IN THE MATTER OF AN ARBITRATION

Between

Canadian Pacific Railway

(the "Company")

and

International Brotherhood of Electrical Workers System Counsel No.11

(the "Union")

Grievance re - Cancellation of the Life for S & C Program

SOLE ARBITRATOR: Marilyn Silverman

APPEARANCES

For the Union:
Ken Stuebing, Counsel
Steve Martin, Senior General Chairman
Brad Kauk, Regional Chairman West
Bill Duncan, Regional Chairman East
Lee Hooper, General Chairman

For the Company:
Brianne Sly, Assistant Director Labour Relations
Nizam Hasham, Counsel
Anthony Mosso, Manager Labour Relations

Hearing held in Toronto on July 22, 2016.

AWARD

The dispute

1. This grievance is about the Company's decision to eliminate the Lifestyle Improvement Fatigue Education for Signals and Communications Program (the "Life for S & C Program" or the "program") The Union grieves the Company's unilateral decision to cancel the program. The Company asserts that it was entitled to do so. First, the Company advances a preliminary argument that I lack jurisdiction to consider and determine this dispute.

2. The Ex Parte Statements of Issue are attached as Appendix "A" to this Award.

The Preliminary Argument

3. The Company argues that this grievance concerning the Life for S & C Program is inarbitrable because the program is not found in Wage Agreement No.1 between Canadian Pacific Railway and the Canadian Signals and Communications System Council No. 11 of the I.B.E.W. expiring December 31, 2017 (the "Collective Agreement").

4. Article 2 of the Collective Agreement governs the hours of service and meal periods. It does not reference or incorporate the Life for S & C Program. The Company also notes that the Collective Agreement reference to the Life for S & C Program is found in an appendix ("Appendix G") to the Memorandum of Settlement dated November 9, 2012, which specifically provides that that appendix does not form part of the Collective Agreement. As such the Company maintains that the Life for S & C Program is inarbitrable. The Company relies on CROA&DR 1784 and CROA&DR 2187. The Union's main case is grounded in the equitable doctrine of estoppel. It says that the Life for S & C Program is a long-standing program established in 2002 and continued to apply until unilaterally cancelled by the Company by notice dated May 18, 2015. The Union also responds that the

cancellation of the Life for S & C Program is an unreasonable exercise of management rights.

5. The doctrine of estoppel has long been applied by labour arbitrators. It is an equitable doctrine and legal principle that does not rely on the existence of specific collective agreement language but rather on the legal relationship between the parties that exists under the collective agreement. The doctrine limits, if conditions are met, one party relying on the strict terms of a collective agreement where it would be inequitable to do so. There are many cases where arbitrators consider and apply the doctrine of estoppel. Its application in labour arbitration has been recognized by the Supreme Court of Canada in *Manitoba Assn. of Health Care Professionals v. Nor-Man Regional Health Authority Inc.* (2011) 212 L.A.C (4th) 93 (S.C.C.) the Ontario Divisional Court in the railway industry in *Canadian National Railway Co. et al. and Beatty et al*. (1981) D.L.R. (3d) 236 and in many awards as noted in Brown and Beatty, *Canadian Labour Arbitration, Fourth Edition (Thomson Reuters Canada), para 2:2200.* The doctrine has also been applied in railway arbitration awards in CROA 1930, 3458 and most recently between these parties in *Canadian Pacific Railway and I.B.E.W System Council No. 11* , 2015-073 (A) and (B) (2015)(Schmidt).

6. The fact that there is no specific Collective Agreement article governing the Life for S & C Program does not mean that I do not have jurisdiction to hear the dispute. That is because the issue of whether or not the Company is at liberty to end the Life for S & C Program involves the legal relationship between the parties and calls into question the application of the doctrine of estoppel. Accordingly, I find that I have jurisdiction to hear and determine this matter, including the interpretation of the provisions of the Collective Agreement, and the Union's estoppel argument. The Company's preliminary motion is dismissed.

