**IN THE MATTER OF AN ARBITRATION**

**BETWEEN**

**CANADIAN PACIFIC RAILWAY**

**(the "Company")**

and

**TEAMSTERS CANADA RAIL CONFERENCE**

**(the "Union")**

**GRIEVANCE CONCERNING NOTICE OF MATERIAL CHANGE (THIEF RIVER FALLS)**

**SOLE ARBITRATOR: John Stout**

**APPEARANCES:**

**For the Company:**
Nizam Hasham - Counsel
Ian Campbell - Fasken Martineau LLP
Dave Guerin - LR Calgary
Brian Scudds - LR Toronto
John Bairaktaris - LR Toronto
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**For the Union:**
Michael Church - Caley Wray
Mike Blanchard - Student-at-Law
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Roland Hackl - Vice President TCRC
Greg Edwards - General Chair TCRC –LE West
Harvey Makoski - Senior Vice Chair, TCRC-CTY West
Dave Fulton - General Chair, TCRC-CTY West
Doug Edward - Senior Vice General Chair, TCRC-CTY West
Benoit Brunet, - General Chair, TCRC-LE East
Bruce Hiller - General Chair TCRC-CTY East
John Campbell – Senior Vice general Chair, TCRC –LE East
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**HEARINGS HELD IN TORONTO, ONTARIO ON OCTOBER 28, AND NOVEMBER 17, 2015**

# AWARD

## I. Introduction and preliminary matters

[1] This matter concerns a grievance filed by the Teamsters Canada Rail Conference (the "Union" also referred to as "TCRC") on December 6, 2013 (the "grievance"). The grievance was filed with respect to the Canadian Pacific Railway Company (the "Company" also referred to as "CPR") serving a notice of material change in working conditions on June 26, 2013.

[2] The nature of the dispute is summarized in a Statement of Dispute and Ex Parte Statement of Issue filed by the Union, which reads as follows:

**DISPUTE:**

The applicability of the Material Change in Working Conditions contained at Article 72 of the Collective Agreement between the Canadian Pacific Railway and the Teamsters Canada Rail Conference Conductors, Trainmen, Baggagemen Car Retarder Operators, Switchtenders and Yardmen ("CP – TCRC (CTY-West)") and Article 34 of the Collective Agreement between Canadian Pacific Railway and the Teamsters Canada Rail Conference Locomotive Engineers ("CP – TCRC (LE-West)").

**STATEMENT OF ISSUE:**

On or about June 26, 2013, the Company served a notice of Material Change in working conditions outlining the Company's intention to implement a change in train service between the terminals of Winnipeg, Manitoba and Thief River Falls, Minnesota. It is the Company's intention that Winnipeg-based crews would be required to operate between Winnipeg and Thief River Falls and to be on duty up to a maximum of 12 hours during a single tour of duty without the ability to provide notice of rest. Additionally, operations over the Winnipeg / Thief River Falls corridor would be shared with American crews based in Thief River Falls.

As a preliminary matter, the Union takes the position that the Company has abandoned its Notice of Material Change. At a meeting held on July 12, 2013, Company representatives were not in a position to provide details of the proposed changes in train service. As such, and at the Company's insistence, the parties agreed to extend the time limits under the applicable Collective Agreements to October 31, 2013. At no time until its letter of November 29, 2013, did the Company attempt to respond to the Union's questions or request a meeting to negotiate. Given that the extended time limits for

negotiations had by then long since passed, the Union's position is that the Company is deemed to have abandoned its purported notice.

With respect to the merits of the grievance, it is the Union's position that:

1. The Company has improperly utilized the Material Change in Working Conditions Articles to change the Seniority Districts and geographical territories governed by the CP – TCRC (CTY-West) and CP – TCRC (LE-West) Collective Agreements. The Material Change provisions contained in each Collective Agreement are limited solely to the geographical territories and Seniority Districts specifically identified therein.

2. The Company cannot purport to reassign employees who are home terminalled and work in the territory governed by their applicable Collective Agreements to perform work assignments into territory governed by a different collective agreement, absent the Union's agreement. The converse is equally true: the Company cannot purport to assign employees represented by a different bargaining agent and subject to a different collective agreement to perform work assignments into territory governed by either the CP – TCRC (CTY-West) or CP – TCRC (LE-West) Collective Agreements. The Company's actions are also in violation of the *Canada Labour Code Section*, Sections 36 and 94(1) (a).

3. At all times, only members of the TCRC have performed their respective duties on the line between Winnipeg and Noyes, Minnesota. The work in question has customarily been performed by a member of the bargaining unit and is work belonging to the employees covered by the applicable Collective Agreement. As such, any work performed by an American employee that is normally performed by a member of the TCRC would violate the Collective Agreement in question. In this regard, the Union relies on the seniority Districts provisions of the relevant Collective Agreements, including, but not limited to, Articles 41 and 43 of the CP – TCRC (CTY-West) Collective Agreement and Article 21 of the CP – TCRC (LE-West) Collective Agreement.

4. Alternatively, the Company is estopped from unilaterally implementing the changes set out in its June 26, 2013 letter. Estoppel precludes the Company from assigning employees to work across the geographic boundary of their Collective Agreements. The TCRC has come to rely on the Company's longstanding recognition of the territorial jurisdiction of each Collective Agreement, which ends at the Canada-U.S. border. As such, the Company cannot now vary that territorial jurisdiction without the Union's consent.

