IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY

(the "Company")

and

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

GRIEVANCES CONCERNING REMOTE CONTROL LOCOMOTIVE SYSTEM (RCLS) ASSIGNMENTS AT THE MOOSEJAW, SA AND VANCOUVER, BC TERMINALS

SOLE ARBITRATOR: John Stout

APPEARANCES:

For the Company:
David Pezzaniti: Manager Labour Relations (Calgary)
Jason Wilkerson: General Manager (Eastern Division)
Caroline Gilbert: Manager Labour Relations (Montreal)

For the Union:
Ken Stuebing: Caley Wray
Dave Fulton: CTY - General Chair (Calgary)
Greg Edwards: LE - General Chair (Calgary)
Doug Edward: CTY - Sr. Vice General Chair (Calgary)
Harvey Makoski: LE - Sr. Vice General Chair (Calgary)
Joe Harris: LE – Local Chair (Port Coquitlam)
Bruce Weber: LE – Local Chair (Moose Jaw)
Dave Hariniuk: CTY – Local Chair (Moose Jaw)
Wayne Apsey: CTY General Chair (Smith Falls)
Ed Mogus: CTY- Sr. Vice General Chair (Toronto)

HEARINGS HELD IN TORONTO, ONTARIO ON JULY 26, 2017

AWARD

INTRODUCTION

[1] I was appointed by the Canadian Pacific Railway Company (the "Company" or "CP") and the Teamsters Canada Rail Conference (the "Union" or "TCRC") to hear and resolve several outstanding grievances pursuant to a Memorandum of Agreement (MOA) dated April 12, 2016.

[2] The MOA provides that the grievances will be heard on an expedited basis and presented in accordance with the Canadian Railway Office of Arbitration & Dispute Resolution (CROA & DR) rules and style.

[3] This award addresses two grievances filed by the Union's two western General Committees of Adjustment ("GCAs"). The two western GCAs represent the Union's running trade members employed by the Company throughout the region known as Western Canada (Thunder Bay west to British Columbia).

[4] The two grievances arise from the Company's decision in 2015 to implement Remote Control Locomotive System (RCLS) assignments at the Moose Jaw, SA and Vancouver, BC Terminals.[1]

[5] There are two collective agreements relevant to this matter (the "Collective Agreements"). One collective agreement applies to the Company's western employees represented by the TCRC and classified as Conductor, Assistant Conductor, Bagperson, Brakeperson, Car Retarder Operator, Yard Foreman, Yard Helper and Switchtender (CTY-West). The other collective agreement applies to the Company's western employees represented by the TCRC and classified as Locomotive Engineers (LE-West).

[6] The Company and the Union each filed one brief addressing both grievances. The parties also made fulsome oral submissions at the hearing.

[1] The Vancouver Terminal is also referred to as Coquitlam & Williston, BC.

[7] At the hearing, the parties advised that the Union filed a number of other related grievances with respect to these assignments and similar assignments at other terminals across Canada. These other related grievances are not currently before me. The parties indicated that they are hopeful that the determination of this matter will assist them in resolving the other related grievances.

THE CURRENT DISPUTE

[8] The parties were unable to agree upon a Joint Statement of Issue. Instead, the parties each filed their own Ex Parte Statement of Issue.

[9] The Union filed two Ex Parte Statements of Issue, one was for the Vancouver Terminal and the other was with respect to the Moose Jaw Terminal. The Union takes a similar position in both Ex Parte Statements of Issue.

