AH641

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

RE: NOTICES OF MATERIAL CHANGE
REMOTE CONTROL LOCOMOTIVE SYSTEMS

SOLE ARBITRATOR: **Christine Schmidt**

There appeared on behalf of the Company:

Dave Guerin	– Senior Director, Labour Relations
Tony Marquis	– Senior Vice President Operations, Eastern Region
Myron Becker	– Assistant Vice President, Labour Relations
Keith Shearer	– General Manager, Regulatory & Operating Practices
Nizam Hasham	– Legal Counsel, Litigation & Labour

There appeared on behalf of the Union:

Michael Church	– Counsel, Caley Wray
Douglas Finnson	– President, TCRC
Roland Hackl	– Vice President, TCRC
Greg Edwards	– General Chair, TCRC-LE West
Harvey Makoski	– Senior Vice General Chair, TCRC-LE West
Dave Fulton	– General Chair, TCRC-CTY West
Doug Edward	– Senior Vice General Chair, TCRC-CTY West
Benoit Brunet	– General Chair, TCRC-LE East
John Campbell	– Senior Vice General Chair, TCRC-LE East
Bruce Hiller	– General Chair, TCRC-CTY East
Wayne Apsey	– Senior Vice General Chair, TCRC-CTY East
Don Ashley	– National Legislative Director

A hearing in this matter was held on January 16 (Toronto), January 27 (Calgary) and June 9, 2016 (Toronto).

AWARD

Background and Chronology

This award concerns an arbitration held under the material change provisions of the four separate collective agreements governing the services of Locomotive Engineers ("LEs") – East and West and Conductors/Trainmen/Yardmen ("CTYs") – East and West pursuant to notices issued on September 18, 2014 and April 15, 2015. The relevant provisions of the collective agreements are found in article 72 of the collective agreements governing CTYs and article 34 of the collective agreements governing LEs.

The parties have been unable to reach a negotiated settlement in respect of the mitigation of adverse effects resulting from the introduction of Remote Control Locomotive Systems (RCLS) in Road Switcher Service as well as the establishment of RCLS assignments in Yard Service in nine locations across the Country. Attached as Appendix A to this award are the parties' respective *ex parte* Statements of Issue.

The most recent Company proposal in respect of the matter before me, dated February 23, 2016, includes a total of 37 RCLS assignments at the following locations: Calgary (2 Road Switcher), Welland (3 Road Switcher), Lethbridge (5 Road Switcher), Regina (3 Road Switcher and 1 Yard), Bredenbury (5 Road Switcher), Montreal (10 Yard), Edmonton (3 Yard), London (2 Yard) and Hamilton (3 Yard).

For many years, belt-pack technology has been operational in hump and flat yard switching. The technology is not new. However, the Company's initiative in this case is significant because for the first time, the Company will be implementing the use of the technology beyond the 15 miles (up to 20 miles in siding) outside established switching limits, using Road Switcher crews on the main line.

As mentioned above, the Company's most recent proposal includes 37 identified RCLS assignments, the effect of which will be the elimination of an equivalent number of LE positions, totalling 46 positions when allowance is made for spareboard positions. Eighteen of the assignments to be bulletined and filled are Road Switcher assignments. The parties are agreed that Road Switcher assignments must leave the yard switching limits daily to be bulletined as such.[1]

The Company's information suggests that the expansion of RCLS in Yard Service and its introduction for the first time in the Road Switcher class of service is part of a larger initiative that will have far-reaching impacts. In fact, the Company's proposed agreement includes language, which would, if awarded, give the Company the discretion to utilize RCLS in either Yard or Road Switcher service at locations where RCLS operations were implemented under previous RCLS agreements but were discontinued for many years. The Company would have the discretion to revive RCLS operations at

[1] Prior to the Company's most recent proposal, the parties had exchanged proposals where 51 assignments were identified in the same locations set out in the Company's most recent proposal (with corresponding LE positions to be eliminated).

these locations despite the fact that they are not specifically identified in the Company's proposal.[2]

Moreover, the Company's RCLS System Update dated March 2015 projects a reduction of 115 LE positions in Canada and the United States, 86.8 positions of which are in Canada, with a projected labour cost savings to the Company of $12.2 million annually on a total project cost of $8.5 million. The anticipated labour cost savings associated with the expansion of the use of RCLS in Yard and Road service are undoubtedly the result of a reduction in the composition of three-person crews, including a LE, to two-person crews consisting of a conductor and a brakeman.

Notwithstanding all of the above, the Company maintains that it does not expect any significant adverse effects to employees, nor will its proposal result in layoffs or severance of employment. However, having regard to the documentary evidence submitted by the Union at the hearing, including the information pertaining to layoffs at the locations identified by the notices at issue in this case, my view is that the Company's position is simply untenable. There is no doubt that the implementation of RCLS will lead to layoffs. Permanent job losses will occur.

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[2] The Company's initial view, from which it has since retreated, was that it could offset benefits offered under previous RCLS agreements to new benefits to mitigate the adverse effects due to the implementation of RCLS at locations covered by this award. The Company had also agreed, during the course of this proceeding to provide the Union will disclosure of all information pertaining to the payout of benefits under the previous RCLS agreements. However, the disclosure the Company provided was extremely limited so as to not be meaningful.

A review of the history of "material changes" and their introduction by railway companies is beyond the scope of this award. However, Justice Freedman's 1965 Report of the Industrial Inquiry Commission on Canadian National Railways Run-Throughs is the theoretical framework that informs the concept of material changes in the railway industry generally.[3] On the broad issue of technological change, Justice Freedman's words bear reproducing:

> 1) Technological change should not be introduced at the universal will or whim of management; it should be the product of discussion and negotiation, with adequate advance notice, adequately timed for a consideration of all the related problems.
>
> 2) Technological change, when instituted, would confer benefits on management – that was the reason it was being introduced. My feeling was, and I said it in the report, that technological change should turn out to be beneficial to the employees in this sense: that we couldn't have all the benefits falling on the side of management and the disadvantages falling on the workforce. Therefore some of the profits resulting from technological change should be diverted from management to ease the blow, to cushion the shock and help the workman.