5. The unilateral implementation of the changes to the train service between Winnipeg, Manitoba and Thief River Falls, Minnesota, will have significant deleterious effects on the working conditions of its members, including hours of work, pension benefits, income tax and drug and alcohol rules.

6. On June 21, 2014 the Company commenced using US Soo line crews from Noyes, MN into Winnipeg MB.

7. The Union seeks an order that all employees be made whole for their losses due to the Company's use of Thief River employees in violation of the Collective Agreements and the *Code*, in addition to such other relief that the Arbitrator deems necessary in the circumstances.

[3] The position of the Company is reflected in their own Statement of Dispute and Ex Parte Statement of Issue filed in this matter, which reads as follows:

**Dispute:**

In June of 2013, Canadian Pacific Railway Company ("CPR") approached the Teamsters Canada Rail Conference (the "Union") to discuss establishing an extended service run from Winnipeg, Manitoba to Thief River Falls, Minnesota. Throughout the fall of 2013, the Union refused to meet with CPR to discuss the proposal and made it clear that it had no interest in performing the work in question. As a result, CPR did not proceed with establishing the ESR. The freight in question is now being moved by a US carrier, the Soo Line Railroad Company ("Soo Line").

The Union has mischaracterized the present grievance as a dispute about the material change provisions of the Collective Agreement when, in fact, no material change was ever affected.

The Union does not have the exclusive right to perform the work currently being performed by the unionized employees of the Soo Line; in fact in many instances, work has been done on CPR lines by third party rail crews. Having refused CPR's repeated overtures to find a solution that would have enabled the work to be performed by Union members, the Union cannot now complain about CPR losing the work.

CPR's position will be that the grievance is without merit and should be dismissed.

**Summary of Material Facts:**

The material facts can be summarized as follows:

- On June 26, 2013, CPR served a notice of Material Change upon the Union pursuant to Article 72 TCRC (CTY West) and Article 34 TCRC (Locomotive Engineer's East) of the Collective Agreement that expired December 31, 2014, regarding its intention to run trains in Extended Run Service between Winnipeg and Thief River Falls.

- Until recently, CPR trains operated out of CPR's terminal in Winnipeg southward to Noyes, Minnesota, located at the border between Manitoba and Minnesota. At Noyes, CPR handed off its international traffic to Soo Line for transport to destinations in the United States, including Thief River, Minnesota and points beyond. Likewise, Soo Line having operated northward to Noyes from its terminal in Thief River Falls, handed off its traffic to CPR for transport to destinations in Canada, including Winnipeg and points beyond.

- The distance from Winnipeg to Noyes is approximately 64 route miles, and the distance from Noyes to Thief River Falls is approximately 79 route miles. Operation of direct service between these two terminals is a more efficient use of equipment and manpower, permits faster movement of rail traffic, and minimizes delay. This in turn results in better service to CPR's customers and Soo Line's customers as well. The prior model was wholly inefficient and needed change.

- The Union refused to meet with CPR to discuss the proposed ESR over the fall and early winter of 2013. After having actively frustrated the material change process, the Union then chose, on December 6, 2013, to file a policy grievance alleging that CPR had effectively abandoned its Notice of Material Change.

- Since June, 2014, Soo Line has operated regular runs from Thief River Falls, Minnesota to Winnipeg, Manitoba, before returning to Thief River Falls, Minnesota with US bound freight. CPR no longer operates through trains in the Winnipeg and Noyes corridor.

- In June of 2014, the Union brought applications to the Canada Industrial Relations Board (the "CIRB") alleging that CPR had violated various provisions of the *Canada Labour Code*. The Union's application for interim relief was denied in June 2014. The Union's underlying complaint was dismissed by the CIRB in December 2014. Importantly, the Union knows that two U.S. labour organizations representing train and engine employees of the Soo Line were given a chance to make submissions in respect of this matter; the Union presumably has not notified the U.S. labour organizations in this case as their interests could now be adverse to the interests of the Union.

- The Union has taken no steps to move the grievance forward since June, 2014. In particular, the Union made no attempt to avail itself of CROA's expedited hearing procedures which it has done in the past on what it feels to be urgent matters.

- CPR and the Union have just completed an interest arbitration process to settle the terms of a new collective agreement, following a work stoppage earlier this year. This process was completed on October 9, 2015. The Arbitrator's decision has not yet been released.

- The Union, only very recently requested that its original grievance be expedited to arbitration. The Company concurred with this request in good faith.

**Preliminary Objections:**

CPR will be raising the following preliminary issues/objections:

1. The Union is estopped from proceeding with the grievance, having taken no steps to move it forward or schedule it for hearing in more than 14 months, knowing the entire time that the work in question has been consistently and continually performed by the Soo Line since June, 2014, and then proceeding to recently schedule a hearing on an expedited basis.

2. In the alternative, the Union's original grievance related to the implementation of a CPR ESR which was never, in fact, implemented. The Union has since attempted to expand the grievance to deal with events occurring long after the date when the grievance was filed. In the two ex-parte statement of issues filed by the Union, it has attempted to improperly expand the scope of the original grievance by, among other things, seeking to address issues relating to the work currently being performed by the Soo Line and its employees, alleging violations of the *Canada Labour Code* and by seeking monetary damages. No particulars have been provided. This is improper and should not be permitted.

