IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY COMPANY
(The "Company")

-And-

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

2016-646

RE: The alleged violation of Wage Agreement No.1 and the Income Security Agreement with respect to the November 23, 2015 S&C Reorganization.

ARBITRATOR: CHRISTINE SCHMIDT

APPEARANCES FOR THE COMPANY:

L. Smeltzer	**– Labour Relations Officer**
D. E. Guerin	**– Senior Director Labour Relations**
J. Leonardo	**– General Manager, Signals and Communication**
S. Smith	**– Labour Relations Officer**
A. Mosso	**– Manager Labour Relations**

APPEARANCES FOR THE UNION:

K. Stuebing	**– Counsel, Caley Wray, Toronto**
S. Martin	**– Senior General Chairman**
L. Hooper	**– General Chairman**
B. Kauk	**– Western Regional Representative**
B. Duncan	**– Eastern Regional Representative**
L. Couture	**– International Representative**

A hearing in this matter was held in Calgary on April 2, 2016.
Ad-hoc matter 2016-646.

AWARD

Introduction

This award concerns a grievance filed by the Union in response to the Company's July 20, 2015 Notice of Technological, Operational, Organizational change ("TO&O change" or "organizational change" or "reorganization") under Article 1.1 (a) of the Income Security Agreement ("ISA").

The nature of the dispute is summarized in a Statement of Dispute and Ex Parte Statement of Issue filed by the Union, which reads as follows:

> Dispute:
>
> The violation of Wage Agreement No.1 and the Income Security Agreement with respect to the November 23, 2015 S&C Reorganization.
>
> Union's Exparte Statement of Issue:
>
> On July 20, 2015 the Company issued an Article 1.1(a) Notice allegedly pursuant to the Income Security Agreement (ISA) notifying the Union of its intention to abolish all Unionized S&C bid positions in Canada with an effective date of November 23, 2015.
>
> The Union contends that the Company has the right to issue a Notice as per Article 1.1(a) of the ISA, the dispute lays in the Union's position that the Company did not have the right to add to, subtract from, or modify any of the terms of Wage Agreement No.1, the Income Security Agreement, years of historical practice and various arbitration awards in conjunction with the issuance of this Notice. The Union also contends that the Company did not have the authority to put into effect the myriad of changes brought about with their General Declaration Document issued on October 5, 2015, which were subsequently implemented on November 23, 2015.
>
> The Union further contends that the Company has, without the necessary Collecting Bargaining requirements, modified the interpretation, application and past practice of numerous Articles of the Wage Agreement and the Income Security Agreement as previously identified by the Union.
>
> The Union requests that the Company reinstate all bid positions, hours of service, rest days, seniority and vehicle entitlements as existed on July 20, 2015. In addition, the Union requests that all affected employees be made

whole for all lost earnings, benefits and damages incurred due to the implementation of the 1.1(a) Notice.

The Company disagrees and denies the Union's request.

For the Union:
S. Martin
Senior General Chairman
IBEW System Council No.11

The position of the Company is reflected in its Statement of Dispute and Ex Parte Statement of Issue filed in this matter, which reads as follows:

Dispute:

The alleged violation of Wage Agreement No.1 and the Income Security Agreement with respect to the November 23, 2015 operational/organizational change restructuring the Signals and Communications (S&C) Department.

Company's Exparte Statement of Issue:

On July 20, 2015 the Company issued an Article 1.1(a) Notice pursuant to the Income Security Agreement notifying the Union that on November 23, 2015 an operational/organizational change would be implemented restructuring the S&C Department. The Notice included detailed lists of all permanent and temporary positions which would be abolished as well as a list of anticipated new permanent positions to be simultaneously established.

The Union's Step One Policy Grievance detailed "two distinct" arguments. First the Union alleged the Company breached the Income Security Agreement stating it had not provided a full description with appropriate details of the comprehensive changes in working conditions. Second, the Union alleged a violation of Wage Agreement Article 9 relating to bulletining of vacancies and new positions across the system.

The Union sought a withdrawal of the July 20, 2015 Notice and reissuance subject to the criteria of Article 1.1(a) and for all positions currently identified as being of a permanent nature to remain as such.

In its September 11 and 23, 2015 letters, the latter of which was taken by the Company as the Union's Step Two Grievance, the Union expanded their allegations to include several alleged violations of the Wage Agreement and Income Security Agreement arguing that the Company modified the interpretation, application and past practice of numerous Articles as follows:

Income Security Agreement:

- Articles 1.1 (a), 1.1 (c), 1.4 and 2.3.

Wage Agreement No. 1:

- Articles 1.1, 1.6, 2.1, 2.3, 2.4, 2.10, 3.1, 3.4, 3.5, 4.1, 4.2, 5, 7.3, 7.4, 7.6, 7.7, 7.12, 7.13, 8.1, 8.2.1, 8.2.2, 8.3, 8.10, 8.11.1, 9.1.4, 10.2, 16.3, 17.22, 21, 32.1.

In these letters, the Union expanded its arguments; however, did not expand its requested resolve.

The Company disagrees with the Union's position and denied the Union's request.

For the Company:
D. Cote
Manager Labour Relations

Background and Chronology

The ISA is a negotiated employment security agreement that provides for certain benefits, such as Maintenance of Basic Rates, Relocation and Severance benefits among others to those employees who have been affected by staff reduction and who meet the eligibility requirements for those benefits.

To provide context to the dispute that flows from the Company's issuance of a TO&O change notice on July 20, 2015, a review of the original Company notification to the Union of the impending reorganization of the Signals and Communication (S&C) Department under Article 1.1(a) of the ISA is in order.

On June 15, 2015, the Company provided notice to the Union pursuant to article 1.1 (a) of the ISA of an operational/organizational change involving the restructuring of the Signals and Communications (S&C) Department. The implementation date for the change was to be October 17, 2015.

Following the issuance of this notice, a Union Management meeting, or more specifically, a Labour Adjustment Committee (“Committee”) meeting was held on June 24, 2015 in which a discussion took place concerning the details of the notice and the impending restructuring of work for the maintenance workforce of the bargaining unit, which is comprised of mostly Maintainers and Technicians. The Committee was established pursuant to article 2.1 of the ISA. Though discussions took place, the difficulties in reaching consensus on proposals ultimately led to the Company rescinding its June 15, 2015 notice. On July 20, 2015, the Company issued a new notice, reproduced below in its entirety:

> In accordance with Article 1.1(a) of the Income Security Agreement, please accept this letter as notice that on November 23, 2015 an operational/organizational change will be implemented restructuring the Signals & Communications (S&C) Department. Please also be advised that by copy of this notice the Company hereby rescinds the Article 1.1(a) notice dated June 15, 2015.
>
> These changes are brought about by the restructuring of all S&C work resulting in a reduction in S&C Construction work, the necessity for territorial realignment and a reduction to S&C Maintenance forces.
>
> Accordingly, on November 23, 2015, all two hundred and seventy-nine (279) permanent S&C positions will be abolished; a list of these permanent positions is attached as Appendix "A". As a matter of information only, all seventy-six (76) temporary positions will also be abolished concurrent with these changes, or at the expiry of the temporary position if prior to November 23, 2015. Temporary positions are not, however, covered by the Income Security Agreement or the related benefits and protection.
>
> Three hundred and twenty-four (324) new permanent positions will be simultaneously established on November 23, 2015; a list of these positions is contained in Appendix "B". Accordingly, a net increase of forty-five (45) permanent positions will be the result of these changes.
>
> For information purposes only, in accordance with the Wage Agreement, please be advised concurrent with these changes, the new established positions will include the following and the Union will be provided with further information during meetings to discuss this notice:
>
> 1. Establishment of assigned shifts that provide 24 hour coverage, i.e. 3 shifts in a 24 hour period.

> 2. Where 24 hour coverage is bulletined, the majority of assignments will not be bulletined with Article 7 obligations/provisions.
>
> 3. Assignments will be bulletined to provide 7 day coverage.
>
> 4. Territorial limits will be revised and reflected in the bulletins advertising such.
>
> In accordance with the specific provisions of the Letter of Understanding on the S&C Wiring and Repair Shop in Winnipeg, Manitoba, the ten (10) positions at this Shop will not form part of this notice.
>
> As required by Article 1.3(b), please also accept this notice as a new notice per Article 1.1(a) that the S&C Maintainer Brockville South abolishment will now be effective November 23, 2015.
>
> Please confirm receipt of this notification. In accordance with Article 1.4, the Company is available to meet on the following dates to discuss the foregoing changes:
>
> 1 July 30, 2015,
> 2. August 7, 2015, or
> 3. August 18, 2015

A similar organizational change to the one initiated by the Company in this instance took place in 1994. When I refer to the change as similar, I mean that the 1994 reorganization was a major one, whereby the Company abolished many permanent S&C positions and simultaneously established new ones.