The relevant articles of the collective agreements in question provide that the Company cannot initiate changes which have materially adverse effects on employees without providing the appropriate notice, followed by negotiation and a resolution, ideally by agreement, but if necessary, by arbitration to determine measures to minimize the adverse effects. Some of the issues that are negotiable are also set out in the relevant collective agreement articles, as are the limits to an arbitrator's jurisdiction in fashioning an award.

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[3] See *The Book of Samuel: The Railway Run Through Commission (1964-66)* Manitoba Law Journal (2014) 37: Special Issue: Manitoba Law Journal pp. 143-168.

The relevant articles of the applicable collective agreements are reproduced below, in part:

CTY agreements

Article 72 – Material change in working conditions

Section 1

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 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.

72.03 While not necessarily limited thereto, the measures to minimize adverse effects considered negotiable under Clause 72.02 may include the following:

(1) Appropriate timing.
(2) Appropriate phasing.
(3) Hours on duty.
(4) Equalization of miles.
(5) Work distribution.
(6) Adequate accommodation.
(7) Bulletining.
(8) Seniority arrangements.
(9) Learning the road.
(10) Eating en route.
(11) Work en route.
(12) Lay-off benefits.
(13) Severance pay.
(14) Maintenance of basic rates.

(15) Constructive miles.
(16) Deadheading.

The foregoing list is not intended to imply that any particular item will necessarily form part of any agreement negotiated in respect of a material change in working conditions.
…

72.07 The decision of the Arbitrator shall be confined to the issue or issues placed before them which shall be limited to measures for minimizing the adverse effects of the material change upon employees who are affected thereby, and to the relaxation in schedule rules considered necessary for the implementation of the material change, and shall be final and binding upon the parties concerned.
…

Section 2
72.16 An employee whose positions is abolished by a change under the provisions of Clause 72.01 or who is displace by a senior employee, such displacement being brought about directly by and at the time of the implementation of such a change will, if they are eligible and elects to receipt and early retirement pension with an actuarial cutback, be entitled to receive:

(1) An allowance of $60.00 per month commencing in the month immediately following the month in which the employee received wages and continuing each month until the date at which they would have been eligible for the pension without a cutback. The maximum period for which the employee will be eligible for the allowance is 5 years; or

(2) a lump sum payment calculated as follows:
… .

LE Agreements

Article 34 – material changes in working conditions

34.01 Prior to the introduction of run-throughs or relocation 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 home terminal;

(2) Negotiate with the Union measures other than the benefits covered by Clause 34.11 of this Article to minimize significantly adverse effects of the proposed change on Locomotive Engineers, which measures may, for example, be with respect to retraining and/or such other measures as may be appropriate 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.

It is unnecessary to review in detail the acrimonious chronology of the process that ultimately culminated in a final day of hearing on the merits of this dispute held June 9, 2016. Briefly, however, during a mediation session held October 26, 2015, the parties reached an agreement to, among other things, consolidate the hearing of the disputes for both the CTY and LE groups. In addition, the Company agreed to provide the Union with information that it sought on benefits provided under previously negotiated RCLS agreements (however, ultimately the Company was unable to provide any meaningful information in this regard). The parties also agreed to meet shortly after October 26, 2015 (which they did), to establish a Board of Review within a certain time frame (which was accomplished), and reached agreement on a further date for the hearing to proceed.

It was apparent to me on the January 16 and January 27, 2016 hearing days that the parties had not conducted sufficient negotiations to resolve the many issues pertaining to the Company's intended implementation of RCLS. The parties agreed to meet on February 8 and 9, 2016 to further narrow the outstanding issues in dispute between them.

On April 12, 2016, the next day of hearing, the Union agreed that certain rights grievances it had previously insisted be resolved or arbitrated prior to this material change arbitration going forward on the merits, would be heard on an expedited basis before another arbitrator.

While a number of items have been agreed between the parties, the following issues remain in dispute:

1. Maintenance of Basic Rates:
   - Term
   - Calculation of previous earnings
   - Rest booked resulting in loss of earnings
   - Exercise of seniority
   - Compensation
2. Layoff Protection:
   - Benefits Entitlement
   - Term
3. Relocation:
   - Benefit Entitlement
4. Early Retirement
5. Severance
6. Annual Vacation Flat Line

7. Description:
   - Assignments
   - Operating flexibility

8. Scope:
   - Re-crew and Rescue of Trains
   - Minimum Required Work Experience
   - Operational Limitations
   - Compensation – Application of Conductor-only Premiums/Rate of Pay

9. Training:
   - Trainers
   - Minimum Required Experience
   - Number of Attempts to Qualify

10. Seniority:
    - Minimum Experience Required

The Company submits that items identified as 7 through 10 above are beyond my jurisdiction and therefore beyond the scope of this award. I will address this position later in the award.

As a general proposition, the Union seeks to replicate the benefits the parties negotiated in the previous RCLS agreements.[4] In an interest arbitration process, the Union submits that the appropriate comparator must be the voluntarily negotiated RCLS agreements. The Company points out that the RCLS agreements were negotiated with the Union many years ago in different circumstances. The Company submits that its relationship with the Union has changed since that time. If the concept of replication is

[4] The Company has on nine previous and separate occasions negotiated RCLS agreements with the Union's predecessor – six agreements having been reached in the West, and three in the East. I have all those agreements before me, the most recent being the Thunder Bay agreement from 2003.

applicable, the Company argues that I should consider more recent non-RCLS settlements in material change cases. It directs me to certain of those settlements in support of its positions on the outstanding issues in dispute (more on that below).

I now turn to consider the appropriate orders and directions to be made having regard to the outstanding issues identified by the parties to this dispute.

