AH640

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY
(The "Company")

-And-

TEAMSTERS CANADA RAIL CONFERENCE
(The "Union")

2015-640

RE: The transfer of work from the RTC on Desk D in Edmonton to the Switchtender position in Symington Yard.

ARBITRATOR: CHRISTINE SCHMIDT

APPEARANCES FOR THE COMPANY:

S. Blackmore	**- Senior Manager Labour Relations, Edmonton**
D. Fisher	**- Senior Director Labour Relations, Montreal**
T. Brown	**- General Manager, WOC, Edmonton**
R. Cavallo	**- Trainmaster, Winnipeg**
L. Karn	**- Manager Operating Practices, Toronto**
C. Rusnak	**- Chief Rail Traffic Controller, Edmonton**

APPEARANCES FOR THE UNION:

J. Shields	**- Counsel, Ottawa**
J. Duff	**- Counsel, Ottawa**
S. Brownlee	**- General Chairman, Stoney Plain**
P. Chorest	**- Local Chairman, Edmonton**
G. Lapointe	**- Vice General Chair CN, Montreal**

A hearing in this matter was held in Montreal on September 24, 2015.
Ad-hoc matter 2015-640.

AWARD

The nature of the dispute before me is reflected in the statement of dispute and joint statement of issue filed, which reads as follows:

> Dispute:
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> The present dispute concerns Canadian National Railway Company's decision to transfer work from the Winnipeg Terminals Rail Traffic Controllers ("RTC Desk D") operating out of Edmonton to the Switchtenders in Winnipeg's Symington Yard.
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> Joint statement of Issue:
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> The Union contends that the work being transferred is solely the work of the Rail Traffic Controller as outlined in the CROR and that the TCRC/RCTC is the sole bargaining agent for that work as a mandated by the Collective Agreement and the certificate issued by the Canada Labour Relations Board on April 15, 1981.
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> The Company does not agree with the Union's contentions. Agreement 7.1 does not contain a clause, nor has the Union cited any clause, providing exclusive work ownership to the work being transferred. Also the work to be transferred amounts to no more than 20% of the time during a Switchtender's work day, and is similar in nature to work already performed by the Switchtender.
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> The Company maintains that it is the specific language of a collective agreement that determines what work will fall within the scope of a bargaining unit, not the language in the CROR Rules.
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> And finally as there will be no adverse effects to employees, Article 8 of the ESIMA does not apply.

FOR THE COMPANY:	FOR THE UNION:
S. Blackmore	S. Brownlee
Senior Manager Labour Relations	General Chairman

The facts are not substantially in dispute. At the beginning of June 2015, the Company notified the Union of its intent to transfer a portion of the work performed by the Winnipeg Terminal's Rail Traffic Controller ("RTC") (Desk D) located in Edmonton to the Switchtenders in Symington Yard, Winnipeg. The portion of the work to be

transferred is the coordination of all train, engine, yard movements and engineering duties between Waverley Street and Dugald Station, which is approximately 17 miles of main line track. The Company has held off implementing the transfer of work pending the arbitration of the grievance now before me.

The Switchtender at Symington Yard works in conjunction with two Yardmasters and the Terminal Supervisor ("PC"-Production Coordinator). Together they are responsible for coordination and direction of all train movements within Symington Yard and the Winnipeg Terminal.

The Switchtender's primary responsibility is to line routes within the Terminal as requested by field personnel (train, yard or engineering crews), or as directed by the Yardmasters or the Terminal Supervisor. The Route Control System ("RCS"), which is a series of indicator lights that govern the use of power operated switches and routes through connecting tracks, operates essentially the same as the Centralized Traffic Control System ("CTC") – the System on CN's main line - and it has the same functionality.

The RTCs in Edmonton do not plan any of the workload for trains operating through the Winnipeg Terminal. The extent of their responsibility is to execute the instructions of the Switchtenders in the RTC II System - the same computer platform currently used by the Switchtenders. The Company estimates that the work it plans to transfer will amount to approximately 40.71 minutes per 8 hour RTC shift – the time it currently takes to complete transactions such as issuing General Bulletin Orders

("GBOs"), various authorities and switching/signal activities. In the JSI, the Company asserts that the work to be transferred will amount to no more than 20% of the work performed during a Switchtender's day.

The issue before me is whether transferring the portion of the RTC work referenced above, is a violation of the collective agreement. The Union asserts that the combined weight of its certification, the recognition clause in the collective agreement between the parties, the CROR Rules and the history and practice of the parties support its claim that the work being transferred is exclusively the work of RTCs and that it is being improperly reassigned outside of the bargaining unit.

