# IN THE MATTER OF AN ARBITRATION

**BETWEEN:**

**ONTARIO NORTHLAND TRANSPORTATION COMMISSION**
**(the "Commission")**

**-and-**

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA, LOCAL 103**
**(the "Union")**

**-and-**

**UNITED STEELWORKERS, T.C. LOCAL 1976**
**(the "Intervener")**

**RE: DISCONTINUANCE OF THE NORTHLANDER**
**REQUEST FOR INTERIM ORDER**

**ARBITRATOR:** MICHEL G. PICHER

**APPEARANCES FOR THE COMMISSION:**

| | |
|---|---|
| Roy Filion | - Counsel |
| Brett Christen | - Counsel |
| Geoff R. Ryans | - Counsel |
| Paul Goulet | - President and CEO, Ontario Northland |
| Glenn Zabarelo | - Director, Human Resources |

**APPEARANCES FOR THE UNIONS:**

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|---|---|
| Brian Stevens | - National Representative |
| Brian Kelly | - President, CAW-Canada Local 103 |
| Nathalie Lapointe | - Staff Representative, USW Montreal |
| Steven Hadden | - Union Representative, USW TC Local 1976 |
| Shawn O'Donnell | - Chief Steward, USW TC Local 1976 |
| Ron Marleau | - Vice-President District 6, USW TC Local 1976 |

This matter was heard by way of teleconference call on September 20, 2012 and a hearing held in Toronto, Ontario on September 24, 2012.

# INTERIM AWARD

This Award concerns the reasons for the Arbitrator's decision, communicated to the parties by email on September 26, 2012, denying the Union's request for interim relief relating to the abolishment of passenger train service between Toronto and Cochrane, Ontario, effective September 28,. 2012.

The Union represents four (4) bargaining units of employees for whom it administers four (4) separate collective agreements with the Commission. The agreements, in effect between January 1, 2010 and December 31, 2013, cover clerical employees, employees in the transportation, express freight and stores departments, employees holding onboard service positions on the Northlander train between Cochrane and Toronto, and the Polar Bear Express which operates between Cochrane and Moosonee, as well as some 250 shopcraft employees who are located across the system dedicated to the inspection, maintenance and repair of the Commission's equipment, including maintenance of way equipment, buildings and a fleet of motor coaches.

The history of the parties' dispute is not substantially in disagreement. The Northlander passenger train, which has operated for years between Toronto and Cochrane on a daily basis, has been operated by the Ontario Northland Transportation Commission, an agency of the Government of Ontario under the Ontario government's Ministry of Northern Development and Mines. On March 23, 2012, Minister Rick Bartolucci announced that the government was undertaking the divestment of the

Commission, an exercise which would involve the cancellation of the Northlander train services, in favour of enhanced bus service. A statement released by the Minister on that date expressed the expectation that some 966 jobs would ultimately be impacted by the divestment exercise.

On August 16, 2012, the unions representing employees were called to a meeting by the Commission and advised that the Northlander passenger service would be cancelled as of September 28, 2012. Significantly, the Commission advised the unions that the train's cancellation was prompted by the decline in ridership which the Commission had experienced over the years, which had made continuing operation of the Northlander no longer viable.

The Union does not dispute the right of the Ministry or the Commission to cease operating the Northlander passenger service. What it does challenge is the nature of the notice which has been provided to the employees and their Union. In a grievance filed on May 22, 2012 the Union advised the Commission's President and CEO, Paul Goulet, that it considered the cancellation of the Northlander passenger service to constitute an operational or organizational change of a permanent nature within the contemplation of the parties' Employment Security and Income Maintenance Agreement (ESIMA). Pursuant to the terms of the ESIMA, the Commission cannot institute an operational or organizational change without first providing to the Union notice under article 8.1 of that agreement. The minimum anticipated notice period is three (3) months and is to contain an extensive description of the changes in working conditions

and the expected numbers of employees to be adversely affected. Significantly, notice under article 8 of the ESIMA triggers an extensive process of discussion and negotiation between the parties with respect to terms and conditions designed to minimize the adverse impact on employees of the Commission's initiative, up to and including the arbitration of any issues not resolved by agreement.