Maintenance of Basic Rates ("MBR")

The Company proposes to maintain basic rates for three years, whereas the Union is seeking their maintenance for five years.

The Company says three years is the "standard" number of years for MBRs in material change cases. It directs me to the recent Kamloops Extended Service Run Agreement/Award of February 19, 2015 ("Kamloops ESRA") where the Union agreed to a three-year term. The Kamloops ESRA sets out the terms for the operation of trains in an ESR between Coquitlam, Roberts Bank and Kamloops without the need to change crews at the North Bend and Boston Bar respectively. In the Kamloops ESRA itself, the parties stipulate that it was unclear, what, if any, were the significant adverse effects of the implementation and operation of the ESRs.

In support of its proposal that the MBRs be limited to three years, the Company also directs me to **AdHoc 354**, a 1995 case adjudicated by Arbitrator Picher between

CP Rail System, IFS-Canada and Canadian Council of Railway Operating Unions (UTU-BLE) concerning the abolishment of two Montreal based assignments to operate Conductor-Only freight trains between Smith Falls, Ontario and Ste-Thérèse, Quebec. Arbitrator Picher awarded the Company's final offer of a three-year MBR. He referred to the Company's proposal as the "standard MBR and layoff benefits… consistent with the prior award between these parties in respect of the sale of the Dominion Atlantic Railway, dated August 8, 1994."

Finally, the Company states that the Memorandum of Agreement put forth by the Union in the *Sparwood* material change case[5] proposed three years of MBR protection, not five. In the *Sparwood* case, at the time submissions were made to Arbitrator Picher, the Company anticipated a reduction of 7 LEs and 7 Conductors working eastward, and the establishment of up to 4 Road Switcher assignments in Sparwood.[6]

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[5] *Canadian Pacific Railway Company and Teamsters Canada Rail Conference (Locomotive Engineers and Conductors/Trainmen/Yardmen)* Re: Dispute with respect to entitlement of benefits arising from the issuance of a material change in working conditions as a result of the cessation of Sparwood as an-away-from-home terminal from unit coal trains operating east of Fort Steele, British Columbia, unreported, April 22, 2014 (Picher).

[6] I note that at the time Arbitrator Picher heard the case, the Union's position was that no surplus staff was anticipated and that there was therefore no need to award severance or layoff benefits. By the time Arbitrator Hodges issued his award pertaining to the Sparwood material change on June 2, 2016, the Company had proposed modifications to its position by way of an amended material change notice, (the complex history of the case is reviewed in the Hodges award), and the Union was seeking 33 retirement or bridging packages in mitigation of anticipated adverse effects. Arbitrator Hodges ordered, among other things, that retirement incentive opportunities be negotiated to offset the 33 job losses.

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In support of its proposal of a five-year MBR term, the Union directs me to all the previous voluntarily negotiated RCLS agreements, which, without exception, provide for five years of MBR protection. The Union submits that these are the appropriate comparator agreements to consider and apply in this case, and the standard they establish is a five-year MBR. In the Union's submission the longer five-year term is justified because the loss of LE positions is a permanent loss, and further, the change is part of a far-reaching initiative that is national in scope. The Union relies upon **AdHoc 353(e)**[7] (which I refer to, hereinafter, as the *CN RCLS* case). In that case Arbitrator Picher issued an award concerning the employer's material change notices to implement RCLS in flat yard switching at six yards (at Edmonton, Winnipeg, Sarnia, Hamilton, Toronto and Montreal) involving 40 assignments.

I agree with the approach taken by Arbitrator Picher in the *CN RCLS* award, where he expressed the view that the appropriate comparator for large-scale material changes is other national negotiated agreements involving material change. Arbitrator Picher saw no basis upon which to distinguish the case before him, which I see as analogous to the one before me, from those like the Freight Crew Consist award of 1990 and Conductor – Only agreements.

I view as flawed the Company's submission that I should look to isolated material change cases for the "standard" MBR. The initiative before me is national in scope

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[7] See *Canadian National Railway and Canadian Council of Railway Operating Unions (UTU-BLE*) unreported award dated March 6, 1995 ("*CN RCLS*")(Picher)

whereby the Company is achieving a permanent reduction of one-third of its labour requirements and for the first time is extending those productivity gains to Road Switcher assignments. Further, the Company has clearly signalled its intent to implement belt pack technology at other locations in both Yard and Road Switcher service throughout the Country. Arbitrator Picher's reasonably expected concerns about the change to automated yard engines in that case, as having "wider currency," is equally applicable to the introduction of RCLS technology in Road Switcher service: the material change to be implemented in this case will have far-reaching impacts.

I do not quarrel with the three-year standard MBR reference by Arbitrator Picher in the 1995 **Adhoc 354** case. It has not escaped me, however, that that "standard" is referenced in an award issued one month after the same Arbitrator awarded five years of MBR protection in the *CN RCLS* award. Moreover, the Union and its predecessors appear to have negotiated, or been awarded, the three-year MBR standard in only the isolated material change cases. Those cases are not cases analogous to the Crew Consist award of 1990 or Conductor-only agreements referenced by Arbitrator Picher in the *CN RCLS* award.

Having regard to the foregoing, I award the Union's proposal of five years of MBR protection.

I also observe that the employer in the *CN RCLS* case originally included language in its proposal that would extend any agreement reached or awarded by

arbitration to apply to all employees in the future adversely affected by the implementation of the technology. By the time the *CN RCLS* case reached arbitration the employer had pulled back from that initial position and limited its request to extend any agreement to future additional notices of material change to be issued that year. Arbitrator Picher refused this proposal as well. Arbitrator Picher's rationale in declining the Company's request is as persuasive now as it was then: the adverse impacts on a particular group of employees affected by a material change may vary substantially from location-to-location. He wrote:

> That being so, absent agreement of the parties on such an important issue, a board of arbitration should be reluctant to establish the terms of an agreement which will be of prospective application to as yet undefined circumstances governing unidentified employees in unidentified locations.