In the alternative, the Union argues that the Company is estopped from implementing the transfer of duties. It asserts that by its past practice the Company has made a representation to the Union that the work in dispute would be exclusively assigned to RTCs. The Union submits that it has relied on the Company's representation to its detriment, having lost the opportunity to negotiate a provision into the collective agreement in the last round of bargaining. The Union directed me to two cases: *Greater Sudbury Hydro Plus Inc. v. C.U.P.E., Local 4705* (2003), 115 L.A.C. (4th) 385 (Marcotte) ("*Greater Sudbury*") and *Re Windsor Western Hospital Centre Inc. and (I.O.D.E.Unit) ad Ontario Nurses' Association* (1989), 8 L.A.C. (4th) 116 (Herlich) ("*Windsor Hospital*").

In support of its primary position, the Union directs me to the bargaining certificate dated April 15, 1981, amended by the Canada Industrial Relations Board on

August 5, 2004, which recognizes the TCRC as the certified bargaining agent for "all employees of Canadian National Railway Company classified as rail traffic controllers." Article 2.1 of the collective agreement - the recognition clause - recognizes the Teamsters Canada Rail Conference/Rail Canada Traffic Controllers (TCRC/RCTC) as the sole collective bargaining agent with respect to wages, hours of work and other working conditions for all rail traffic controllers located in RTC centers and other offices of the Company. Article 1.2 defines a RTC as "an employee occupying a position included in Seniority Group 1. Seniority is governed by Article 5, and Rates of pay for employees in Seniority Group 1 are set out at Article 24.1.

The Union also directs me to the CROR Rules, which establish that the duties being transferred on the main line are governed by the CTC rules, which set out that train movements and track work activities are to be supervised by a RTC. In the proposed transfer of duties the Switchtenders will be issuing General Bulletin Orders ("GBO"), Temporary Occupancy Permits ("TOPs") as well as all main line CTC authorities (see CROR Rules 564, 566, and 568) between Waverly Street and Dugald Yard in the Winnipeg Terminal. Until now, this work has been confined to the RTCs at the Edmonton RTC Centre.

Further, the Union submits that the work to be assigned to the Symington Switchtenders may reasonably be expected to represent a significant portion of their daily functions. It directs me to the Company's risk assessment in support of its position. The Union disagrees that the work to be transferred to the Switchtenders can be characterized as representing a "minor and incidental" portion of their duties.

Decision

For the purposes of this decision, it is unnecessary for me to review the Company's reasons for implementing the transfer the RTC's work at issue to the Switchtenders in Symington Yard. Its reasons are *bona fide.* The transfer of work historically performed by RTCs is being implemented because the Company thinks that in doing so it will streamline what it believes has become an inefficient method of operating within the Winnipeg Terminal. Further, despite the Union's concerns about training and safety, the Company is managing these aspects of the case under the oversight of Transportation Canada in accordance with its mandate.

The Company's position must prevail. The collective agreement between the parties contains no language that defines what the RTC does, nor does it have language to limit management's right to assign work outside the bargaining unit. In **CROA&DR 3081**, circumstances relating to the transfer of "core" RTC work (operation of signals and switches and the conveying of train orders and directions including such matters as occupancy permits) to bridgetenders, Arbitrator Picher commented on the very language of this collective agreement between these same parties:

> The Brotherhood asserts that it holds bargaining rights for employees performing the work of rail traffic controllers pursuant to a certificate issued by the Canada Labour Relations Board on April 15, 1981. It further stresses that the Canadian Operating Rules (CROR) in particular rule 561 contemplate the train movements are to be supervised by an RTC.
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> The Company notes that an important operational change is being implemented at the Second Narrows Bridge. Specifically the current CTC (Centralized Traffic Control system) rules which it operated at Second Narrows are, as part of the

> change, being modified to less stringent rules governed by Locally Controlled Interlocking systems. Under the CTC regime the rules of the CROR would require the supervision of train movements by an RTC. However, under the interlocking system the rules contemplate train movement communications between train crews and signal men or bridgetenders at the location in question.
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> Fundamental to the grievance is the claim of the Brotherhood that it possesses jurisdiction to the work in question. A secondary, albeit related issue, is whether the duties and responsibilities which will ultimately devolve under the bridgetender or signalman are such as to be fairly described as preponderantly involving the core functions of the RTC/operator position so as to come within the bargaining unit, under the Brotherhood's collective agreement.
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> ….
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> The Company's initiative is obviously pursued for valid business purposes. Given the flexibility which it can gain by reverting to the rules which govern interlocking systems, it seeks to gain efficiencies of utilizing the services of employees in a single classification to perform a slightly broader range of functions, rather than face the less productive option of having two separate classifications of employees perform separate functions when a train utilizes the bridge. On the whole I am satisfied that the initiative of the company falls within its prerogatives, and that there is nothing in the language of the collective agreement at hand which would give exclusive jurisdiction to the Brotherhood in respect of the work in question. In my view the case at hand is to be distinguished from the different facts reviewed by this office in **CROA 804** and **805**. The Brotherhood's claim cannot succeed on the basis that the work in question falls within its exclusive jurisdiction.