It is common ground that the parties agreed that I should act as arbitrator in respect of the Union's grievance. On or about September 11, 2012 the Union filed before me its request for an interim order directing the Commission to continue the operation of the Northlander passenger train until such time as the Union's grievance could be heard and resolved on its merits. The Union's position is that if it should ultimately succeed in its grievance after the discontinuance of the Northlander the parties will have greater difficulty in managing the process of employee displacement and bumping which will result. In its submission, a more orderly way of proceeding would be to have the parties themselves address the issue of how the change will impact employees, working out such arrangements as may be necessary to affect a smooth transition in respect of employee displacements and/or layoffs before the actual implementation of the train's cancellation. On that basis the Union asks that I give interim relief under section 60(1) (a.2) of the *Canada Labour Code* which provides as follows:

> **60.** (1) An arbitrator or arbitration board has
> ....
>
> (*a.2*) the power to make the interim orders that the arbitrator or arbitration board considers appropriate.

The Union therefore asks that I direct the Commission to continue the operation of the Northlander beyond September 28, 2012, until such time as the Union's grievance is dealt with on its merits and, presumably, if the Union is successful, that the article 8 process under the ESIMA is properly administered.

The Commission strenuously resists the Union's request. Its counsel submits that for the Union's application to succeed would be to visit substantial prejudice upon the Commission, effectively requiring it to operate a train which has been unprofitable for years. The operation of the Northlander is said to presently involve a loss of 1.5 million dollars each month. In the Commission's submission, the suspension of the Commission's plan to discontinue the operation of the Northlander train for an indefinite period can only result in the continued accumulation of unrecoverable losses for an indefinite period of time, a consequence which it characterizes as simply unacceptable and contrary to the public interest.

Counsel for the Commission stresses that the Union's motion before the Arbitrator must been seen in the broader context of its political campaign to effectively stop the cancellation of the Northlander train. In that regard reference is made to certain political initiatives taken by the Union, in my view understandably, to attempt to rally public support for a reversal of the Minister's decision. Counsel submits that the arguments of the Union in the instant matter must be understood as part of a larger

strategy to undo the cancellation of the Northlander train, and not merely a vindication of the rights of employees' pursuant to the ESIMA.

Additionally, counsel submits that the impact of the cancellation of the Northlander train will be relatively minor as regards the Union's membership. He notes that six (6) employees in onboard services will be affected by the cancellation of the train and that, in any event, the Commission has undertaken to protect affected employees in their wages and benefits until the normal bidding process scheduled to take place at the change of card towards the end of October. As provided under article 13.3 of the collective agreement, employees whose positions are then abolished shall have the opportunity exercise their seniority to displace the junior most employee in their classification, or to take a position on the spare service list.

The Commission submits that the decision of the Arbitrator in respect of interim relief under section 60(1)(a.2) of the *Code* is to be taken in conformity with the principles enunciated by Arbitrator Christie in *Atlantic Communication and Technical Workers Union v Aliant Telecom Inc.* (2002), 103 L.A.C. ($4^{th}$) 304 (Christie). In accordance with that award, the first question of be asked is whether there is a fair question to arbitrated. Secondly, where does the balance of foreseeable damage or harm lie?

Additionally, the Commission submits that I am without jurisdiction to order that the Northlander continue to operate. For the Commission counsel argues that it is, to say the least, extraordinary for a board of labour arbitration to make an order for interim

relief which extends to requiring a railway to operate a government subsidized passenger train service over a distance of some 700 kilometres each way, twice a day, for what would be an indefinite period of time. Counsel argues that any such arbitral direction would arguably fly in the face of the terms of article 8.6 of the ESIMA which provide, in part:

> ... the matters to be decided by the arbitrator shall not include any question as to the right of the Company to make the change, which right the Unions acknowledge, and shall be confined to items not otherwise dealt with in The Plan.

