AH724

IN THE MATTER OF AN AD HOC RAILWAY ARBITRATION

BETWEEN

CANADIAN SIGNALS AND COMMUNICATIONS SYSTEM COUNCIL NO. 11 OF THE IBEW (IBEW)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

Article 10 – Temporary Layoffs/Income Security Agreement

Date:	August 12, 2021
Arbitrator:	Graham J. Clarke

Appearances

IBEW:

D. Ellickson	Counsel, CaleyWray, Toronto
S. Martin	Senior General Chairman
L. Hooper	General Chairman
B. Kauk	Western Regional Representative

CP:

D. Zurbuchen	Manager, Labour Relations – Calgary
D. Guerin	Managing Director Labour Relations
J. Switzer	General Manager S&C Operations
C. Wogrinc	Asst. General Manager S&C Operations West
A. Brayman	Asst. Chief Engineer Testing Commission

Arbitration heard on July 23, 2021 via videoconference.

TABLE OF CONTENTS

Background 3
Key provisions 3
  Collective Agreement 3
  Income Security Agreement 4
Facts 6
Parties' Arguments 10
  IBEW 10
  CP 11
Analysis and Decision 12
  Previous Awards involving the ISA or ISA-type agreements 12
  ISA Article 1: Did the end of the Project constitute a TO&O? 22
  The ISA's definition of a TO&O: Did any of the exceptions apply? 23
    Exception (i): Was there "a permanent decrease in the volume of traffic outside of the control of the company"? 23
    Exception No. (ii): Was there "a normal reassignment of duties arising out of the nature of the work in which the employee is engaged"? 23
    Exception No. (iii): Was there "a normal seasonal staff adjustment"? 23
    Exception No. 4 (Note): Were any changes "brought about by general economic conditions"? 24
  Could CP temporarily lay off the employees in the circumstances of this case? 25
Disposition 26

Award

BACKGROUND

1. Following the completion of a 10-year construction project, the IBEW contested CP's 2018-2020 notices of temporary layoffs for permanent employees. The parties had resolved these layoff issues on a temporary without prejudice basis and agreed to arbitrate their dispute.

2. The IBEW argued CP ought to have provided notice under the parties' 1995 Income Security Agreement (ISA). The IBEW asked for a declaration confirming that entitlement so that the parties could then discuss the appropriate remedy. The IBEW also alleged that CP's actions violated the collective agreement.

3. CP argued that nothing in the collective agreement prevented it from temporarily laying off the employees. Moreover, the end of a long project did not meet the definition of a Technological, Operational and Organizational change (TO&O) as defined in the ISA.

4. For the following reasons, the arbitrator concludes that the ISA did not apply to a situation where a capital project ended. However, the arbitrator does find that CP's use of temporary layoffs, after a major construction project on which the employees worked had ended, violated the collective agreement since it prevented the employees' exercise of their seniority (bumping) rights.

KEY PROVISIONS

Collective Agreement

5. Article 10 titled "Staff Reduction" refers at article 10.1 to a force reduction and positions being abolished. Article 10.2 protects employees' seniority rights:

> 10.1 When force is reduced the senior employee in a classification will be retained. Not less than fifteen (15) calendar days' advance notice will be given when regularly assigned positions are to be abolished, except in the event of a strike or a work stoppage by employees in the Railway industry, in which case a shorter notice may be given.
>
> When a notice is issued under item 10.1 and it becomes known to the Company that the reductions will be delayed for reasons over which the Company has no control, advice will be issued to the System General Chairman, or such other

> officer as may be named by the Union, explaining the situation and revising the implementation dates. If necessary, more than one such advice may be issued.
>
> When the implementation of the reduction is delayed or is to be delayed by the Company in excess of nine working days, a new notice as per paragraph one of this item 10.1 shall be given
>
> 10.2 **When force is reduced or positions abolished, an employee affected must, within fifteen (15) calendar days (or if on leave of absence, within fifteen (15) calendar days from date of return) displace any employee with less seniority in the same class on his own seniority territory**. If there is no such junior employee he may, within fifteen (15) calendar days, displace any employee his junior in the next lower class on his seniority territory within the same time limits.
>
> (Emphasis added)

6. Article 10.6 deals with laid off employees filling vacancies in other Districts:

> 10.6 Employees laid off on account of reduction in staff will, if qualified, be given employment in their respective classes on other Districts where there are vacancies, in preference to new employee. (sic).

Income Security Agreement

7. The ISA defines "Technological, Operational and Organizational Changes" as follows:

> (q) "Technological, Operational and Organizational Changes" means as follows:
>
> "Technological": **the introduction by the employer into his/her work, undertaking or business of equipment or material of a different nature or kind than 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 the 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 staff 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 result from the reduction or elimination of excess plant capacity shall also be considered as Technological, Operational or Organizational changes**.

(Emphasis added)

8. The ISA applies only to employees who work bulletined permanent positions as opposed to temporary or seasonal employees:

(d) "Temporary and Seasonal Employees", as distinguished from employees who work permanent positions, are entirely excluded from the provisions of this Agreement.

(m) "Permanent Position" means a position that has been bulletined as permanent.

9. Article 1.1 requires CP to provide notice when a permanent TO&O occurs:

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.