3. The scope of the grievance should be limited to the procedural questions of whether the CPR abandoned the notice of material change and whether it could force the Union to participate in the ESR. The other issues now being raised by the Union are not matters that are properly part of the grievance at issue.

4. That, as far as CPR is aware, neither Soo Line nor the unions that represent the Soo Line employees currently operating trains between Thief River Falls, Minnesota and Winnipeg, Manitoba, have been provided with notice of this proceeding, despite the fact it could materially impact their rights.

5. As a result, CPR will seek the following preliminary orders:

    a. an Order dismissing the grievance on the grounds set out in paragraph 1 above;

    b. in the alternative, an order defining the scope of the matters in dispute and striking out those matters not properly within the ambit of the grievance that was originally filed;

    c. in the further alternative, an adjournment of the hearing on the grounds that:

        i. unions representing the Soo Line employees who are currently doing the work in question have not been provided with proper notice of this proceeding;

        ii. until the terms of the new collective agreement between the parties have been settled; and

        iii. CPR has not been provided with sufficient time and details to assess or respond to the new allegations made by the union in the revised ex-parte statement, filed on October 20, 2015.

6. CPR will be taking the position that the above objections will need to be dealt with by Arbitrator Stout, on a preliminary basis, before the parties will be in a position to deal with the issues determined to be properly within the scope of the original grievance filed.

[4] The parties referred this matter to me and they agreed that I have jurisdiction to hear the grievance and render a decision. The parties also agreed to utilize the Canadian Railway Office of Arbitration & Dispute Resolution (CROA) process for hearing and resolving grievances. The CROA process involves the parties filing an extensive brief, which includes a written statement of their position together with evidence and argument. The arbitrator has jurisdiction to make such investigation, as he or she deems proper, including whether or not oral evidence is necessary for resolving the dispute.

[5] On the first date of hearing, October 28, 2015, I addressed the Company's preliminary objections as set out in their Statement of Dispute and Ex Parte Statement of Issue.

[6] After hearing submissions from counsel, I dismissed the Company's preliminary objections and adjourned the matter to an agreed upon date. My reasons for dismissing the Company's preliminary objections and adjourning the matter are set out below:

- The Union is not estopped from proceeding with the grievance. The Union properly referred the grievance to CROA in June 2014. CROA has a backlog of approximately 18 months. The Union sought the Company's agreement to have the grievance given priority at CROA. The Company refused to give the grievance priority. The Union then filed a complaint with the Canada Industrial Relations Board (CIRB). The CIRB released a decision on December 3, 2014 deferring the complaint to arbitration. On October 9, 2015, the parties mutually agreed to have me hear this matter. The Union has actively pursued having this dispute resolved in a reasonable and timely manner. Any delay in having this matter heard is attributable to both parties and the CROA backlog. In these circumstances, the Union is not estopped from proceeding with having this matter heard.

- The Union's original grievance is drafted broadly enough to encompass the events that occurred after it was filed, including the work later being assigned to employees of the Soo Line and assertions that the Company violated the *Canada Labour Code*. The real complaint arising from the grievance was of a continuing nature involving a change in the operation of the train service between Winnipeg, Manitoba and Thief River Falls,

Minnesota. The Company was well aware of the Union's allegations based on the Union's original Statement of Dispute and Ex Parte Statement of Issue and the CIRB complaint. Furthermore, the Company has not demonstrated any prejudice that they may suffer as a result of the matter proceeding after a short adjournment. It is in the interests of both parties to resolve the real complaint and bring resolution to the matters giving rise to the grievance, see *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157 at paragraphs 68-71.

- It is not necessary to give notice to the Soo Line or the two unions (BLET and SMART) that represents the Soo Line's employees. The Soo Line is a wholly owned subsidiary of the Company and as such no additional notice is necessary. In addition, I am satisfied that the two unions representing the Soo Line employees were given notice by the Union and they do not wish to participate in these proceedings. I note that the Union filed letters from the two unions, which indicates that they are aware of these proceedings and support the Union's position. The two unions specifically advise that they are involved in separate proceedings in the United States of America challenging the Soo Line's assignment of work north of the Emerson/Noyes Yard that was formerly performed by the Union's members. The two unions take the position that the Soo Line is not permitted to force their members to perform the work that was formerly performed by the Union's employees.

- In light of my rulings above, including clarifying the scope of the grievance, I adjourned the hearing to the agreed upon date of November 17, 2015. Counsel agreed to file their briefs electronically prior to the hearing.

[7] The merits of grievance were heard on November 17, 2015.

## II. Background facts

[8] Before addressing the merits of the grievance, I am of the view that it would be helpful to set out some relevant background facts.

[9] The Company is a class 1 railway with 22,500 kms of track in Canada and the United States of America. The Union represents the Company's train and engine service employees in Canada.

[10] The historical bargaining relationship in the railway sector dates back to the advent of Confederation and has been described as being "among the longest standing collective bargaining relationships in Canada.[1]

[11] In terms of the parties in this matter, while the relationship is long standing, the most recent certification order was issued by the CIRB on March 25, 2004. The Union's bargaining unit is described as follows:[2]

> "all running trades employees designated as locomotive engineer, conductor, baggageman, brakeman, car retarder operator, yardman, switchtender, yardmaster, assistant yardmaster, locomotive fireman (helper) working on the Canadian lines of Canadian Pacific Limited and its subsidiaries and leased lines."

