclusion, I am satisfied, on the evidence before me, that the parties, in their classification scheme, have, on the whole, valued dispatching duties less than customer service

responsibilities. By that measure alone, the PSPL, which is primarily a dispatch position, would receive a lower rate than the CSR/CSRD.

Most importantly though, it is also clear on the evidence, that the activities performed by CSRDs, at least during the day shift, are much more complex than the customer service activities performed by the PSPLs. As noted, I do not need to set out the extensive evidence which supports this conclusion. However, it is clear that CSRDs can and do preform the full range of CSR responsibilities, especially during the day. This includes negotiation of repayment plans and other complex work involving employee judgement. PSPLs, on the other hand, perform a far more limited customer service role essentially receiving calls from customers about their power being cut off and accepting payment through credit card or western union and then making a dispatch ticket for the power to be restored.

In finding this I do not mean to diminish the customer service role that PSPLs have or the stress they are under in dealing with these or other calls where customers may be angry and upset. However, there is no evidence before me that the parties have used such considerations as stress and dealing with angry customers as a measure of the worth of a job. For example, it appears to me that there is no more stressful job than that of an old Trouble Dispatcher during a severe storm, and yet, that did not result in the parties agreeing to pay that Trouble Dispatcher more than even a clerk, who may do paper work all day.

All of that being said, I also do not agree that the wage rate of the PSPL should remain the same as the old Trouble Dispatcher simply because the job duties added to the trouble dispatcher were previously performed by a classification that, as of 2011, no longer existed in its then form. There is no evidence before me that the parties ever went back in time like that. At a minimum, the 2008-2011 CSD is a better comparator since it actually existed at the time of the reclassification of the Trouble Dispatcher to the PSPL. It would be consistent with the parties'

harmonization practice both parties urged me to apply to find that the duties added to the Trouble Dispatcher came from the post 2008 CSD and apply that rate since it was greater than the Trouble Dispatcher rate. But, as I said, given that this is not a harmonization, I do not find it appropriate to apply such a mechanical approach. It does represent, however, the minimum that the PSPL should earn.

The approach I apply is to compare the actual duties performed by the post-2008 CSD, with the PSPL to determine what the PSPL should earn. That amount, as I said, could not in any event be as great as the CSRD for the reasons expressed above and therefore the appropriate rate for the PSPL must fall in between the rate paid to the post-2008 CSDs and the CSRDs. I consider the job duties actually performed by the post 2008 CSD employees. Those duties include the customer service dispatching which was transferred to the PSPL so there is no difference there. However, they also perform very mundane and simple clerk duties (opening mail and data entry). I appreciate that these duties are performed by employees in the Senior Clerk Level 1 position, but such employees also perform much more complex work which justifies their wage rate. In my view, it is obvious that the clerk duties actually performed by post- 2008 CSDs (as opposed to the duties, which on the employer's evidence, might have been given to the post-2008 CSDs but were not) are less complex and valuable than the trouble dispatch and confined space duties performed by PSPLs and therefore PSPLs should earn more than post-2008 CSDs.

I recognize that the establishment of an appropriate wage rate between two points is a somewhat arbitrary process. In doing so, I am mindful of the fact which I mentioned before, which is that the parties have through negotiations recognized a significant gap between the value of customer service duties as opposed to dispatch duties. Because the PSPL is primarily a dispatch position and the CSR/CSRD are primarily customer service positions, it is important to maintain a significant gap to reflect priorities in the maintenance and recruitment etc. of skilled customer service employees.

Under the circumstances, I find the appropriate rate for the PSPL position is, as of 2011, 25 cents per hour above the rate paid to post-2008 CSDs. This means that the new PSPL employees should have been paid seventy-five cents per hour more than Trouble Dispatchers on the creation of the PSPL position. This will result in a wage gap between the PSPL and the CSR/CSRD positions which maintains the priority to customer service and reflects the duties actually performed by PSPLs versus those actually performed by post-2008 CSDs. In accordance with Article 10.09 (a) of the collective agreement this amount is to be paid retroactively, with applicable increases which were negotiated and applied to the bargaining unit generally over time, to occupants of the PSPL position.

I remain seized should there be any dispute about the calculations which are necessary by this award or any other difficulties in the implementation of this award.

Brian McLean

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Brian McLean

Toronto

June 11, 2018