(b) Prior to implementing any other change which will have adverse effects on employees, the Company will provide the Union with as much notification as possible. The notification will contain a description of the change and the expected number of employees who will be adversely affected.

Note: The expiration of a temporary vacancy does not constitute a change under this Agreement.

(Emphasis added)

FACTS

10. As previous ISA awards demonstrate, *infra*, these cases are highly fact specific. The focus is on what changes CP made, if any, which might bring the situation within the terms of the ISA.

11. This dispute concerns Seniority District 1 (District 1)[1] and work on the Montreal Commuter Service upgrades known as the AMT Project (Project). District 1 is the former Atlantic Region and is described as "Mileage 20 Winchester Subdivision and all lines in Canada to the East". The employees in question worked in the Montreal area.

12. The Project, which started in 2009, took 10 years to complete. District 1 has a construction group which included 1 permanent S&C Foreman and 4 permanent S&C wiremen[2]. The collective agreement distinguishes S&C Construction, which is involved in this case, from S&C Maintenance[3].

13. As the Project started to wind down in or about 2018, CP commenced issuing temporary layoff notices, including to the permanent employees. The IBEW objected to the layoff notices and CP's reliance on article 10 of the collective agreement. The parties agreed, on a without prejudice basis, to use "off district agreements" to resolve some of these issues temporarily.

14. In December 2018, CP advised four temporary wiremen that their positions would be abolished as of December 28, 2018. CP asked them to "Please exercise your seniority as per article 10.2." (IBEW Brief, Tab 2).

15. In May 2019, CP issued a temporary layoff notice to 11 District 1 employees, including to some employees occupying permanent positions. CP did not reference article 10.2 but instead stated that "As per article 10.6 all affected employees will be offered employment within District 2." (IBEW Brief, Tab 3).

16. In February 2020, CP referred to the limited construction work in District 1 (TR&E support) and issued temporary layoff notices to employees, including to some who

---

[1] Collective agreement, article 8.1.
[2] IBEW Brief, paragraph 8
[3] See, for example, article 2.1

occupied permanent positions (IBEW Brief, Tab 4). The notice stated, “As per article 10.6 all affected employees will be offered employment within District 2”.

17. On November 16, 2020 CP issued another layoff notice for all S&C Construction employees on the District 1 seniority list but added “As per article 10.6 all affected employees will be offered employment within District 4”. (IBEW Brief, Tab 5). Article 8.1 indicates that District 4 is the former Pacific Region and describes it as: “Mileage 1.72 Maple Creek Subdivision Swift Current and all lines to the West”.

18. CP did not reference article 10.2 in either the February or November 2020 notice.

19. The IBEW had contested the 2019 layoff notices and argued, *inter alia*, the ISA applied to the situation (IBEW Brief, Tab 6):

> - The layoff notice for both the permanent Foreman and permanent D1 wireman is improper as Article 10 is not intended for the use of abolishing/laying off permanent positions, These notices should have been issued under Article 1.1A of the ISA again we will be forced to grieve if this continues. (sic).

20. On December 10, 2020, the parties negotiated a Letter of Understanding (LOU) agreeing to arbitrate their differences (IBEW Brief, Tab 7). The LOU described the parties' dispute:

> The application of Article 10.1 to “temporarily layoff” permanent positions has been disputed in District 1 twice in the past 18 months. The previous “temporary layoff” notices were issued on May 11th 2019 and again on February 7th 2020 affecting multiple permanent positions. In similar fashion to the November 18th 2020 both “temporary layoff” notices were rescinded without resolution to the present dispute.

21. On January 6, 2021, CP issued another temporary layoff notice for all 10 S&C construction employees in District 1 (IBEW Brief, Tab 8). That notice read in part:

> In accordance with Article 10 (Staff Reduction) of the Collective Agreement between Canadian Pacific Railway and the International Brotherhood of Electrical Workers, System Council No. 11 a temporary layoff will take place on January 22, 2021 within District 1. **As per Article 10.6 all affected employees will be offered employment within District 2, 3, and 4.**
>
> This layoff notice affects all S&C Construction employees listed in the District 1 Seniority List.

(Emphasis added)

22. On January 14, 2021, the IBEW filed the current grievance (CP Brief, Tab 3a). As is the IBEW's custom, and given the importance of the arbitration Record in an expedited system, its grievance provided helpful and detailed particulars of its position, including:

> The recent background on this matter begins with the completion of the multi year Montreal commuter system project. Over the course of the project the Company had staffed, trained and even bulletined additional temporary and permanent positions to the District 1 construction crew. The Company arbitrarily deemed these positions as redundant and then issued individual layoff Notices in May of 2019 to all of the Temporary and Permanent positions for the District 1 construction employees in violation of Article 10.1.
>
> The Company has since made this a reoccurring practice to illegally issue layoff notices in this manner to the same group of members again on February 7, 2020, November 18, 2020 and most recently on January 6, 2021. This illegal and manipulative reoccurring violation in each of the first three occasions have had the Notices rescinded without addressing the Union's concerns as to the Article 10.1 violation that comes to the continual detriment of the effected members.
>
> …
>
> The Union has maintained that permanent positions can only be abolished in accordance with the applicable provisions of the CA and or the Income Security Agreement (ISA) and can not be "temporarily" laid off. It would be remiss to note that there is no mention or illustration of a temporary layoff of a permanent position to be denoted anywhere in the CA and accompanying ISA.
>
> …
>
> The Union contends that the Company's baseless interpretation of Article 10 coupled with the repeated efforts to "temporarily" layoff permanent positions is a bad faith and illegal attempt to turn the District 1 permanent Construction positions into seasonal employees without following the provisions of the ISA and the proper good faith consultations required under this Agreement.
>
> …
>
> This reference included in each Article 10 notice and referencing the specific District in which the Company has proposed off district work agreements further supports the Union's allegation as stated above, the Union contends that the Company is using this blatant Article 10.1 violation to coerce the Union into alternative off District work agreements. More specifically, the Company is challenging the effected members with unemployment and no ISA benefits, or to become transient workers effectively replacing contractors at a significant

financial discount to the Company with little to no added benefit to the employees.

…

As a point of clarity, Article 10.6 does not have application for employees to work off district on temporary projects or to cover seasonal TR&E programs. The language clearly refers to "Employees laid off on account of reduction in staff will, if qualified, be given employment in their respective classes on other Districts when there are vacancies, in preference to new employee." This would more accurately refer to vacant permanent positions that exist in a district other than the one the employee has been hired on to. This new employment would require the employee to bid on the vacancy, be the successful applicant, establish seniority in the new district and relocate to the new district without benefit of the ISA.

23. CP provided its own helpful and detailed response to the grievance and highlighted these points (CP Brief, Tab 3b):

> The Company maintains it met the requirements under Article 10.1 by providing the required notice period when it was deemed that the workforce had to be temporarily reduced. There is no language restricting the Company from providing layoff notice to only when permanent reductions apply. The Parties have a sophisticated bargaining relationship. If it was the intention of the Parties to limit the Company's ability to lay off on a permanent basis only, such language would have been negotiated and be clearly illustrated in the collective agreement. Further, there are other provisions negotiated between the Parties which address changes of a permanent nature which result in lay off.
>
> Part III of the Canada Labour Code clearly allows employers to temporarily lay off employees. The collective agreement language provides no specific language excluding what would already be provided for under the Canada Labour Code.
>
> …
>
> The Union contends that under the collective agreement, only permanent positions can be abolished. The Company cannot agree and again refers to the language of Article 10 where there is no provision restricting the Company from being able to issue temporary layoff notices and/or abolishing temporary bulletined positions. The Company maintains it is in compliance with the terms of the collective agreement and the Canada Labour Code.
>
> …
>
> The Company maintains the provisions of the Income Security Agreement do not apply as these layoffs are temporary in nature, are not a result of any

Technological, Operational or Organizational Change nor are they reductions of a permanent nature. As such, the temporary layoffs do not meet the requirements to trigger Material Change nor any provisions under the Income Security Agreement.

PARTIES' ARGUMENTS

24. The arguments changed in some respects from those found in the parties' original Briefs. The parties debated mainly whether the ISA applied to the facts.

IBEW

25. After the parties exchanged their Briefs, the IBEW brought a motion for particulars. The arbitrator issued AH724-P[4] granting the IBEW's motion and adjourned the original May 6, 2021 arbitration date.

26. The IBEW's Brief originally raised these three issues for resolution:

> 1. Does the Collective Agreement permit the Company to issue "temporary layoffs" to employees holding permanent positions in the fashion it has?
>
> 2. Is the Company required to retain the senior employee in a classification when force is reduced? and
>
> 3. Alternatively, do the provisions of the Income Security Agreement apply in the present circumstances?

27. Following receipt of CP's particulars as ordered by AH724-P, the IBEW did not proceed with its first argument that the collective agreement did not "permit the Company to issue "temporary layoffs" to employees holding permanent positions in the fashion it has" (IBEW Brief, paragraph 25). Neither did it pursue its article 10.1 argument suggesting CP "had to retain the senior employee in a classification when force is reduced" since in its view every District 1 position had been abolished (IBEW Brief; paragraph 41).

28. The IBEW's oral argument at the hearing described the issues as:

> Did CP change the permanent bulletined positions into something else and, if so, what are consequences under the collective agreement and/or the ISA?

---

[4] Canadian Signals and Communications System Council No. 11 of the IBEW (IBEW) v Canadian Pacific Railway Company, 2021 CanLII 37611

29. The IBEW submitted that the end of the Project meant that the District 1 S&C Construction employees' positions had all been abolished. CP's "temporary layoffs" meant that employees' permanent positions, rather than being abolished, had been improperly and permanently turned into either temporary or seasonal positions. The IBEW alleged that CP took these steps to avoid its ISA obligations.

30. The IBEW argued the positions were never seasonal. The employees had worked on the Project for 10 years without interruption until the first temporary layoff notice issued in 2018. At this point, CP should have abolished the positions in accordance with the ISA, then bulletined them. In exchange, the employees would have received their negotiated ISA benefits.

31. The IBEW argued the facts demonstrated that an organizational change, as defined in the ISA, occurred. A TO&O, by definition, includes a permanent partial shutdown. Similarly, the impacted employees lost important benefits which they had enjoyed as permanent employees. The foreman, for example, would have lost $9.00 per hour in wages. This demonstrated the "adverse effect" the ISA required.

