IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY
(the "Company")

-and-

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (IBEW) SYSTEM COUNCIL NO. 11
(the "Union")

RE: S&C MAINTAINERS MARK HEBEL AND DENNIS KUZYK; CONCERNING A CLAIM FOR SKILLS DIFFERENTIAL PAY AS FOUND IN THE DULUTH, WINNIPEG AND PACIFIC RAILWAY AND BROTHERHOOD OF RAILWAY SIGNALMEN CONTRACT IN THE UNITED STATES

ARBITRATOR: MICHEL G. PICHER

APPEARANCES FOR THE COMPANY:

Susan Blackmore	**- Manager, Labour Relations**
Sylvie Grou	**- Senior Manager, Labour Relations**

APPEARANCES FOR THE UNION:

Michael A. Church	**- Counsel**
Luc A. Couture	**- International Representative**
Brian Strong	**- Senior General Chairperson**
Lee Hooper	**- Assistant General Chairperson**
Mike Clancy	**- Western Regional Chair**
Dennis Kuzyk	**- Grievor**

A hearing in this matter was held in Montreal, Quebec on November 5, 2012.

AWARD

The Union claims that grievors Mark Hebel and Dennis Kuzyk have been improperly denied Skills Differential Pay in violation of their specific contracts of service to perform work in the United States on the Sprague Subdivision, pursuant to a written agreement dated December 16, 1997.

The nature of the dispute is reflected in the Dispute and Joint Statement of Issue filed at the hearing:

> **Dispute:**
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> S&C Maintainers Mark Hebel and Dennis Kuzyk: concerning claim for Skills Differential Pay as found in the DWP and Brotherhood of Signalmen contract in the U.S.
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> **Joint Statement of Issue:**
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> Messrs. Hebel and Kuzyk are employees who were hired under the 11.1 Collective Agreement and extraordinarily, are employed as Signal Maintainers who perform work in the United States on the Sprague Subdividion. Their unique working conditions are governed by identical Letters of Agreement signed between the Company and the Union on December 16, 1997, which state, in part, that the wages and general holidays in effect in the U.S. will apply to both employees.
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> The Union contends that Messrs. Hebel and Kuzyk have not received skills differential pay as found in the DWP and Brotherhood of Railway Signalmen (BRS) Collective Agreement. The Union contends that this breaches the Collective Agreement and the December 16, 1997 Agreement.

> The Union contends that Mr. Hebel and Mr. Kuzyk ought to have been paid Skills pay since the signing of the December 16, 1997 Agreement and are seeking remuneration of all outstanding Skills pay owing to the Grievors from December 16, 1997 to date.
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> The Company raises a preliminary objection to the arbitrability of this dispute in that this grievance is untimely by years. Furthermore, and in the alternative, the Company disagrees with the Union's assertions and denies the Union's contentions that Skills Differential Pay has any merit or foundation under the terms of the Collective Agreement or the Letter of Agreement dated December 16, 1997.

The facts in relation to the grievance are not in dispute. While they are employees of the Company, both grievors work in the United States and are compensated in U.S. currency. Mr. Kuzyk, who resides in Canada, has performed work principally in the United States, and to some extent in Canada, since 1992. Mr. Hebel, who resides in the United States, has been under a similar arrangement since 1994. It appears that in compliance with the requirement of the Company, both employees have become U.S. citizens.

For many years the Company has operated through a portion of Minnesota on what is described as the Roosevelt East and West Subdivision. It appears that for a time that operation was under the name of the Manitoba and Minnesota Railroad (M&M), a wholly owned subsidiary of CN Rail operating from Rainy River, Ontario to Warroad, Minnesota. In 1996 the assets of M&M were transferred to another subsidiary of the Company, the Duluth, Winnipeg and Pacific Railway (DWP). More recently, in January of 2002, the DWP was merged into the Wisconsin Central Ltd., a road which is also a wholly owned subsidiary of CN Rail.

The record discloses that as early as 1982 Mr. Hebel worked for the M&M railroad out of Warroad, Minnesota. Following a hiatus after he was displaced in 1985, Mr. Hebel subsequently joined the M&M railroad in 1994, taking up residence in Warroad, Minnesota. Mr. Kuzyk transferred to a position as a signal employee with the M&M railroad in December of 1991. A Letter of Agreement in relation to him made in 1992 specified that he would be paid "equivalent to the rate of pay of S&C Maintainers working in Canada". It appears however, that in fact he was paid the wages in effect at the DWP in the United States. Mr. Kuzyk has continued to maintain his residence at Rainy River, Ontario, close to the United States border.

