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:

Brianne Sly – **Assistant Director, Labour Relations**
Nizam Hasham – **Counsel**
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**

A supplemental hearing in this matter was held in Calgary on November 8, 2016.
Ad-hoc matter 2016-646.

SUPPLEMENTARY AWARD

On August 2, 2016 I issued an award arising from the 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") ("Award").

The Award provided a detailed history of the chronology of this dispute. Among other things, I described the Union's attempt to obtain an interim order pursuant to section 60(1)(A)(II) of the *Canada Labour Code* to prevent the Company from implementing its intended reorganization of its maintenance employees. I dismissed the Union's application for an interim order. On the merits of the grievance heard April 2, 2016, the Union's resolve, among other things, was to have all bid positions reinstated, together with the restoration of hours of service, rest days, seniority and vehicle entitlements as they existed prior to the reorganization– essentially a return to the *status quo*.

As reflected in the Union's Ex Parte Statement of Issue on the merits the Union also took issue, among other things, with the Company's alleged non-compliance with "various arbitration awards" as well as its alleged violation of numerous collective agreement articles in implementing the reorganization. The Union sought to be made whole for all lost earnings, benefits and damages incurred due to the implementation of

the 1.1(a) Notice. At the hearing on April 2, 2016, the Union argued and the Company responded to the Union's specific allegation that the Company's reorganization was an attempt by the Company to circumvent a previous award of mine issued July 13, 2015 (Ad Hoc Award 2015 (A) and (B)).[1]

The summary at the conclusion of the Award illustrates the approach I took to the issues advanced and the conclusions I reached. It reads as follows.

> **SUMMARY**
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> 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.
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> 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.
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> 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:
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> - Article 7.6 (iii) by failing to provide employees who were in receipt of standby allowance associated with their positions who had their

[1] In Ad Hoc 2015 (A) and (B) I reversed the Company's decision to remove Company vehicles assigned to all maintenance employees with standby obligations for the duration of the collective agreement (see page 13 of the August 2, 2016 award).

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.

By correspondence dated September 15, 2016, the parties requested that a supplemental hearing be scheduled. That hearing was set for November 8, 2016. In anticipation of the hearing, a telephone conference was held on November 2, 2016. At that time I heard submissions about the scope of the hearing. I decided that in addition to outstanding interpretations of the Hours of Service and Rest Days provisions referred

to in the Award, submissions on remedial issues stemming from the Award, as well as the dispute between the parties relating to Mobile Maintainers would be addressed. Briefs were exchanged by the parties and provided to me on November 7, 2016.

As can be seen by the summary reproduced above, and a review of the Award more generally with particular regard to my preliminary comments set out therein, I made clear in the Award that I decided not to address those largely single-sentence paragraphs in the Union's written submissions of September 23, 2015 alleging Company violations of the collective agreement where the Union failed to explain them or expand upon them at the hearing.

For further clarity, my comments at page 56 of the Award, referring to "all other violations relating to the implementation of the November 23, 2015 S&C reorganization are either not being made out or are to be progressed in the normal course through the grievance procedure as noted in this decision" spoke only to those Union allegations which I addressed in the Award.

Appreciated in the context of the Union's challenge to the Company's initiative, the Award cannot properly be taken to mean – as the Company now suggests - that the Union is precluded from proceeding in the normal course before a CROA arbitrator (or some other mutually acceptable arbitrator) with grievances filed in respect of the alleged violations that I declined to deal with in the Award.

In the circumstances, the Company's position that somehow the common law principles of *res judicata* or *functus officio*[2] apply to matters I did not address or about which I was unable to, or did not, make any findings or determinations, is incorrect. As I have indicated, there were a substantial number of issues that I declined to determine in the Award. The *functus officio* doctrine only applies with respect to those issues addressed in the Award. Therefore, in respect of the issues relating to Mobile Maintainers raised at the supplemental hearing, aside from those already addressed in the Award (at pages 34, 43, and those findings in respect of maintenance employees more generally throughout the Award) the Union is entitled to have those matters adjudicated in the normal course.

The parties do not dispute that the purpose of the supplemental hearing was to allow them to seek clarification or direction in respect of the Award itself and with respect to matters flowing from the Award. It is not an opportunity for a party to re-litigate the original dispute. It is not an opportunity to have my findings or determinations challenged or revisited by way of supplemental argument.