[12] The bargaining unit has been divided into four separate collective agreements. The agreements separate the bargaining unit based on two geographic regions, East and West, and two separate trade groups, Locomotive Engineers (LE) and Conductors, Trademen and Yardmen (CTY). The following recognition clauses are found in the respective collective agreements:

- **LE- Collective Agreements**

  The Company recognizes the Teamster's Canada Rail Conference, (Locomotive Engineers) (the "Union") as the sole and exclusive bargaining agent for all its employees classified as Locomotive Engineers

- **CTY-Collective Agreements**

  The Company recognizes the Teamster's Canada Rail Conference, (CTY) (the "Union") as the sole and exclusive bargaining agent for all its employees classified as Conductor, Assistant Conductor, Baggageperson, Car Retarder Operator, Yard Foreman, Yard Helper and Switchtender.

[13] The grievance was filed by the Union under the following two agreements:

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[1] See Canadian National Railway and Teamsters Canada Rail Conference (2010), 196 L.A.C. (4th) 207 (M.G. Picher)

[2] See TCRC bargaining unit certificate issued March 25, 2004 at tab 28 of the Company's Brief.

- The collective agreement between CPR and TCRC on behalf of Locomotive Engineers, Thunder Bay and West ("LE-West")

- The collective agreement between CPR and TCRC on behalf of Conductors, Trademen, Yardmen, Thunder Bay and West ("CTY-West")

[14] The relevant articles in each of the two applicable collective agreements (the "Collective Agreements") are similar. The parties agree that any difference in language is not material to the determination of this matter. For ease of reference I have set out below the relevant provisions (in part) of the Collective Agreements with respect to material change:

> **LE-WEST COLLECTIVE AGREEMENT**
>
> **ARTICLE 34 –MATERIAL CHANGES IN WORKING CONDITIONS**
>
> 34.01 Prior to the introduction of run-throughs or relocations of main home terminals, or of material changes in working conditions which are to be initiated solely by the Company and would have significantly adverse effects on Engineers, the Company will:
>
> (1) Give to the General Chairman as much advance notice as possible of any such proposed change with a full description thereof along with appropriate details as to the consequent changes in working conditions, but in any event not less than:
>
> (a) three months in respect of any material change in working conditions other than those specified in subsection (b) hereof;
>
> (b) six months in respect of introduction of run throughs, through a home terminal or relocation of a main terminal;
>
> (2) Negotiate with the Union measures other than the benefits covered by Clause34.11of this article to minimize significantly adverse effects of the proposed change of Locomotive Engineers, which measures may, for example, be with respect to retaining and/or such measures as may be appropriates in the circumstances.
>
> …
>
> 34.04 The decision of the arbitrator shall be confined to the issue, or issues, placed before such arbitrator and shall also be limited to measures for minimizing the significantly adverse effects of the proposed change upon employees who are affected thereby.

…

34.06 The changes referred to in Clause 34.01 will not be made until the procedures for negotiation, and arbitration if necessary, have been completed.

34.07 The effects of changes proposed by the Company which can be subject to negotiation and arbitration under this Article do not include the consequences of changes brought about by the normal application of the Collective Agreement, changes resulting from decline in business activity, fluctuations in traffic, traditional reassignment of work or other normal changes inherent in the nature of the work in which Engineers are engaged.

…

**CTY-WEST COLLECTIVE AGREEMENT**

**ARTICLE 72 – MATERIAL CHANGE IN WORKING CONDITIONS**

**72.01 Notice of Material Change**

The Company will not initiate any material change in working conditions that will have materially adverse effects on employees without giving as much advance notice as possible to the general Chairperson concerned, along with a full description thereof and with appropriate details as to the contemplated e=effects upon employees concerned. No material change will be made until agreement is reached or a decision has been rendered in accordance with the provisions of Section 1 of this Article.

**72.02 Measures to Minimize Adverse Effects**

The Company will negotiate with the Union measures other than the benefits covered by Sections 2 and 3 of this Article to minimize such adverse effects of the material change on employees who are affected thereby. Such measures shall not include changes in rates of pay. Relaxation in schedule rules considered necessary for the implementation of a material change is also subject to negotiation.

…

[15] Over a period spanning many decades prior to June 2013, the Company's Canadian crews (typically one Locomotive Engineer and one Conductor) represented by the Union would operate Company trains on the Emerson Subdivision south of Winnipeg, Manitoba to Noyes, Minnesota (just over the border) in the United States of America. The train would be exchanged

in Noyes with American crews based out of Thief River Falls, Minnesota. The American crew would then take the exchanged train to Thief River Falls. The Canadian crew would tie up at Emerson, Manitoba (on the Canadian side of the border) in a bunk house and wait for the next train north or at times be taxied back to Winnipeg.