[10] The relevant portions of the Union's Ex Parte Statement of Issue concerning Vancouver provides as follows:

> **STATEMENT OF ISSUE**
>
> In 1996 the Company introduced RCLS technology in the Vancouver terminal. RCLS assignments remained employed in Vancouver until 2007, at which time they were abandoned and the operation was returned to conventional 3 man switching assignments.
>
> Following a 7 year absence, in 2015 the Company introduced new RCLS technology in the Vancouver terminal. Beyond the immediate adverse effects of returning to 2 man switching operations, RCLS now contained expanded capabilities as well as additional job loss not previously considered within the original material change. The new RCLS operations operate differently and adversely affect different employees.
>
> **THE UNION'S POSITION**
>
> The Union contends the re-introduction of RCLS technology and operations at Vancouver constitutes a material change in working conditions as defined under the Collective Agreements (Article 7 CTY/34 LE). As a result, the Company is required to negotiate with the Union any and all measures to minimize adverse prior to implementation.
>
> The Union seeks a finding that the Company has violated the Collective Agreements as indicated above and an order that the Company cease and desist its ongoing breaches of these provisions.

The Union seeks an order that the Company comply with all provisions as indicated above, and provide a full description of the proposed changes as well as negotiate measures to minimize any and all adverse effects as a result. The Union also requests an order that the Company make whole any employees adversely affected as a result of their above-described actions. The Union is also seeking any further relief the Arbitrator deems necessary in order to ensure future compliance with the Articles in question.

[11] The relevant portion of the Union's Ex Parte Statement of Issue concerning Moose Jaw provides as follows:

STATEMENT OF ISSUE

In 1997 the Company introduced RCLS technology in the Moose Jaw terminal. RCLS assignments remained employed in Moose Jaw until 2011, at which time they were abandoned and the operation was returned to conventional 3 man switching assignments.

Following a 5 year absence, in 2015 the Company introduced new RCLS technology in the Moose Jaw terminal. Beyond the immediate adverse effects of returning to 2 man switching operations, RCLS now contained expanded capabilities as well as additional job loss not previously considered within the original material change. The new RCLS operations operate differently and adversely affect different employees.

[12] The Company disagrees and denies the Union's allegations. The Company's position is set out in their Ex Parte Statement of Issue as follows:

STATEMENT OF ISSUE:

In 1996 at Coquitlam, BC and in 1997 in Moose Jaw, SK the Company introduced RCLS technology through the Material Change process. The Company and the Union negotiated, signed and executed Material Change Memorandum of Agreements implementing RCLS technology in the aforementioned terminals. RCLS assignments remained in effect until 2008 in Coquitlam and 2011 in Moose Jaw, SK.

In 2015 the Company returned to RCLS operations under the same material Change Memorandums of Agreement following an absence when conventional assignments were operated.

UNION POSITION:

The Union contends that following such absence, the Company has abandoned existing RCLS agreements and that any reversion to the previously signed operating agreements requires a negotiation of adverse effects, if any.

COMPANY POSITION:

The Company has not abandoned existing RCLS agreements. Rather, the Company has simply exercised its contractual right to operate in the conventional method of operating with a three (3) person crew as expressed in the agreements.

The adverse effects of the implementation of RCLS in these terminals were dealt with in their entirety as evidenced by the benefits contained in those agreements.

BACKGROUND FACTS

i. RCLS technology

[13] RCLS technology (also referred to as "Beltpack technology") is used to perform switching operations. Generally, RCLS technology eliminates the need for a Locomotive Engineer as part of a traditional (also referred to as a "conventional") three-person yard crew.

[14] RCLS is a computer-based locomotive remote control system. It allows employees to control driverless, microprocessor-equipped switching locomotives using a battery-operated portable operator control unit. The system ties directly into the locomotive control inputs that would normally be controlled by a Locomotive Engineer. RCLS technology allows the operator to control the locomotive from a remote control box that is clipped to his or her safety vest.

[15] The RCLS system is generally operated by two employees, a Yard Service Employee (YSE) and a Yard Service Helper (YSH). These two employees are able to control the locomotive (although not simultaneously) by way of the transmitter in the remote control box that they wear. The two employees are able to "pitch" and "catch" the control of the locomotive to each other. The Company may also designate a third employee, known as a Utility Yard Employee (UYE) to augment certain RCLS assignments.