Having regard to what I view as a sound and fundamental rationale articulated by Arbitrator Picher in the above excerpt, the terms of this material change are to have application only to those assignments at the locations identified in the Company's latest proposal. The terms of this award have no application to "undefined circumstances and unidentified employees in unidentified locations." It is trite to say that to determine benefit entitlement, employees impacted by the material change must be identified individually. Therefore, if the Company wishes to establish further RCLS assignments at the locations identified in the February 23, 2016 proposal it must first provide notice of material change to the Union and an agreement must be reached prior to implementation. As such, and to be clear, the Company's proposals including the Notes at 1.3 of the most recent proposal as well as those at 1.7, 1.8, 1.9 must be rejected.

My comments pertaining to the application of this award effectively dispose of the disputed item characterized by the parties as “Assignments” under the heading of “Descriptions” on page 9 of this award. To the extent that the Union seeks to limit how the assignments are used by the Company to provide service, it goes without saying that in implementing the assignments the Company must act in accordance with the relevant collective agreement provisions.

With respect to the calculation of previous earnings for the purpose of quantifying MBR, the Company proposes the basic yard rate for those employees, whereas the Union is seeking to have the 1/52 MBR weekly rate formula apply to both Road and Yard employees.

I appreciate the historical distinction between the two types of employees and their manner of payment. It seems to me, however, that the MBR weekly rate should aim to compensate an employee at the level they earned before the material change. The 1/52 formula does just that. Moreover, I note that the Company, in its two most recent RCLS agreements in Edmonton (September 1998) and Thunder Bay (2003) agreed to apply the 1/52 weekly MBR formula to Yard employees. I therefore award the Union’s proposal. Similarly, I see no reason that the threshold for booking rest resulting in loss of earnings should be not be consistent with the changes to article 73 of the CTY agreement. I therefore award the Union’s proposal to reflect the updated 12 hours of rest.

As for the necessity of exercising one's seniority at one's home or outpost terminal, it is to be exercised in accordance to the highest rated position. All previous RCLS agreements provide for the exercising of seniority in these circumstances to be according to the highest rated position. Absent some valid reason to depart from the established pattern of these voluntarily negotiated agreements I see no reason for doing so in this case. The Company has provided no rationale for its proposal to have seniority exercised in accordance to the highest rated earnings. It relies upon the Kamloops ESRA, but that Agreement/Award bears no similarity to this case, and therefore is of little assistance. Moreover, the parties themselves make reference to the highest rated position in the collective agreements between them.

Finally the Company's position is that all earnings are to be taken into account when an employee is on MBR. However, it seems to me that that the general rule should not apply where employees work beyond that which they are regularly expected or required to perform.[8]

Layoff Protection Benefits

It was not until after negotiations had ceased between the parties that the Company in its most recent proposal made any provision for layoff protection benefits

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[8] *See Canadian Pacific Railway Company and Teamsters Canada Rail Conference, Trainmen West and Locomotive Engineers West* Re: Remote Load-Out at Five Coalmines Cranbrook/Fort Steele Terminal unreported, November 25, 2011(Picher) ("*Cranbook*"). Arbitrator Picher agreed in that case, that employees should not be "penalized" with respect to their incumbency for performing extra work.

stemming from this material change. The Company's most recent proposal seeks to limit the protection to directly affected and regularly assigned employees, for a term of three years from the date of the agreement. This appears to be based on the Kamloops ESRA as well as the London Buffalo ESR Memorandum of Agreement dated September 12, 2013. The Union, on the other hand, is seeking to replicate the RCLS agreements which all provide for the number of benefits to be determined by the actual assignments reduced with a relief factor.

I do not accept that the Kamloops ESRA layoff provisions constitute an appropriate comparator that should somehow inform an analysis in what is essentially a form of interest-based arbitration. That Agreement is an isolated ESR material change agreement where it was entirely unclear to the parties what, if any, significant adverse effects there would be. In the case at hand, however, it appears to me certain that there will be job losses and that the immediate adverse effects of the implementation of this material change, which is part of a broader national initiative, are more layoffs.

In the circumstances, the Union's proposal, which replicates the RCLS agreements, is to be preferred over the Company's. Further, I see no rationale for disqualifying employees who do not own positions from access to layoff protection. Finally, since the entitlement to protection resides with the employee affected by the implementation of the material change, there is no rational basis to limit the duration of the entitlement.

Relocation Benefits

The Company's most recent proposal relies on the Kamloops ESRA referred to above as well as the Toronto London Buffalo ESR Memorandum of Agreement. The Company has offered no rationale for a proposal that limits the relocation benefits to only those adversely affected employees who are subject to and entitled to layoff benefits. As pointed out by the Union, were the Company's proposal accepted, an employee adversely affected would be unable to claim this benefit entitlement if he or she chose to relocate to where he or she could hold work pursuant to the provisions of the collective agreement. While the Company's proposal may very well result in cost savings, it limits the opportunities of employees adversely affected by the material change who are unable to hold positions, and it limits the locations to which employees may be permitted to go. In an exercise undertaken to minimize adverse effects, the approach voluntarily agreed to by the parties as set out in the original beltpack agreements, and proposed by the Union, must be preferred. The approach spares a greater number of employees from the adverse effects, and reduces MBR strings**.**

Early Retirement Benefits and Severance Allowances

The parties disagree with respect to both early retirement and severance allowance benefits. The Company addresses both as well as layoff benefits under one heading in its brief. It repeats its submissions verbatim in its reply brief. The Company's position is premised on the assumption that the implementation of RCLS assignments

will not result in a surplus of employees despite the elimination of one LE position per assignment.

