IN THE MATTER OF AN ARBITRATION

BETWEEN

Teamsters Canadian Rail Conference

(the "Union")

- and –

Canadian National Railway Company

(the "Employer")

Grievance concerning the November 20, 2014 Initiative re Grain Block Service on the Three Hills Subdivision

SOLE ARBITRATOR: Marilyn Silverman

APPEARANCES:

For the Union:
Ken Stuebing, Counsel
Michael Church, Counsel
R.A. Hackl, General Chair CTY-CN Lines West
B. Willows, General Chair LE-CN Lines West

For the Employer:
Kerry Morris, Senior Manager Labour Relations
Doug Van Cauwenbergh, Director Labour Relations
Tom Brown, General Manager Operations, Western Canada

Hearing held in Toronto, April 19, 2016.

AWARD

1. This is a policy grievance concerning a Material Change notice dated November 20, 2014 issued by the Company to the Union in respect of employees under Collective Agreement 4.3 (covering Conductors, Trainmen and Yardmen). Although the Material Change notice affects both employees covered by Agreement 4.3 and Collective Agreement 1.2 (covering Locomotive Engineers), this grievance was only filed under Agreement 4.3. The policy grievance disputes the Company's use of the Material Change provisions of the Collective Agreement. However, for the purpose of the dispute the Union says that both Collective Agreements are relevant.

2. The change at issue is the removal of the calling preference for spareboard employees working in Grain Block Service on the Three Hills subdivision. The Union asserts that the change is a new method of manning Grain Block service on the Three Hills subdivision.

3. The grievance contends that the Material Change notice is not proper or appropriate because the change in issue is not a *bona fide* Material Change within the meaning of the Collective Agreements. The Union asserts that the change is a new method of manning Grain Block service on the Three Hills subdivision.

4. In the Union's submission, the Company is simply attempting to evade its contractual commitments. In the alternative, if it is a properly issued Material Change notice, the Union says that the Company failed to adequately address the potential adverse effects created by the Material Change, as it is obliged to do.

5. The position of the Company is that the change is in fact neither "adverse" nor "significant" as contemplated under the Collective Agreement language, but the Company explains why it issued the Material Change notice despite this view (set out

below). The Company says that it is not seeking to exclude or deny Calgary home based employees the "Grain Block" work but simply removing the calling preference.

6. The Company explains that its initiative is to reduce non productive/ deadhead costs. The Company characterizes its action as the removal of the preferential calling procedure in Calgary. The Company will first assign the work to Calgary pool crews, and following that, to the spareboard employees. It has outlined the nature of the change and the costs associated with it and its efforts to reduce or eliminate them.

7. Each Collective Agreement contains language concerning the introduction by the Company of significant changes adversely affecting the working conditions of the bargaining unit employees. Although the language in the Collective Agreements is not identical, the material change provisions share a number of elements. They contemplate that:

- The change is "significant" or "adverse"
- the Company will give the Union lengthy or at least advance notice of the Material Change that the Company intends to introduce;
- the Company will fully disclose to the Union the details of the change
- the parties will meet to negotiate measures to minimize or ameliorate the adverse consequences of the change (not to include rates of pay; and
- to the extent they cannot reach full agreement, any dispute will be referred to binding arbitration.

8. The parties are signatory to two material change agreements, the August 1990 material change agreements regarding material change at Hanna and Mirror Home Stations (the "Hanna-Mirror Agreements") applicable to the Union's predecessors. The Hanna-Mirror agreements incorporated measures to minimize the adverse effects on the bargaining

unit employees as a result of the closure of the home stations and terminals of Hanna, Alberta and Mirror, Alberta. One of the measures in the Hanna- Mirror Agreements was that trains operating in Grain Block Service on the Drumheller, Oyen, Mantario and Three Hills subdivisions were to be manned by the Joint Spareboard of each bargaining unit. The spareboard is a set of unassigned employees on call to perform yard or service assignments. Grain Block Service involves dropping empty cars and picking up full cars from grain elevators.