The ISA defines TO&O changes in the following terms:

- "Technological": the introduction by the employer into his/her work, undertaking or business or equipment or material of a different nature or kind that previously utilized by him/her in the operation of the work, undertaking or business; or

- "Operational or Organizational": a change in the manner, method, procedure or organizational structure by which the employer carries on the work, undertaking or business not directly related to the introduction of equipment or material provided that any such change is not brought about by:

> (i) a permanent decrease in the volume of traffic outside of control of the company; or
>
> (ii) a normal reassignment of duties arising out of the nature of the work in which the employee is engaged; or
>
> (iii) a normal seasonal adjustment.
>
> **Note:** Any permanent shutdown or permanent partial shutdown of an operation, facility or installation, shall be considered as a Technological, Operational or Organizational change. Any permanent Company-initiated changes (excluding changes which are brought about by general economic conditions) which results from the reduction or elimination of excess plant capacity shall also be considered as Technological, Operational or Organizational changes.

For the Company to initiate a TO&O change, article 1.1(a) of the ISA sets preconditions to its implementation:

> 1.1 (a) The Company will not put into effect any Technological, Operational or Organizational change of a permanent nature which will have adverse effects on employees holding permanent positions without giving as much advance notice as possible to the General Chairman representing such employees or such other officer as may be named by the Union concerned to receive such notices. In any event, not less than 120 days' notice shall be given, with a full description thereof and with appropriate details as to the consequent changes in working conditions and the expected number of employees who would be adversely affected.
>
> …

As stated above, this reorganization is about the manner in which the maintenance workforce, comprised primarily of Technicians and Maintainers, carries out its work.

Prior to this reorganization almost all maintenance employees worked 5/2 shift schedules and were on standby or rotating standby. A standby allowance is a premium payment provided to employees whose positions require them to be available during off-duty hours to attend to service outages or emergencies referred to as trouble calls. For

the most part, they worked Monday to Friday, usually from 0700 hours to 1500 hours, with weekends (or partial weekends) off. Employees were assigned territories comprised of specific track mileage, section or yard limits for which they were responsible for the maintenance and repair of the signal systems and equipment within that territory. They considered their assigned territory as their own. While on call (standby) these employees attended and dealt with any trouble call on their assigned territory with Company vehicles that were provided to them.

The changes contemplated and ultimately implemented on November 23, 2015 are significant. Maintainers and Technicians are now assigned an entire district (or half a district) as their territory. A district, in most instances, comprises all track mileage in an entire province or in the case of Districts 3 and 4, two provinces. They no longer have sole “ownership” for the maintenance and repair of signal systems and equipment on a smaller section or mileage of track, although they are assigned primary work areas. Because of this new realignment, there is no longer the need to have the vast majority of employees on standby. With the new changes, those Maintainers and Technicians who do have standby obligations may or may not have Company vehicles provided to them to attend trouble calls when on standby.

The Company has also created more Mobile Maintainer positions and has scheduled them on 4/3 work cycles (a relatively recent addition to the collective agreement), which includes a staggering of days off with non-preferred rest days and new shifts.

There is no doubt that the changes provide for more flexibility to the Company for coverage of the maintenance work, particularly having regard to the "on call work." Mr. Leonardo, General Manager S&C, repeatedly testified that the Company's decision to have certain positions with standby requirements share Company vehicles is "practical." Considering how the previous maintenance work was undertaken, there is little doubt that the Company is seeking to achieve more efficient and cost effective ways of operating.

When the Company undertakes an initiative such as this one, article 2.1 of the ISA provides for the establishment of the Committee consisting of equal numbers of Company and Union representatives. Pursuant to article 1.4 of the ISA, the Committee must meet within 30 days of the issuance of the notice to determine the adverse effects and options available to affected employees pursuant to the ISA. The Committee's role is a restricted one: it can only deal with matters relative to the ISA, it is precluded from dealing with any item already provided for in the ISA, and the Committee is further precluded from adding, subtracting or modifying the ISA or Wage Agreement No. 1 ("the collective agreement") between the parties.

Article 2.3 of the ISA, is the provision that sets out the Committee's authority:

> Subject to the provisions of this Agreement, the Committee shall have full and unrestricted power and authority and exclusive jurisdiction to adjudicate upon all matters relative to this Agreement, which do not add to, subtract from, or modify any of the terms of this Agreement or any other Collective Agreement. Such matters, for example may be related to the exercise of seniority rights, or such matters as may be appropriate in the

> circumstances, but shall not include any item already provided for in this Agreement.

An example of a process engaged in by the Committee in the then impending 1994 reorganization initiative was a “pre-bid” process. Such a process essentially provides for the efficient filling of newly established permanent positions concurrent with the abolishment of the old ones: all employees bid on the new positions by order of preference in advance of the anticipated implementation date and are awarded a position having regard to their seniority and qualifications.

Were there no pre-bid process engaged to implement a reorganization of the magnitude contemplated by the Company here, the applicable processes outlined in the collective agreement for filling all the newly created positions - specifically articles 9 and 10 - would be the default process. The regular process for the filling of positions would be monumentally more disruptive to employees. Stated differently, the pre-bid process is one that minimizes the adverse effects on employees that result from the need to fill many new positions. It was contemplated and incorporated into the ISA in the interests of both parties in the round of bargaining that followed the 1994 reorganization.

The ISA provides that any pre-bid process is to be co-ordinated by the Committee. Article 1.1 (c) of the ISA provides:

> Pre-Bid
> Where the Company and the Union determines that nature of the change warrants such consideration, the parties agree to mandate the Labour Adjustment Committee, to coordinate the exercise of seniority and supervise the pre-bidding and displacement process. The goal is to reduce the adverse effects on employees concerned pursuant to the provision of this Agreement and Articles 9 and 10 of the collective agreement.

> The Labour Adjustment Committee will prepare all necessary bulletins and additionally will contact all affected employees who will be required to advise of their intentions within the time allotted by the Committee.

On the same day as the Company issued its July 20, 2015 Notice, the Union submitted a Step One Policy grievance under article 12.7 of the collective agreement. The grievance alleged that the Company had violated the ISA and the collective agreement between June 15 and July 20, 2015. The parties are agreed that the grievance should have been filed at the final step of the grievance procedure pursuant to article 2.5 of the ISA.

The Union's grievance raises two distinct issues. First, the Union objects to the sufficiency of the information contained in the notice. Secondly, it alleged a violation of article 9 of the collective agreement because the Company had "prematurely" posted a number of vacant permanent positions (six identified in the grievance) as temporary for four (4) months so as to align with the timeline for the establishment of all new positions to be created on the then anticipated date of the implementation of the organizational change on October 17, 2015. The Union also asserts that by posting these temporary positions as it had, the Company violated article 1.6 of the collective agreement, which states: "established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of rules in this agreement."

To resolve its grievance, the Union sought the Company's withdrawal of the July 20, 2015 notice, and sought to have all positions identified as permanent to remain as

such notwithstanding the notice replacing the rescinded one that had been issued on June 15, 2015.

Following receipt of the July 20, 2015 notice, the Committee was established, and it met on August 7, 14 and September 1, 2015. Prior to the August 7, 2015 meeting, the Union had received from the Company a complete list of all the newly created permanent positions to become effective November 23, 2015, together with the information the Company was required to provide pursuant to article 9.1.4 of the collective agreement (that is to say headquarters location, assigned territory, hours of service, classification, standby requirements). The list also indicated whether the Company would be providing a Company vehicle for each position. At the August 7, 2015 meeting the Union stated its preference for the Company to hold information sessions (town halls) for employees as well as for a pre-bid process to proceed by way of a General Declaration Document ("GDD") bid sheet that the Company would issue for all employees to bid on available jobs.

The Union had also sought, and was provided during the second Committee meeting on August 14, 2015, a revised list of the newly created permanent positions adding shift times, correcting certain hours of service, rest days and standby requirements. On August 28, 2015, the Company provided the Union with an outline of how employees would be called to handle trouble calls having regard to the expanded territory of employees and their primary work areas.

During the Committee meetings, aside from the initial allegations raised in the Union's grievance, the Union became very concerned that the Company's proposed restructuring did not comply with the collective agreement. In particular, and among other things, the Union was of the view that the Company's initiative ran contrary to the Hours of Service provision of the collective agreement (Article 2), the Assignment of Rest Days (Article 4) provision, and the Standby Allowance (Article 7) provisions. It was apparent that the Company's initiative also contemplated the removal of Company vehicles from Maintainers and Technicians between Sudbury and Montreal, which the Union viewed as the Company's attempt to circumvent an award I had issued on July 13, 2015, in which I reversed the Company's decision to remove vehicles assigned to all maintenance employees with standby obligations for the duration of the collective agreement.

A review of the material before me indicates that the Union was initially content with the timeline established by the Committee for a pre-bid process to take place: with the bulletining of all new permanent positions by way of a GDD on October 5, 2015, and the awarding of them on October 19, 2015 to be effective November 23, 2015. There is also every indication that the Union agreed that the notice of the abolishment of all temporary positions would take place on October 3, 2015, with an effective expiry for those temporary positions on October 18, 2015. The timeline contemplated by the Committee made eminent sense, as it allowed for all employees, including those then holding temporary positions, to consider which of the newly created positions they might

wish to bid on. It also allowed for the “cleaning up” of seniority lists, as had been suggested by the Union.

