IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY
(The "Company")

-And-

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

2015-073 (A) and (B)

RE: Grievances in relation to S&C Notice 2014-09 (Use of Company Vehicles for Commuting) that was issued on September 11, 2014 and Payment for After Hour Calls

ARBITRATOR: CHRISTINE SCHMIDT

APPEARANCES FOR THE COMPANY:

B. Medd	**– Officer, Labour Relations**
J. Gillanders	**– Director, S&C Operations**
K. Law	**– Director, S&C Project Contracts**
J. Roberts	**– Director S&C Maintenance East**

APPEARANCES FOR THE UNION:

D. Ellickson	**– Counsel, Caley Wray**
S. Martin	**– Senior General Chairman**
B. Strong	**– General Chairman**
L. Cooper	**– Assistant General Chairman**
B. Duncan	**– East Region General Chairman**

A hearing in this matter was held in Calgary on June 23, 2015 Ad-hoc matter 2015-073(A) and (B)

AWARD

This award applies to two separate disputes that were heard in Calgary on June 23, 2015. The nature of the disputes are reflected in the statements of dispute and joint statements of issue filed, which read as follows:

File 2015-073(A)

Dispute:
The introduction of S&C Notice 2014-09 Use of Company Vehicles for Commuting that was issued on September 11, 2014.

Joint Statement of Issue:

On September 11, 2014 the Company issued a policy notice titled S&C Notice 2014-09 Use of Company Vehicles for Commuting with an effective date of September 15, 2014.

The Company contended that recently there have been a number of incidents involving damage or break-ins to Company vehicles while on the personal property of employees who have been assigned these vehicles.

As a result the Company instructed engineering employees that they would no longer be permitted to use Company vehicles for personal commuting.

The Union contends that the Company's refusal to provide employees with a company vehicle for the use while on-call is a violation of the Collective Agreement including but not limited to Appendix 21 and past practice. In the alternative, the Union contends that as this issue was not raised at the bargaining table, the Company is estopped from changing the past practice for at least the life of the current Collective Agreement.

The Union seeks a declaration that retracts S&C Notice 201-09 Use of Company Vehicles for Commuting and the vehicles be returned to the on-call engineering employees as per the long standing practice.

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

FOR THE UNION:	**FOR THE COMPANY:**
Brian Strong	**Dave Guerin**
General Chairman	**Director Labour Relations**

File 2015-073(B)

Dispute:
The Additional directive that was sent out after the introduction of S&C Notice 2014-09 Use of Company Vehicles for Commuting stating the start-end time for after-hour calls began at their headquarters.

Joint Statement of Issue:

On September 11, 2014 the Company issued a policy notice titled S&C Notice 2014-09 Use of Company Vehicles for Commuting with an effective date of

September 15, 2014 and numerous subsequent directives from various supervisors stating that payment for overtime calls will start at the headquarters.

The Union contends that the Collective Agreement including but not limited to Articles 3.4, 3.8, 7.1, 7.10 and the undisputed past practice clearly indicate once the employee accepts a call and begins to respond payment begins.

It has been previously undisputed by the Company that the payment for calls outside regular working hours began once the employee received the call. The Company failed to notify the Union in the most recent round of bargaining that the Company intended to change the longstanding practice.

The Union seeks a declaration that the Collective Agreement has been violated and an order directing the Company to rescind its various directives in order to comply with the Collective Agreement. Alternatively, the Union seeks a declaration that the Company is estopped from altering the longstanding practice between the parties. In either case, the Union seeks full compensation for all affected employees and such other remedies that may be appropriate.

