AH 632

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY COMPANY
(the "Company")

-and-

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

RE: JOB POSTING UNDER ARTICLE 9.2.3
OF THE COLLECTIVE AGREEMENT

ARBITRATOR: MICHEL G. PICHER

APPEARANCES FOR THE COMPANY:

Mike Moran	**- Manager, Labour Relations**
Jennifer Love	**- Officer, Labour Relations**
Marcel Gauthier	**- Director, S&C East**

APPEARANCES FOR THE UNION:

Michael A. Church	**- Counsel**
Ron A. Hewson	**- General Chairman, Eastern Canada**
Steve Martin	**- Regional Chairperson, Eastern Canada**
Brad Kauk	**- Business Manager, Local 2050**

A hearing in this matter was held in Toronto, Ontario on May 10, 2013.

AWARD

The parties are disagreed as to whether the grievor, Maintainer/Wireman Peter Runions, was wrongfully denied an assignment in relation to a bulletin which issued on November 2, 2009 advertising the position of: "Temporary position of S&C Mobile Maintainer Agincourt, headquarters Toronto Yard. Expected duration 11 months."

The nature of the dispute is reflected in the Statement of Dispute and Joint Statement of Issue filed with the Arbitrator at the hearing, which reads as follows:

> **Dispute:**
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> Appeal of the Company's failure to award Peter Runions a Temporary Toronto S&C Mobile Maintainer Position.
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> **Joint Statement of Issue:**
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> On November 2, 2009, the Company posted a Bulletin advertising a Temporary position of S&C Mobile Maintainer Agincourt for an approximate duration of 11 months. The Grievor, Peter Runions bid on this position. The position was awarded to an employee with nine years' less seniority than Mr. Runions. In response to this denial of the position to the Grievor, the Brotherhood advanced a grievance under Wage Agreement No. 1.
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> The Brotherhood contends that the Company's failure to award Peter Runions a Temporary Toronto S&C Mobile Maintainer Position constitutes a breach of Wage Agreement No. 1 as well as the 1994 Mobile Maintainer Agreement.
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> The Brotherhood seeks a finding that the Company has breached Wage Agreement No. 1 as well as the 1994 Mobile Maintainer Agreement, and order that the Company cease and desist from such breaches in the future. The Brotherhood seeks an order the Mr. Runions be made whole of all of his losses as a result of the Company's actions.

The Company denies the Brotherhood's contentions and declines the Brotherhood's request.

For the Company:	For the Union:
Mike Moran Manager Labour Relations	Brian Strong Senior General Chairman

It is not disputed that the position in question was awarded to a junior employee, Maintainer Colin Griffiths. At issue is whether the Company violated the requirements of article 9 which govern the assigning of bulletined positions.

Article 9.2.3 of the collective agreement reads as follows:

> **9.2.3** Employees holding a permanent position shall not be appointed to fill a temporary position in his classification, except when:
>
> (i) bidding from a 40-hour per week position to a standby position; or
>
> (ii) when bidding on a preferred shift.
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> NOTE: Preferred shift will be the shift preferred by the individual employee. The employee will only be allowed to bid to a preferred shift at the same Headquarters locations.

The positions of the parties are relatively straightforward. The Company submits that the position was properly assigned to Mr. Griffiths as he was in fact bidding on a preferred shift. It is not disputed that Mr. Griffiths was working an afternoon shift at the time of the bulletin, and that assuming a regular day shift would have been bidding on a

preferred shift, insofar as Mr. Griffiths was concerned. The Company's further position is that neither of the exceptions described in subparagraphs (i) and (ii) applied to the grievor, Mr. Runions.