Counsel submits that if this Arbitrator cannot exercise jurisdiction under the ultimate merits of the article 8 ESIMA arbitration on its merits, how can he do so by the exercise of interim relief?

Counsel also refers to precedents within the railway industry which confirm that a job security agreement such as the ESIMA simply does not grant the Arbitrator the authority to prevent the introduction of the changes which the employer seeks to implement. In that regard reference is made to the following passage from the award of Arbitrator Hope in *B.C. Rail and Transportation Communication International System Board 496 Lodge 1828*, [1990] 22 C.L.A.S. 235 (Hope):

> I am of the view that a referee does not have the jurisdiction to enjoin the Railway from introducing changes. The remedies available to the Union with respect to a perceived failure to give proper notice, or any other perceived breach of the JSA, is to pursue a claim for compensation or other redress for the breach.
>
> ...

> I turn finally to the declaration sought by the Union. I am not able to say that the Railway can be required to delay or reverse proposed changes. The rights of employees affected by changes that have an adverse impact are limited to notice and to the various forms of compensation outlined in the JSA. Those forms of compensation are well-defined in terms of employees who face job disruption or loss of employment. The remedy for a failure to give adequate notice is also compensation, either in the form of wages in lieu of notice or compensation for other benefits lost by the affected employees by reason of the failure to give proper notice.
>
> The governing principle is the one set out by Mr. Kates in the CROA decision. Employees are entitled to be placed in the position they would have occupied if proper notice had been given. That does not include a right to have the proposed changes delayed or reversed while a dispute over the application of the JSA is negotiated and adjudicated. That interpretation of the JSA would have the same effect as the one rejected by Mr. Kates. That is, it would extend the notice requirement beyond the period contemplated in the provision.

The reference to the decision of Arbitrator Kates above relates to an award between the Canadian Pacific Limited and the Brotherhood of Maintenance of Way Employees in CROA 1150.

Counsel for the Commission also questions whether there is a serious issue to be arbitrated. He argues that the discontinuance of the Northlander is not a technological, organizational or operational change within the meaning of article 8.1 of the ESIMA. In support of that proposition he quotes the following passage from this Arbitrator in CROA 3910 relating to the material change protections found in article 132

of the collective agreement of the Teamsters Canada Rail Conference. In that context the following comment appears:

> That [article] is simply not intended as insurance for employees against the impact of market realities beyond the control of the Company.

As regards the balance of convenience, counsel submits that substantial prejudice could be visited upon the employer by granting the interim relief sought by the Union. Conversely, he argues, employees who are affected by the discontinuance of the Northlander train will not suffer harm from which they may not be made whole should the Union ultimately succeed in its claim that the train's cancellation is an operational or organizational change which triggers the protections of the ESIMA. Counsel notes that if in fact it is found that three (3) months' notice should have been provided, that can be dealt with by way of a direction for the Commission to provide to the employees pay in lieu of notice, as well as the further protections which would be available after the fact under the ESIMA.

In this regard counsel stresses that the Union itself acknowledges that the Northlander service can and will be terminated. Counsel also questions the basis upon which the Union can assert that there will ultimately be a need to undo bumping which might take place as a result of the train's discontinuance.

Fundamentally, the position of the Commission is that the rights of the employees will not suffer irremediable harm should the Union's request for interim relief

be denied. Conversely, the Commission will be put to the continued cost of operating a train at a rate of unrecoverable losses estimated, without significant dispute, to be in excess of one million dollars per month.

Having heard the submissions of the parties, by email communication on September 26, 2012, I advised that the Union's request for interim relief, as well as the parallel request for interim relief made by two Locals of United Steelworkers and heard separately, must be denied. In coming to that conclusion I have applied the principles enunciated by Arbitrator Christie in the *Aliant Telecom Inc.* case. Firstly, I should stress that I do not necessarily share the perception put forward by counsel for the Commission to the effect that there is no serious issue to be arbitrated. Whether a government subsidized railway passenger service which has operated at a loss for a substantial period of time can be said to have been cancelled as a result of an operational or organizational decision is a matter which has previously been dealt with within arbitral jurisprudence. I must agree with the Union's representative that prior reductions in service in Via Rail Canada, prompted at the federal government's initiative, did give rise to triggering of rights under the ESIMP. That is reflected in AH265, an award between Via Rail and the IAM as well as SHP330, an award between the parties to the instant grievance, as well as the International Association of Machinists and Aerospace Workers, involving changes implemented in January of 1990. In the result, whatever may be the ultimate merits of the grievance, I cannot agree that there is not a serious issue to be arbitrated.