In the Company's reply brief, with respect to early retirement benefits, it takes the position that those benefits are only to be provided Conductors pursuant to Article 72.16 of the CTY agreements should those affected employees have been laid off for 9 months in a 12-month period. In its most recent proposal, however, the Company proposed the application of article 72.16 be afforded to LEs.

Quite apart from the apparent conflict in the Company's articulated positions, the case cited by the Company in its reply brief, namely **AdHoc 577,**[9] does not stand for the proposition that early retirement benefits cannot apply to LEs. That case involved the abolishment of one road switcher position. The Company in that matter took the position that it was not obligated to pay early retirement allowance benefits provided for employees covered in article 72.16 in that agreement. Arbitrator Picher disagreed despite the Company suffering a manpower shortage because of the specific language of the collective agreement. Arbitrator Picher went on to point out:

> … benefits that are contractually vested for trainpersons do not, however, appear in the language that governs locomotive engineers. … . For reasons the parties best appreciate, they negotiated different benefits for trainpersons and locomotive engineers in the event of a material change.

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[9] *Canadian Pacific Railway Company and Teamsters Canada Rail Conference East*, Re Material Change Notices – Outremont Yard, dated July 17, 2008 (Picher).

AdHoc 577 has no application to this case because it did not deal with the abolishment of LE positions. Moreover, Arbitrator Picher ruled that in the CTY agreement the existence of a surplus situation was irrelevant to the application of article 72.16.

In support of the qualification threshold for the payment of early retirement benefits the Company directs me to **AdHoc 321**,[10] a 1993 decision issued by Arbitrator Picher involving CN, where the evidence was that the 14 yard positions lost to the UTU bargaining unit at McMillan Hump Yard would have a "substantial" number of job opportunities available in Toronto to replace those lost positions.[11]

The Company also relies on **AdHoc 337**,[12] the 1994 decision that followed **AdHoc 321** - also involving CN - where the BLE sought an order requiring the Company to implement measures to minimize the adverse effects of the elimination of eight LE positions as a result of the change at the McMillan Hump Yard. Those employees were

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[10] *Canadian National Railway Company and United Transportation Union,* unreported award dated June, 1993 ("*CN and UTU*")(Picher)

[11] The arbitrator explicitly wrote that he did not find the case to be analogous to those of the crew consist reduction, which arose in the context of the widespread implementation of reduced crews in certain defined forms of service across Canada. In the crew consist reduction case, the Arbitrator found the changes to be substantial, in terms of productivity gains for the Company and as a result of a significant reduction in manpower, thus clearly giving rise to adverse effects on work opportunities and earnings.

[12] *Canadian National Railway Company and Brotherhood of Locomotive Engineers,* unreported award dated September 23, 1994 ("*CN and BLE*") (Frumkin)

to be assigned to spareboards in the Toronto area when there were manpower shortages across the region. Arbitrator Frumkin agreed with Arbitrator Picher's refusal to grant early retirement or severance allowances in those circumstances.

The Company says that if I do find that early retirement allowances are warranted, I should follow Arbitrator Picher's approach in the *Cranbrook* case where the Union had sought such benefits consistent with the RCLS material change agreements.[13] In that case, Arbitrator Picher issued a conditional direction to the employer to make early retirement allowances available for a period of three years, to be triggered only if a surplus was demonstrated. For the purpose of demonstrating a surplus, the standards established by the parties in the Vancouver RCLS material change agreement from 1996 were to apply – where an employee(s) is to be laid off for nine out of twelve months. Arbitrator Picher directed the same contingent approach for the issuance of severance allowances.

In the *Cranbrook* case, the Company had argued that there had been a manpower shortage crisis for some time and that the Company had been in a substantial hiring campaign. It further argued that no present or likely future issue of a surplus of employees at the Fort Steele Terminal would warrant the direction of early separation allowances as had been agreed to by the Company in the other RCLS

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[13] In *Cranbrook*, the loading of the coal trains at five mine sites near Sparwood had been performed by train crews. Pursuant to the change mine employees would operate the trains remotely. The change would ultimately occasion the elimination of 34 positions shared between the LEs and Conductors.

agreements. Arbitrator Picher was persuaded by those arguments, and as a result he imposed a condition on early retirement and severance allowances for employees of the Fort Steele terminal.

In my view, the refusal by Arbitrator Picher in **AdHoc 321**, and by Arbitrator Frumkin in **AdHoc 337** to grant retirement or severance allowances was sound in the circumstances of those cases. In **AdHoc 321**, there were a "substantial" number of job opportunities to replace the lost positions. In **AdHoc 337**, the employees whose LE positions were abolished were to be assigned to spareboards in the Toronto area when there were manpower shortages across the region.

The Company submits that this case is analogous to **AdHoc 321** and **AdHoc 337.** It forecasts hiring new employees this year as a result of projected employee attrition numbers. It says it anticipates there being a surplus of positions.

I do not accept the Company's submission. Despite the Company's articulated forecasted plan for hiring,[14] the evidence before me is that there will be direct and inevitable layoffs stemming from the implementation of the proposed RCLS material change. In the face of there being every indication of the Company's continuing trend of eliminating jobs[15] - the most recent announcement reveals an "opportunity" to eliminate

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[14] Mr. Tony Marquis, Senior Vice President Operations, in cross-examination confirmed that the Company's anticipated hiring for trainmen has been deferred.

[15] Albeit is it unclear from its press releases which 1000 to 1400 jobs will be eliminated in 2016.

as many as 1400 positions, up from the projected 1000 for 2016 - and its projected $12.2 Million annual labour costs savings once the “roll out” of RCLS is completed with its associated full-time equivalent (FTE) reduction, I accept that there will be a manpower surplus – not a shortage.