The Merits of the Grievance

The introduction and development of the Life for S & C Program

7. The Life for S & C Program is a detailed, written program that addresses both lifestyle and fatigue management concerns. For the purpose of this Award I need not describe the program in detail but it is useful to describe some of its features.

8. Signals and Communications ("S & C") maintenance department works on a 24/7 basis with are responsibility for maintaining and repairing the track, control and signals system and equipment for the railway. Their work is safety sensitive. There are days when these employees are off work but must be on call. The Life for S & C Program addressed a number of concerns that the requirements of this job had for the S & C Maintainers.

9. In March 2000 a committee was established by the Company to study the issue of lifestyle and fatigue management among this group of employees. The study was established first in the Northern Ontario Service area. Specific proposals and recommendations arose out of the study. A pilot project in certain Northern Ontario areas was rolled out in the spring of 2001.

10. A list of countermeasures was recommended through the study to reduce fatigue, enhance safety and improve employee lifestyles. A total of 9 countermeasures were identified including an eleven and three shift schedule. (Prior to this initiative S & C employees worked twelve days on and two days off.) . This achieved an additional day off from on- call duty on a bi-weekly basis. In addition the system formalized a booking-off-with- pay system and formalized "napping" requirements. Both napping and booking off with pay was done prior to these recommendations (with napping on an irregular basis) but the Life for S & C Program established a consistent, clear and regular entitlement for employees. Other features of the Life for S&C Program were also established.

11. The Life for S & C Program was extended throughout the country (except in Quebec) and continued from the pilot in 2001 until it went system wide in 2002. It remained in effect until May 2015 when the Company cancelled it. The Company says some changes were made to the program over the years but the fundamentals of the Life for S & C Program remained intact and operational during this period.

12. The Life for S & C Program did arise as an issue between the parties prior to its cancellation in 2015. In 2010 and 2012 collective bargaining sessions the Union proposed that the Life for S & C program be incorporated into the Collective Agreement. That proposal was not accepted. The program remained outside the parameters of the Collective Agreement.

13. It is necessary to describe the events occurring during collective bargaining in 2012 that affect the determination of this grievance. By letter dated October 30, 2012, the Company expressed concerns about the amount of overtime arising out of the eleven/three schedule under the Life for S & C Program. The Company indicated that it would work with the Union to develop "mutually agreeable solutions" but wrote that absent a satisfactory resolution, it would terminate the program and would revert to the strict application of Article 2. The Company specifically referred to the creation of an averaging process to address its concerns. The October 30, 2012 letter provides in part that:

> The Company remains open to the development of mutually agreeable solutions to address this concern, which may include, but not be limited to, creating an averaging process.
>
> Absent such a solution, however, the Company will administer the aforementioned work schedule principles of Life for S & C based upon the practice, until such time as the parties conclude the upcoming round of collective bargaining, at which time the Company will revert to the strict application of Article 2.

14. Collective bargaining proposals were exchanged regarding, among other things, the overtime aspect of the Life for S & C program. The parties exchanged proposals regarding the averaging agreement referred to in the letter. In the end, a Memorandum of Settlement was entered into on November 9, 2012 concluding the collective bargaining for that round.

A side letter entitled Appendix "G" dealing with the Life for S & C Program was signed by the Union and the Company. The relevant portions of Appendix "G" record the concern of the Company about the overtime issue and provides in part as follows:

> During negotiations the Company expressed a concern pertaining to the Life for S & C concept creating issues adhering to the Canada Labour Code and the Collective Agreement in applying the overtime policy the S & C Maintainers and Technicians who are in receipt of a standby allowance as provided for in the Collective Agreement.
>
> While the parties were unable to agree to a resolution, they did agree to meet within 90 days of ratification to continued [sic] discussions on the matter to develop solutions which may include, but not be limited to, an overtime averaging agreement over complete 14-day cycle of 11 days on call and 3 days off where overtime will not apply until an employee has first worked 80 hours in a 14 day work cycle.

15. The Company highlights that the letter states that it does not form part of the Collective Agreement. Although this letter is dated in November 2012, the Company did not cancel the Life for S & C Program until 2 ½ years after the date of this letter.