However, the Union continued to insist there were fundamental problems with the Company’s proposed reorganization. The Company representatives on the Committee made clear to the Union that the initiative would be going ahead as planned. During the Committee’s September 1, 2015 meeting, the Union advised the Company that it would not be attending any town hall meetings. In the face of the Company’s alleged intransigence, the Union essentially withdrew from the Committee process as it did not want to appear complicit in a reorganization that it saw as a repudiation of the collective agreement.

After the September 1, 2015 Committee meeting, matters largely deteriorated between the parties.

On September 2, 2015, the Company responded to the Union’s July 20, 2015 grievance, denying it. On September 11, 2015, the Union wrote to the Company expressing its view that the Company was seeking, under the guise of a 1.1(a) ISA change, to unilaterally modify longstanding terms of the collective agreement, and it identified the specific violations of Article 2 (Hours of Service), Article 4 (Assignment of Rest Days), Article 7 (Standby Allowance), Article 9 (Vacancies and New Positions) as well as Union recognition under the *Canada Labour Code*. The Union proposed that the

grievance proceed to arbitration immediately. It proposed that I hear the grievance, as I was then the most senior CROA&DR arbitrator.

On September 20, 2015 the Company responded to the Union's letter of September 11, 2015. It said that the Union's assertions lacked "evidence or rationale." Among other things, the Company expressed its disagreement about "the necessity to prematurely arbitrate" the matter. The Company went on to express a willingness to meet with the Union once it provided detailed information, evidence or any rationale for what the Company asserted were unfounded allegations.

On September 23, 2015, the Union wrote to the Company, reiterating its position, and it set out thirty-seven (37) largely single sentence paragraphs alleging violations of the collective agreement, past practice and the ISA as well its contention that the Company's mandate for shared trucks for new positions with standby requirements violated my award pertaining to Company vehicles issued July 13, 2015. The provisions of the alleged violations are captured in the Company's Ex Parte Statement of Issue.

On October 5, 2015, the Union sent a letter to me requesting that its grievance be expedited to a hearing. The Union advised that it would be seeking an interim order pursuant to section 60(1)(A)(II) the *Code* to prevent the Company from implementing the reorganization on November 23, 2015. On October 6, 2015, the Company expressed its concern that the parties had not exhausted the timeframe provided by the collective agreement for the Company to respond to the Union's most recent

allegations. Nevertheless, the Company did respond, to the extent that it was able, by letter dated October 27, 2015.[1]

On November 12, 2015, I heard the Union's application for an interim order by way of oral and written submissions, followed by additional written submissions. By decision dated November 20, 2015, I issued a bottom line decision, dismissing the Union's application for interim relief pending the adjudication of the merits of the case now before me.

On October 5, 2015, the Company proceeded with the bulletining of all newly created positions by way of the pre-bid/GDD process for all newly established positions. The vast majority of employees participated, indicating the positions they were applying for in order of preference. Positions were awarded consistent with the timeline the Union had agreed to at the September 1, 2015 Committee meeting. However, since the Union had, by September 11, 2015 advised the Company that it would no longer participate in the Committee, the Company proceeded to implement the pre-bid/GDD process unilaterally.

The restructuring of the S&C Department proceeded as planned on November 23, 2015.

[1] The issues of contention between the parties concerning the grievance procedure and the remedy sought by Union in this case are no longer at issue between them. The parties are agreed that the grievance process was exhausted and that the issues raised in the grievance filed July 20, 2015, and the alleged violations referenced in the Union's correspondence dated September 23, 2015, are properly heard on the merits. Further, the Company does not challenge my ruling that Union's request for remedial relief may be considered in this award. The Union seeks to have all bid positions reinstated, together with the restoration of hours of service, rest days, seniority and vehicle entitlements as they existed on July 20, 2015. In short, the Union seeks to return to the *status quo* prior to the reorganization.

I now turn to the merits of the grievance.

DECISION

I will attempt to address the allegations made by the Union systematically. Before doing so, I have some preliminary comments. I will then set out the framework for my analysis of the Union's myriad of allegations covered in its grievance. In that section of the award I will address the Union's submission, one repeated throughout its brief, that the alleged "repudiations" of the collective agreement categorized in its brief are contrary to the limitations of article 2.3 of the ISA. Thereafter, I turn to the two facets covered by the Union's grievance filed July 20, 2015. I will do so briefly, as they can be dealt with summarily. Finally, I will deal with the alleged collective agreement violations by category and the Union's submission that the Company has circumvented my award dated July 13, 2015.

Preliminary Comments

It will be apparent from the background and chronology set out above, that the Union has raised many allegations as part of its grievance. It was not until the hearing that the Union provided any specifics about many of the thirty-seven (37) largely single sentence paragraphs alleging Company violations referred to in the correspondence dated September 23, 2015.

In its brief, the Union has highlighted some of the alleged violations of the collective agreement (and alleged violation of articles 1.1 (c) and 2.3 of the ISA) by category. It says it has, in most cases, responded to the violations by filing individual and policy grievances, some of which the Union has appended to its brief.[2] The Union directs me to those grievances to explain in a "cogent and concise" manner some of the specific alleged violations.

Not all alleged violations highlighted in the Union's brief are mentioned in the appended grievances. Not all alleged violations mentioned in the grievance filed July 20, 2015 or those asserted in the Union's correspondence of September 23, 2015 (itemized in the Company's Ex Parte Statement) are in the Union brief or referred to in the grievances appended to the brief. The Union also made, for the first time at the hearing, additional specific violations of the collective agreement.

It is the Union's onus to prove the allegations it has raised. To the extent that the Union has raised new specific alleged violations, for example alleged article 12 violations (refusal to answer grievances), they are not properly before me and will not be addressed in this award. To the extent that the Union has not explained or expanded on specific allegations raised in the July 20, 2015 grievance filed, or the alleged violations referred to in its September 23, 2015 in its submissions, I will not address

[2] The grievances are all proceeding in the normal course to be heard by a CROA arbitrator unless the parties agree to another arbitrator.

them in this award either. In addition, where the Union failed to adequately explain an allegation, I decline to make any finding or order a remedy.

However, to the extent that I am able to make findings on whether the Company's initiative violates any specific provision alleged by the Union on the material before me – where the facts are agreed and the violations are apparent on the face of the Company's initiative, or the violations are apparent notwithstanding any differences on facts that are immaterial to the determination of an alleged violation - I have done so. I have also provided specific direction to the parties as appropriate in respect of those findings, and will remain seized of any outstanding issues flowing from the direction provided and this award more generally. Finally, in respect of some of the allegations for which determinations of fact must be made but cannot be made without further evidence, such as those relating to alleged violations of article 21 - the contracting out provision - they will need to be adjudicated in due course.

Framework for Analysis – Operational/Organizational Change

The history and jurisprudence identified by the parties in their respective briefs reveal that both parties to the ISA acknowledge that the Company is entitled to make changes to its work methods, organization and operation. That is the nature of the "Technological, Operational, Organization and Other Changes" contemplated by the ISA.

As articulated by Arbitrator Lawson in his 1987 award referred to as such in the Company's book of documents:

> Since it is within the discretion of each railway company to decide whether a technological, operational or organizational change ought to be introduced, they have undertaken an obligation to protect employees who are displaced as a result of any such initiative.

In **Ad Hoc 318**, a case between Canadian National Railway and the IBEW, Arbitrator Picher confirmed the intent of Arbitrator Larson's comments, stating in part:

> It appears clear to the arbitrator that Arbitrator Larson did not intend to depart from the fundamental principle that employees are to have the protections of the [Income Security Agreement] in respect of changes initiated by the Company in those circumstances where a change is within the Company's exclusive control.

In a more recent case, **CROA&DR 3539**, Arbitrator Picher reiterated those comments, albeit related to Running Trades employees who are covered by separate provisions in their collective agreements:

> This office has had considerable opportunity to consider the meaning of "material change". Essential to the concept is the notion that a change is essentially initiated as a result of a decision of the employer, rather than being dictated by circumstances beyond its control, such as the closing of a client's business or plant, fluctuations in traffic or other such factors which can normally impact railway operations. The essential concept of material change protection is that if the employer chooses, of its own volition, to materially alter its operations, employees should be given certain protective benefits which might not otherwise be available to them, where it can be shown that those employees would be adversely affected.

To the extent that the Union pleads that it was unaware of any problems necessitating the Company's initiative, that fact is irrelevant to the determination I must make. The Company is able to implement, of its own volition, a change to the "manner, method, procedure or organizational structure by which it carries out its work" –

presumably with the intent of increasing operational and cost efficiencies – so long as there are no contractual impediments that prohibit the Company from doing so. Though I am cognizant that the maintenance work of the bargaining unit was carried out in a certain way for decades, that "past practice" does not preclude the Company from initiating an organizational change as contemplated by the ISA.

Arbitrator Stout in a recent award dated December 9, 2015, involving this Company and the Teamsters Canada Rail Conference ("TCRC"), found the Company's material change initiative to have been invalid and in breach of the collective agreements. He canvassed the relevant arbitral jurisprudence and summarized the key principles as follows:

> I am of the view that the material change provisions are clearly aimed at providing a mechanism for relief of the adverse effects of material changes undertaken by the Company. As a prerequisite of the material change provisions applying, the Company's material change must not only be initiated by them alone, but also must not violate the specific terms of the Collective Agreements. In other words, the material change provisions are not a process for instituting mid-term alterations to the Collective Agreements.