In light of the above, I accept the Union’s proposal that the number of the early retirement benefits it urges be made available is appropriate and consistent with the actual assignments reduced with a relief factor of 1.25 as per the replication of the RCLS agreements. These benefits will accelerate the retirement of senior employees and thereby favour the retention of junior employees. As for severance opportunities, I think it appropriate to make such opportunities available to employees in any given location if after any pay out of early retirement benefits there is a surplus of employees. The standard for a surplus to be established is where an employee(s) is required to be laid off for nine out of 12 months. It may be that no surplus will arise, but if one does emerge, payments are to be made available as found in the RCLS agreements.

Annual Vacation Flat line

The elimination of LE positions directly impacts the annual flat line vacation allotment at the locations identified in this material change. To minimize the adverse effects on those LEs who remain in those positions, the natural consequence, it seems to me, is to maintain the allotment of annual vacation for those LEs in affected terminals as per the Thunder Bay RCLS agreement.

I now turn to those remaining issues, that the Company submits all fall outside my jurisdiction because they do not consider the mitigation of adverse effects contemplated by the material change at issue.

Scope/ Training/ Seniority, Preference of Work and Promotion

As it relates to “Scope” the Union would have me direct a prohibition on the Company from utilizing RCLS crews to re-crew/rescue trains. The Union submits that there are numerous articles in the current collective agreements that prohibit such utilization and which govern work entitlement. The Union would also have me impose a 2-year minimum cumulated compensated service (“CCS”) work experience requirement for employees to be eligible to become RCLS operators. The Union asserts this would ensure the safety and integrity of the RCLS operations. The Union asks that I restrict train length, weight, commodity and the speed of trains operated by Road Switcher crews as it relates to the newly established assignments. The Union is very concerned about RCLS crews operating on the main line without what it submits are necessary restrictions to ensure their safety as well as that of the general public. The Union has brought its concerns to the attention of Transport Canada.

Beyond the aforementioned prohibitions and restrictions, the Union would have me declare that all payments and guarantees for Road Switcher employees are to apply to such employees operating in RCLS. The Company, in its proposal seeks to have all

RCLS operators, whether operating in Yard service or Road Switcher service, paid as hourly rated Yard Service employees. Finally, the Union would have me prohibit the Company from operating RCLS crews in conventional mode during a shift.

As for RCLS training, the Union seeks to be directly involved in determining the duration, content and providers of the training – all of which it asks that I direct must be mutually agreed upon by the parties. Beyond the minimum two years of CCS work experience to be eligible for the training, the Union requests that I grant eligible employees two opportunities to successfully qualify to operate RCLS. With respect to Seniority, Preference of Work and Promotion, the Union reiterates the two-year minimum of CCS work experience, and it seeks to have previously agreed upon bulletining and seniority provisions of previous RCLS agreements awarded.

Earlier in this award I found to be instructive for the purposes of this case the *CN RCLS* award concerning that employer's material change notices to implement RCLS in flat yard switching at six yards involving 40 assignments. That decision is also instructive in respect of the limits of my jurisdiction in fashioning an award, which is explicitly set out in the collective agreement provisions reproduced above. The LE and CTY collective agreements are virtually identical on this point: the decision of the arbitrator is to be concerned with and limited to measures for minimizing the adverse effects of the material change on affected employees.

In the *CN RCLS* case a number of issues, which remain in dispute in this case, remained outstanding when adjudicated before Arbitrator Picher, including a request by the Council, through the BLE, for orders preventing RCLS operations within certain zones. The BLE submitted that the automated locomotives should not be permitted to go over the main track or operate in transfer service between yards without a LE onboard. The UTU sought orders concerning the training of employees to be assigned to operate RCLS technology. It also raised separate safety concerns, as the Union has in this case. The relevant extracts of the Picher award are reproduced below:

> The Council, through the BLE, seeks an order from the Arbitrator restricting belt pack operations within certain zones. The BLE submits that automated locomotives should not be permitted to go over the main track, or operate in transfer service between yards without a locomotive engineer aboard. … The arbitrator has substantial difficulty with this proposal. With respect the appropriate method of operating is not a matter which can fairly be said to fall within the factors within the arbitrator's jurisdiction in considering the mitigation of adverse effects as contemplated in articles 89 and 78 of collective agreements 1.2 and 1.1 respectively. That matter is for the Company, subject, of course, to compliance with the *Railway Safety Act* and the regulatory supervision of Transport Canada.

Arbitrator Picher continued:

> One of the issues stressed by the U.T.U.'s representative is the establishing by the arbitrator of zones to which automated yard operations will be restricted, as well as restricting in respect of sight-line operations and push-pull operations in certain circumstances. The U.T.U. also requests the arbitrator to establish penalty provisions in the form of penalty premiums payable when the Company violates such rules. With respect, for the reasons touched upon above, the arbitrator finds it inappropriate to deal with issues directly affecting operations, a matter which is substantially different than mitigating the adverse impacts on employees caused by the material change. The decision as to the location and method of automated yard switching operations remains the Company's, subject of course to the safety rules found with the CROR and other regulatory restrictions as well as to the safety provisions found within the Canada Labour Code. I therefore reject this aspect of the Council's request.

Finally, Arbitrator Picher wrote the following with respect to training:

> Nor does the arbitrator deem it appropriate to make an order or direction as to the training of employees who will be assigned to operate belt-pack technology. It is obviously in the interests of the Company and indeed, its obligation, under law, to ensure that its employees are adequately trained and that its enterprise is conducted in a safe manner. There is little reason to doubt that that will occur. Moreover, it is open to question as to whether training is an appropriate factor to be included in an arbitrator's award in relation to the minimizing of adverse impacts in the wake of a material change under the collective agreements in question, a matter which, in any event need not be conclusively resolved for the purpose of this case.