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

FOR THE UNION:	**FOR THE COMPANY:**
Brian Stong	**Dave Guerin**
General Chairman	**Director Labour Relations**

The first dispute relates to the Company's Notice to the Union issued on Thursday, September 11, 2014, to become effective the following Monday, September 15, 2014: engineering employees ("employees") who had Company vehicles assigned to the positions they held, would no longer be permitted to use those vehicles to commute to work. The Notice was issued without notice or consultation to the Union. The stated reason for the change was that there had been a number of incidents involving damage or break-ins to Company vehicles while on the personal property of employees. The Company had supplied vehicles to employees to commute to and from work for just over twenty years.[1]

[1] Though the Union had sought production of information pertaining to the damage or break-ins subsequent to the issuance of the Notice, none was forthcoming from the Company. No issue was raised as to the *bona fides* of the Company's rationale during the grievance process and it is not my intention to address the Company's stated rationale for the change or the Union's

Prior to 1994, during the "Motorcar Era", employees commuted to certain locations where Company vehicles were stored. Employees would pick up vehicles to which they were assigned and proceed to work and return the Company vehicles to "toolhouses" or "headquarters" ("headquarters") at the end of the day.

In 1994, the Company went through a re-organization. A rebidding process for positions took place. Available positions covering numerous territories were bulletined. Company vehicles were specifically assigned to the vast majority of these positions. Although the provision of Company vehicles has never been expressly stated in posted job bulletins, employees have always applied for vacancies with the understanding and expectation that the Company vehicles assigned to those positions would be provided.[2]

The Company's Notice has significantly impacted employees. Prior to the implementation of the Notice, employees with Company vehicles started and ended their days anywhere on their territory, without the necessity of going to headquarters. They were expected to be at their first work location at the start of their shifts and were expected to finish their shifts at whatever location they were last working.

Now employees are required to attend at headquarters to pick up a Company vehicle before heading to their work locations for the day. They must drop off the

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contention that it makes no "business sense" as asserted in the Union's brief filed at the hearing.

[2] The applicable Vehicle Fleet Policy is consistent with the Company's until recently held view that those employees to whom Company vehicles had been assigned were required to carry out the duties associated with the positions.

Company vehicle at headquarters at day's end before heading home in their personal vehicles. Depending on the day's first and last work locations and an employee's residence, employees' time away from home may be extended significantly.

Once home, many employees are on standby. They are responsible for handling trouble calls outside their regular hours on both their territory and those of other employees. These employees now have no Company vehicle for after-hours calls ("call outs").

The second dispute between the parties relates to an additional Company directive that stipulates that the start and end times for payment for call outs begins and ends at the point where the Company vehicle is being stored rather than at employees' homes. In other words, the time spent travelling from home to headquarters no longer qualifies for paid overtime.

The Union says that the Company's directive that employees are no longer permitted to use Company vehicles for personal commuting violates the collective agreement, and in particular Appendix 21, as well as past practice. In the Union's submission, the assignment of Company vehicles has become a term of those employees' employment (typically positions requiring on call and stand by duties) that cannot be unilaterally altered.

With respect to the additional directive about start times and end times as it relates to compensation for after hour call outs, the Union says that the clear and unambiguous language of the collective agreement – it cites articles 3.4, 3.8, 7.1 and 7.10 - means that overtime is paid from the time an employee accepts a call out until they return home. On this point, the Union's evidence was somewhat different than that set out in its brief: since the re-organization in 1994, employees on call outs have been paid overtime from the time they leave home until they return home irrespective of whether or not they were assigned the use of a Company vehicle. On this point the Union's evidence was not seriously contested by the Company.

The primary language of the collective agreement has not changed since prior to the re-organization in 1994. However, in 1997, shortly after many employees were provided with Company vehicles, the parties negotiated a new article - Article 3.8 - into the collective agreement. One of the Company representatives in attendance at the hearing gave evidence to the effect that the parties' intention in using the words "prior to his leaving home" in Article 3.8 was the same as "getting in the Company vehicle."

In respect of both directives and in the alternative to the Union's primary submissions, it argues that the Company is estopped from implementing either directive for the duration of the collective agreement since the Company did not raise its "new" interpretations of the collective agreement at the bargaining table during negotiations.