In addition to remaining seized of any outstanding issues stemming from the Award generally, I also remained seized on remedial issues flowing from the Award, in the event the parties were unable to come a resolution on those issues.

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[2] The *functus officio* doctrine holds that where an arbitrator has fully exercised his or her authority and finally determined the matter or matters that were submitted to arbitration then the arbitrator's authority is exhausted. In this case, given its unique nature, I did not determine all matters put before me (see September 23, 2015 Union correspondence). I determined that certain matters were more properly adjudicated in the normal course, if the Union sought to pursue them in that venue.

At page 58 of the Award, immediately after I summarized the Company's specific collective agreement violations in respect of articles 7.6 (iii) (failure to provide required notice for discontinuance of standby allowance), 2.1, 4.2 and 2.4 (establishing rest days that are not preferred rest days, and establishing new shifts contrary to article 2.4), I directed that the Company rework the schedules of employees that did not comply with my findings. I also specifically retained jurisdiction with respect to any issue of implementation or compensation arising from my directions. Further, I directed the Company to provide Company vehicles to those employees with standby requirements - full or rotating - for the duration of the collective agreement, and I retained jurisdiction with respect to remedy stemming from the Company's withholding of vehicles to employees in receipt of a standby allowance since the establishment and filling of those new positions on November 23, 2015.

Notwithstanding this, the Company chose to argue at the supplemental hearing, and it maintained its position "in principle" when questioned on it specifically at the hearing, that the Union was precluded from seeking compensation for the violations found in the Award because the Union had not led evidence on remedy on April 2, 2016 - the Union's Exparte Statement only requested that affected employees be "made whole for lost earnings, benefits and damages" - and because the Company did not agree to bifurcate the merits and the issue of compensation.

The Company's argument is set out at paragraphs 68 through 71 of the supplemental brief and reads as follows:

> 68.During the April 2, 2016 proceedings, the Company submitted at Paragraph 17 of its submission when challenging the Union's Ex Parte Statement of Issue:
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> > 17. In this Statement of Issue, the Union further identified its requested resolved as: "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."
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> > 18. The Company disagrees with the Union's position and cannot agree that its requested remedy has been properly advanced through the grievance procedure...
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> > (Excerpt from April 2, 2016 Company Brief at 13)
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> 69.As a result of this position, discussions were held during the April 2, 2016 hearing and it was determined that the Company would not challenge the Arbitrator's ruling that the Union's request for remedial relief may be considered in the award as reflected in the footnote to the Arbitrator's August 2, 2016 decision on page 16:
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> > 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.
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> 70.The Company respectfully submits that the parties and the Arbitrator were bound by this determination that all aspects of the Union's claim for remedial relief would be considered in the award and therefore all submissions made at the hearing. Therefore, it was the obligation of the Union to submit, in its entirety, all submissions and evidence to support any claims within the context of the April 2, 2016 hearing. The Union failed to do so and cannot now attempt to rectify that or expand on their

> submissions.
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> 71.The Company respectfully submits that there must be explicit agreement by the parties for the issue of merits and compensation to be bifurcated into two separate processes. The Arbitrator's summary outlines that just the opposite was in place and while the Company did not desire to have remedy dealt with within the hearing, the Arbitrator ruled that the Arbitrator had jurisdiction to consider remedial relief only within "this" award. Therefore, the totality of evidence on both alleged violations and impact to employees is confined to the evidence and submissions of the parties during the hearing and no further submissions or additional remedies may be ordered.

The Company's position mischaracterizes my Award and the context in which I made my oral ruling. The Company is quite aware that I ruled orally at the April 2, 2016 hearing that I had the jurisdiction to order a return to the *status quo* that existed prior to the reorganization. The Company's position – that the Union had not advanced that remedy in the grievance procedure - makes little or no sense when one considers that the Union sought to prevent the Company's initiative from going forward on an interim basis in the first place by way of its section 60(1)(A)(II) motion for interim order pursuant to the *Canada Labour Code* application. Moreover, the Company agreed at the April 2, 2016 hearing that it would not contest my ruling notwithstanding the position it advanced in its brief. Further, the Company is aware that my ruling was confined to the specific issue of my jurisdiction to order a return to the *status quo* as a remedy on the merits. My ruling could not reasonably have been construed as a determination that all remedial issues were to be addressed once and for all at the hearing.