[16] Soo Line Railroad Company ("Soo Line") employs the American train crews based in Thief River Falls. The Soo Line is a wholly owned subsidiary of CPR, which operates a railroad system across a number of Midwestern states.[3]

[17] The Brotherhood of Locomotive Engineers and Trainmen ("BLET) represent the Soo Line Engineers. The United Transportation Union division of the Sheet Metal Workers International Association ("SMART") represent the Soo Line Conductors. Both the BLET and SMART are parties to separate collective agreements with the Company under legislation enacted by the government of the United States of America.[4]

[18] This matter arises from a notice of material change served by the Company on June 26, 2013.[5] The notice of material change advised that it was the Company's intention to implement a change in train service between Winnipeg and Thief River Falls. In particular, the Company advised of their intention to implement an Extended Service Run ("ESR"), which would result in Winnipeg-based Canadian crews operating between Winnipeg and Noyes continuing south of the border with their run terminating at Thief River Falls. The Company also advised that it was their intention for such Canadian crews to be on duty up to a maximum of 12 hours during a single tour of duty without the

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[3] See *Teamsters Canada Rail Conference and Canadian Pacific Railway Company* 2014 CIRB LD 3326 at page 3, tab 35 of the Union's Brief and *Soo Line Railroad Company and Brotherhood of Locomotive Engineers and Trainmen and United Transportation Union*, Case No. 14-cv-04489 United States District Court for the Northern District of Illinois Eastern Division at tab 41 of the Union's Brief.

[4] See cover pages of the collective agreements between CPR and BLET and SMART.

[5] See Notice of Material Change addressed to General Chairmen of LE West and CTY-West dated June 26, 2013 at tab 1 of the Company's Brief

ability to provide notice of rest. The Company also indicated that operations over the Winnipeg/Thief River Falls corridor might be shared with employees based in Thief River Falls.

[19] The employees referenced in the notice of material change based in Thief River Falls are American crews employed by the Soo Line.

[20] The Company served a similar notice of material change on the General Chairmen of the BLET and SMART on June 26, 2013.[6]

[21] The parties engaged in some discussions about the proposed ESR between Winnipeg and Thief River Falls. However, there is no dispute that the parties did not follow the material change process provided for under the Collective Agreements. Both parties blamed each other for the break down in the process. In my view, the evidence demonstrates that both parties are to blame for the failure to follow the material change provisions under the Collective Agreements. In any event, the Union filed the grievance on December 6, 2013 taking the position, *inter alia*, that the Company improperly utilized the material change provisions in the Collective Agreements.

[22] On June 13, 2014, the Company contacted the Union and advised that they planned to operate trains with American train crews (Soo Line employees) on Company assets between Thief River Falls and Winnipeg. The Company also advised that they were willing to operate trains with Canadian train crews in the same manner, subject to the Union agreeing that their members may work up to a 12 hour duty day. If the Union would not commit to the up to 12-hour duty day for their members, then the Company indicated that they would only use

[6] See notice of material change from Randall B. Ohm dated June 26, 2013 at tab 21 of the Union's Brief.

American train crews on the run. The Company gave the Union until June 16, 2014 to respond to their proposal.[7]

[23] On June 21, 2014, the Soo Line implemented a new freight pool of American crews from Thief River Falls to Winnipeg over the objection of BLET and SMART. Both the BLET and SMART have taken the position that the Soo Line cannot operate trains north of Noyes with BLET and SMART represented employees. The BLET and SMART are currently engaged in litigation in the United States of America over this issue. The disputes between Soo Line and BLET and SMART shall be decided by an arbitration board appointed pursuant to the collective agreements between those parties and governed by the applicable legislation in the United States of America.[8]

[24] There is a dispute between the parties with respect to the totality of the work being performed by the American crews working between Thief River Falls and Winnipeg. In my view, it is not necessary for me to decide the exact nature of all the work being performed by American crews. What is clear and not in dispute is the fact that American crews are now exclusively operating the trains running between Thief River Falls and Winnipeg. The amount of work involved is not *de minimus*, but rather a substantial amount of work that includes work north of Noyes that was formerly performed exclusively by the Company's Canadian crews.

## III. The parties' positions briefly stated

[25] In the matter before me, it is the Union's position that the Company cannot utilize the material change provisions of the Collective Agreements to change the hours on duty and geographical and jurisdictional boundaries of the Collective Agreements. The Union argues that the Company has violated the Collective Agreements and the *Canada Labour Code,* by assigning bargaining

[7] See email from Myron Becker June 13, 2014 at tab 31 of the Union's Brief.
[8] See letters from BLET and SMART found at tab 42 of the Union's Brief.

unit work to employees outside the Collective Agreements. In the alternative, the Union asserts that the Company is estopped from utilizing the material change provisions in these circumstances. If the material change provisions of the Collective Agreements are found to have application, then the Union takes the position that the Company's unilateral action violates the material change provisions, which mandate that any material change can only be implemented after an agreement is reached or a decision is rendered by an arbitrator.

[26] The Company conceded at the hearing that they had in fact abandoned the June 26, 2013 notice of material change. The Company asserts that they were not required to amend or issue a new notice of material change when they decided to "cease operations" between Winnipeg and Noyes and allow Soo Line to operate on the corridor in a more efficient manner. The Company argues that the Union does not have the exclusive right to perform the work in question. The Company states that there is nothing in the Collective Agreements that prevents the Soo Line from operating in Canada with its' own employees. The Company points out that there are a number of other railways who operate on their lines in Canada. Furthermore, the Company submits that the material change provisions would not apply, in any event, because the Union's members did not suffer any significant or material adverse effects.