The Collective Agreement

In support of the Union's position that that the use of Company vehicles is a term of employment the Company relies on Appendix 21 to the collective agreement, and past practice. Appendix 21 provides as follows:

> During negotiations the Company expressed a concern pertaining to the increased response time for employees responding to call-outs and the increased operating costs associated with the supply of Company vehicles attributed to employees relocating their primary residence, on their own in the future, so as to distance themselves from their responsible territory.
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> Although the Union was unable to address the Company's request, the parties agree that should such concerns begin to impact negatively on operations or budgets, the parties would meet with a view to develop mutually agreeable solutions to resolve these concerns.

With respect to the Union's submissions on the manner of payment for call out, the Union relies on the 3.4, 3.8, 7.1 and 7.10, all of which are reproduced below:

> **Article 3.4**
> Except as otherwise provided in clause 4.5, an employee called in case of an emergency or a temporary urgency outside of his regular assigned hours, after having been relieved, will be paid a minimum of three hours at overtime rates for which three hours of service may be required, but for such minimum he will not be required to perform work other than that of the emergency, and possibly another emergency which might arise subsequent to the time of the call. If, however, an employee is called to commence work less than two hours before his regular starting time, the time will be computed continuously with the regular day's work and the time before the regular starting time will be paid for at the rate of time and one-half on the minute basis, with a minimum of one (1) hour at time and one-half.
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> **Article 3.8**
> An employee who is called by the Company and accepts the call, will be paid one (1) hour punitive overtime rates if such call is cancelled prior to his leaving home.
>
> **Article 7.1**
> When employees are required by the Company to hold themselves available to protect the requirements of the service outside of regular working hours and on rest days, they will be paid a standby allowance in addition to the regular earnings.

Article 7.10
Employees will be paid pursuant to the provisions of Article 3 for work performed outside of regular hours.

Decision

I am unable to accept either of the Union's primary submissions as they relate to alleged violations of the above articles of the collective agreement or of Appendix 21.

A plain reading of Appendix 21 reveals that the Company, in the 2005 round of bargaining, expressed a concern about the increased response time for employees to call-outs and the increased operating costs associated with the Company's supply of Company vehicles attributed to employees relocating their primary residence. The parties agreed that if the articulated concerns began to impact on operations or budgets, the parties would meet with a view to develop solutions to resolve the Company's concerns.

It was not alleged by the Union that the Company vehicles were removed because of an increased response time for call-outs and an increase in operating costs associated with the relocation of employees' primary residences. Accordingly, the language of Appendix 21 simply has no application to the circumstances before me. The Union can point to no other language in the collective agreement that provides for an entitlement to the use of Company vehicles for commuting.

As for the language in articles 3.4, 3.8. 7.1 and 7.10 pertaining to the manner of in which call outs are paid, I am unable to agree with the Union's submission that the

language clearly and unambiguously supports the position that payment for call outs commences from the moment an employee accepts a call until his return home (as set out in the Union's brief) or from the time the employee leaves home until he returns home.

Article 3.4 sets out certain guarantees concerning the minimum number of hours for which payment will be made, but does not specifically address the issue of when call out pay commences. Furthermore, I note that article 3.4 was in effect prior to the re-organization when employees had to drive to designated locations to pick up Company vehicles. Except where there is express collective agreement language to the contrary, the law is clear that travel time from home to one's workplace (in this case "headquarters") is not compensable (see *Re: Canadian National Railway National Railway and Canadian Telecommunications Union*, 17 L.A.C. (2nd) 142 (Adams).

Similarly, though articles 7.1 and 7.10 are helpful to the extent that they provide the context for the payment of work outside of regular hours, they do not speak to the issue of when call out pay entitlement begins or when it stops.

As for Article 3.8, it was negotiated when many employees already held positions to which Company vehicles were assigned (approximately 3 years after the re-organization) – when the language was negotiated, "prior to leaving home" essentially meant "prior to getting in the Company vehicle" for many employees because the Company vehicles were parked at the employees' homes.