It is not unusual for an arbitrator to remain seized in respect of certain matters - remedy being one of them. In that way, an arbitrator is able to provide parties with a

timely decision on the merits of the dispute, and at the same time provide direction to them so as to encourage discussion to ideally resolve those issues without the necessity of additional days of hearing and further arbitral intervention. It would have made no sense that all aspects of the Union's claim for remedial relief stemming from its multitude of allegations be considered at the hearing of April 2, 2016.

Simply put, the Company's position that this case cannot be "bifurcated" is not consistent with fundamental labour relations principles in the arbitral process. Moreover, the requested remedies referenced in the Union's ExParte Statement must be liberally construed and for these reasons, I shall address the Union's request for remedies stemming from the findings made in the Award below.

Although the parties disagreed about what should be dealt with at the supplemental hearing, they did agree to seek clarification on two outstanding issues of interpretation relating to several collective agreement clauses, which I found the Company to have violated: Rest Days (articles 2.1 and 4.2) and Hours of Service (article 2.4).

Preferred Rest Days

The Union says that the preferred rest days for employees working 5 & 2 cycles are Saturday and Sunday unless a *bona fide* operational requirement makes it necessary to deviate from Saturday and Sunday. The Union argues the relevant collective agreement articles, namely articles 2.1 and 4.1 and 4.2, provide a

presumptive preference for Saturday and Sunday as consecutive rest days. Since the Company demonstrated no operational necessity to justify Friday/Saturday or Sunday/Monday as rest days, the Union requests that I order the Company to rework its schedules to adhere to Saturday and Sunday as rest days.

I reproduce 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).

….

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.

At page 45 of the Award I found that the preferred rest days set out in article 2.1 are mandatory, subject to the Company establishing, by clear and cogent evidence, that a departure from those rest days is necessary to meet operational requirements as set out in article 4.2.

The Union takes the position that the Company must demonstrate a *bona fide* operational requirement making it necessary to deviate from Saturday and Sunday because, in reworking those employee schedules that violated the collective agreement with respect to preferred rest days, employee positions on 4/3 work schedules were re-established as 5/2 work schedules with Friday and Saturday or Sunday and Monday as rest days.

I disagree with the Union’s argument. Nowhere in the relevant articles does the language reflect that the departure from Saturday and Sunday as rest days is permissible only if a *bona fide* operational requirement makes it necessary to establish work schedules with Sunday and Monday or Friday and Saturday as rest days.

Article 2.1 of the collective agreement refers to article 4.1 for the identification of the preferred rest days for those employees on 5&2 work schedules; and article 2.1

reiterates the preferred rest days as Saturday and Sunday “and then” “Sunday and Monday, or Friday and Saturday (as reiterated in article 4.1).

On the plain language pertaining to employees on 5&2 work schedules, Sunday and Monday and Friday and Saturday fall within “preferred rest days” options from which the Company may choose. Moreover, Article 4.2, which must be read in conjunction with article 4.1, provides that only in granting rest days other than Saturday and Sunday, or Sunday and Monday, or Friday and Saturday is it incumbent on the Company to demonstrate that a departure from the preferred Saturday/Sunday rest days is necessary to meet operational requirements.

Further, Arbitrator Picher’s comments in **CROA&DR 3524** which I cited in the Award are as applicable to the Union’s position taken at the supplemental hearing as they were to the Company’s position taken on April 2, 2016 that preferred rest days were not mandatory. 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:
>
> 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.

As mentioned in the Award, in the collective agreement at issue before Arbitrator Picher, preference was to be given to "Saturday and Sunday and then to Sunday and Monday." Arbitrator Picher found that any departure from either Saturday and Sunday or Sunday and Monday could only be justified on the basis that it was necessary to meet operational requirements. The fact that the parties to this collective agreement negotiated an additional rest days option, Friday and Saturday, does not detract from the principle articulated by Arbitrator Picher in **CROA&DR 3524**. The Union's position in the present matter, therefore, simply has no support in the language of the relevant articles of the collective agreement or in this Office's jurisprudence.

Further, I note that, prior to the reorganization when a minority of employees working on 5&2 work schedules had preferred rest days other than Saturday and Sunday, the Union did not contest the Company's ability to bulletin and fill such positions without any need to demonstrate an operational requirement necessitating a deviation from Saturday and Sunday rest days (so long as the rest days were those otherwise established pursuant to article 2.1).