[16] There is no dispute that the introduction of RCLS technology provides efficiencies (eliminating the need of a Locomotive Engineer) and results in cost savings for the Company.

[17] RCLS technology was first utilized by the Company in the 1990's. RCLS technology is also used by the Canadian National Railway (CN) and other class 1 railroads in the United States of America. RCLS systems are constantly being updated to reflect advances in communication, technology and electronic hardware.

[18] At the time of initial implementation in the mid-1990's, the Company served a material change notice upon the Union in accordance with the material change provisions found in the Collective Agreements.[2]

[19] Between 1996 and 1998 the Company engaged in material change negotiations with the Union relating to the implementation of RCLS yard assignments at several terminals across the country.

[20] The parties were able to negotiate a number of "material change agreements" to address the material change in working conditions for each affected terminal. These material change agreements included "RCLS operating agreements" for the specific terminals where the technology was being introduced. Each material change agreement had an "appendix" that outlined the RCLS assignments that were being introduced at each terminal. The material change agreements did not contain any cancellation language.

[2] At that time the Canadian Council of Railway Operating Unions, the Union's predecessor, was the bargaining unit representative.

ii. The Vancouver operations

[21] On October 31, 1996 the parties negotiated a Memorandum of Agreement concerning the implementation of RCLS technology at the Vancouver Terminal (the "Coquitlam Agreement").[3]

[22] The Coquitlam Agreement provided the Company with the ability to implement 35 assignments, including extra assignments as necessary, which were specified in an attached Appendix "A". The Coquitlam Agreement also addressed the adverse affects arising from the implementation of RCLS technology at the Vancouver Terminal. In this regard provisions were made for the maintenance of basic rates, layoff benefits, early separation allowances, relocation expenses, and severance payments. The parties also agreed that in order to include relief and extra assignments, benefits for 44 adverse affects would be used in place of the 35 specified assignments.

[23] All Locomotive Engineer positions on the assignments were to be abolished and all assignments were to operate with a minimum two-person crew equipped with RCLS Beltpacks as per an attached RCLS Operating Agreement for the Vancouver Terminal (the "Coquitlam RCLS Operating Agreement"). The Coquitlam RCLS Operating Agreement addressed, among other things, the conditions and rates of pay for YSE and YSH assignments identified in Appendix "A".

[24] Between 1996 and 2008 the Company operated the RCLS assignments provided for under Appendix "A" at the Vancouver Terminal. It appears that over this period of time the specified start times of the assignments in Appendix "A"

[3] The October 31, 1996 Memorandum of Agreement was between the Company and the Canadian Council of Railway Operating Unions, who were the predecessor unions to the TCRC.

were slightly modified but the assignments generally correlated to the RCLS assignments established in 1996.

[25] On September 28, 2008, the Company abolished 7 RCLS assignments and 3 Utility positions. On November 16, 2008, the Company abolished the remaining 13 RCLS assignments and 3 additional Utility positions. By November 17, 2008 RCLS technology was removed from use at the Vancouver Terminal. All RCLS assignments were abolished and the Company implemented eleven conventional assignments with a traditional three-person crew, which included a Locomotive Engineer.

[26] The Company operated with traditional crews at the Vancouver Terminal from November 17, 2008 until June 2015. During this period of time, the Company did not use any RCLS technology at the Vancouver Terminal.

iii. The Moose Jaw operations

[27] On January 9, 1997, the parties negotiated a Memorandum of Agreement concerning the implementation of RCLS technology at the Moose Jaw Terminal (the "Moose Jaw Agreement").[4]

[28] The Moose Jaw Agreement provided the Company with the ability to implement 8 assignments, including extra assignments as necessary, which were specified in an attached Appendix "A".[5] Like the Coquitlam Agreement, the Moose Jaw Agreement also addressed the adverse affects arising from the implementation of RCLS technology. In this regard provisions were made for the maintenance of basic rates, layoff benefits, early separation allowances,

[4] The January 9, 1997 Memorandum of Agreement was between the Company and the Canadian Council of Railway Operating Unions, who were the predecessor unions to the TCRC. This Memorandum of Agreement also applied to Sutherland.