32. In reply, the IBEW emphasized that this case was not about temporary layoffs but rather CP modifying permanent bulletined positions. That action brought the ISA into play since the employees had been adversely affected.

CP

33. CP added supplementary written comments when it provided the particulars required under AH724-P. CP maintained that it has the right under the collective agreement to issue temporary layoffs when required. The language of article 10 did not prohibit layoffs for permanent employees.

34. The Project took roughly 10 years to complete. CP then issued temporary layoff notices based on the work available for employees. A temporary reduction in work did not result in employees' positions being abolished but instead arose from the seasonality of the work available in District 1.

35. CP further argued that no TO&O had occurred since the decrease in work resulted from the Project ending rather than any specific actions on CP's part. Similarly, a TO&O change must be permanent, but the contested layoffs were only temporary.

36. CP also suggested that there had been no adverse effects since the parties had been able to enter into other agreements. Moreover, the changes had occurred due a decrease in traffic which was a recognized ISA exception. Similarly, the changes occurred due to economic conditions when the Project ended, something outside CP's control.

ANALYSIS AND DECISION

37. This is an interpretation case. The arbitrator must focus on the language the parties chose to include in their agreement[5]. An interpretation exercise can become more challenging when dealing with a decades-old agreement[6]. The arbitrator will first review previous awards interpreting ISA-type agreements and will then decide whether the ISA applies to this case.

Previous Awards involving the ISA or ISA-type agreements

38. These cases are highly fact specific. The parties submitted previous awards between themselves as well as others involving similar types of income security agreements[7]. The awards help identify how arbitrators have analyzed these issues in the past.

39. However, even though the ISA itself dates to 1995, some of the awards date back much further. The cases may not always cite the entire text of the ISA-type of agreement in place at the time. The cases must therefore be interpreted with that background in mind.

CROA 284

40. In this award dealing with CN's version of an ISA, Arbitrator Weatherill examined similar language to that found in CP's ISA. The case involved the abolition of a position: "On December 9, 1970, Mr. S.G. Cleary, Messenger, Mail Room St. John's, was advised that his position would be abolished effective December 31, 1970".

41. CN's language read:

---

[5] Unifor Local 28.04-o v The Chemours Canada Company, 2019 CanLII 81068 at paragraph 10.
[6] Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2021 CanLII 27309 at paragraphs 46-47.
[7] The arbitrator reviewed two awards the IBEW submitted in its Brief concerning "material change" in the CP-TCRC collective agreement dealing with the running trades. Those decisions did not involve a similar ISA type of agreement: Canadian Pacific Railway Company v Teamsters Canada Rail Conference, 2017 CanLII 43214 and Canadian Pacific Railway v Teamsters Canada Rail Conference, 2017 CanLII 59191.

> 1. The Company will not put into effect any technological, operational or organizational change of a permanent nature which will effect a material change in working conditions with adverse effects on employees 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 three months' notice shall be given if relocation of employees is involved, and two months' notice in other cases, 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.
>
> …
>
> 5. The terms Technological, Operational and Organizational change shall not include normal reassignment of duties arising out of the nature of the work in which the employees are engaged nor to changes brought about by fluctuation of traffic or normal seasonal staff adjustments.

42. Arbitrator Weatherill contrasted a change in "operations" with an "operational change":

> The organizational or operational change, if any, would appear to have been in the reduction of mail deliveries. This is, as is the abolition of a position, a change of "operations" in a narrow sense, but it is not necessarily an "operational change" of the sort referred to in Article VIII of the Job Security Agreement. **The collective agreement itself contemplates a number of situations in which there may be such changes, and providing for the rights of employees in such cases, which clearly do not involve the special provisions of Article VIII. Here, the company simply found that the work it had to do could be done by fewer employees. There was no longer a need for as many mail deliveries per day. There is no evidence of any special circumstance which would take this out of the area of "normal reassignment of duties" referred to in Article VIII (5).**
>
> (Emphasis added)

CROA 316

43. Arbitrator Weatherill again interpreted similar language for a change described as "Effective May 1, 1970, the scheduled staff of the local wharf freight office was reduced":

> The material provisions of Article VIII of the Job security agreement are as follows:
>
> 1. The Company will not put into effect any technological, operational or organizational change of a permanent nature which will effect a material change

> in working conditions with adverse effects on employees 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 three months' notice shall be given if relocation of employees is involved, and two months' in other cases, 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.
>
> …
>
> 5. The terms Technological, Operational and Organizational change shall not include normal reassignment of duties arising out of the nature of the work in which the employees are engaged nor to changes brought about by fluctuation of traffic or normal seasonal staff adjustments.