On the issue of compensation flowing from the Company's erroneous scheduling of maintenance employees to work on preferred rest days established by article 2.1, the Union requests that employees be compensated at the overtime rate of pay for every preferred rest day worked since November 23, 2015, less the regular pay already paid. While the Company accepts the determination in the Award of a violation of rest days of maintenance employees, it contends that no compensation is properly ordered to

employees who were compelled to work those schedules since they are not “out” any monies to which they otherwise would be entitled under the collective agreement.

In **CROA&DR 3524** when employees were compelled to work on Saturday and Sunday or Sunday and Monday (the preferred rest days in the collective agree at issue in that case) in violation of the collective agreement, Arbitrator Picher provided compensation as follows:

> The Arbitrator also directs that the Company provide compensation to those employees who were compelled to work on Saturday and Sunday or Sunday and Monday, or alternatively on their scheduled rest days of Thursday and Friday, if overtime rates were not so paid. Should the parties be unable to agree on the quantum of compensation to any employee the matter may be spoken to.

Employees are properly compensated for the inconvenience of having had to work on preferred rest days, which I found to be mandatory rest days, at overtime rates. I award the same formula as Arbitrator Picher in **CROA&DR 3524**. Employees not compensated at overtime rates for work performed on what would otherwise be a rest day as provided for in article 2.1 are to be compensated as such or compensated with the difference between the regular rate of pay and the overtime rate of pay if previously compensated a the regular rate of pay. In the event that the parties are unable to agree on the quantum of compensation to any employee affected by the determination in the Award, I remain seized.

Hours of Work

The Union seeks clarification of the Award as it pertains to hours of work. The Union says that article 2.4 does not contemplate staggering maintenance employees' individual shift start times within the window that their shift is scheduled to commence (which must be between 0400 hours to 1000 hours or 0400 and 1200 for maintenance employees working on commuter lines). It directs me to certain email documents that suggest that maintenance employees have been asked to have their start time changed from day to day to meet operational requirements. Mr. Hooper, the Union's General Chairman, testified that, although the Company had committed not to change employees' start times it has not always adhered to that commitment.

For ease of reference, the relevant articles are reproduced below:

> **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.
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> Employees in S&C maintenance working on commuter lines may commence work between 0400 and 1200 hours. (Emphasis Added)
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> **2.5** Regular day shifts in S&C Construction shall start at or between 0400 hours and 10 00hours.
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> **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.
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> ….

Leaving aside those issues regarding Mobile Maintainers, which are to be addressed before a CROA arbitrator (or an arbitrator otherwise agreed to by the parties and referenced above), there can be no serious contention that, with respect to the maintenance workforce, the Company has no right to “stagger” or change employees’ individual shift start times from one day to the next based on operational requirements. Articles 2.6, 2.7, 2.8 and 2.9 of the collective agreement do allow for a change to start times for employees in S&C Construction on that basis, but there is no equivalent language for the maintenance employees. Had the parties intended to impose changes in shift start times for maintenance employees as well as S&C Construction employees, the collective agreement language would not have differentiated between these two kinds of employees.

To the extent that the Company is changing maintenance employees’ shift start times it is directed to cease and desist from doing so.

The Company is correct that the Award confirmed that, so long as individual work schedules commence between the 0400 hours to 1000 hours window (or the 0400 hours to 1200 hours window for maintenance employees working on commuter lines), the Company was within its rights to commence shifts between those times. At page 51 of the Award I wrote:

> 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.
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> 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.

To the extent that the Union asserts that the Company must demonstrate an operational requirement to establish what it refers to as "multiple shifts" within the applicable time window, the Union has misconstrued the Award. It is only in respect of those shifts the Company seeks to implement after the shifts that commence in the applicable window (a second shift as I refer to it in the first paragraph cited above), that the Company must demonstrate, having regard to the jurisprudential test, that conditions make it necessary to establish such a shift. Obviously, in establishing any such additional shift, the Company must still comply with the other constraints imposed by article 2.4.

Notwithstanding the above clarification, I found that the Company violated article 2.4 of the collective agreement when it bulletined positions for maintenance employees whose shift commenced outside the range of hours provided for in article 2.4. The Company failed the test established by the jurisprudence and failed to negotiate a

departure from the 0400 to 1000 hours (or 0400 to 1200 hours for commuter lines) shift commencement time with the Union.