In another recent decision material change decision involving this Company and the TCRC, Arbitrator Picher also wrote about the limits to the Company's desire to unilaterally implement a material change:

> The proposal of the Company, which would impose a mandatory 12-hour tour of duty, is plainly inconsistent with the terms of the Collective Agreement. It is clearly not something which the Company can impose unilaterally, which may explain its attempt to have the Arbitrator effectively endorse that arrangement.

> I can see no responsible basis to do so. The ability of employees to book rest, as negotiated within the terms of their respective Collective Agreements, is a critical element going to health and safety as well as the quality of working life. While it might be open to the Company to negotiate 12-hour tours of duty in specific circumstances with the Union, presumably in exchange for some appropriate consideration benefitting the employees, it is far from clear to me that it is appropriate, or arguably within my jurisdiction, to effectively decree that employees are to work hours in excess of those contemplated within the Collective Agreements as part of an Award within the Material Change context.
>
> The Material Change provisions of the parties' Collective Agreements do not contemplate the arbitration process as intended to give relief to the Company in respect of mandatory provisions of the Collective Agreements. On the contrary, the object of the Material Change provisions, insofar as both negotiation and arbitration is concerned, is to minimize adverse effects on employees. …
>
> On what basis, then, can the Material Change provisions of the Collective Agreements be invoked to effectively override the mandatory hours of duty provisions found in these Articles, to mandate a mandatory 12-hour tour of duty?
>
> As is evident from the language of Article 34.01 (2) of the Locomotive Engineers Collective Agreement, and similar provisions in the Collective Agreement governing Conductors, the object of Material Change negotiations and arbitration in the Material Change context is to "minimize significantly adverse effects of the proposed change" on the employees affected. In my view it is a far cry from that contractual intent for the Arbitrator to effectively sanction an increase in mandatory hours of duty beyond those permitted by the Collective Agreements, as the Company would have it in the instant case. With respect, I am compelled to conclude that it is simply beyond my jurisdiction to endorse a Material Change which effectively imposes mandatory hours of duty in excess of those permitted by the Collective Agreements. For these reasons, the Company's request in that regard must be declined. Of course, it remains open to the parties themselves to negotiate such a mandatory hours of duty provision, presumably for appropriate compensation, should they be willing to do so. However, the contractual right of employees to book rest in accordance with the Collective Agreements cannot be ignored or effectively nullified within the context.

There can be no doubt that the Company cannot, under the guise of an operational change, implement changes to the manner of operation that are contrary to

the mandatory provisions of a collective agreement. In the case before me, the Union argues the Company has done just that. The Company disagrees.

The Union also argues that article 2.3 of the ISA fetters the Company initiative. In the Union's submission, any changes processed under the ISA cannot "add to, subtract from or modify any of the terms of this Agreement or any other collective agreement." As indicated above, throughout its brief and with respect to the types of "repudiations" of the collective agreement the Union sets out by category, the Union repeats that they are contrary to article 2.3 of the ISA.

Before turning briefly to the specific allegations the Union raises in the grievance document and some of the violations asserted during the grievance process, I address this argument at the outset. The Union characterizes it as a "fundamental" one. It can be easily disposed of.

The Union is incorrect in its assertion that article 2.3 of the ISA fetter's the Company's ability to implement a TO&O change as defined above. Article 2.3 of the ISA bears no relationship to the Union's numerous alleged violations of the collective agreement. Article 2.3 of the ISA relates solely to the Committee and its authority to carry out its mandate under the ISA to determine the adverse effects of options available to affected employees. It is in carrying out that mandate that article 2.3 of the ISA precludes the Committee from altering the ISA or the collective agreement. To the extent that the Union says that the types of repudiations of the collective agreement identified in its brief are contrary to the ISA, that argument cannot be sustained.

Rather, having regard to the relevant jurisprudence identified above, the Company must not, in implementing a TO&O change, violate specific terms of the collective agreement or implement changes that are plainly inconsistent with its terms.

I now turn to the July 20, 2015 grievance document.

July 20, 2015 grievance

As described above, there are two facets to the grievance filed on July 20, 2015. The first allegation is about the sufficiency of the notice given to the Union pursuant to article 1.1(a) of the ISA. That article requires that the Union be provided with no less than 120 days' notice "with a full description of the change and appropriate details as to the consequent changes in working conditions and the expected number of employees who would be adversely affected."

In addition to including the list of all positions to be abolished, and the list of positions to be simultaneously established, the notice issued to the Union provides the Company's stated reason for the organizational change as well as certain general details pertaining to changes to the working conditions to be implemented (as well as the anticipated increase in permanent positions). Though the Union describes the four month process that followed the issuance notice as a "moving target," I am satisfied, having regard to the events leading up to the pre-bid by way of the GDD process undertaken unilaterally by the Company on October 5, 2015, that the Union was well

aware very early in the process, indeed as early as the first Committee meeting held August 7, 2015, of the information pertaining to new positions that were to be created as well the nature of the changes contemplated by the initiative. The requirements of article 1.1(a) of the ISA were satisfied.

The grievance also claims that, by posting six vacant permanent positions as temporary prior to the notice, the Company violated article 9 of the collective agreement pertaining to the bulletining of vacancies and new positions. I note that this aspect of the Union's grievance was not raised after July 20, 2015. The claim by the Union is not expanded upon or even mentioned in the Union's submissions. In the circumstances, I need not address this allegation as it appears to have been abandoned.

In any event, the record before me does not support the Union's assertion that the vacant positions were bulletined as temporary positions in order to evade entitlements under the collective agreement or the ISA. Rather, they were bulletined as temporary to facilitate an orderly transition to the filling of newly created permanent positions on the then anticipated effective date of the implementation of the reorganization, October 17, 2015.

Alleged Violations of the Collective Agreement by Category, and the July 13, 2015 Award Concerning the Provision of Company Vehicles to Maintenance Employees with Standby Requirements.

Article 8: Seniority

The Union cites violations of articles, 8.1, 8.3, 8.2.1, 8.2.2, 8.10, and Appendix 11. It appends three grievances at Tabs 21, 22 and 23, dated November 22, 2015, January 25, 2016 (Step 1 and Step 2) and December 17, 2015 and February 25, 2016 (Step 1 and Step 2), and December 23, 2015 and February 29, 2016 (Step 1 and Step 2) together with whatever Company responses were provided.

The three grievances do not cite all of the collective agreement provisions said by the Union in its brief to have been violated. The first two grievances relate to the cancelling of temporary bulletined positions effective October 18, 2015 and the seniority implications of the Company's actions to its members in this regard. They also allege a violation of article 1.6. The third grievance alleges a violation of article 8.1 because a position filled by S&C Maintainer Waterson, a District 2 employee, was bulletined with headquarters in District 3.

The alleged violations as I understand them, in respect of the two grievances at Tabs 21 and 22, stem from the Company having gone forward with the pre-bid/GDD process on October 5, 2015. By expiring all temporary positions on October 18, 2015, the Union alleges that the Company violated article 1.6 of the collective agreement because it laid off these employees and had them continue to work in the identical

positions on and after October 18, 2015 under the provisions of article 9.6.1. Article 1.6 provides that: “established positions shall not be discontinued and new ones created under a different title covering relatively the same class of work for the purpose of reducing the rate of pay or evading the application of rules in this agreement.” According to the Union, by ending the temporary positions, the Company arbitrarily affected the numerical standing of certain Maintainers and Wiremen.

The Union alleges a “flagrant” breach of article 8.3 because the Company, upon the cancellation of all temporary positions on October 18, 2015, updated the seniority standing of certain Maintainer/Wiremen and therefore revised the seniority lists in anticipation of the pre-bid/GDD process awarding positions on October 19, 2015.

Clearly, article 8.3 mandates the Union as having sole responsibility for compiling seniority rosters for each of the four districts listed in article 8.1. Further, there is no question that the Company updated the seniority lists despite that the collective agreement mandates that seniority lists are the Union’s responsibility. The Company did so in order to have accurate lists to proceed with the awarding of the permanent positions flowing from the pre-bid/GDD process initiated on October 5, 2015. This is because the Union, although asked to provide updated lists, was unwilling to do so as article 8.4 of the collective agreement only requires that the Union provide to the Company the lists in January and June of each year.

By the time the pre-bid/GDD process was initiated by the Company alone, discussions at the Committee level had ceased. It was no longer functioning. The Union had decided that the Committee would not co-operate in the co-ordination of the pre-bid process contemplated by article 1.1 (c) of the ISA.

The pre-bid process is the one envisaged by the parties to expedite the bulletining and awarding of positions in the event of a major reorganization. Indeed, article 1.1 (c) of the ISA was added to the Agreement after the 1994 reorganization and it entrenches the parties' agreement that it is the Committee's responsibility to coordinate the pre-bid in an organizational change of the magnitude of this one.

By September 1, 2015, the date of the last Committee meeting, the Committee had agreed to the timeline to facilitate the pre-bid process by way of a GDD.

I appreciate that the Union felt a great deal of frustration about the Company's steadfast determination to proceed with the organizational change despite the Union's many concerns. The Union cannot complain, however, having chosen to withdraw from the Committee process it agreed to under the ISA, and then having chosen to withhold its seniority lists, when the Company revised the seniority lists on its own. The Union cannot reasonably expect any remedial relief in those circumstances.