[5] It appears that the reference to 8 RCLS assignments is not entirely accurate as Appendix "A" to the Moose Jaw Agreement references 5 RCLS assignments in Moose Jaw and 4 in Sutherland for a total of 9 assignments.

relocation expenses, and severance payments. The parties also agreed that in order to include relief and extra assignments, benefits for 10 adverse affects (5 for Moose Jaw and 5 for Sutherland) would be used in place of the 8 assignments.

[29] All Locomotive Engineer positions on the assignments were to be abolished and all assignments were to operate with a minimum two-person crew equipped with RCLS Beltpacks as per an attached RCLS Operating Agreement for the Moose Jaw Terminal (the "Moose Jaw RCLS Operating Agreement"). The Moose Jaw RCLS Operating Agreement was similar to the Coquitlam RCLS Operating Agreement.

[30] Between 1997 and 2011, the Company operated the RCLS assignments provided for under Appendix "A" at the Moose Jaw Terminal.

[31] In May 2011, the Company abolished the RCLS assignments at the Moose Jaw Terminal and reverted back to traditional three-person crews. In this regard, 10 three-person conventional assignments were established to replace the RCLS assignments that were abolished.

[32] From May 2011 until September 2015, the Company operated with traditional crews at the Moose Jaw Terminal. During this period of time, the Company did not use any RCLS technology at the Moose Jaw Terminal.

iv. Common facts applicable to both Moose Jaw and Vancouver

[33] Both the Coquitlam Agreement and the Moose Jaw Agreement disposed of all Union material change demands with respect of the abolishment of positions resulting from the introduction of RCLS technology and implementing the new assignments specified for each terminal in the attached Appendix "A".

[34] It is worth noting that both the Coquitlam RCLS Operating Agreement and the Moose Jaw RCLS Operating Agreement contained the following provision:

> 1.8 The Company reserves the right to operate any yard job with a traditional crew if it is deemed appropriate. In those instances, this agreement shall not have application.

[35] The Coquitlam Agreement and the Moose Jaw Agreement also permitted the Company to designate a Utility Yard Employee (UYE) to augment certain RCLS assignments.

[36] I also note that the YSE, YSH and UYE positions outlined in the Coquitlam Agreement and the Moose Jaw Agreement have now been incorporated into the Collective Agreements.[6]

[37] The Company points out that the Union accepted the abolishment of all RCLS assignments and reversion back to conventional assignments without any protest. The Union acknowledges that they did not protest the reversion to traditional crews. However, the Union asserts that the elimination of RCLS technology in 2008 and 2011 was a material change in operations that did not result in any adverse effects. In particular, the Union notes that the conversion from RCLS technology back to conventional yard assignments resulted in a net increase in available work for employees. In these circumstances, the Union suggests that there was no need to protest, because a material change without any adverse affects would not trigger the material change provisions of the Collective Agreements.

[6] See for example the "Preamble" found at page 2 of the CTY- West Agreement.

v. The return of RCLS technology at Coquitlam and Moose Jaw

[38] In 2015 the Company made a business decision to reintroduce RCLS operations.

[39] In June 2015, the Company issued a series of bulletins indicating that RCLS operations would commence in Coquitlam. Around the same time, bulletins were also issued with respect to RCLS beltpack training.

[40] By July 6, 2015, the Company had abolished all conventional assignments and replaced them with RCLS assignments in Coquitlam. These new RCLS assignments were different (different start times and different days off) than the assignments specified in Appendix “A” of the Coquitlam Agreement.

[41] The Union provided evidence of displacements and layoffs that they say resulted from the 2015 reintroduction of RCLS operations at the Vancouver Terminal.