The inconvenience to employees caused by the shift start time violations of article 2.4 is analogous to the inconvenience caused by the Company's violation of the preferred rest days provisions. In the circumstances therefore, those employees who, by virtue of the reorganization of the maintenance workforce on November 23, 2015, were compelled to work shifts that commenced after the windows provided for by article 2.4, are to be compensated at overtime rates, less the regular pay already paid to them.

In the event that the parties are unable to agree on the quantum of compensation to any employee affected by the determination made in the Award, or in this supplementary award, I remain seized.

Compensation for Violation of 2015-073 (A) and (B) Re: Failure to Provide Company Vehicles to Employees with Standby Requirements.

Finally, beyond the issues addressed above, the Union submits that some of the employees who were successful in obtaining positions with standby requirements (either full or rotating) established pursuant to the Company's reorganization were not provided with a Company vehicle while on standby. The Company says that it has provided Company vehicles to all employees affected by the Award. In support of its position the Company argues that the Ad Hoc 2015 (A) and (B) Award issued in July 2015 is limited in scope, and that it has complied with that decision.

The Company says that those few maintenance employees with standby requirements who were not provided with Company vehicles prior to the reorganization implemented on November 23, 2015, and who did not receive one after posting into new positions with standby requirements fall outside the "estoppel" I found in the Ad Hoc 2015 (A) and (B) award. In the Company's submission, any such employees are not covered by the Award and need not be provided with Company vehicles.

The hearing held November 8, 2016 was not an opportunity to revisit Ad Hoc 2015 (A) and (B) or an opportunity to challenge my findings and direction provided in the August 2, 2016 Award. On the issue of Company vehicles, and in particular who was to be provided them pursuant to the Company's reorganization, the Award reads as follows:

> **Ad Hoc Award 2015 (A) and (B)**
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> 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.
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> 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.
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> 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:
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>> 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.

As is clear from the above excerpt, I did not accept the Company's position at the hearing on April 2, 2016. I determined that if the position bulletined as part of the Company's reorganization required standby, employees awarded such positions were to have been provided with a Company vehicle while on standby, and those same employees are to be provided with a Company vehicle while on standby for the duration of the collective agreement. There is simply not the "wiggle room" by way of the Company's argument to revisit the determination I made and which is apparent on the face of the Award.

Moreover, with respect to the Award, I specifically retained jurisdiction to address any additional remedial issues stemming from the withholding of Company vehicles from employees awarded positions with standby requirements since the reorganization on November 23, 2015.

On the issue of compensation, apart from the dispute as to which employees are affected by the Award, since the Award's issuance, the parties have agreed that those employees impacted would be paid full mileage up to 80 kilometres each way from the date of the Award to the date of the return of Company vehicles to them. This is in accordance with the language of article 24.2 of the collective agreement, with the caveat that the parties negotiated an 80 kilometres maximum each way pursuant to the application of a Company policy to the affected employees.

In addition to this, beyond that which was agreed by the parties, the Union is seeking the same remedy from November 23, 2015 and it is also seeking compensation for any personal insurance premium incurred for daily work commutes, compensation for winter tire costs and compensation for vehicle lease or financing costs incurred as a result of the Company's removal of vehicle entitlements.

There was some dispute at the hearing about whether the parties' agreement regarding compensation was a comprehensive one – so as to preclude the Union from seeking relief beyond the full mileage up to 80 kilometers each way. I need not resolve that dispute. The terms of the parties' informal agreement – that the Company pay full mileage each way up to 80 kilometres - is quite appropriately applied to all employees

affected by the bulletining and awarding of positions with standby requirements who were not provided Company vehicles from the period from November 23, 2015 onwards, until such time as they are provided with a Company vehicle. In my view the compensation agreed to represents fair and adequate compensation to the employees in question. For clarity the compensation includes all commuting kilometres from employees' respective places of residence to their assigned headquarters and return up to a maximum of 80 kilometres. All kilometres travelled on account of responding to call outs, planned overtime, and all other work that requires the availability and attendance of the affected employee must likewise be compensated.

In the event that the parties are unable to agree on the quantum of compensation to any affected employee, I remain seized.

Lastly, I remain seized with respect to any and all issues stemming from this supplementary award.

Dated at Toronto on December 13, 2016.

CHRISTINE SCHMIDT
Arbitrator