It appears that by reason of what the employees viewed as perceived injustices relating to exchange rates, a grievance was filed on behalf of Mr. Hebel on March 28, 1996. That grievance and ensuing discussions led to the making of Letters of Agreement in respect of both Mr. Hebel and Mr. Kuzyk, dated December 16. 1997.

The terms of the Letter of Agreement of December 16, 1997 which govern Mr. Kuzyk, and are identical for Mr. Hebel, are, in part, as follows:

> Mr. Kuzyk commenced working on this position under an agreement dated December 16, 1991 stipulating that he was to be paid the equivalent to the rate of pay of S&C Maintainers working in Canada for CN Rail, and would subject to the normal rate increases in effect for employees under Agreement 11.1. It is apparent that these arrangements were never implemented for Mr. Kuzyk and consequently he has been paid the S&C Maintainer's rate in

> effect in the U.S. including applicable wage and COLA adjustments.
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> In order to clarify the manner in which Mr. Kuzyk is to be paid it is agreed that the following will apply for Mr. Kuzyk while employed as S&C Maintainer in the U.S. on the Sprague Subdivision:
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> 1. Mr. Kuzyk will be retained on all Prairie Regional seniority lists under Collective Agreement 11.1 on which he appeared on December 12, 1997;
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> 2. Wages and General Holidays in effect in the U.S. will apply;
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> 3. In the event Mr. Kuzyk desires to exercise his seniority back into Canada, it would be necessary for him to give the Company up to one year's notice. This notice would not be mandatory if qualified replacement could be found sooner or if the position is abolished;
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> 4. Mr. Kuzyk will not be displaced by a senior employee unless that employee is qualified under Agreement 11.1 and is acceptable under U.S. immigration laws;
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> 5. All rights under the Employment Security and Income Maintenance Agreement in effect will be afforded Mr. Kuzyk;
>
> 6. The general rules in Agreement 11.1, other than those exceptions listed above will govern Mr. Kuzyk.

The undisputed evidence before me is that both Mr. Kuzyk and Mr. Hebel worked for many years under the terms of the 1997 Letters of Agreement without being aware that their counterpart employees on the DWP were in receipt of specific payments for Skills Differential Pay. In fact, it appears that only in 2008 did both employees learn that they had not been receiving the Skills Differential Pay which is part of the remuneration package of employees of the DWP, and that they had also been denied COLA

adjustments which their American counterparts at the DWP had also been receiving. The Union therefore grieved on April 4, 2010, claiming both the Skills Differential Pay and COLA adjustments for both employees. It appears that the COLA issue was resolved between the parties. The claim of both grievors to Skills Differential Pay, said to be 65 cents per hour prior to January 1, 2000, and 85 cents per hour thereafter, retroactively to December of 1997, is the subject of this grievance.

The Company submits that the grievance is inarbitrable, based on the question of timeliness. Its representative submits that for many years the grievors made no claim with respect to Skill Differential Pay, only bringing the issue to the attention of the Company in late 2010 with the filing of the grievance. Noting that article 13.8 of the collective agreement contemplates that grievance are to be filed within 28 calendar days from the cause of the grievance, she submits that in the instant case there has been a degree of laxity on the part of the grievors which should bring into play the doctrine of laches and prevent the instant claim from being heard, both for a failure of the mandatory time limits and an unreasonably long delay, in any event.

With respect, the Arbitrator cannot sustain the Company`s position on arbitrability. In my view the language of article 13.8 of the collective agreement, which stipulates a 28 calendar day delay from the cause of the grievance, must be interpreted reasonably, and must be taken to mean 28 days from such time as an employee knew or reasonably should have known that he or she had a cause of grievance.

In the instant case the record discloses that the grievors were not able to obtain a copy of the DWP collective agreement with the Brotherhood of Railroad Signalmen (BRS) until mid-2008. Shortly thereafter, commencing September 5, 2008, they initiated an extensive exercise of communication with S&C Manager Al Mott and Manager, Labour Relations Susan Blackmore, to clarify their entitlement to the Skills Differential Pay. The record before me confirms that communications between the parties on the issue continued into late 2009. It appears that it is only after the exhaustion of those exchanges that it became clear to the Union that the Company did not agree that the grievors are entitled to the Skills Differential Pay received by other employees of the DWP. It is on that basis that the grievance was ultimately filed, at Step 3 of the Grievance Procedure on April 4, 2010.