[42] On September 14, 2015, the Company issued a bulletin indicating that RCLS operations would commence in Moose Jaw. The bulletin also referred to RCLS training, which was to commence on September 21, 2015.

[43] The Company eventually abolished all conventional assignments in Moose Jaw and replaced them with RCLS assignments. These RCLS assignments, were different (different start times and different days off) than the assignments set out in Appendix “A” of the Moose Jaw Agreement.

[44] The Union provided evidence of layoffs and relocations that they say resulted from the 2015 reintroduction of RCLS operations at Moose Jaw. The Union notes that the majority of those adversely affected employees who were

laid off or relocated as a result of the 2015 RCLS assignments had only worked in conventional yard assignments during their time with the Company.

[45] The Company acknowledges that there are different schedules and fewer RCLS assignments at both Coquitlam and Moose Jaw, than the assignments provided for in Appendix “A” of both the Moose Jaw Agreement and the Coquitlam Agreement. However, the Company maintains that they have the right to interchange assignments between traditional crews and RCLS operations and determine the number and type of assignments needed to meet their business needs.

[46] The evidence also indicates that in 2015 the Company introduced Point Protection Zones (PPZ) technology, which had not been previously utilized by the Company. The Union points out that the new PPZ technology may have the effect of bringing about the abolishment of UYE positions that are provided for under the Coquitlam Agreement and the Moose Jaw Agreement. The UYE positions were also known as “point protectors” and were regularly utilized to protect the point when RCLS yard crews were making long pulls out of a yard.

[47] There is no dispute that the Company did not issue any notice of material change regarding the 2015 reintroduction of RCLS operations at Moose Jaw and Coquitlam.

[48] It is the Company’s position that they were not required to issue any notice of material change because they were simply exercising their rights under the Coquitlam Agreement and the Moose Jaw Agreement to shift between traditional crews and RCLS operations.

[49] The Union disagrees with the Company and they take the position that the reintroduction of RCLS technology and operations constitutes a material change in working conditions as defined under the Collective Agreements.

[50] On July 17, 2015, the Union filed a grievance with respect to the Company's 2015 reintroduction of RCLS operations in Vancouver. The Company denied the grievance.

[51] On November 8, 2015 the Union filed a grievance with respect to the Company's 2015 reintroduction of RCLS operations in Moose Jaw. The Company denied this grievance as well.

DECISION

[52] The issue to be decided is whether the 2015 abolishment of conventional assignments and reintroduction of RCLS technology for new assignments at the Vancouver and Moose Jaw Terminals were material changes in working conditions that would have significant adverse effects requiring the Company to give notice and negotiate with the Union measures to minimize such adverse effects.

[53] The Collective Agreements have similar language addressing material changes in working conditions. The relevant provisions are as follows:

> **LOCOMOTIVE ENGINEERS (LE-West)**
>
> ARTICLE 34 – MATERIAL CHANGES IN WORKING CONDITIONS
>
> 34.01 Prior to the introduction of run-throughs or relocations of main home terminals, or of material changes in working conditions which are to be initiated solely by the Company and would have significantly adverse effects on Engineers, the Company will:
>
> (1) Give to the General Chairman as much advance notice as possible of any such proposed change with a full description thereof along with appropriate details as to the consequent changes in working conditions, but in any event not less than:

(a) three months in respect of any material change in working conditions other than those specified in subsection (b) hereof;
(b) six months in respect of introduction of run throughs, through a home terminal or relocation of a main terminal;

(2) Negotiate with the Union measures other than the benefits covered by Clause 34.11 of this article to minimize significantly adverse effects of the proposed change on Locomotive Engineers, which measures may, for example, be with respect to retaining and/or such other measures as may be appropriate in the circumstances…

CONDUCTORS TRAINMEN AND YARDMEN (CTY-West)

ARTICLE 72 – MATERIAL CHANGE IN WORKING CONDITIONS

72.01 Notice of Material Change

The Company will not initiate any material change in working conditions that will have materially adverse effects on employees without giving as much advance notice as possible to the General Chairperson concerned, along with a full description thereof and with appropriate details as to the contemplated effects upon employees concerned. No material change will be made until agreement is reached or a decision has been rendered in accordance with the provisions of Section I of this Article.