It is with respect to the second part of the test that I find the Commission's submission more compelling. On what basis can I conclude that an employer should continue to operate indefinitely at what is certain to be a rate of loss of some 1.5 million dollars a month in exchange for what the Union characterizes as a smoother transition towards bumping and displacements? Bearing in mind that the Union accepts that the Northlander service will be discontinued, the best that can be said for its position is that it simply seeks to stave off the inevitable. The fact is that the service will be terminated and the employees affected will, if the Union is successful on the merits of its grievance, have the fullest protections of the ESIMA. In my view, that agreement will allow for the ordering of such make whole remedies as may be justified. The vested rights of the employees affected by the Commission's actions will not be eliminated or curtailed. Should I ultimately determine that the Union is correct in its position that an article 8 notice should have been issued, all of the rights and protections which the employees have under the ESIMA will then be fully available to them. Significantly, should the parties be unable to agree on appropriate measures to deal with adverse impacts, the Union retains the ultimate recourse to a form of interest arbitration to resolve that dispute.

When these competing interests are compared, I am compelled to conclude that the balance of convenience starkly favours the position of the Commission. While it may be that as a matter of political convenience the Government of Ontario found it acceptable to operate a highly subsidized passenger train service over a period of many years, its right to terminate what is plainly a highly unprofitable venture should not lightly

be impeded, particularly where the employees affected by its decision do have the benefit of substantial collective agreement and job security agreement protections. They will, in the fullness of time, have the benefit of the ESIMA provisions which the Union negotiated on their behalf. That is not, in my view, an insignificant form of protection. Most importantly, the Commission would clearly suffer prejudicial harm that will be substantial and irrecoverable should the Union's request for interim relief be granted.

For all of the foregoing reasons I concluded that the balance of foreseeable damage or harm clearly lies on the side of the Commission. In the result, for these reasons, the Union's request for interim relief was denied.

Dated at Ottawa, Ontario, this 5th day of October, 2012

"Michel G. Picher"

Michel G. Picher
Arbitrator

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**ONTARIO NORTHLAND TRANSPORTATION COMMISSION**
**(the "Commission")**

**-and-**

**UNITED STEELWORKERS, T.C. LOCAL 1976**
**(the "Union")**

**-and-**

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA, LOCAL 103**
**(the "Intervener")**

**RE: DISCONTINUANCE OF THE NORTHLANDER**
**REQUEST FOR INTERIM ORDER**
**AGREEMENT 2**

**ARBITRATOR:** MICHEL G. PICHER

**APPEARANCES FOR THE COMMISSION:**

| | |
|---|---|
| Roy Filion | - Counsel |
| Brett Christen | - Counsel |
| Geoff R. Ryans | - Counsel |
| Glenn Zabarelo | - Director, Human Resources |

**APPEARANCES FOR THE UNIONS:**

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| Shawn O'Donnell | - Chief Steward, USW TC Local 1976 |
| Ron Marleau | - Vice-President District 6, USW TC Local 1976 |
| Brian Stevens | - National Representative |
| Brian Kelly | - President, CAW-Canada Local 103 |

**This matter was heard by teleconference call on September 25, 2012.**

# INTERIM AWARD

The Union represents all customer service and sales agents, car coordinators and rail traffic controllers working under collective agreement number 2 between the Commission and the Union.