Although I accept the Union's evidence that, since the re-organization, employees have been paid for call outs from the time they left home until their return, Article 3.8 is about whether employees will be paid an hour of punitive rates if their callout call is cancelled once accepted but before they leave home. It does not address when the clock starts or stops ticking for the purpose of overtime on callouts. The entitlement to punitive rates for a cancelled call prior to leaving home does not translate into, nor can it be equated with, an entitlement to be paid door to door when an employee does leave home for a call out. Just as there is no express language in the collective agreement to support an entitlement to a Company vehicle, there is also no express language that creates an entitlement to be paid for all hours between the moment the employee accepts the call out and the time he returns home.

That leaves the question of estoppel.

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.

The Company referred me, among other cases, to **CROA&DR 2638**, which considers the doctrine of estoppel following the Ontario Divisional Court's review of the *Re CN/CP Telecommunications and Canadian Telecommunications Union* (1981) 4

L.A.C. (3rd) 205 (Beatty). The Company argues that “indulgences” or gratuitous benefits are not protected by estoppel.

In **CROA&DR 2638** the Brotherhood of Maintenance of Way Employees (“Brotherhood”) took issue with the Canadian National Railway Company (“CN”) changing the bulletining requirements for mechanical repairs for the Extra Gang season on the Mountain Region without first negotiating the change with the Brotherhood. For eleven years CN had bulletined the positions as Field Maintainer positions when under the strict letter of the applicable collective agreement the positions were to be bulletined as Mechanics “A.”

Arbitrator Picher denied the grievance. He determined that it could not be said that the past practice could be taken to be a representation by the Company to affect their legal relations where either the Union or employees could be said to have relied on a representation to their detriment. Arbitrator Picher commented that there had been no suggestion before him that any employee had altered his circumstances or taken steps to change his position based on the past practice.

In this case it is agreed that there has been a long-standing practice of providing many employees with Company vehicles, and I have found there to have been a long standing practice consistent with that practice to pay employees (whether they were provided with Company vehicles or not) overtime for call-outs from the time they leave their homes to attend at a trouble spot until their return.

The Company has exercised its management right to no longer assign Company vehicles for personal commuting, and to commence paying overtime for call-outs where employees now pick up the Company vehicles and drop them off. There is nothing in the collective agreement to preclude the Company from doing so. But fairness dictates that the Company not be permitted to unilaterally, and with next to no advance notice, pull the rug out from under the Union and the many employees who have come to rely upon their assigned Company vehicles for commuting purposes and who have every reasonable expectation to be paid for all hours on call backs in the door-to-door fashion that has emerged over a lengthy period of time. That is the essence of estoppel: to prevent an unfair insistence on a party's strict legal rights, at least for a period of time, when it has led the other party to believe that it would forego those rights.

The significant distinguishing fact between **CROA&DR 2638** and the case before me is that the Company changed the longstanding and consistent practice of providing vehicles knowing that employees had for over twenty years bid into positions based on the reasonable assumption that they would have access to Company vehicles. In these circumstances, unlike those before Arbitrator Picher, it can be said that the Company has made a representation that was intended to affect its legal relations with the affected employees and the Union.

Moreover, employees altered their circumstances and changed positions in reliance on the Company's past practice. By unilaterally changing the practice relating

to the use of Company vehicles for commuting (and its sister practice of paying for call outs from the time employees leave home until their return) the employees have relied on the Company's representation to their detriment and the Union was deprived of the opportunity to bargain the issue during negotiations. In such circumstances it would be inequitable to allow the Company to unilaterally remove the Company vehicles from those employees who held positions to which they had been assigned without allowing the Union the opportunity to negotiate the issue.

Based on the foregoing, I find that an estoppel exists for the life of the collective agreement. Then, the parties are free to negotiate the issues if they wish. In the interim and forthwith, the Company is directed to return Company vehicles to employees who held positions with Company vehicles assigned to them, on the same terms and conditions that applied as of September 11, 2014. As for the start and end times for callouts, employees are to be compensated from the time that they leave their home to attend at the work location until their return home irrespective of whether they have a Company vehicle assigned to the position they occupy or not. Any other remedial issues stemming from this award are remitted to the parties and I remain seized in the event they are unable to resolve them.

July 13, 2015

CHRISTINE SCHMIDT
ARBITRATOR