72.02 Measures to Minimize Adverse Effects

The Company will negotiate with the Union measures other than the benefits covered by Sections 2 and 3 of this Article to minimize such adverse effects of the material change on employees who are affected thereby. Such measures shall not include changes in rates of pay. Relaxation in schedule rules considered necessary for the implementation of a material change is also subject to negotiation…

[54] The material change provisions are unique to the railroad industry. The provisions have their genesis in the 1965 Report of the Industrial Inquiry Commission on Canadian National Railways “Run-Throughs” authored by Justice Samuel Freedman (the “Freedman Report”). Justice Freedman touched upon the issue of technological change and his words are worth repeating:

1) Technological change should not be introduced at the universal will or whim of management; it should be the product of discussion and negotiation, with adequate advance notice, adequately timed for consideration of all the related problems.

2) Technological change, when instituted, would confer benefits on management – that was the reason it was being introduced. My feeling was, and I said it in the report, that technological change should turn out to be beneficial to the employees in this sense: that we couldn't have all the benefits falling on the side of management and the disadvantages falling on the workforce. Therefore some of the profits resulting from technological change should be diverted from management to ease the blow, to cushion the shock and help the workman.[7]

[55] The material change provisions provide a process for notification and negotiations to address Company initiated material changes in working conditions that will have materially adverse effects on employees. In a recent award between these parties, I summarized the railway arbitration jurisprudence and principles applicable to interpreting and applying the material change provisions as follows:

> I have recently had occasion to address these provisions in a matter between these parties. In *Canadian Pacific Railway and Teamsters Canada Rail Conference (Termination of GO Commuter Rail Service)* 2017 31781 (ON LA), I summarized the principles applicable to the material changes provisions as follows:
>
> > The principles that apply with respect to the material change provisions of the Collective Agreements are well established. In **CROA 1167** Arbitrator David Kates indicated that in order for the notice requirements contemplated under the material change provisions to be triggered, the onus rests on the Union to establish two factors:
> >
> > - The Union must demonstrate that the alleged changes in working conditions were initiated by the Company and such changes are "material" changes; and
> >
> > - The Union must also establish that the proposed changes, if implemented, would not only have an adverse effect on the affected employees, but such changes must bear "significantly" adverse effect on the affected employees.

[7] See The Book of Samuel: The Railway Run Through Commission (1964-66) Manitoba Law Journal (2014) 37: Special Issue: Manitoba law Journal pp 143-168 as cited by Arbitrator Christine Schmidt in Canadian Pacific Railway Company and Teamsters Canada rail Conference 9Re: Notices of material Change Remote Control Locomotive Systems) 2016 CanLII 63108 (ONLA)

Arbitrator Michel Picher elaborated upon the test in determining if a material change had occurred in **CROA 3083**, where he stated as follows:

> As the party pursuing a claim under the terms of article 78.2 of the collective agreement the Council bears the onus of proof. To bring itself within the terms of the article the Council must establish that there has been a material change, that it was initiated solely by the Company and that it "… would have significantly adverse effects on employees". This Office has had prior occasion to consider the meaning of significantly adverse effects. In CROA 1167 the following comments appear:
>
> > In considering the second factor referred to above I am also satisfied that it would not suffice for the Trade Union to show that the engineers involved were merely adversely affected by proposed changes. The Trade Union must demonstrate "significantly" adverse effects. That is to say, it must be established that such proposed changes in working conditions will have the adverse effect of rendering the engineer redundant or superfluous to the Company's manpower exigencies or otherwise undermine his job security. …