## IV. Decision

[27] I begin by noting that there is absolutely nothing wrong with the Company seeking more efficient means of operating. That being said, when the Company seeks greater efficiency, they can't ignore their obligations and agreements with the Union. If the provisions of the Collective Agreement prohibit or impede the implementation of an efficiency, then the Company must negotiate relief with the Union.

[28] Thus the real issue between the parties in this proceeding is whether the Company could implement the efficiency they sought in the notice of material

change on June 26, 2013 (the proposed ESR) or as they later implemented by permitting Soo Line American crews to operate on the run between Winnipeg and Thief River Falls.

[29] The resolution of this matter involves consideration of the material change provisions found in the Collective Agreements. The material change provisions are unique to the railroad industry. In this regard, it is helpful to consider previous awards involving material change provisions in the railroad industry. In **CROA 3539**, Arbitrator Michel Picher stated the following with respect to the meaning of "material change":

> This office has had considerable opportunity to consider the meaning of "material change". Essential to the concept is the notion that a change is essentially initiated as a result of a decision of the employer, rather being dictated by circumstances beyond its control, such as closing of a client's business or plant, fluctuations in traffic or other such factors which can normally impact railway operations. The essential concept of material change protection is that if the employer chooses, of its own volition, to materially change operations, employees should be given certain protective benefits which might not otherwise be available to them, where it can be shown that those employees would be adversely affected.

[30] Thus the material change provisions do not apply to every change initiated by the Company. The material change provisions do not apply to changes that are beyond the Company's control. Rather, the material change provisions only apply to Company initiated changes that would have significant adverse effects on employees in the bargaining unit. In this regard, the material change provisions mandate negotiation of measures to minimize any adverse effects. If the parties can't agree on the necessary measures to minimize the adverse effects, then an arbitrator is empowered to make a final and binding decision.

[31] The material change provisions are not a process for providing the Company with an opportunity to implement a material change that is inconsistent with the specific terms of the Collective Agreements.[9]

[32] The Company, in this situation, sought to implement an ESR, which included Canadian crews being on duty up to a maximum of 12 hours without the ability to provide notice of rest. The Union objected pointing out that working up to 12 hours on duty without the ability to provide notice of rest is precluded by the terms of the Collective Agreements.

[33] This very issue, between these same parties under these Collective Agreements was before Arbitrator Michel Picher, which he addressed in a May 9, 2014 award. Arbitrator Picher, found that the right of employees to book rest under the Collective Agreements could not be nullified or altered within the context of a material change proposal. In particular, Arbitrator Picher stated as follows:

> …The proposal of the Company, which would impose a mandatory 12-hour tour of duty, is plainly inconsistent with the terms of the Collective Agreement. It is clearly not something which the Company can impose unilaterally, which may explain its attempt to have the Arbitrator effectively endorse that arrangement.
>
> I can see no responsible basis to do so. The ability of employees to book rest, as negotiated within the terms of their respective Collective Agreements, is a critical element going to health and safety as well as the quality of working life. While it might be open to the Company to negotiate 12- hour tours of duty in specific circumstances with the Union, presumably in exchange for some appropriate consideration benefitting the employees, it is far from clear to me that it is appropriate, or arguably within my jurisdiction, to effectively decree that employees are to work hours in excess of those contemplated within the Collective Agreements as part of an Award within the Material Change context.
>
> The Material change provisions of the parties' Collective Agreements do not contemplate the arbitration process as intended to give relief to the Company in respect of mandatory provisions of the Collective Agreements. On the contrary,

[9] See Canadian Pacific Railway Ltd. and Teamsters Canada Rail Conference (Sparwood Material Change Grievance) unreported award dated October 13, 2015 (Tom Hodges) at page 15.

the object of the Material Change provisions, insofar as both negotiation and arbitration is concerned is to minimize adverse effects on employees…

…

As noted above, the Collective Agreements are relatively categorical with respect to hours on duty. Article 27.06 of the Locomotive Engineers Collective Agreement makes the following provision in that regard:

> 27.06 When an employee on a crew gives notice to book rest the Company will make arrangements to ensure the employee is off duty within 10 hours. The Company may, at its option, relieve a single employee or it may require that all members of the crew be relieved. This may resulting the Company requiring that rest be taken prior to the expiration of 10 hours and/or that the crew be relieved prior to 10 hours on duty.

Article 29.07 of the Collective Agreement governing Conductors is identical with respect to the right of an employee to be off duty within 10 hours.

On what basis, then, can the Material Change provisions of the Collective Agreements be invoked to effectively override the mandatory hours of duty provisions found in these articles, to mandate a mandatory 12-hour tour of duty?

As is evident from the language in Article 34-01 (2) of the Locomotive Engineers Collective Agreement, and similar provisions in the Collective Agreement governing Conductors, the object of material Change negotiations and arbitration in the Material Change context is to "minimize significantly adverse effects of the proposed change" on the employees affected. In my view it is a far cry from that contractual intent for the Arbitrator to effectively sanction an increase in mandatory hours of duty beyond those permitted by the Collective Agreements, as the Company would have it in the instant case. With respect, I am compelled to conclude that it is simply beyond my jurisdiction to endorse a Material Change which effectively imposes mandatory hours of duty in excess of those permitted by the Collective Agreements. For these reasons, the Company's request in that regard must be declined. Of course, it remains open to the parties themselves to negotiate such a mandatory hours of duty provisions, presumably for appropriate compensation, should they be willing to do so. However, the contractual right of employees to book rest in accordance with the Collective Agreements cannot be ignored or effectively nullified within the context of a Material Change proposal, absent agreement.