I agree with counsel for the Union that what is disclosed in the instant case is not a single event which is being grieved. Rather, to the extent that the shortfall in the grievors` wages has been an ongoing and recurring event, what the Union alleges in the instant case is a continuing breach. On that basis I am satisfied that it was entitled to file its grievance at any time, on the presumable basis that a grievance must be viewed as having been filed within 28 days of the most recent failure to pay the wages claimed. On that basis I would find the grievance to be timely and arbitrable. Alternatively, if it were necessary to do so, I would exercise my discretion to extend time limits to allow the grievance to be heard. That is particularly so as I am satisfied that the grievors exercised diligence at all times, attempting first to resolve the matter in communications with Company officers after they discovered the existence of the Skills Differential Pay

at some point in 2008. They moved without undue delay to grieve once it became clear that the Company does not agree with their claim.

For the purposes of clarity, however, it is important to recall that the instant grievance is subject to the conditions of article 13.11 of the collective agreement. That article reads as follows:

> **13.11** The settlement of a dispute shall not under any circumstances involve retroactive pay beyond a period of forty-five (45) calendar days prior to the date that such grievance was submitted as Step 1 of the Grievance Procedure.

Based on the foregoing, it would appear that the maximum entitlement to compensation which the grievors can achieve in the instant case is retroactive pay back to February 19, 2010. Although counsel for the Union suggests that the circumstances should justify full recovery back to 1997, I can see no reasonable basis to sustain that position. Firstly, it appears to me that it was incumbent upon the grievors to maintain vigilance and clear knowledge as to their own wage entitlements at all times. Additionally, the language of article 13.11 of the collective agreement appears to me to be categorical. For the reasons they best appreciate, the parties have agreed to limit any claim for retroactive pay to the period of 45 calendar days prior to the date of the grievance being submitted. I am simply not at liberty to disregard that part of the parties` agreement.

I turn to consider the merits of the dispute. The grievance rests upon the second numbered paragraph of the respective letters of December 16, 1997. The language in question is as follows:

> 2. Wages and General Holidays in effect in the U.S. will apply.

The submission of counsel for the Union is relatively straightforward. He argues that wages means compensation received for work, including all remuneration payable under the collective agreement. That, he submits, includes Skills Differential Pay which was introduced at page A-7 of the DWP/BRS collective agreement on August 8, 1996 and has continued at page A-8 of the same collective agreement since January 1, 2000. He argues that the intention of the parties in executing the Letters of Understanding of December 16, 1997 was clear and simple: the employees who are subject to those letters should receive the same wages as their U.S. counterparts in the service of the DWP. The Skills Differential Pay is an intrinsic part of the DWP employees' wages and is therefore a form of compensation to which the grievors have at all times been entitled.

The Company's representative submits that the word "wages" as it appears in the Letters of Agreement of December 16, 1997 should be construed to mean the basic rates of pay found in the collective agreement governing the employees in the United States. On that basis she argues that the Letters of Agreement do not extend to

guaranteeing to the grievors such additional forms of pay over and above the basic pay rates, including the Skills Differential Pay.

I have considerable difficulty with the Company's position. It is axiomatic that words in a collective agreement or related document should be given their normal grammatical meaning, absent some contextual indication to the contrary. For reasons they best appreciate, in making the Letters of Agreement of December 16, 1997, the parties agreed that the employees covered by those letters should receive "wages … in effect in the U.S. …" In my view the word "wages" without any further qualification, must be taken to mean any payments which U.S. employees would receive by virtue of their performing assigned work under their collective agreement. The fact that the take home pay of U.S. employees is enhanced, in part, by the addition of Skills Differential Pay, a term expressly negotiated into their collective agreement, can only be viewed as augmenting their wages. To put it differently, if the parties had intended to limit the pay entitlement of the grievors to receipt of the base rate of pay contained in the DWP/BRS collective agreement, they could easily have said so expressly. By opting for the broader term "wages" I am satisfied that they intended that the grievors should be seen as entitled to the same wages or full compensation for work paid to their U.S. counterparts. Indeed, why should it be otherwise? To accept the Company's interpretation would be to conclude that the parties in fact agreed to have the grievors work side-by-side with S&C Maintainers on the U.S. territory for less pay than their counterparts would receive for the same work. In my view so counterintuitive a result

would require clear and unequivocal language, language not to be found in the instant agreement.

I am therefore satisfied that the grievance must succeed upon its merits. I cannot, however, sustain the suggestion of the Union that the grievors should now be entitled to retroactive pay back to 1997. In that regard, I consider myself bound by the terms of article 13.11 of the collective agreement. The limit of recovery which the parties have agreed should operate in the instant case is for the grievors to be compensated for Skills Differential Pay back to February 19, 2010 and, obviously, to continue to receive such Skills Differential Pay for the balance of the term of the collective agreement.

On the foregoing basis the grievance is allowed. I retain jurisdiction in the event of any dispute between the parties concerning the interpretation or implementation of this Award.

Dated at Ottawa, Ontario this 9th day of November, 2012.

"Michel G. Picher"

Michel G. Picher
Arbitrator