16. The other relevant document to this dispute is a local agreement entered into by the parties dated October 3, 2013. That agreement dealt with scheduling for a Saskatoon S & C Mobile Maintainer position. It contained a provision indicating that the Company would extend a Life for S & C schedule for that position until the end of the current Collective Agreement, but with a 30 day right to cancel at the option of either party. The Company contends that the Union's agreement to that provision means that the Union agreed that the Life for S & C program was cancellable upon either party providing 30 days notice.

17. Finally, in October 2014 the Company filed an excess hours application with the Federal Labour Standards Program in which it described the Life for S & C Program. The Union asserts that this shows that the Company intended to rely on the program and that it represented in its excess hours application.

18. After these events, the Life for S & C Program continued until May 18, 2015 when the Company posted a notice to all employees advising that it was cancelled effective

immediately. The Union filed a grievance and approached the Company asking for the notice to be rescinded and requesting a meeting. The Company refused to rescind its cancellation of the program and responded, in part, that the Life for S & C was a pilot project and never formed part of the Collective Agreement.

The submissions of the parties

19. The Company advances a number of arguments in support of its position. One is that the Life for S & C Program was a pilot project, never formalized in the Collective Agreement and therefore cancellable at its option whenever it wished to revert to its rights under Article 2 of the Collective Agreement.

20. Second the Company asserts that it gave notice to the Union in 2012 bargaining that the Life for S & C Program would not be maintained. Third, it relies on the October 3, 2013 letters which, in the Company's view, confirms that the Program is cancellable on 30 days' notice. It concedes that it did not give that 30 day notice, but says that is the limit of its obligation. The Company argues that the local agreement which was entered into to resolve an issue concerning the S & C Mobile Maintainer position means that either party could give notice of cancellation during the term of the Collective Agreement.

21. The Company further relies on other measures that it has instituted to address fatigue and contends that it meets its obligations imposed by Federal regulation.

22. In sum, the Company position that all parties were aware that the Life for S & C Program was cancellable at any time, that there was no clear and unequivocal representation by the Company that it would continue, and that there was no resulting detriment as no employee had "altered his circumstances irrevocably" (see CROA 2638).

23. On the other hand, the Union's says that the Life for S & C Program is of very long standing and a major component of health, well-being and lifestyle for employees. It says that cancellation of the Life for S & C Program has a serious impact on employees' rest

levels and has resulted in the loss of personal time off and time arrangements that have been relied on for years.

24. While the Union agrees that the Company raised the prospect of ending the Life for S & C Program during the 2012 bargaining, in fact the program was not cancelled by the Company. Negotiations ensued and the Company provided a proposed Memorandum of Settlement including an Appendix "E" which detailed an overtime averaging agreement under the *Canada Labour Code*. Further the final result out of that negotiation was Appendix "G" which was a clear understanding, in the Union's submission, that the Life for S & C Program would continue intact. The commitment in that agreement was to mutually review and discuss aspects of the Life for S & C Program. It did not signal that the program was in jeopardy.

25. The Union also relies on the representations made by the Company to the Federal Labour Standards Program in 2014. It those representations, the Company clearly referred to the terms of the Life for S & C Program in its Excess Hours Permit Application. The Union asserts that these representations to the Federal government relied on a negotiated work arrangement with the Union. It also shows further the Company did not intend to act upon its notice to terminate the program.

26. In sum the Union submits that the Company is estopped from altering its long standing practice on which the Union and its members have relied for over a decade. The Union says that the Life for S & C Program has become the agreed upon application of the Collective Agreement (see CROA 1930). It relies also on *CNR and Beatty*, supra and CROA 3458.

Analysis

27. There is no reference or inclusion of the Life for S & C Program in the Collective Agreement. Article 2 governs the hours of service and work schedules. The Union can only

succeed in this grievance if the principle of estoppel applies to prevent the cancellation of the Life for S & C Program.

28. In assessing whether an estoppel has been created four elements need to be established:

1) A clear and unequivocal representation;
2) The representation may be made by words or conduct;
3) It must be intended to be relied upon; and
4) The party who relied on the estoppel did so to its detriment.