The Union disagrees. Its counsel submits that in fact the grievor properly fits within the exception found in article 9.2.3(i), as in the Union's submission the job for which the grievor had applied was in fact a standby position. The Company's counter to that assertion is that the expressed terms of the bulletin contain the phrase "NO STANDBY". In further elaboration of that, the Company draws to the Arbitrator's attention the history of the position of S&C Mobile Maintainer, apparently created as part of the reorganization which occurred within the department of Signals and Communications in 1994. Subsequent to that it appears that a description was issued to all S&C managers and employees in 1997 which contained, in part, the following:

> *The Mobile Maintainer will be **required to perform relief maintenance and other assigned activities where and when required** on the Supervisor's territory. Each Mobile Maintainer may be required to perform work on the adjacent Supervisor's district.*
>
> *Expenses will be reimbursed as per Article 6 of the Wage Agreement.*
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> ***The positions of Mobile Maintainer were bulletined as NO STANDBY**; however, when an S&C Mobile Maintainer is assigned to be a relief S&C Maintainer, the S&C Mobile Maintainer must assume all the duties and responsibilities of the Maintainer. This includes being on standby if the position being relieved is a standby position.*
> ***(Emphasis added)***

The Company's position, consistent with the foregoing, is that while it may be true that in fact Mr. Griffiths performed extensive amounts of standby work, he did so strictly in relief of employees whose regular duties involved the standby obligation, and receipt of the standby allowance, as contemplated under article 7 of the collective agreement.

How, then, is this conflict to be resolved? It is difficult to dispute the Union's assertion that as a matter of fact Mr. Griffiths worked substantial amounts of time for which he received the standby allowance. In the 11 month period of his service in the bulletined position, between December 28, 2009 and October 28, 2010, he is said to have received approximately 450 hours in standby pay, which is the equivalent of receiving it virtually every day he worked in the position. The Union further points to the fact that the grievor's vacation period was remunerated in such a way as to include standby allowance.

Having considered the facts, the Arbitrator has some difficulty rejecting the Union's position. While it may be open to the Company to argue, on a technical basis, that the bulletin indicated that the S&C Mobile Maintainer's position was not a standby position, on the facts of the instant case, and the case should have no application beyond those facts, it is clear that Mr. Griffiths was virtually assigned on a constant and continuous basis, albeit in relief of other maintainers, to work to which standby pay was attached. On the facts before me, it cannot be said that performing relief in relation to which standby pay was an occasional feature was the expectation. On the contrary, it

does not appear disputed on the facts of this particular case that virtually all of the time Mr. Griffiths was assigned, perhaps with minor exceptions, he did receive standby pay. While it may be that that is so because he was relieving employees entitled to standby pay, the particular position which he successfully bid on cannot be said to be other than one which would involve standby duties and the receipt of standby pay on a virtually regular basis. It should be stressed that the facts might well be different in another situation, but that this case must necessarily turn on its own facts.

What these facts lead the Arbitrator to is the conclusion that the position successfully bid by Mr. Griffiths must, in the end, be said to have been a standby position, notwithstanding the contrary label assigned to it by the Company at the time of the bulletin. If there is any doubt about that fact, it would appear to be to some degree confirmed by the Company's decision to provide to the incumbent standby pay as part of his vacation pay under the collective agreement. In my view, the Company was not in error in doing so, but rather was properly recognizing that the position in question virtually involved continuous standby obligations, albeit in relief.

For these reasons I am satisfied that the position of the Union must be preferred to that of the Company. It is trite to say that substance, and not form, must prevail. Notwithstanding the inclusion of the phrase "NO STANDBY" in the job bulletin, the facts on the ground confirm that in the case of the position awarded to Mr. Griffiths the payment of standby was virtually a daily event. Notably, standby pay was included in his vacation pay. On these facts I can come to no other conclusion but that the Union's

position must be accepted. The position which was bulletined was, in fact, if not in name, a standby position within the meaning of article 9.2.3(i) of the collective agreement. In the result, Mr. Runions, the grievor, was bidding from a 40 hour per week position to a standby position, and was therefore entitled to priority over Mr. Griffiths by reasons of his greater seniority, even though Mr. Griffiths properly fell under subparagraph (ii) of the same article.

The grievance is therefore allowed. The Arbitrator finds and declares that on the particular facts of the instant case and the position involved in the job bulletin here under consideration the grievor was properly entitled to be awarded the position. I therefore direct that he be made whole in respect of the denial of the position to him, with interest, if in fact he did suffer any loss of earnings.

I remain seized of this matter in the event of any dispute between the parties concerning the interpretation or implementation of this Award.

Dated at Ottawa, Ontario this 21st day of May, 2013.

Michel G. Picher
Arbitrator