[34] I acknowledge that the above referenced award of Arbitrator Picher has no binding effect on me. This is particularly so when the award was made without prejudice to the Union's judicial review application of an earlier preliminary award involving the same grievance and respecting the applicability of the material

change provisions to the elimination of the long term Sparwood Run Through Agreement (and ancillaries).[10]The Alberta Court of Queen's Bench quashed the preliminary award rendering the later above-noted award a nullity. Nevertheless, Arbitrator Picher was the primary arbitrator at CROA since 1986 and the designated Chief Arbitrator of CROA from 2004 until 2014. The comments of Arbitrator Picher cannot be taken lightly. Most importantly, the reasons of Arbitrator Picher resonate with me.

[35] I am of the view that the material change provisions are clearly aimed at providing a mechanism for relief of the adverse effects of material changes undertaken by the Company. As a prerequisite of the material change provisions applying, the Company's material change must not only be initiated by them alone, but also must not violate the specific terms of the Collective Agreements. In other words, the material change provisions are not a process for instituting mid-term alterations to the Collective Agreements. Furthermore, an arbitrator appointed under the material change provisions does not have the jurisdiction to effectively endorse and impose a material change that is inconsistent with the terms of the Collective Agreements.[11]

[36] If the parties wanted the material change provisions to apply to situations where the Company needed relief from the specific terms of the Collective Agreement, then one would expect that the parties would have stated so in clear terms. Furthermore, if the parties intended to provide an arbitrator with the jurisdiction to alter the specific terms of the Collective Agreements, then one would expect that they would have also stated so explicitly.

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[10] See the detailed history of the grievance and proceedings in Canadian Pacific Railway Ltd. and Teamsters Canada Rail Conference (Sparwood Material Change Grievance) unreported award dated October 13, 2015 (Tom Hodges).

[11] The Memorandum of Agreement Establishing CROA&DR specifically states that "The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement." This sort of language is normative in collective bargaining regimes.

[37] Accordingly, I am of the view that the Company's proposal to have Canadian crews work an ESR on duty up to a maximum of 12 hours during a single tour of duty without the ability to provide notice of rest is not something that can be implemented pursuant to the material change provisions of the Collective Agreements.

[38] The parties are also at odds with respect to the right of the Company to allow Soo Line American crews to perform the work that was formerly exclusively performed by the Company's Canadian crews represented by the Union.

[39] Arbitrator Michel Picher dealt with a similar, although not identical, situation involving Canadian National Railway ("CN") and the Union and a material change notice. In *Canadian National Railway and Teamsters Canada Rail Conference* (2010), 196 L.A.C. (4th) 207, Arbitrator Picher addressed four grievances concerning CN's attempt to use the material change provisions to re-assign employees to routes that were outside the geographic and seniority districts of the applicable collective agreements. The Union took the position that the material change provisions do not contemplate the unilateral ability of CN to make assignments beyond the geographic limits of each particular collective agreement. Arbitrator Picher agreed with the Union. The following comments at paragraphs 35, 38 and 39 of Arbitrator Picher's award are particularly relevant to this matter:

> 35 To be clear, in the Arbitrator's view the collective agreements do, by their express and implied terms, affirm that work within the geographic areas described within them is to be performed exclusively by employees who hold seniority under those collective agreements. That, in my view, is a conclusion which must be drawn by necessary implication from the very scheme and framework of the four collective agreements. If it were otherwise, and the submission of the Company is correct that there can be no claim of exclusive work ownership in these geographic areas, what would prevent the Company from hiring an entirely separate cadre of employees to perform work in the same territories, in disregard of the terms of the collective agreements? What would prevent the Company from assigning employees from Eastern Lines to perform various kinds of work on Western Lines, as needs dictate, over territory in which they hold

no seniority? To simply ask these very fundamental questions is to answer them. To allow the position of the Company and dismiss these four grievances would be to disregard the most fundamental jurisdictional underpinnings of the collective agreements and, in my view, the well entrenched understanding of the parties over many years.

…

38 If I am incorrect in my interpretation of these collective agreements and the limitations on the Company's prerogative with respect to implementing a material change with trans-territorial consequences, I would also be inclined to accept the union's submission with respect to the application of the doctrine of estoppel. There is no suggestion on the record before me that the Company has ever asserted that it can assign work across the territorial divide of these collective agreements. While I recognize that it was on a without prejudice basis, it obviously considered it appropriate to specifically negotiate a trans-territorial work assignment in circumstances of the Kinghorn Subdivision Agreement in 2003. More significantly, notwithstanding that it has implemented many changes system wide for decades, the Company has never previously asserted that it can assign employees from Eastern Lines to work on Western Lines or vice versa. At a minimum, its actions and practice over many years must, I think, be taken as a representation by conduct that even if the material change provisions of the collective agreements can be properly interpreted as allowing trans-territorial assignment, it has effectively represented to the Union that it would not make any such assignment, whether in the implementation of extended runs or otherwise. That is particularly affirmed by the manner in which it implemented the exceptional adjustment with respect to the Kinghorn Subdivision Agreement.