29. Specifically, the pilot project was initiated in 2001 to deal with issues relating to fatigue and lifestyle for this group of employees. The Life for S & C Program is a clear and written program that contains specific rules and guidelines. It continued to be applied with no substantial change until 2015. There is no doubt that the Life for S & C Program was a firmly established program, in effect for 13 years and over a number of rounds of collective bargaining. In this 13 year period, the parties have organized their work arrangements for this group of employees in accordance with the terms, guidelines and principles of the Life for S & C Program. And although the Union sought and failed to have it incorporated into the Collective Agreement, it assumed that the Life for S & C Program would continue. It was reasonable for the Union to arrive at that assumption because of the representations that the Program would continue. The employees and the Union had through the consistent application of the program, over many years, come to understand and were entitled to expect that it would continue unless a change was agreed or proper notice given.

30. That consistent application over those years, and through a number of contract negotiations, was a clear and unequivocal representation by conduct that the Life for S & C Program would continue. I reject the contention that the Life for S & C Program was a pilot program, cancellable at the option of the Company. Although it began as a pilot project, after such a substantial period of time of consistent application, it lost that character.

31. As to the issue of detrimental reliance, after 13 years of consistently applying the program, the Union was entitled to rely on the continuation of the program and not expect that the Company would suddenly and unilaterally cancel it without proper notice. Had it known that would occur, the Union would have had the opportunity, with proper notice, to attempt to maintain it. This is reinforced by the agreement concluded in the last round of bargaining. There was also reliance by the employees themselves who no doubt would arrange their personal affairs (vacation, childcare, time off) in a manner that was in accordance with the eleven/three schedule (see CROA 3458 and *Canadian Pacific and IBEW No. 11*, supra on the issue of detriment to employees). As was stated at page 12 of that case, and applies to the instant case, …" the employees have relied on the Company's representation to their detriment and the Union was deprived of the opportunity to bargain the issue during negotiations. In such circumstances it would be inequitable to allow the Company to unilaterally remove the Company vehicles from those employees who held positions to which they had been assigned without allowing the Union the opportunity to negotiate the issue".

32. I turn then to the Company's argument that the Union agreed on October 3, 2013 that the Life for S & C Program could end on 30 days notice by either party. This agreement was in the context of a local agreement in Saskatoon in relation to a particular situation. This local, agreement and its resolution in Saskatoon cannot be construed as an acknowledgement by the Union that the Company could cancel the substantial, longstanding Life for S & C Program for its employees.

33. As to the Company's argument that it gave notice of its intention to discontinue the program, by its letter of October 30, 2012, that letter, read in conjunction with what became "Appendix "G" to the Collective Agreement, refutes that assertion. Although the Company appeared to give the required notice in its letter of October 30, 2012, the final document signed as Appendix "G' does not signal an end to the estoppel. In fact it gave the Union reason to expect that the Life for S & C program would continue and certain identified overtime issues would be addressed. What the Company raised in its October 30, 2012 letter was superseded by the November 9, 2012 (Appendix "G") agreement. The

Union was invited to participate in a solution which would supersede the notice of termination. Appendix "G" documents the approach the parties would take going forward. The fact that the Company did not revert to the strict application at the conclusion of bargaining in 2012 further supports the position that Appendix "G' was the resolution the Company contemplated in its October 30, 2012 notice. The continuation of the Life for S & C program for a further 2 ½ years after Appendix "G" was entered into, confirms the understanding of the parties that the program would continue.

34. The content of the discussions during bargaining in 2012 and specifically the interpretation of the October and November 2012 documents make clear that the aim for the Company was to address what it perceived as the overtime problem. The manner by which the Company engaged with the Union did not signal a clear message to the Union that long established program would be cancelled. As such it deprived the Union of its opportunity to bargain the issue. The continuation of the Life for S & C program for a further 2 ½ years after Appendix "G" was entered into, confirms the understanding of the parties that the program would continue.