44. After noting that each case is fact specific, Arbitrator Weatherill concluded that a TO&O did not occur when there was no longer a need for certain work to be done:

> As to the particular cases before me, the material put forward by the company shows that in each case either the work load was insufficient the work itself not necessary to be performed. (sic) Here, as in Case No. 284, there was simply no longer a need for certain work to be done.
>
> **In the circumstances of these particular cases, then, it is my conclusion that these have not been the "technological, operational or organizational" changes contemplated by Article VIII of the job security agreement.**
>
> (Emphasis added)

CROA 1410

45. In a non-CP case, the employer abolished two positions of "Communications Maintainers". The employer alleged the changes occurred from a fluctuation in business:

> The Company claimed it came within the scope of the exemption contained in article 8.7 whereby the terms "Operational and Organizational" chance (sic) shall not include changes brought about by a fluctuation of business. **And, in this regard, the Company adduced direct evidence demonstrating why, because of a reduction in orders, its manpower needs had drastically changed.**
>
> (Emphasis added)

46. In contrast, the trade union focused on the permanency of the positions which had been abolished:

> The Trade Union's principal argument as to why article 8.1 ought to apply is based on the "permanency" that was attached to the abolition of the three positions. Had the grievors' redundancies been caused by a temporary suspension of their jobs so that they would be subject to recall, then, different considerations would apply. In short, given the permanency of the redundancies, the Trade Union asked me to draw the inference that the changes that occurred were for technological, operational or organizational reasons.

47. The arbitrator rejected the trade union's argument that the permanent abolition of positions constituted a TO&O since that conclusion would rewrite the parties' agreement:

> **Of course, that principle, if it were adopted, would in effect nullify the exempting provision contained under article 8.7**. I do not doubt that a certain degree of technological change, as described in the Trade Union's submissions, contributed over the years to the change or transformation of the Company's manpower requirements. **Nevertheless, the direct and immediate reason that precipitated the abolition of the three positions were business considerations. And a business consideration that is exempted from article 8.1 by virtue of the provision contained in article 8.7 will not operate to the grievors' benefit merely because the abolition of their positions may be of a permanent nature**.
>
> (Emphasis added)

CROA 2023

48. In a 1990 CN case, Arbitrator Picher concluded that a layoff due to belt tightening did not constitute a TO&O. In that CN case, the employee had displaced another employee:

> In accordance with the procedures contemplated under the Collective Agreement Mr. Bowen exercised his seniority to take up a position in the bargaining unit, thereby displacing the incumbent employee, with a resulting ripple effect in other job displacements.

49. Arbitrator Picher focused not on the fact a layoff had occurred, but rather whether there had been a discontinuance of a service or any part of the employer's operations or organizational structures:

> The instant case reveals that there was a general "belt tightening" in the administrative ranks of the Mountain Region, resulting in the abolition of Mr. Bowen's supervisory position. **There is no evidence of any discontinuance of any particular service previously provided by the Company, or of any part of its operations or organizational structures. In the circumstances, for the reasons related in CROA 284 and 316 the Arbitrator is satisfied, assuming without finding that the ESIMP would apply, that the abolition of Mr. Bowen's position would not have constituted an operational or organizational change within the meaning of Article 8.1 of the ESIMP.** I am likewise satisfied that the subsequent alteration of the Shop Track limits was not an operational or organizational change having adverse affects on any members of the bargaining unit, on the basis of the evidence before me.
>
> (Emphasis added)

AH309

50. In 1992, Arbitrator Picher interpreted an ISA-type agreement negotiated by CN and the IBEW. The parties' agreement contained similar language to that in the ISA in this case:

> "Operational or Organizational Change" means: 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 the 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 staff 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 change, **excluding changes which are brought about by general economic conditions**, and which result from the reduction or elimination of excess plant capacity shall also be considered as Technological, Operational or Organizational changes.
>
> (Emphasis from original award)

51. CN abolished a number of positions but without providing the IBEW with any ISA-type notice. Arbitrator Picher accepted that the end of capital projects fell within the "general economic conditions" exception to the parties' TO&O definition:

> **The preponderance of the evidence overwhelmingly confirms that in the spring of 1991 the Company was faced with a serious scaling down of the projects contemplated for the St. Lawrence Region**. These involved both reductions in the projected spending of the Company's transportation department, with respect to maintenance and installation projects, as well as the activities of outside customers such as Unitel and Ontario Hydro. **In the Arbitrator's view those constraints must be taken to fall within the purview of "general economic conditions" as that phrase is intended to apply within the "Note" to the definition of "Operational or Organizational Change" appearing at page 5 of the Employment Security and Income Maintenance Agreement. On the merits of the case, therefore, the Arbitrator is compelled to sustain the position of the Company, as the facts are not substantially different from those found in prior arbitral awards (See SHP 345, CROA 1227, 1410 and 2023). In the Arbitrator's view, the concept of changes brought about by general economic conditions must, at a minimum, include changes occasioned by reductions in operating and capital budgets which are generally traceable to overall declines in business and economic activity.** There is nothing in the material before me to suggest an artificial manipulation of budgets, or the mere transfer of funds elsewhere within the Company – circumstances which might well constitute operational or organizational change. **I am satisfied, on the balance of probabilities, that the budget reductions were generated by a reduction in the Company's basic capital projects, as well as an anticipated reduction in the projects of outside customers and are the result of general economic conditions of the kind contemplated within the "Note" appearing on page 5 of the Agreement**.
>
> (Emphasis added)

CROA 3056

52. In 1999, Arbitrator Picher examined ISA wording negotiated between CP and the Brotherhood of Maintenance of Way Employees. CP abolished 65 bargaining unit positions but advised that only 8 were due to a TO&O. CP argued that the other 57 employees had been laid off due to "general budgetary constraints implemented as a result of a decline in traffic".