Notwithstanding Arbitrator Picher's reluctance to venture into operational issues and issues of employee training, he recognized the crucial input the Union is able to provide the Company on the issues of safety of operations. As the Company ventures into the use of RCLS on the main line, that input is essential to the Company in its ability to carrying out the obligations Arbitrator Picher refers to in the paragraph above. He wrote:

> The UTU raises separate concerns with respect to the safety of operations, particularly as it relates to cars running free, in some circumstances, during the course of yard switching. In the arbitrators view, it is not unreasonable to proceed with a degree of deliberate caution in this area and the wisdom of establishing joint committees to consult in respect of problems, which could arise in relation to safe operations within each yard clearly has merit. The arbitrator therefore directs that the parties meet to establish joint committees for each location, the purpose of which shall be to study and discuss safe procedures for yard switching utilizing belt-pack technology and two-person crews. The mandate, frequency of meeting and duration of such committees is a matter, which, for the time being, the arbitrator remits to the parties, for their consideration, while retaining for their consideration, while retaining jurisdiction in the event of ultimate disagreement. For the purposes of clarity, the joint committee is to be consultative, to provide the Council the fullest opportunity of input. In the event of disagreement among the members of the joint committee, however, the Company shall retain the right and prerogative to proceed with the belt pack operations.

I accept and adopt Arbitrator Picher's comments as they pertain to my jurisdiction to wade into those areas that can be broadly characterized as operational limitations (without commenting of course on any limitations already reflected in the collective agreements between the parties or those imposed by regulatory bodies or provided for by CROR Rules or otherwise by law).

The Union is very concerned that the Company will not or may not adhere to the collective agreement provisions of the agreements in force between them. Should that become the case, the grievance process is available to resolve any such dispute. For example, to the extent that "numerous articles within the current collective agreements" prohibit the use of RCLS crews from rescuing or re-crewing trains - none of which were identified for me by the Union in its submissions or at the hearing - the Union will be in a position to challenge those alleged violations if and when they occur. On the face of the Company proposal, however, there is no provision pertaining to the re-crewing or rescuing of trains that would appear to violate any unidentified mandatory provisions of the collective agreements.

Similarly, the Union would have me direct that RCLS crews are not to operate the locomotive in conventional mode during a shift. Notwithstanding that the Company agreed in the Thunder Bay RCLS agreement to that operational restriction, the Union's

request in this case appears to be unrelated to minimizing adverse effects on employees who are impacted by the change at issue.[16] To reiterate Arbitrator Picher's comment:

> …it would be inappropriate to deal with issues directly affecting operations, which are matters substantially different than mitigating the adverse impacts on employees caused by the material change.

However, with respect to "Compensation – Conductor-Only Premiums/Rate of Pay," pertaining to Road Switchers operating in RCLS, the Union's proposal must be awarded as provided for in clause 2.11 of its proposal (updated to reflect 2016 rates). Road Switchers operating in RCLS are Road Service employees. The Company's proposal would treat them as Yard Service employees, which is a separate class of service. To accept the Company's proposal on this issue would be entirely inconsistent with the collective agreement between the parties.

Having regard to the submissions pertaining to training, the Union's position cannot be sustained for the reasons articulated by Arbitrator Picher. It would simply be inappropriate for me, as the adjudicator appointed to deal with the adverse effects arising from this material change, to specify the training components that the Company must establish, or to direct that the training in RCLS must be mutually agreed upon by the Union at each particular location. As for Seniority, Preference of Work and Promotion, in the absence an agreement to determine entitlement to RCLS training or a process by which such applicants are selected or assigned, the Union's proposal to

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[16] I do note that, in the Company's proposal, in the event a RCLS crew operates in conventional mode during the shift, one of the crew must be a qualified LE.

have previously agreed upon bulletining and seniority provisions of previous RCLS agreements awarded, is granted (without its desired caveat of a two-year CCS requirement).

Finally, while I certainly appreciate the Union's concern about junior crews operating in RCLS on the main line, as well as the Union's safety concerns about train weight, length, commodity and speed – which I accept as legitimate concerns - absent any contractual or regulatory mandate on these issues it is neither my role, nor within my jurisdiction to wade into these waters. Although I heard evidence about the Union's safety concerns, I conclude that this forum is simply not the appropriate one to have them addressed.[17]

As stated above, however, I am of the view that the Union has invaluable input to offer on the safety issues presented by the implementation of RCLS operated by Road Switchers operating for the first time on the main line. There is wisdom in establishing joint committees at each location to which this award applies to consult in respect of problems that could arise in relation to safe operations of RCLS as it relates to the uncharted use of the technology on the main line. As such I adopt, with necessary

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[17] The Union has sought the involvement of Transport Canada – the regulatory body whose role is to ensure rail safety through the development and enforcement of standards and regulations. As for the Union's argument that the definition of remote control operator had been eliminated in the latest revisions to the CROR resulting in all train moves being controlled by a LE thereby preventing the Company from using anyone other than a qualified LE for the operation of RCLS, the definition change, in my view, was simply made to clean up the language of the CROR.

changes, Arbitrator Picher's directions provided to the parties in the final paragraph of the *CN RCLS* award reproduced above.

Having regard to all of the above, the parties are directed to jointly compose the required agreement language and finalize the requisite details within 60 days following the date of the issuance of this decision, failing which any outstanding matters are to be returned to me for binding resolution. Only following complete agreement between the parties or the issuance of a final award will the implementation of this material change be permitted. I remain seized with respect to any and all disputes arising from this decision.

September 21, 2016

CHRISTINE SCHMIDT
ARBITRATOR

APPENDIX A

The Company's *Exparte* statement reads as follows:

DISPUTE:

The Company intends to implement Remote Control Locomotive Systems (RCLS) across various terminals in Canada. The parties have been unable to agree on how potentially adverse effects would be addressed pursuant to the Material Change provisions outlined in the Collective Agreement.

COMPANY'S POSITION:

On September 18, 2014 the Company served a notice of Material Change upon the Union pursuant to the Collective Agreement regarding its intention to implement RCLS at various terminals across Canada in both yard and road switcher operation. It is not anticipated that any bargaining unit employees will be laid off as a result of this initiative.