35. I find on these facts that all the elements of estoppel were met. In order to revert to its Article 2 rights, the Company was required to give notice in such a way that the detrimental reliance by the Union and its members could be addressed in bargaining. The Company was estopped from cancelling the Life for S & C Program in the way that it did. The parties must have the opportunity to deal with the issue in the next round of collective bargaining.

Determination

36. The grievance is allowed.

Disposition

37. I make the following declarations and orders:

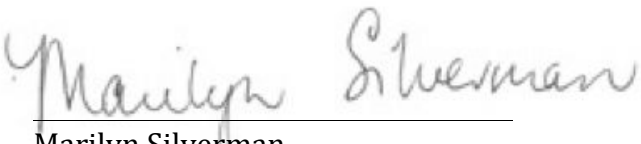
a. Declare that the doctrine of estoppel applies and the Company could not unilaterally cancel the Life for S & C Program in May 2015;

b. Order the Company to immediately reinstate the Life for S & C Program; and

c. Order that the Company pay damages, if any, to employees, who suffered loss as a result of the cancellation of the Life for S & C Program.

38. I remain seized to deal with the implementation of this Award including the calculation of any damages that may be owed to employees.

Dated at Toronto this 24th day of October, 2016.



Marilyn Silverman
Arbitrator

APPENDIX "A"

COMPANY EX PARTE STATEMENT OF ISSUES

The Dispute

The Company's cancellation of the LIFE for S&C Program on May 18, 2015, including cancellation of the following:

a. Eleven and Three shift schedule;
b. Booking off with pay; and
c. Napping Policy.

Statement of Issue

The LIFE for S&C Program was a pilot project that was implemented in some regions of Canada commencing in 2000. On May 18, 2015, the Company gave notice that effective immediately the LIFE for S&C Program was cancelled.

The Union contends that the Company is estopped from cancelling the LIFE for S&C Program for the balance of the term of the Collective Agreement. The Union requests that the LIFE for S&C Program be reinstated and its members be made whole for any loss from its improper cancellation.

The Company contends that this matter is not arbitrable as the Union has not alleged a violation of the Collective Agreement, which is the subject of a preliminary objection.

If the matter is arbitrable, which the Company denies, the Company contends that it was well within its right to cancel the LIFE for S&C Program as the parties agreed that it was cancellable. In addition, the Company contends that the Union has failed to establish on the balance of probabilities that the Company is estopped from cancelling the LIFE for S&C Program in all the circumstances.

As a result, the Company denies the Union's contentions and declines the Union's request.

UNION EX PARTE STATEMENT OF ISSUES

Dispute

The introduction of S&C Notice 2015-06-Cancellation of the LIFE for S&C issued on May 18, 2015.

Statement of Issue:

On May 18 2015 the Company issued a policy notice titled S&C Notice 2015-06 Cancellation of LIFE for S&C with an effective date of May 18 2015 (effective immediately).

The Company contends that the Lifestyle Improvement Fatigue Education (LIFE) for S&C program was a pilot program in use since 2000 and was never fully implemented by the parties. Additionally the Company contends that the program was cancelled in part to comply with the strict language of Article 2 "Hours of Service and Meal Period" of Wage Agreement No. 1.

The Union contends that the Company's cancellation is a violation of Agreement 11.1, and is also prohibited by representations made by the Company in the last round of collective bargaining, which the Union relied on to its detriment. It is also a violation of the historical past practice spanning rounds of negotiation. The Union also contends that since the implementation in 2000 the benefits and the responsibilities of the program have been embraced to the point of being a guiding principle of fatigue management and as a Term and Condition of being employed in an on call position. Additionally, the Union contends that as the LIFE program was raised at the bargaining table in 2010 and in 2012 resulting in no changes to the program for the duration of the Wage Agreement and is not in violation of Article 2 but an alternative work cycle, the Company must reinstate the Lifestyle Improvement Fatigue Education for S&C program forthwith.

The Union seeks a declaration that retracts S&C Notice 2015-06 Cancellation of the LIFE for S&C and that all employees who suffered lost wages, benefits and damages be made whole.

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