53. CP's evidence proved a decline in traffic volumes had occurred, notably from a reduction in grain shipments. This decline led to the layoffs. Arbitrator Picher described the situation as follows:

> In the Arbitrator's view what the evidence discloses is a difficult decision by the Company to implement a general belt tightening across the system, as a means of responding to what it perceived as a permanent reduction in traffic volumes.

54. On those facts, Arbitrator Picher found several reasons why the parties' ISA did not apply:

> On the material before me, **I am satisfied that the decision of the Company to implement wide-spread budgetary reductions across its operations, affecting jobs in a number of bargaining units as well as those of supervisory employees, was taken as a response to a decrease in traffic volumes which was beyond the control of the Company. I would also conclude, if it were necessary to do so, that the elimination of certain track maintenance positions across the system, with the result that some of the work involved would necessarily be performed by other permanent track maintenance employees, would be justified as a normal reassignment of duties within the meaning of sub-paragraph (ii) flowing from circumstances not of the Company's own making. The changes in question would, in my view, also qualify as Company initiated changes "brought about by general economic conditions"** within the meaning of the note to paragraph (m) of the definitions section.
>
> (Emphasis added)

CROA 3070

55. Again in 1999, Arbitrator Picher examined another situation involving the Brotherhood's ISA and the elimination of permanent year-round positions, a situation the union alleged constituted a TO&O:

> On January 4, 1995 two employees received four day notices of temporary layoff from their B&B machine operator positions on the Calgary seniority territory. It appears that they operated a bobcat and a truck. It is common ground that the temporary layoff became permanent, as the equipment in question has been re-assigned for the use of other employees. **The Brotherhood asserts that as the reductions in question concern the elimination of permanent year round positions, the Company was under an obligation to issue a notice of a technological, operational or organizational change under the provisions of article 8 of the Job Security Agreement (JSA).**
>
> (Emphasis added)

56. Arbitrator Picher noted the Brotherhood's burden of proof and the fact that the parties had never agreed that every abolishment of a permanent position fell under the ISA, something they could have easily done:

> In these proceedings the burden of proof is upon the Brotherhood. It must establish, on the balance of probabilities, that the Company implemented a technological, operational or organizational change which resulted in the abolishing of the positions held by the grievors. **In approaching these provisions it is important to understand certain fundamental concepts. If the parties had intended that the permanent abolishing of an employee's position, without more, constitutes an operational or organizational change, they could have said so in clear and unequivocal language within their Job Security Agreement**. They have not done so.
>
> (Emphasis added)

57. Instead, Arbitrator Picher commented on the relationship between layoffs, whether temporary or permanent, and TO&O concepts in their ISA:

> On the contrary, the Job Security Agreement is structured in such a way as to recognize that temporary layoffs may be for a considerable period of time, and indeed that permanent layoffs may be implemented as cost cutting measures without necessarily constituting operational or organizational change.

58. Furthermore, the permanent abolition of a position constituted just one factor in the analysis of the ISA:

> **It is understandable that an individual employee might feel that the permanent elimination of his or her job constitutes organizational change. However, as the definitions section of the JSA indicates, whether a change is operational or organizational must be analysed in a much broader perspective, having regard to the "manner, method, procedure or organizational structure" within which work is carried out by the Company**. Further insight is gathered from the "Note" to the definition section which makes reference to the shutdown of all or part of an operation, facility or installation. **Nowhere in the scheme of the Job Security Agreement is there any suggestion that the elimination of a job as a general cost cutting measure, without any fundamental change to the Company's operations or organizational structures, of itself requires the issuing of a notice under article 8 of the JSA**, with all of the attendant procedures and substantive protections which that involves.
>
> (Emphasis added)

59. When examining the context of the change, Arbitrator Picher concluded a TO&O had not occurred:

> **In the case at hand the evidence of the Company indicates that a general directive for cost cutting measures was in effect in late 1994, apparently as a result of negative financial results in the fourth quarter of that year**. As a result, local managers were issued directives to reduce costs, including labour costs, wherever possible. It is within that framework that the grievors' jobs were eliminated. **In the Arbitrator's view the circumstances disclosed would fall within the parenthetical contained within the note, and constitute changes brought about by general economic conditions**.
>
> (Emphasis added)

CROA 3447

60. In a case involving CP and the TCRC-MWED, the employer abolished a working foreman's position but did not issue a TO&O notice. Arbitrator Picher concluded that CP could not rely on the exception arising from a "normal reassignment of duties":

> **The real issue in the case at hand is whether the Company can bring itself within one of the exceptions in the defined definition of operational or organizational change produced above, and in particular whether the facts disclose "a normal reassignment of duties arising out of the nature of the work in which the employee is engaged;".** The Arbitrator cannot see how that exception can apply in the case at hand. This is not a case, for example, of the relocation of work from one place to another which eliminates the need for a given position or, for another example, an adjustment in employee complement by reason of the abolishment of a train or some other part of the Company's enterprise. **In the case at hand there is simply no change whatsoever in the plant or the work it performs, save that the Company has determined that it can do without a first line supervisor in the relatively small operation at Surrey. That is clearly an organizational or operational change, and cannot be fairly be characterized as a normal reassignment of duties inherent in the nature of the work of the production and maintenance foreman, or of the work performed generally within the butt welding plant**.
>
> (Emphasis added)