As for the abolishment of all temporary positions on October 18, 2015, with notices to all affected employees on October 3, 2015, the record of notes from

Committee meetings reveals that it was the Union that raised, on August 14, 2015, the possibility of abolishing all temporary positions. On September 1, 2015, after some discussion, the parties agreed to abolish all temporary positions as of October 18, 2015, with notice to be given to affected employees on October 3, 2015 (15 days' notice was required). The parties further agreed that these same employees whose positions were to expire would be assigned to the same temporary positions of less than 60 days to facilitate the "cleaning up" of seniority rosters. Clearly, the temporary positions were not discontinued and new ones created contrary to article 1.6 as alleged by the Union. They were discontinued to facilitate an orderly transition to the filling of newly created permanent positions on November 23, 2015.

The Union was well aware of the impact of articles 9.9.2 and 9.9.3 on temporary employees' relative seniority standing. It was the Union that had initially suggested that the parties proceed in the manner described in the preceding paragraph. Quite frankly, there would have been no reason for the Company to have expired the temporary positions and then have them assigned to the same employees were it not for the Union's suggestion.

As with the pre-bid/GDD process more generally, the Union is precluded from asserting remedial relief stemming from the Company's alteration of the numerical standing of Maintainers and Wiremen when it had suggested and the Company had agreed on September 1, 2015, to proceed with the abolishment of temporary positions

with full knowledge that by operation of articles 9.9.2 and 9.9.3 the seniority rank of several employees would be reduced.

It is unclear to me if the seniority lists the Company used in the pre-bid process are at odds with the ones the Union would have provided had it been willing to coordinate the process with the Company. If there were any inconsistencies that were not the result of certain Maintainer and Wiremen having their seniority rank reduced by the application of article 9.9.3, I am unaware of them, and am in no position to award corresponding remedial relief.

With respect to the allegation that the seniority districts specifically established in article 8.1 have been overridden by the Company's reorganization, the only documentation to support this allegation is the grievance at tab 23, which relates to the bulletining of a District 2 position with its headquarters located in District 3. The Company contends that this does not constitute a violation of the collective agreement. In my view, the success of this grievance will depend on the determination of whether Maintainer Waterson, the employee concerned, is found to be working in District 3. That determination is best made in a factual context. This grievance should therefore proceed to be adjudicated in the normal course.

As for the other alleged violations of article 8, specifically articles 8.10, 8.2.1, 8.2.2, and Appendix 11, the Union has not explained its position nor provided any material in support of its position aside from paragraphs 61, 63 and 64 of its brief. It

appears to me that the allegations in those paragraphs were made to underscore the fact that the Company unilaterally revised the seniority lists and awarded positions based on the new seniority standing of employees. In the circumstances and notwithstanding that the Company provided its response to each of these allegations in its submission, in the circumstances, I am unable to make a determination on the material before me that there have been violations of these provisions.

Article 9: Vacancies/Bulletining

The Union cites article 9, 10 and 10.2 in its brief. The grievances appended by the Union in support of its position, can be found at Tabs 24, 25 and 26, and are dated December 19, 2015 and February 12, 2016 (Step 1 and Step 2), December 23, 2015 and February 12, 2016 (Step 1 and Step 2), and December 25, 2016 and February 13, 2016 (Step 1 and Step 2) They refer to articles 9.1.1, 9.1.2, 9.2.5 and 10.2. The Company did not respond to the grievances and all have been forwarded to arbitration.

The essence of the Union's position outlined in its brief is that the Company went ahead with the pre-bid/GDD process on October 5, 2015 – which was the Company's unilateral application of the ISA article 1.1(c) – instead of following the regular process for filling vacancies as outlined in article 9.1.1 and 9.1.2 of the collective agreement. The Company also allegedly violated 10.2 "regarding displacement of junior employees..." According to the Union, the Company "arbitrarily required employees to work while in the process of exercising their seniority after a position abolishment."

The Union argues that the Company violated articles 9.1.1 and 9.1.2 because it did not follow the regular process for bulletining vacancies set out in those articles. It also alleges that the Company “ordered” and/or “threatened” employees to participate in the pre-bid/GDD process. No collective agreement provision required employees to bid on positions on October 5, 2015, while the employees were holding permanent positions only set to expire on November 23, 2015.

As stated in above alleged Section 8 violations of the seniority provisions of the collective agreement, the pre-bid process is intended by the parties to bulletin and award positions in the circumstances of this organizational change. The Union was unwilling to participate in the co-ordination of the pre-bid because it did not want to be viewed as complicit in the Company’s reorganization. The Union, however, cannot simply withdraw from what it fully appreciated and understood was its joint role in coordinating the exercise of seniority and supervising the pre-bidding and displacement process. That process has as its very goal the minimizing of adverse effects on employees. Having withdrawn from its acknowledged role the Union cannot reasonably expect to assert an entitlement to remedial relief because the Company did not follow the collective agreement process that article 1.1 (c) of the ISA specifically contemplates will be averted in the circumstances.

In addition, having reviewed the grievances appended to the Union’s brief, I have no evidence to make any determination pertaining to allegations that employees were “ordered” or “threatened” to participate in the pre-bid/GDD process, nor can I determine

that assignments relating to the specific circumstances of individual employees were made in an “authoritarian fashion” on or after November 23, 2015.

With respect to the allegation that article 10.2 has been violated, I have carefully reviewed the grievance at Tab 25, which purports to provide a “cogent, concise explanation” of the alleged violation. I am unable, upon a review of that grievance, to ascertain or make sense of, with any degree of certainty, what transpired after November 23, 2015 with respect to the application of article 10.2. In the circumstances I am unable to make any general finding with respect to the Union’s allegation that the Company violated article 10.2. I am unable to determine on the information provided that that there has been a violation on the face of the grievance. To the extent that the alleged violation pertains to individual employees negatively impacted by the Company’s application of article 10.2, any such determination must be made in the normal course of the adjudication of the grievance. As for the particular circumstances of S&C Maintainers Gilchrist and Stevens, that grievance too must be adjudicated in the normal course.

Article 7: Standby Allowance and Calls

The Union cites violations of articles 1.6, 7.3, 7.4, 7.6, 7.7, 7.11, 7.12, 7.13 and 3.5. It appends four grievances at Tabs 27, 28, 30 and 31 dated December 19, 2015 and February 12, 2016 (Step 1 and Step 2), December 24, 2015 and February 13, 2016 (Step 1 and Step 2), December 20, 2015 (Step 1) and February 12, 2016 (Step 1). None of the grievances had been responded to as of the date of the hearing.

In reorganizing its workforce, the Company established certain positions where standby is required and others where it is not. For example, Mobile Maintainer positions, which have increased in number in this reorganization, are working 4/3 work schedules and have standby requirements associated with their positions. Prior to the reorganization they were not required to stand by, except when they were working in a relief capacity covering a position which had a standby requirement.

It must be noted that the standby allowance provisions of the collective agreement were negotiated when the maintenance workforce worked 5/2 schedules. However, as a result of the Company's reorganization employees are now working 4/3 schedules with standby requirements associated with their positions.

There can be no doubt that the Company has the discretion to designate positions as having a standby requirement. Article 7.1 presumes that to be the case: "When employees are required by the Company to hold themselves available to protect the requirements of the service outside of regular hours and on rest days, they will be paid a standby allowance in addition to their regular earnings."

The other relevant provisions of the collective agreement, which have not been reproduced above, provide:

> **3.5** Where work is required by the Company to be performed on a day which is not part of any assignment, it may be performed by an available unassigned, laid off, or new employee who will otherwise not

have forty hours of work that week; in all other cases by the regular employee.
…

7.3 Broken time for employees compensated on the basis of this article 7 shall be based on 47.5 straight time hours. In the event an employee is off-duty without pay, he shall have deducted from his wages 8.6 straight time hours for each regular workday off duty and 4.5 straight time hours for each assigned call day off duty.

7.4 Bulletins advertising vacancies in new and existing positions will include the standby requirements. …
….

7.6 A standby allowance established pursuant to article 7.4 may be discontinued, should the company so require, in the following manner:

i.) when the incumbent on the date the position was established vacates the position and such vacancies subsequently re-advertised;

OR

ii.) when the appropriate System General Chairman agrees to its discontinuance;

OR

iii.) on 12 months notice from the appropriate company officer to the employee concerned. A copy of such notice will be supplied to the local representative.

Whichever occurs first.

7.7 A position established without a standby allowance pursuant to article 7.4, may, should the company so require, have such a standby requirement added in the following manner:

i.) On a date mutually acceptable to the appropriate System General Chairman and the appropriate company officer;

OR

ii.) when the incumbent on the date the position was established vacates the advertised without a standby requirement has had one added in such vacancies subsequently bulletined;

OR

iii.) on 12 months notice from the appropriate company officer to the employee concerned. A copy of such notice will be supplied to the local representative.

Whichever occurs first.

….

7.11 An employee in receipt of a standby allowance shall be assigned two rest days in accordance with the provisions of article 4.