9. The Hanna-Mirror agreements continue to be in effect. There have been two related arbitration awards (in 2010) of the Canadian Railway Office of Arbitration & Dispute Resolution that touched upon them. In each (CROA No. 3945 and No. 3946), Arbitrator Picher found that the Company had violated the Collective Agreements by failing to give notice of a material change in respect of a work assignment that would have been contrary to the Hanna-Mirror Agreements. Specifically, the Company removed grain work from the Calgary based spareboard, and although Mr. Picher stated that the commitments in the Hanna-Mirror Agreements were not made in perpetuity, and that the Company was not forever barred from initiating a change away from the restrictions in the Hanna-Mirror Agreements, any change in the handling of grain on a subdivision covered by the Hanna-Mirror Agreements had to be initiated through the material change process in order to give the trade unions an opportunity to negotiate the ramifications. Consequently, not long after the issue of that Award in October 14, 2010, the Company served notice of a material change to allow Edmonton home stationed crews to perform Grain Block Service assignments, which was subsequently amended to propose that Edmonton crews perform “all grain service” on Three Hills subdivision (work preserved for Calgary based spareboard employees pursuant to the Hanna-Mirror Agreements) and other areas. Ultimately, the parties came to a resolution of that material change notice.

10. The Company says that all that it is attempting to achieve is a simple reassignment of work within the terminal of Calgary in order to eliminate or at least reduce the non-productive costs associated with the deadheading and taxi transportation of the spareboard employees. The Company says that's its change involves simply the "normal application of the Collective Agreement" in the "reassignment of work". These are from the provisions found in Article 89 of Agreement 1.2 and Article 139 from Agreement 4.3. In fact, says the Company, this reassignment does not fall within the scope of a material change with significant adverse effects. Nevertheless, the Company says it is proceeding in this fashion – issuing a Notice of Material change - because the establishment of the preferential calling procedure at Calgary was initially created through the material change process, and because arguably it is required to do so under Arbitrator Picher's ruling in CROA 3945/3946.

11. The Union's overall contention is that the Company cannot implement the initiative through the Material Change provisions. It says that the Company is bound to the terms and conditions of its agreements to the Union, notably in this case the Hanna-Mirror Agreement.

12. In CROA 3945, the Company bulletined two freight assignments which had the effect of transferring work assignments involving the servicing by a Velocity Train of three grain elevators from crews home terminalled in North Battleford, Biggar and Calgary to employees home stationed at Edmonton. The Union maintained that there was no precedent for the Edmonton based crew to handle work on the three subdivisions over which the Velocity Train travelled and serviced the grain elevators. In respect of the change in assignment affecting the Calgary crew, the Union made an alternative argument that this constituted a breach of the Hanna-Mirror Agreement.

13. The assignments affecting the North Battleford and Biggar crews were found by Arbitrator Picher not to violate the Collective Agreement. However, the Arbitrator

determined that the change in assignment for the Calgary crew contravened the Hanna-Mirror Agreements, and as such, the failure of the Company to give notice of a material change constituted a violation of the material change provisions of the Collective Agreements that preceded the Collective Agreements in this case. As I have indicated, that prompted the Company to give notice of a material change, and ultimately it led to a resolution by the parties.

14. In arriving at his conclusion concerning the Hanna-Mirror Agreement, Arbitrator Picher opined that the Hanna-Mirror Agreement – or, as he referred to it, "the Special Agreement" – did not provide the Union or its members rights that necessarily prevailed in perpetuity. He observed that the Company "could initiate a change away from the restrictions of that Special Agreement as part of its normal prerogative to manage its business." However, because the Hanna-Mirror Agreement had conferred grain handling rights on the Three Hills subdivision to the Calgary spareboard, the Arbitrator stated that the Company violated Collective Agreement 1.2 by failing to initiate the material change provisions in the Collective Agreements before implementing the change in assignment to the Edmonton crew.

15. The Union says that absent a cancellation clause, it is not open to a party to unilaterally alter the substance of the Agreement. For example, in an unreported decision dated March 17, 2015 of the Court of Queen's Bench of Alberta, Canadian Pacific Railway Company ("CP") served a notice of material change on the Union purporting to cancel a 1984 MCA designating Sparwood as "an away from home terminal", as well as a 1993 agreement allowing crews to pass through Sparwood without a change of crew. The arbitrator who dealt with the Union's grievance challenging the notice of material change found that CP was entitled to cancel the 1993 run through agreement in order to better serve its customers at a number of mines and was therefore entitled to issue the material change notice. The Court determined on judicial review that the arbitrator committed a reviewable error by failing to answer whether CP was entitled to render

the 1984 material change agreement, an agreement without a cancellation clause, of no effect by way of a notice of material change. As the arbitrator did not turn his mind to that question, the Court quashed the award. However, once returned for consideration before a different arbitrator it was held to properly fall within the material change process and returned to the parties. That case is also distinguishable on the basis that it represented an attempt to unilaterally withdraw from the Hanna Mirror Agreement and not advance the matter through the material change process.