AH573

61. In 2007, Arbitrator Picher examined a situation involving the current parties and their ISA. Under article 10.1 of the collective agreement, CP had abolished the position of an S&C Maintainer in these circumstances:

> The facts pertinent to the grievance are not in substantial dispute. **By reason of budget constraints imposed on management at Sudbury, the decision**

was made that the S&C maintainers work being performed over a given territory by some five S&C Maintainers could in fact be handled by four employees, rather than five. In the result, the position held by Mr. Pelto was abolished. **The Company takes the position that the abolishment took place under article 10.1 of the collective agreement, as the adjustment did not constitute an operational or organizational change**.

In fact, Mr. Pelto continued to work as an S&C Maintainer at Sudbury, exercising his seniority to take a maintainer's position covering territory east of Sudbury. That move resulted in a certain degree of chain bumping. Mr. Pelto bumped a less senior employee working as an S&C Maintainer out of the Sudbury East Terminal. In turn that employee exercised his seniority, displacing junior employee Steve Beaudry. Mr. Beaudry was unable to exercise his seniority to continue to hold a maintainer's job. In the result, he was required to return to work on S&C Gangs as an S&C Wireman. That resulted in Mr. Beaudry losing the standby pay enjoyed by S&C Maintainers, being 7.5 hours a week, said at that time to be the equivalent of $8,000 over a working year.

62. The facts showed that no reduction in workload had occurred:

There is no question in the case at hand of any reduction or fluctuation in traffic, or indeed of any reduction of the work which needed to be performed. In fact, at the end of day, the same number of employees at Sudbury essentially performed the same work as was previously done. The Company submits, however, that what transpired was not a TO&O change as contemplated within the ISA. Its representative submits that that is so firstly because the change was predicated on a budget constraint and, secondly, the grievor, Mr. Pelto, in fact suffered no adverse effect, continuing to work on a full time basis, albeit out of the East Terminal rather than the West Terminal at Sudbury. In fact, the Company stresses, the grievor's earnings improved following the job abolishment, and on that basis the employer submits that the condition precedent of adverse effects is not made out.

(Emphasis added)

63. Arbitrator Picher concluded that a TO&O had occurred when CP decided to do the same work but with one less employee:

The first question in the case at hand is to determine whether there was a TO&O change. I am satisfied that there was. Previous awards within the railway industry have made it clear that the abolishing of positions in the wake of budgetary constraints can constitute operational or organizational change. **Indeed, decisions as to reducing budgets and the consequent reorganization of the workforce are an intrinsic prerogative of**

management which can be at the heart of an operational or organizational change. (See, e.g., AH 265.)

(Emphasis added)

64. The arbitrator will consider these past awards when analyzing the current situation.

ISA Article 1: Did the end of the Project constitute a TO&O?

65. The arbitrator concludes that the ending of a construction project, even a long one like the Project, does not fall within the parties' negotiated definition of a TO&O:

> 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
>
> (b) Prior to implementing any other change which will have adverse effects on employees, the Company will provide the Union with as much notification as possible. The notification will contain a description of the change and the expected number of employees who will be adversely affected.
>
> Note: The expiration of a temporary vacancy does not constitute a change under this Agreement.
>
> (Emphasis added)

66. The IBEW had the burden to demonstrate that a TO&O, as defined in the ISA, occurred. It must go beyond proving adverse effects on permanent employees (CROA 3070).

67. The IBEW did not demonstrate that CP "put into effect" a permanent TO&O. For example, CP did not decide it could do the same work but with fewer employees, a situation which Arbitrator Picher explored in AH537 and CROA 3447. Instead, the evidence demonstrated that a major third party funded construction project in District 1 ended. Whether CP could then resort to temporary layoffs, rather than allow employees to bump, is a collective agreement issue which will be explored, *infra*.

68. The IBEW did not explain how the current situation differed from any other ending of a construction contract which resulted in adverse effects on S&C Construction

employees. Presumably, construction contracts come and go. CP noted that construction work is usually variable and seasonal (CP Brief, Tab 38-39).

69. The definition of a TO&O provides additional reasons why the ISA does not apply in this case.

The ISA's definition of a TO&O: Did any of the exceptions apply?

70. The ISA's definition of a TO&O provides further insight into the parties' intentions. Besides defining a TO&O, it also provides at least 4 clarifications or "exceptions".

Exception (i): Was there "a permanent decrease in the volume of traffic outside of the control of the company"?

71. CP referred to a decrease in traffic (CP Brief, Paragraph 54). However, it did not lead any evidence proving a "permanent decrease" in traffic[8] which might have brought it within exception number (i) in the TO&O definition.

Exception No. (ii): Was there "a normal reassignment of duties arising out of the nature of the work in which the employee is engaged"?