One day will be designated as a rest day and the second as a call day. Notwithstanding the foregoing, arrangements may be made by the appropriate company officer any appropriate local representative to allow such an employee to rest days each alternate week and two standby days each alternate week. And employee commencing a rest day or days pursuant to this cause will not be subject call between the completion of work on the day preceding the rest day or days and the commencement of the next regularly scheduled workday.

7.12 On call days outside of regular hours, employees must protect calls on their own territory, and, recognizing that the requirements of service must be met, they will protect calls on other territories if required, unless they make suitable arrangements with their Supervisor which does not involve additional expense to the Company, and will notify the appropriate Officer or Supervisor.

…

7.13 All calls will be directed to an employee on call, unless otherwise mutually satisfactory arrangements exist between the employee assigned to the territory and his Supervisor. This provision applies irrespective of the standby arrangements and effect.
…

Articles 7.6 and 7.7 address the manner in which a standby allowance that is already in place for a given position may be discontinued by the Company and the manner in which the Company may add a standby allowance to a position that was originally established without such a requirement.

In my view, the only violation of article 7 that is made out on the face of the material before me is the Company's failure to provide the requisite 12 months' written notice pursuant to article 7.6 to those employees who held positions with standby requirements prior to the abolishment of their positions on November 23, 2015. The Company cannot simply ignore this specific provision's application to employees who were entitled to standby allowance prior to November 23, 2015 by issuing a notice to abolish the positions under article 1.1 (c) of the ISA.

To the extent that employees who were in receipt of standby allowance associated with their positions had their positions abolished with four months (120 days) notice and were not given 12 months notice of the discontinuance of their standby allowance required by article 7.6 iii), the Company violated the collective agreement. However, the lack of sufficiency of notice to specific employees, depending on where they ultimately landed in the reorganization, may or may not result in compensation for any lost standby allowance that would otherwise have been payable to them. In my view, the period of 12 months' notice begins on the day the employees who were formerly in receipt of a standby allowance became aware that they would not be able to secure a position with a standby allowance. The matter of compensation to specific employees is remitted back to the parties and I remain seized.

Notwithstanding my finding with respect to article 7.6, I fail to see how a newly established position advertised with a standby requirement (those positions created on November 23, 2015) in the Company reorganization results in any violation of article

7.7. All positions had been abolished as of November 23, 2015 and as such there was no employee awarded a position to which a standby requirement was added.

At the core of the Union's alleged violations pertaining to articles 7.3, 7.11, 7.12 and 7.13 and 3.5, is its position that the Company is precluded from reorganizing the manner in which its maintenance workforce is now doing its work. The Union's allegations amount to a collateral attack on the Company's departure from the assignment of specific territories to individual employees who used to work 5/2 schedules.

Article 7.3 of the collective agreement cannot be said to have been violated because it "penalizes" employees who work 4/3 work schedules. The article speaks to how the 7.5 hours per week to be paid to all employees on standby is to be broken down in the event that an employee is off duty without pay on the assumption that the employee is working a 5/2 work schedule. Should the Company apply the formula outlined in the second sentence of article 7.3 to a newly established position with standby requirements on a 4/3 work schedule, the Union may very well wish to grieve that calculation. However, so long as those employees in positions working 4/3 work schedules with standby requirements are paid 7.5 hours per week, there is no violation of article 7.3.

In a similar vein, the Union submits article 7.11 has been violated because it says the manner by which local agreements can be made to provide for two rest days in each

alternate week (for employees on 5/2 work schedules) no longer applies. Article 7.11 continues to apply to 5/2 work schedules. To the extent that local arrangements are not being made to allow these employees two rest days each alternate week and two standby days each alternate week that does not translate into a violation of this article of the collective agreement.

Article 7.11, like article 7.3, was also negotiated in the context of only employees on 5/2 schedules having standby requirements. The Company's reorganization of its workforce such that employees with standby requirements are now also working 4/3 schedules does not violate the specific provision that provides for the possibility of local arrangements to be made for standby coverage of rest days between maintenance employees who work 5/2 schedules.

As for articles 7.12 and 7.13, these articles speak to the requirements of employees to protect calls on their own territories and others if required, as well as the requirement of calls being made to employees on call outside their regular hours. The language in these articles as well as that of article 3.5 was negotiated in the context of how the Company had previously decided to have the maintenance workforce carry out coverage of trouble calls. Though employees were able to ascertain who was responsible for covering each employee's assigned territory at any given time, the collective agreement as it currently reads does not preclude the Company from implementing the new call out process explained to the Union in August 2015.[3]

[3] In stating this I am cognizant of the Company's proposed changes to the language of articles 7.12 and 7.13 in the 2012 round of bargaining between the parties.

Finally, having regard to article 1.6 of the collective agreement, that article provides a form of protection against the Company eliminating established positions and creating new ones under a different title for relatively the same class of work, for the purpose of either reducing the rate of pay of the position or evading the rules of the collective agreement. The Union has not alleged any instances of the Company discontinuing S&C positions and creating new ones under different titles for the same class of work. The changes the Union takes issue with were "brought about by the restructuring of all S&C Work" in the context of the Company's desire for "territorial realignment." I am satisfied that the purpose of the changes contemplated by the Company is to achieve more efficient and cost effective ways of operating.

Article 1.1 - Mobile Maintainers

The Union argues that the establishment of Mobile Maintainer positions violates article 1.1 of the collective agreement pertaining to Rates of Pay, by creating a new classification. The Union relies on the Special Agreement ("SA") between the parties stemming from the 1994 reorganization to support its position. The parties agree that the position of Mobile Maintainer was established by agreement in 1994. The Union argues that by virtue of the expiry date of the 1994 SA, the Mobile Maintainers are positions that are conditional on the Union's continued agreement.

The Union's position cannot be sustained. The Union's creative legal argument is proffered as a collateral attack on the Company initiative because of the way the Company has decided to use Mobile Maintainers.

I have limited portions of the 1994 SA before me. In the materials provided to me, Mobile Maintainers are referred to as part of a Declaration Document for District 3 at section 8. Page 1 of that section provides for "6 S&C Maintainers" referred to as Mobile S&C Maintainers, to be headquartered at Thunder Bay, Kenora, Winnipeg, Brandon, Moose Jaw, and Saskatoon.

Since the creation of the original Mobile Maintainer positions by agreement in 1994, their duties have included providing relief to maintainers (including their standby requirements) as well as other assigned duties where and when required on identified territories. They have always been paid the same rate as S&C Maintainer/Wiremen. Since 1994 Mobile Maintainer positions have been bulletined and filled across the Country without the continued agreement of the Union and without any expressed concern by the Union. To suggest at this juncture that in light of the 1994 SA these positions have only remained in effect by mutual agreement in these circumstances is untenable. Mobile Maintainers are subsumed as part of the Maintainer classification and that has been the case for more than 20 years.

Article 17.22 Mutual Arrangements for AV Relief

The Union alleges a violation of article 17.22 with respect to the termination of any arrangements that were mutually agreed upon between employees to provide for coverage when they were off on annual vacation. Article 17.22 provides the following:

> **17.22** The officer in charge and the recognized representative of the employees will, as far as is practicable, make mutual arrangement to carry on the work while members of the staff are on vacation, but if this is not practicable, employees engaged temporarily, or employees temporarily promoted from one position to another, to provide vacation relief, will if definitely assigned to fulfill the duties and responsibilities of a higher-rated position, be paid the schedule rate applicable to such position.

The Union directed me to Tab 34, a Step 1 grievance dated January 8, 2016 accompanied by the Company's response and the Step 2 grievance progressed on March 19, 2016. In its grievance the Union argues that, since the implementation of the Company's initiative, the Company has no longer engaged the Union in discussions concerning the filling of vacancies for vacation relief and as such, the Company should pay a penalty payment of nine hours standby pay in each and every instance where the Company assigned the adjacent Maintainer to protect calls when the Maintainer was provided vacation without the Union's involvement. The Union states in its submission that "The Company's reorganization unilaterally designates that Mobile Maintainers be assigned as AV relief employees."

The Union has included in Tab 32 of its submission the 1994 Reorganization Agreement and the documentation pertaining to Mobile Maintainers. Clearly, the original

intent of the parties was for the Mobile Maintainers to provide relief work. For more than 20 years Mobile Maintainers have been used in a relief or supportive capacity, including AV relief. Article 17.22 does provide a mechanism for the parties to make mutual arrangements for AV relief when practicable, however the Company's actions in assigning vacation relief to Mobile Maintainers does not violate the collective agreement or the 1994 Agreement.

Article 2: Working Hours, Start Times and Preferred Rest Days

The Union cites violations articles 2.1, 2.3, 2.4, 3.1, 3.2, 4.1, 4.2, and 4.5. The Union appends two grievances at tabs 35 and 36 dated December 23, 2015 and February 29, 2016 (Step 1 and Step 2), and December 20, 2015 and February 24, 2016 (Step 1 and Step 2), as well as the Company's step 1 responses dated January 27 and 20, 2016.

a) Preferred Rest Days

The rest days associated with newly established positions where Mobile Maintainers are on 4/3 work schedules are not those established as preferred rest days in article 2.1 b) in the collective agreement. Article 2.1 establishes the preferred rest days for those employees on 4/3 work schedules as Friday, Saturday and Sunday or Saturday, Sunday and Monday. The Company has created work schedules starting on

Wednesday or Sundays, which results in days off on Sunday, Monday and Tuesday or Thursday, Friday and Saturday.