16. Material change notices serve a specific purpose, that is, to deal with the adverse consequences of a decision by the employer to materially change operations. Not every change introduced by an employer qualifies as a material change within the meaning of the Collective Agreements.[1] For example, the material change notice provisions cannot be utilized by an employer to achieve relief against its obligations under a collective agreement[2]. Nor can an employer, in the absence of cancellation language in a material change agreement, unilaterally resile from its commitments under the material change agreement.[3]

17. The Union relies on the decision in Ad Hoc dated June 7, 2010 that the Company cannot use the material change provisions to undermine its contractual obligations. However. this case was about a change proposed to geographic areas and as such the fundamental underpinnings of the collective agreements were affected. It does not compare in scope or quality to the November 20, 2015 proposed initiative. And in an Ad Hoc dated December 9, 2015 regarding Thief River Falls, the Company was restricted from instituting a unilateral change involving a change of work across geographical

[1] *Canadian Pacific Railway v Teamsters Canada Rail Conference*, 2015 CanLII 82083 (CA LA), at paragraph 30.

[2] *Ibid*.

[3] Unreported award dated April 1, 1984 (Kates) between Canadian Pacific Railway Company and The United Transportation Union and The Brotherhood of Locomotive Engineers.

boundaries, which is not what the Company is doing here by way of a notice of material change.

18. The Company characterizes the change it proposes as "a simple reassignment of work within the terminal of Calgary and by definition is not the subject of a material change". It asserts that there will no material or significant change and posits that in fact the elimination of the non-productive miles and taxi costs do not inherently mean the spare boards will be reduced or employees replaced. Given the jurisprudence provided and the circumstances of this case, I agree that the Material change notice was the proper approach. This process was set out in those decisions for this type of initiative. I do not accept the Union's contention that the Company cannot advance this initiative as it seeks to do under the Material Change provisions of the Collective Agreement. CROA 3945 and 3946 contemplate that that is what the Company should do.

19. At Page 13 of CROA 3945 the Arbitrator found that the Company could not simply initiate a change without given the Material Change notice and recognizing the import of the Hanna-Mirror Agreement as follows:

> What is the import of that agreement? Can it be suggested that the Company has undertaken to perpetually assign the grain block service on the Three Hills subdivision to spare employees at the Calgary home station, given that the Special Agreement has no date of termination or notice provision by which it can be terminated? I think not. Clearly, in the normal course, the Company could initiate a change away from the restrictions of that Special Agreement as part of its normal prerogative to manager its business. However, in the Arbitrator's view, given the express stipulations of the Hanna and Mirror Special Agreement, any change in respect of the handling of grain on the Three Hills Subdivision must be dealt with through a proper material change notice. At a minimum, it must be deemed that employees who are generally entitled to the protections of the Special Agreement can only be deprived of them through the material change provisions of the collective agreement which allow for the fashioning of terms which minimize the adverse impact of any additional change.

20. Therefore, this jurisprudence supports the position of the Company that it should properly seek to advance the initiative through the Material Change notice, as it did.

21. The Union asserts, as an alternative position, that if I find that the Material Change notice was proper, as I have, that the matter be returned to the parties for further disclosure and to address adverse effects. It says too that a Board of Review process should be conducted.

22. Even without the Company acknowledging that the change is either significant or materially adverse, the Company is prepared to mitigate the effects of the change by offering MOE as a means to address the change to the preferential calling procedure. The Maintenance of Earnings is protection for employees impacted by a change (see AD HOC 441). That appears to be a reasonable proposal to address the impacts. It will do so for both Conductors and Locomotive Engineers. It contends that this is a fair and reasonable resolution. It contends that the Union proposal for guaranteed spare board positions is excessive. The Company submits that the Union has not provided any evidence that the MOE would not address any effects of the change.

23. The Union asserts that another Board of Review would be the appropriate remedy, if I find that the Material Change initiative is properly issued. It asserts that it did not have sufficient information at the Board of Review to engage in that process and suggests that the Company did not meet its substantive obligations to provide the required information and full disclosure. The Company says that a Board of Review has already taken place, which it has with a report issued on April 16, 2016, during which the Board was unable to arrive at a recommendation. The Company responds that the Union has had opportunity to provide evidence or data of the adverse effect, that would not be remedied by the MOE, the solution the Company has put forward, and that the Union has been unable to do so. I do not see any utility in ordering another Board of Review when one has already taken place.

24. For the reasons described, I cannot conclude that the Company has improperly used the Material Change provisions in this circumstance.

25. Accordingly, the grievance is dismissed.

DATED AT TORONTO, this 31st day of March, 2022.

Marilyn Silverman

Marilyn Silverman
Sole Arbitrator