Though the Union sought to distinguish **CROA&DR 3081** from the case before me on the basis that the work at issue involves approximately 17 miles of main line track (in the Winnipeg Terminal), I fail to see how that fact detracts from Arbitrator Picher's commentary about the collective agreement language. In both cases, the issue was the transfer of traditional RTC duties to another classification outside the RTC bargaining unit. In that sense the cases are exactly the same even though the factual backdrop is different in each case. The case before me is on all fours with **CROA&DR 3081**.

The focus of the jurisprudence, as described by Arbitrator Picher, is whether the devolved responsibilities can be fairly described as "preponderantly involving the core functions of the RTC/operator position so as to come within the bargaining unit,…". The relevant jurisprudential principle is set out in Palmer, Collective Agreement Arbitration in Canada, 2nd ed. (1983), page 438, as follows:

> In the absence of a specific restriction in the agreement, an employer may assign work previously performed by employees within the bargaining unit to employees excluded from the bargaining unit, but it is open for the union representing the bargaining unit to prove that the employees to whom the work is assigned are doing the work normally done by the members of the bargaining unit to such an extent as to bring them within the bargaining unit.

Arbitrators have referenced varying degrees of the "extent of work" that an individual can perform before bringing him or herself within the bargaining unit. It is unnecessary for me to adopt any specific quantum identified in the jurisprudence. The Company may be underestimating the extent to which Switchtenders will be assigned work that was done by the RTCs in Edmonton, however, on the record before me, I am not satisfied that the Union has met its burden by asserting that the work may reasonably be expected to represent a significant portion of the Switchtenders daily functions.

That leaves the question of estoppel. The Union argues that all of the essential elements of this doctrine apply, and that if I find that an estoppel exists, the Company is precluded from implementing the transfer of the intended portion of the RTC's duties for the life of the collective agreement. Thereafter the parties would be free to negotiate the issue of the transfer of work if they wish.

The Company submits that estoppel cannot now be pleaded. The Union raised the issue of estoppel for the first time at the hearing. There is no reference to estoppel in the JSI.

I am satisfied that, for the following reasons, the Union's estoppel argument fails, regardless of whether it raised that argument in a timely manner.

The doctrine of promissory estoppel is founded in equity. It precludes a party from relying on its strict contractual rights when it would be inequitable to do so. Labour arbitrators are entitled to be flexible in their application of the doctrine to the labour relations environment depending on the facts of the case.

In order to find an estoppel, the Company must have made a clear and unequivocal representation intended by the Company or reasonably construed as intended by the Company to affect the legal relations between the parties. The Union would have had to essentially take the Company at its "word" such that it should not be allowed to revert to the previous legal relations between the parties. In other words, the Union would reasonably have understood that the Company had bestowed a right not provided for in the collective agreement, which the Union then relied upon to its detriment.

This case is a about the assignment of certain traditional RTC responsibilities, which this Office has interpreted not to be exclusively the work of RTCs. The "practice" of which the Union speaks is not inconsistent with the collective agreement.

What is missing here is the element of a representation by the Company. The Union seems to suggest that the representation lies in the fact of the RTCs having performed the disputed work. That is not something the Company represented to the Union. That is how the duties of the RTC evolved. Without detracting from the reality that the work being transferred falls within the traditional responsibilities of the RTC, it cannot be said that there was a pre-existing legal relationship that the Company, through some representation, had implicitly undertaken to alter.

I understand that recent negotiations were silent on the issue. That cannot be taken as an indication that the disputed duties would continue. This reveals an absence of intention to bestow upon the Union or its members a substantive right not provided for by the collective agreement. Without an intent to affect legal relations by means of a representation, there can be no detrimental reliance by way of a lost opportunity to negotiate a provision to protect a Company practice.

I have reviewed the cases provided to me. The *Greater Sudbury* case relates to the distribution of unscheduled overtime where there was no collective agreement provision but the issue had been one of contention between the parties, and the arbitrator found that a memo setting out the mechanism for assigning unscheduled overtime bestowed a substantive right signalling the Employer's intent to alter legal relations between the parties. In *Windsor Hospital,* for years the Hospital determined vacation entitlement consistent with a previous collective agreement provision that was no longer in effect rather than in accordance with the strict terms of the then applicable

agreement. The length of the practice gave rise to an inference that the Hospital intended to alter the legal relations between it and the trade union. Neither case is analogous to the one at hand.

Finally, given that the Company had agreed to hold off implementing the transfer of duties to the Switchtenders at Symington Yard pending this award, and as at the time of the hearing it did not anticipate adverse effects on employees holding permanent positions, it would be premature to find that notice required under the Employment Security and Income Maintenance Agreement was not provided as argued by the Union.

In the result the grievance is dismissed.

October 5, 2015

CHRISTINE SCHMIDT

ARBITRATOR