The Union says that the bulletining and awarding of positions with rest days other than those stipulated in article 2.1 is a flagrant violation of the collective agreement. The Company disagrees. The relevant collective agreement articles are articles 2.1 and articles 4.1 and 4.2:

> **ARTICLE 2**
> **HOURS OF SERVICE AND MEAL PERIOD**
>
> **2.1** The work week for employees covered by this agreement, unless otherwise excepted herein, shall be designated by the Company as follows:
>
> a.) forty (40) hours consisting of five (5) days of eight (8) hour shifts, with two (2) consecutive rest days in each seven (7). The preferred rest days will be those identified in Article 4.1, which are Saturday and Sunday and then Sunday and Monday, or Friday and Saturday; or
>
> b.) forty (40) hours consisting of four (4) days of ten (10) hour shifts, with three (3) consecutive rest days in each seven (7). The preferred rest days will be Friday, Saturday and Sunday or Saturday, Sunday and Monday; or
>
> c.) eighty (80) hours consisting of eight (8) days of ten (10) hour shifts, with six (6) consecutive rest days in each fourteen (14).
>
> The 8/6 cycle will preferably start on a Monday, Tuesday or Wednesday and the 4/3 cycle will preferably start on a Monday or Tuesday, and the General Chairman will be consulted prior to any changes.
>
> Employees working in S&C Construction shall work a 4/3, or 8/6 work cycle in preference to a 5/2 cycle, unless:
>
> i. required to align with other scheduled work and allotted track blocks for operational reasons; or
>
> ii. for S&C training purposes.
>
> Employees working in S&C Maintenance shall work a 5/2 or 4/3 work cycle.

> When the work cycle of an employee changes, the employee will not suffer lost wages through the course of fulfilling the requirements of eighty (80) regular hours in the pay period.
>
> This article shall not be construed to create a guarantee of any number of hours or days of work not provided for elsewhere in this agreement. (See Article 4)
>
> ….
>
> **ARTICLE 4**
> **ASSIGNMENT OF REST DAYS**
>
> 4.1 Except as otherwise provided, employees shall be assigned two rest days in each seven. The rest days shall be consecutive as far as is possible consistent with the establishment of regular relief assignments and the avoidance of working an employee on an assigned rest day. Preference shall be given to Saturday and Sunday and then to Sunday and Monday, or Friday and Saturday. The workweeks may be staggered in accordance with the company's operational requirements.
>
> 4.2 In any dispute as to the necessity of departing from the pattern of two consecutive rest days or for granting rest days other than Saturday and Sunday or Sunday and Monday, or Friday and Saturday, two employees covered by clause 4.1, it shall be incumbent on the company to show that such departure is necessary to meet operational requirements and that otherwise additional relief service or working an employee on an assigned rest day would be involved.

The Company is incorrect in its assertion that the “preferred” rest days set out in article 2.1 are not mandatory. They are mandatory, subject to the Company establishing, by clear and cogent evidence, that the departure from those rest days is necessary to meet operational requirements as set out in article 4.2.

The preferred rest days’ provision contains language that has long been the subject of dispute in this Office and its application is well settled in the arbitral jurisprudence. The language of this Agreement is virtually identical to that which was argued in **CROA&DR 3524** and the other cases cited therein. Those decisions stand for

the proposition that in order for the Company to establish that a "departure is necessary to meet operational requirements…" it must demonstrate circumstances, which substantially interfere with the Company's ability to meet operational requirements. Circumstances that allow the Company to deviate from preferred rest days are irregular situations that are either temporary and/ or urgent. In other words, schedules designed solely to permit better, more efficient or more profitable ways of operating do not, by that reason alone satisfy the conditions to allow for the Company to depart from the preferred rest days stipulated in article 2.1.

In **CROA&DR 3524** this Company sought to bulletin positions with Thursday and Fridays as rest days when its collective agreement with the Teamsters Canada Rail Conference – Maintenance of Way Employees Division - provided for preferred rest days on Saturday and Sunday and Sunday and Monday. The applicable provision of that collective agreement is article 5.1, which has virtually identical language to that of article 4.2 in the collective agreement before me**.**[4] Arbitrator Picher's comments are reproduced below, in part:

> This Office has had considerable opportunity to consider the provisions of article 5.1 of the collective agreement (**CROA 700, 951, 1061, 1958** and **2464**). In **CROA 2464** the Arbitrator reviewed the prior jurisprudence and commented as follows:

[4] 5.1 The rest days shall be consecutive as far as is possible consistent with the establishment of regular relief assignments and the avoidance of working an employee on an assigned rest day. Preference shall be given to Saturday and Sunday and then to Sunday and Monday. In any dispute as to the necessity of departing from the pattern of two consecutive rest days or for granting rest days other than Saturday and Sunday or Sunday and Monday, it shall be incumbent on the Railway to show that such departure is necessary to meet operational requirements and that otherwise additional relief service or working an employee on an assigned rest day would be involved.

> In the Arbitrator's view there is a common theme running through all of the prior decisions relating to the interpretation and application of the language of article 5.1. Arbitrators in this Office have found that the onus which the Company bears to justify a departure from the scheduling of rest days on either Saturday and Sunday or Sunday and Monday is discharged where a temporary and/or urgent circumstance necessitates such a departure, and where the Company would otherwise be compelled to incur the additional cost of relief or overtime assignments.
>
> In that case the grievance was allowed, with the Arbitrator reasoning, in part, as follows:
>
> It may be true that the Company's convenience and productivity would be better served by never scheduling days off for work gangs on Sundays and that efficiencies would be maximized by always scheduling the days off of the work gangs on Fridays and Saturdays. As is evident from the text of article 5.1, however, the Company's natural desire for efficiency and productivity is not the sole consideration governing the scheduling of days off. Significantly, the language of the provision makes it clear that the parties agree that Sundays off are a matter of primary importance, and that any departure from a schedule which involves Sunday as a day off must be shown, by clear and cogent evidence, to flow from a necessity to meet operational requirements. In the Arbitrator's view the exceptional provision for the necessity to meet operational requirements involves the kind of irregular circumstances noted in the prior decisions of the Office, reviewed above. Schedules designed solely to permit better, more efficient or more profitable ways of operating are a legitimate employer concern, but they do not, by that reason alone, satisfy the conditions of article 5.1 of the collective agreement.

At the hearing, Mr. Leonardo essentially parsed the Company's brief to justify the departure from the established rest days. The Company's brief pointed to the need for "better coverage." The Company cited:

> Asset counts have changed
> Routine maintenance requirements being refined
> Track Windows changing
> Employee in Charge terminals being implemented in Canada
> Construction approach evolving
> Standardized installations
> Refresh systems where it makes sense
> More Pre-testing in Wiring Shop.

The Company goes on in its brief to assert: “Outages have an increasingly serious impact on operations, customer relations, public safety and the Company’s ability to remain competitive in the marketplace.”

The items cited above do not assist the Company’s position. First, it is unclear what the bullet points mean. However, it does not appear to me that they suggest unusual circumstances that arose necessitating the need for “better coverage.” What is clear is that the Company’s articulated “necessity” to depart from preferred rest days is not an irregular situation. It is neither temporary nor urgent. The Company’s explanation for the departure from “preferred rest days,” can only be taken to mean a more efficient and profitable way of operating. That reason does not satisfy the conditions which enable the Company to depart from the preferred rest days stipulated in article 2.1.

Moreover, the fact that the Company sought, in its 2012 negotiations with the Union, to add Monday, Tuesday and Wednesday as preferred rest days in the 4/3 work schedules, together with its proposal to add a provision that for certain territories consecutive rest days could be established that were not those referenced in article 4.2, further demonstrates that the Company knew full well that it was unable, except through negotiation, to alter preferred rest days established in article 2.1. The Company is unable under the guise of an organizational change to alter preferred rest days for maintenance employees since doing so contravenes article 4.2 of the collective agreement.

b) Working Hours - Start Times

The Union alleges that regularly scheduled hours of work associated with certain new positions established by the Company violates article 2. The relevant provisions associated with hours of work are articles 2.4, 2.5, 2.6. Article 1.3 of the collective agreement speaks to shift differentials and therefore properly forms part of the analysis. Article 3.2 refers to overtime and the work week beginning on the first day on which the assignment is bulletined to work and article 4.5 deals with employees being required to work on an assigned rest day. These articles provide:

> **1.3** Shift Differentials
>
> Employees whose regularly assigned shifts commence between 1400 hours and 2159 hours, shall receive a shift differential of $0.75 per hour, and employees whose regularly assigned shifts commence between 2200 hours and 0559 hours shall receive a shift differential of $1.00 per hour. Overtime shall not be calculated on the shift differential nor shall the shift differential be paid for absence from duty such as vacations, general holidays, etc.
> …
>
> **2.4** The working hours for employees in S&C Maintenance, will commence at or between 0400 hours and 1000 hours. When conditions make it necessary to work more than one shift, the hours of duty may be arranged to conform with the requirements provided that not more than eight consecutive hours, exclusive of meal period, will constitute a day's work and that the first shift will commence at or between 0400 hours and 1000 hours. Where mutually agreed, working hours may be otherwise arranged to meet local requirements.
>
> Employees in S&C maintenance working on commuter lines may commence work between 0400 and 1200 hours. (Emphasis Added)
>
> **2.5** Regular day shifts in S&C Construction shall start at or between 0400 hours and 10 00hours.
>
> **2.6** Notwithstanding the provisions of Article 2.5, the starting time for employees in S&C Construction, may be established or changed to meet the requirements of the service. When the start time is to be changed, as much advance notice as possible, but no later than at the completion of the

previous shift, shall be given to the employees affected and, where practicable, the notice will be posted promptly in a place accessible to such employees.