39 For all the foregoing reasons the Arbitrator finds and declares that the material change provisions of the four collective agreements do not extend to permitting the Company to assign employees who hold seniority and work under one territorial collective agreement to perform work over lines which fall under another territorial collective agreement. Any such arrangement must be the subject of negotiation and agreement with the Union. Alternatively, should the Arbitrator's analysis be incorrect, the Company is estopped from implementing any such change until such time as the parties return to the bargaining table for the renewal of the collective agreements.

[40] The decision of Arbitrator Picher is informative and I agree with the Union that the reasoning is equally applicable to the grievance before me. In particular,

the Union has been certified to represent "all running trades employees…working on the Canadian lines of Canadian Pacific Limited and its subsidiaries and leased lines." The Collective Agreements also confirm the Union's exclusive representational rights. The employees covered by the Collective Agreements also have seniority rights based on geographical districts.[12]

[41] The Company cannot ignore the rights and the commitments found in the Collective Agreements and just assign work in Canada, that has been previously exclusively performed by Canadian crews represented by the Union, to American crews working for their subsidiary Soo Line.

[42] In this situation, the Company has not contracted out the work in question. Contracting out involves an employer entering into an arrangement with an independent arms length third-party to perform work on its behalf.[13] The Soo Line is not an independent arms length third-party. The Soo Line is a wholly owned subsidiary of the Company.

[43] The Company has also not "gotten out of the business" of running trains between Winnipeg and Thief River Falls. Rather, the Company is utilizing a parallel workforce of American crews (with separate seniority rights) employed by their subsidiary in the United States of America to operate Company assets (trains) on its Canadian lines.

[44] This situation is somewhat similar to a "contracting in" situation where an employer brings in non-bargaining unit personnel to work along side bargaining unit employees. The use of non-bargaining unit American crews is inherently destructive of the bargaining relationship and is contrary to the obligations undertaken by the Company in the Collective Agreements. The Company has agreed that Locomotive Engineers (LE) and Conductors (CTY) operating

[12] See article 21 of the LE –West Collective Agreement and articles 41 and 43 of the CTY-West Collective Agreement.
[13] See *Re United Steelworkers of America and Russelsteel Ltd*. (1966), 17 L.A.C. 253 (Arthurs)

Company trains on their Canadian lines will be covered by the Collective Agreements and enjoy the benefits negotiated by the Union, including seniority rights.

[45] In my opinion, the Company is violating the Union's exclusive bargaining rights and has improperly assigned work to employees who are not members of the bargaining unit represented by the Union.[14]

[46] I acknowledge the four examples, referenced in the Company's Brief, of other railroads who operate utilizing the Company's Canadian lines. However, those situations are much different from the situation before me. Three of the situations involve independent third-party railroads operating on the Company's Canadian lines with their own assets (trains).

[47] The only example somewhat similar to the situation before me is the Delaware and Hudson Railway, which uses the Company's rail lines between Saratoga Springs, New York and Montreal, Quebec. The Delaware and Hudson Railway is a subsidiary of the Company that was purchased in 1991. The Delaware and Hudson Railway utilized the Company's lines prior to being purchased and the Union's members did not perform the work in question. In fact, the Union indicated that they actually were provided more work as a result of the Delaware and Hudson Railway purchase. The situation was stable until most recently when the Union filed a grievance alleging that the Company has begun assigning bargaining unit work to Delaware and Hudson's American crews.

[48] The situation before me is much different as it involves the Company reassigning work that has been exclusively performed by the Union's members for decades. I agree with the Union that in the matter before me, the Company is

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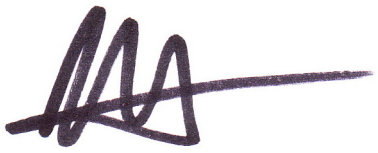
[14] See *Weyerhaeuser Co and U.S.W.A., Local 1-80,* (2006) 146 L.A.C. (4th) 237(Kinzie) and *Teamster's Canada Rail Conference and Canadian Pacific Railway Company* CIRB decision No. 528902

in effect using non-bargaining unit employees operating Company trains on the Company's Canadian lines. Such conduct violates the Union's exclusive bargaining rights as well as the terms of the Collective Agreement.

[49] Therefore, after carefully considering the evidence and submissions of the parties, I find that the material change provisions of the Collective Agreements do not extend to allowing the Company to require Canadian crews to work an ESR on duty up to a maximum of 12 hours during a single tour of duty without the ability to provide notice of rest. Furthermore, the material change provisions also do not extend to permitting the Company the right to assign bargaining unit work to American crews employed by their subsidiary Soo Line. Any arrangement involving altering the specific terms of the Collective Agreements regarding rest and bargaining unit work must be the subject of negotiation and agreement with the Union.

[50] Having regard to my findings in this matter, the Company is ordered to cease violating the Collective Agreements by assigning bargaining unit work to the American crews employed by their subsidiary, Soo Line. I remain seized to address any issues arising from my award.

Dated at Toronto, Ontario this 9th day of December 2015.



John Stout - Arbitrator