72. The nature of the IBEW members' work is construction. Construction projects come and go. This exception seems designed to cover any reassignment of duties which would arise following the completion of a project. Subject to the arbitrator's comments below on article 10, the IBEW did not demonstrate how the changes impacting the permanent S&C employees who had worked on the Project would not fall within a "normal reassignment of duties" when that construction work ended.

73. In CROA 3056, Arbitrator Picher noted that a decrease in traffic volumes could also lead to a normal reassignment of duties. The arbitrator is unaware why this principle would not apply when a major 10-year project concluded.

Exception No. (iii): Was there "a normal seasonal staff adjustment"?

74. This exception did not seem to arise in the specifics of this case. CP seemly suggested that the end of the Project "would also constitute a normal seasonal staff adjustment" (CP Brief, Paragraph 54) but did not elaborate on why. CP did highlight that the Project during its 10-year duration had allowed employees to avoid the usual seasonal realities for construction work (CP Brief, Paragraphs 38-39).

[8] The arbitrator assumes this to mean rail traffic as Arbitrator Picher explored in CROA 3056.

Exception No. 4 (Note): Were any changes "brought about by general economic conditions"?

75. The parties included a "Note" in the definition of a TO&O:

> 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 result from the reduction or elimination of excess plant capacity shall also be considered as Technological, Operational or Organizational changes.

76. The parties did not comment on the phrase "reduction or elimination of excess plant capacity". The arbitrator is not familiar how that phrase applies to either maintenance or construction work. Despite this awkward wording in a decades-old agreement, several awards have applied the concept of "general economic conditions" when determining if a TO&O occurred.

77. The arbitrator notes that in AH309 the IBEW contested collective agreement layoffs and argued, unsuccessfully, that they should have been done pursuant to an ISA-type agreement. Arbitrator Picher's conclusion regarding capital projects bears repeating:

> I am satisfied, on the balance of probabilities, that the budget reductions were generated by a reduction in the Company's basic capital projects, as well as an anticipated reduction in the projects of outside customers and are the result of general economic conditions of the kind contemplated within the "Note" appearing on page 5 of the Agreement.

78. The reasoning in AH309 applies to the instant case[9]. Despite the same awkward wording regarding "excess plant capacity" in that award's agreement, Arbitrator Picher found that a decease in capital projects was not a TO&O. A similar result occurred from the end of the Project in this case.

79. While the ISA does not apply to this case, the IBEW also raised the collective agreement when contesting CP's temporary layoffs.

[9] See also CROA 3056

Could CP temporarily lay off the employees in the circumstances of this case?

80. All the previous ISA awards involved an employer abolishing positions, including CP in AH573. In the instant case, CP instead issued temporary layoff notices, despite the Project no longer existing, and referenced article 10.6 rather than article 10.2.

81. In its comments provided with its particulars, CP noted that "Over the past few years, there has been little to no construction work in District 1" (Paragraph 4).

82. The IBEW alleged that CP changed the District 1 permanent bulletined positions into either seasonal or temporary positions contrary to the collective agreement.

83. While the IBEW did not convince the arbitrator that the ISA applied to the current situation, it did satisfy the arbitrator that its members were entitled to exercise their seniority rights under article 10.2 of the collective agreement. The ability to exercise seniority is one of the most fundamental rights in a collective agreement.

84. The facts demonstrate that the end of the Project, and the resulting lack of work, created a situation which fell within article 10 (Staff Reduction) of the collective agreement. This situation differs from one where, if the Project had been stopped for a month, then CP might have issued temporary layoff notices.

85. CP cannot avoid the negotiated procedures in article 10 once the facts demonstrate that a "Staff Reduction" has occurred[10].

86. The "temporary" layoff notice of November 16, 2020 is of particular relevance to this conclusion (IBEW Brief, Tab 5). If the arbitrator understands that notice correctly, CP purported to temporarily layoff Montreal-based employees and suggested it could rely on article 10.6 to offer them employment within District 4. As article 8.1 notes, District 4 starts at Swift Current, Saskatchewan and covers the rest of the western part of the country.

---

[10] Disputes often arise regarding whether a situation constitutes a layoff, a finding which then gives employees the right to exercise their bumping rights: see, for example, Toronto East General Hospital v. Ontario Nurses' Association, 2018 ONCA 175

87. Article 10.6 does not provide CP with an exception to the application of article 10.2. That article enshrines employees' seniority rights.

88. The end of the Project and the lack of other comparable Montreal projects led to a Staff Reduction. While the ISA did not apply to the situation, the affected employees had the right to exercise their bumping rights within District 1.

89. If either party prefers to avoid a chain bumping situation, then nothing prevents the parties from attempting to negotiate a mutually agreeable alternative.

DISPOSITION

90. The IBEW did not meet its burden of proving that the end of the Project constituted a TO&O, as defined in, and governed by, the ISA. However, the IBEW did demonstrate that the end of the Project constituted a "Staff Reduction" under the terms of article 10 of the collective agreement. The employees accordingly have the right to exercise their seniority pursuant to article 10.2.

91. The arbitrator declares a Staff Reduction has occurred on the facts of this case. As requested by the IBEW, the arbitrator reserves jurisdiction to resolve any issues which may flow from this award.

SIGNED at Ottawa this 12th day of August 2021.

____

Graham J. Clarke
Arbitrator