….

3.2 Except as otherwise provided in Clause 2.1, work in excess of forty straight time hours, or five days in any work week, shall be considered overtime and paid at the rate of time and one-half, except where such work is performed by an employee due to moving from one assignment to another or to and from a laid-off list, or where rest days are being accumulated under Clause 4.3

NOTE: The term “work week” for regularly assigned employees shall mean a week beginning on the first day on which the assignment is bulletined to work; and for spare or unassigned employees shall mean a period of seven consecutive days starting with Monday.

4.5 Work on Assigned Rest Days

Employees, if required to work on regularly assigned rest days, except when these are being accumulated under Clause 4.3, shall be paid at the rate of time and one-half on the actual minute basis, with a minimum of three hours at time and one-half for which three hours of service may be required.

The reference in article 1.3 to the payment of shift differentials demonstrates that there can be regularly assigned shifts commencing between the hours stipulated in the provision. However, those regularly assigned shifts for which differentials are paid must be read in conjunction with the hours of work provisions of the collective agreement. Shift differentials are paid to maintenance employees when their regularly assigned shift commences on or after 14:00 or 22:00 as stipulated in article 1.3. The establishment of the shift however, must first comply with the requirements as set out in article 2.4. Any departure from the requirements of article 2.4 requires the negotiation of an agreement between the Company and the Union, subject to the exception provided for in that article.

Article 2.4 mandates when the working hours for maintenance employees must commence. Their hours can commence anytime within the range of hours established by the provision – either the 0400 hours to 1000 hours window or the 0400 hours to 1200 hours window for maintenance employees working on commuter lines. However, as with the language providing for the departure from preferred rest days ("necessary to meet operational requirements") the parties have agreed that the Company can establish more than one shift only when it can demonstrate that "conditions make it necessary to work more than one shift." Further, any second shift established, assuming that conditions making one necessary are met, cannot be more than eight hours long.

The test established by the jurisprudence to justify any departure from preferred rest days established by article 2.1 and mandated by article 4.2, is equally applicable, in my view, to the Company's ability to arrange more than one shift for maintenance employees commencing after the ones that commence between 0400 hours and 1000 hours (or 1200 hours for maintenance employees working on commuter lines). The fact that article 2.4 goes on to make clear that working hours may be otherwise arranged by negotiation between the parties – which I understand has happened – underscores that, absent the conditions making it necessary to add a shift on a temporary or urgent basis, the Company must negotiate and come to an agreement with the Union before any additional shift can be established.

As with the Company's proposals in the 2012 round of negotiations surrounding preferred rest days, with respect to article 2.4 the Company sought to modify the

working hours for maintenance employees in order to meet the requirements of the service. The Company was unsuccessful in modifying the collective agreement as it had proposed and it is unable under the guise of an organizational change to institute a mid-term alteration to the shifts of maintenance employees, which must (absent meeting the test referenced above) be negotiated with the Union.

The Company is ordered to cease and desist violating the collective agreement in respect of mandatory rest days, and the start of shift times. The Company is directed to rework those work schedules of employees that do not comply with the mandatory rest days established by article 2.1 and shift start times mandated by article 2.4. The Company has 45 days to rework the schedules. It may very well wish to negotiate a resolution to its predicament with the Union. In any event I remain seized with respect to any issue of implementation or compensation arising from these directions.

Though the Union alleges a violation of article 2.3 pertaining to Hours of Service and Meal period, the Union did not articulate a rational basis for the allegation, and I therefore make no finding of a violation.

Ad Hoc Award 2015 (A) and (B)

The Union challenges the Company's decision to not provide Company vehicles to all the newly created positions that have stand-by requirements associated with them. The Union has indicated in its submission that Company vehicles are not being

provided to employees in receipt of standby on Districts 1 and 2 between Sudbury and Montreal.

I issued an award on July 13, 2015 related to the removal of Company vehicles from engineering employees who used them to commute to work and for the purpose of attending to calls outside their regular hours – that is to say when an employee was on-call. One of the Union arguments was that the Company was estopped for at least the duration of the collective agreement from refusing to provide employees with a Company vehicle for their use while on call. I agreed that the Company was estopped from refusing to do so for the duration of the collective agreement.

The Company, in its brief, accepts that I found an estoppel. However, the Company quotes my direction in the final paragraph of the award to: "… return Company vehicles to employees who held positions with the Company vehicles assigned to them, on the same terms and conditions that applied as of September 11, 2015" and has chosen to interpret it literally. The Company ignores the context in which the dispute was framed and the award issued. The Company then proceeds to argue that since it abolished positions and re-bulletined new positions without an assigned, but rather a shared, vehicle, it has complied with my award. The Company's failure to provide employees with Company vehicles who have been awarded positions with stand-by obligations under the guise of an operational change is properly characterized by the Union as an "end run" around my award.

In fact, the Company's articulated position in their response on October 27, 2015 flies in the face of the position it took at arbitration. At that time the Company wrote:

> The Company's November 23, 2015 operational change on shared trucks violates Arbitrator Schmidt's recent Award. This statement is inaccurate. Clearly, those employees who are awarded a bulletined position that has standby pay obligations as part of the position will be entitled to standby pay pursuant to Article 7 of the CBA will still be afforded a vehicle.

As set out earlier in this award, it was the Company's prerogative to bulletin positions with standby requirements or not – full or rotating. However, if the position requires standby, an employee awarded such position was to have been provided with a Company vehicle while on standby for the duration of the collective agreement. To the extent that the Company has failed to comply with my award, it is directed to do so forthwith. I remain seized to address any additional remedial issues stemming from the Company's failure to follow my award by withholding the use of Company vehicles to employees in receipt of a standby allowance since the establishment and filling of those new positions.

SUMMARY

The fundamental change to the manner in which the Company has organized how the maintenance workforce carries out its work falls within the definition of an operational and organizational change under the ISA. As part of the organizational change, the Company was entitled to abolish bargaining unit positions in the S&C

Department, and replace them with new ones. The Company gave an appropriate notice to the Union of its intention to reorganize the S&C Department, with sufficient information. The Company attempted to carry out its role in the Committee in order to facilitate the reorganization.

There is no question that the magnitude of the reorganization was unprecedented and very far-reaching in its scope. It has fundamentally impacted the entirety of the maintenance workforce. Notwithstanding its breadth, changes of this nature can be made so long as the protections to employees negotiated with the Union under the ISA are respected. One further caveat - a crucial one - is that in reorganizing the work the Company cannot violate the mandatory provisions of the collective agreement to which it is signatory. Nor can it circumvent an arbitral award under the guise of an operational and organizational change.

For the reasons set out above, the grievance is allowed, in part. Specifically, I have found that in the following respects, the Company's initiative has violated specific terms of the collective agreement between the parties. The Company violated:

- Article 7.6 (iii) by failing to provide employees who were in receipt of standby allowance associated with their positions who had their positions abolished 12 months' notice of the discontinuance of their standby allowance;

- Article 2.1 of the collective agreement by establishing rest days that are not preferred rest days as provided for in that article, contrary to article 4.2; and

- Article 2.4 of the collective agreement by establishing new shifts contrary to that article.

In respect of the article 7.6 violation the Company is directed to provide compensation in the form of a standby allowance to those employees whose positions with standby requirements were abolished and who were unable, through the exercise of seniority, to secure new positions with a standby requirement. Such period of compensation is to begin on the first day the employee was so affected and will continue for a period of 12 months as stipulated in Article 7.6, or until such time as the employee secures a position with a standby requirement. In any event, the employee is entitled to the full 12 months' notice of a change in standby and the corresponding entitlement to the standby premium.

In respect of the Article 2.1 and 2.4 violations, the Company is directed to cease and desist in its violation of the collective agreement in respect of non-preferred rest days, and the start of shift times. The Company is further directed to rework the work schedules of employees whose schedules do not comply with the preferred rest days established by article 2.1 and shift start times mandated by article 2.4. In that regard, the Company has 45 days from the date of this award to do so. It may very well wish to negotiate a resolution to its predicament with the Union.

All other alleged violations with respect to the implementation of the November 23, 2015 S&C Reorganization are either not made out or are to be processed in the normal course through the grievance procedure as noted throughout this decision.

I remain seized with respect to any and all issues stemming from this award, including its interpretation, implementation and/or and further remedies that may flow from this award and that the parties are unable to resolve.

August 2, 2016

CHRISTINE SCHMIDT

ARBITRATOR