It seeks interim relief with respect to the cancellation of the Northlander passenger service between Toronto and Cochrane. For the reasons initially expressed in an Award of this same date between the Commission and the CAW, and amplified in an Award between the Commission and this same Union as representative of the running trades employees, I am persuaded that the balance of convenience does not favour the granting of the Union's request for interim relief. On that basis it was denied, as communicated to the parties by an email communication on September 26, 2012.

For these reasons the Union's request was declined.

Dated at Ottawa, Ontario, this 5th day of October, 2012

"Michel G. Picher"

Michel G. Picher
Arbitrator

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

**ONTARIO NORTHLAND TRANSPORTATION COMMISSION**
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**-and-**

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**(the "Union")**

**-and-**

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA, LOCAL 103**
**(the "Intervener")**

**RE: DISCONTINUANCE OF THE NORTHLANDER**
**REQUEST FOR INTERIM ORDER**
**AGREEMENT 8**

**ARBITRATOR:** MICHEL G. PICHER

**APPEARANCES FOR THE COMMISSION:**

| | |
|---|---|
| Roy Filion | - Counsel |
| Brett Christen | - Counsel |
| Geoff R. Ryans | - Counsel |
| Glenn Zabarelo | - Director, Human Resources |

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| Brian Stevens | - National Representative |
| Brian Kelly | - President, CAW-Canada Local 103 |

**This matter was heard by teleconference call on September 25, 2012.**

# INTERIM AWARD

The Union represents locomotive engineers and conductors whose terms and conditions of employment are governed by collective agreement number 8 between the Commission and the Union. As related in an Award between the Commission and the CAW, on this same date, the Commission announced the cessation of the operation of the Northlander passenger train between Toronto and Cochrane effective September 28, 2012.

By letter dated May 22, 2012, the Union placed the Commission on notice that it invoked the protections of article 53 and 53(a) of collective agreement number 8 which deals with material changes in working conditions. Additionally, the Union sought interim relief from the Arbitrator, which request is the subject of this Award. The facts and issues relating to the granting of interim relief in the circumstances presented, concerning the cancellation of the Northlander passenger service, are thoroughly reviewed and analyzed in the Award between the Commission and the CAW issued on this same date by the Arbitrator. They need not be repeated here. This Award reflects the reasons for the denial of the Union's request, communicated to the parties by email on September 26, 2012.

There are, to be sure, some differences with respect to the instant collective agreement. Under the terms of article 53.1, the Commission cannot implement a material change with significantly adverse effects on employees without first negotiating

measures to minimize the adverse effects and giving extensive notice of three (3) months duration to the Union prior to the implementation of the proposed change.

In my view the equities in the instant case are identical to those reviewed and found in the CAW Award. The Commission estimates that some 15 positions will be affected by the discontinuance of the Northlander. Those employees, who fall under collective agreement number 8, will have continued job protection, as announced by the Commission, until such time as they are able to bid on available work at the change card in late October. They will then have the option of bidding work in freight service or in the mixed passenger/freight service of the Polar Bear Express.

For the reasons expressed in the CAW Award, I cannot conclude that the balance of convenience, or the distribution of relative harm, favours the granting of the Union's request for interim relief under section 60(1) (a.2) of the *Canada Labour Code*. The unchallenged fact before the Arbitrator is that the Northlander operates at a loss estimated to be in the neighbourhood of 1.5 million dollars per month. While there will be some dislocation to the employees, they do have the protections which will be available to them under article 53.1 of the collective agreement, should the grievance succeed on its merits. It should be noted that undue delay is not an issue, as the hearing of the grievance on its merits has been scheduled for October 23, 2012. Given that the employees' earnings and benefits are protected by the Commission's stated declaration that they will be protected until the change of card in late October, there is in my view little significant harm to the employees which will result by the denial of interim

relief. In contrast, the granting of interim relief will place the Commission in the position of operating the Northlander for an indefinite period, at a continuing loss that would be substantial and unrecoverable.

For all of these reasons, the request of the Union for interim relief in the form of directing the Commission to continue the operation of the Northlander was denied.

Dated at Ottawa, Ontario, this 5th day of October, 2012

"Michel G. Picher"

Michel G. Picher
Arbitrator