On April 23, 2015 additional information with respect to the Material Change was provided to the Union. Several draft agreements to address potential adverse effects were provided to the Union, the latest on October 30, 2015.

The parties held a preliminary hearing with Arbitrator Schmidt on October 26, 2015 in Calgary, AB. During that hearing the parties agreed to further negotiate the Material Change on October 29, 2015 in Toronto, ON and that a Board of Review would be scheduled and held no later than November 27, 2015.

- The parties met on October 29, 2015 and the Company provided answers to the Unions list of questions.
- The Company gave the Union a draft proposal on October 30, 2015.
- A Board of Review convened on November 18, 2015 in Toronto, ON. The Union-Management representatives of the Board failed to reach consensus.
- No agreement was reached during the October 29, 2015 meeting or during the November 18, 2015 Board of Review.

The parties have been unable to reach an agreement on measures to minimize adverse effects associated with this Material Change. The Company requests that the Arbitrator approve the Company's latest proposal for immediate implementation of RCLS technology for the locations designated in the Company's Material Change notice.

The Union's *Exparte* statement reads as follows:

DISPUTE:

The Company desired to implement Remote Control Locomotive Systems (RCLS) in a number of terminals throughout Canada, however the negotiations have not resulted in mutual agreement on all measures to minimize the adverse effects on employees arising from the proposed material change nor has the Company dealt with other issues which need to be determined first prior to the Arbitrator being able to adjudicate this case.

As the arbitrator is already aware, the Union has filed grievances (rights grievances) on behalf of each of GCA's taking issue with the Company's various and different initiatives in this case. These grievances would normally be heard by the CROA&DR in due course.

The Union has also taken issue with the various Notices of Material Change (and other suggested amendments thereto by the Company) in this case.

POSITION:

On September 18, 2014 the Company served upon the TCRC Notice under the Material Change Articles to introduce RCLS assignments in Roadswitcher service in Calgary, Edmonton, Montreal (Delson/Dorion) and Welland. In addition, Remote Control Locomotive System (RCLS) assignments for Yard service in Montreal (inclusive of Hochelaga), London and Hamilton.

Following this, on April 23, 2015 the Company provided the TCRC with an amended and updated list of terminals they wished to utilize RCLS technology in, including Lethbridge, Bredenbury, Regina and Edmonton (Scotford). The Company now desires to have the right to utilize RCLS in either Yard or Roadswitcher service at locations/terminals where it had previously been implemented.

The Union met with Arbitrator Schmidt and the Company at the FMCS offices in Calgary, AB on October 26, 2015. An agreement was reached on procedures in order to deal with the issues raised by the parties to date.

The parties met in Toronto, Ontario on October 29, 2015, as agreed to at the meeting on October 26, 2015 in Calgary, AB. The parties agreed to meet on November 12, 2015, however due to extenuating circumstances, the meeting was cancelled.

The Union has repeatedly raise issue with the quality, quantity and timing of the disclosure of requested information and documents from the Employer. The Agreement reached between the parties on October 26, 2015 attempted to address these issues but left Ms. Schmidt with the jurisdiction to later deal with such issues as she saw fit.

The Union has also repeatedly raised issues in connection with other earlier related grievances which have yet to be addressed, resolved or arbitrated. These earlier

related grievances include situations where the Union maintains that the Company has implemented material changes which need to be addressed, resolved or arbitrated prior to the present dispute proceeding further. The Union submits that the earlier disputes must be addressed, resolved or arbitrated to determine whether or not the Company is to be permitted to introduce any or all of its proposed material changes in this case and even if so such earlier grievances must be first resolved, addressed or arbitrated in order for the Union to be able to accurately determine the adverse effects in this case. The Union submits that it cannot negotiate, agree or litigate this dispute without first knowing how the other disputes are to be determined. The Company has rejected all requests to address, expedite or first arbitrator the other earlier related disputes.

On November 18 the Board of Review met in Toronto. The parties presented their respective positions. On December 7, 2015 the Board of Review members held a conference call in camera. The Board members were unable to come to a unanimous agreement. However, the Union's representatives on the Board of Review released their findings and recommendations which the Union relies upon in this case.

The raises all of the above as preliminary and procedural issues which need to be litigated and determined before this case may be litigated on the merits. The Union submits it needs to first receive and address any issues arising out of any decisions issued in respect to the above noted grievances and cases.

The Union's members on the Board of Review issued recommendations. The Union adopts and relies upon these recommendations and maintains these recommendations must be addressed before this case can be litigated on the merits.

In addition to the above, the Union submits that the Arbitrator ought to bifurcate this case in order to deal with the preliminary issues raised above. The Union requests a decision first on these issues. The Arbitrator ought to rule that the present matter be held in abeyance until and unless the related and underlying grievances have been heard and decided either by the CROA&DR Arbitrator or other Material Change Arbitrator.

The Union also submits that the present dispute ought not to proceed on the merits until the Company has complied with its collective agreement obligations and provide full disclosure and particulars of the material change intiatives and all related consequences.

In the alternative, and without prejudice to the above, the Union submits that on the merits, the dispute may be described as follows.

The parties have not agreed to any measures to address the adverse effects.

The issues and measures to address the adverse effects remaining in dispute are:

1. Appropriate phasing and locations.
2. Equalization of miles.
3. Adequate accommodation.
4. Bulletining.
5. Seniority arrangements.
6. Learning the road.
7. Eating provisions.
8. Lay-off benefits.
9. Severance pay.
10. Early separation allowance.
11. Rates of pay.
12. Maintenance of basic rates.
13. Deadheading.
14. Types of work and appropriate limitations under which RCLS will operate.
15. Training / Familiarization.
16. Risk assessment and the various components.
17. Regulatory issues.
18. Duty to accommodate.
19. Relocation expenses.

In addition to the above and in the alternative the Union submits the Arbitrator award the Union's proposal. The Union relies upon its proposal submitted to the Company in connection with the mitigation of the adverse effects in this case.