Both parties cited **CROA 3539** as providing guidance in resolving the matter before me. In **CROA 3539**, Arbitrator Picher explained the meaning of material change as follows:

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

There can be no doubt that not every change constitutes a “material change” under the Collective Agreements. In addition, the Union has the onus of demonstrating that the change at issue falls within the material change provisions of the Collective Agreements.[8]

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[8] See *Canadian Pacific Railway Company and Teamsters Canada Rail Conference (Grievances concerning the discontinuance of hump operations in Calgary AB and Winnipeg, MB)* 2017 CanLII 43214 (CA LA)

[56] In this case, there is no dispute that the Company initiated a change in working conditions. There also appears to be no dispute that the Company's 2015 initiative had materially adverse effects on employees with respect to available work and assignments. The evidence indicates that Locomotive Engineer positions were eliminated and employees ended up with less work opportunities, which resulted in some lay offs.

[57] The Company asserts that the change in working conditions was not material because they were exercising their right to operate RCLS assignments pursuant to the previously negotiated Coquitlam Agreement and the Moose Jaw Agreement. According to the Company, these two agreements addressed the adverse effects of implementing RCLS at these two terminals and provide the Company with the right and flexibility to shift between conventional yard operations utilizing traditional crews and RCLS operations depending on the needs of the business.

[58] The Union disagrees, maintaining that the Company abandoned RCLS at both the Coquitlam and Moose Jaw Terminals. In the alternative, the Union submits that the 2015 changes were not a reversion to the former state of affairs, but rather a new material change under different circumstances that were not contemplated by the Coquitlam Agreement and the Moose Jaw Agreement.

[59] In the normal course, the Company's decision in 2015 to abolish the traditional three person-crews and replace them with new RCLS assignments, utilizing new technology would, in my view, constitute a material change in working conditions. In fact, the Company acknowledged as much in similar circumstances during the mid 1990's by serving material change notices when they initially implemented the RCLS technology across the country.

[60] The only difference between what happened in the mid 1990's and what occurred in 2015 is the existence of the Coquitlam Agreement and the Moose

Jaw Agreement. In this regard, I must determine whether the Coquitlam Agreement and the Moose Jaw Agreement contemplate and permit the changes that occurred in 2015.

[61] Therefore, in order to resolve the dispute, I must interpret the Coquitlam Agreement and the Moose Jaw Agreement by applying the normal canons of contractual interpretation, albeit in a labour relations context. The exercise is to determine the objective intent of the parties as evidenced by their agreements. To determine the parties' objective intent, an arbitrator must interpret the agreement as a whole, giving the words used their ordinary and grammatical reading, consistent with the surrounding circumstances known to the parties at the time of consummating the agreement.[9]

[62] It goes without saying that agreements are not negotiated in a vacuum. All agreements are negotiated within a factual context that breathes life into the words chosen by the parties. In this case, the Coquitlam Agreement and the Moose Jaw Agreement were negotiated pursuant to the Collective Agreements' material change provisions. The clear intention of the parties was to address the adverse effects relating to the initial introduction of RCLS technology. Those adverse effects were directly related to the abolishment of conventional assignments and replacing them with RCLS assignments at Vancouver Terminal in 1996 and Moose Jaw Terminal in 1997.

[63] The purpose of the Coquitlam Agreement and the Moose Jaw Agreement was to provide measures to minimize the adverse effects associated with the material change in working conditions at each terminal. As part of the material change agreements, the parties negotiated a RCLS operating agreement for each terminal. These operating agreements provided for certain

[9] See *Sattva Capital Corp. v. Creston Moly Corp.* [2014] 2 S.C.R. 633, where the Supreme Court of Canada outlines the modern approach to contract interpretation. The modern approach to contract interpretation applies to contracts between a trade union and an employer although these principles must always be applied within a labour relations context.

specific assignments and “extra assignments” to “supplement” the specified assignments. The specific assignments were to replace the positions that were abolished. It was the abolishment and replacement of conventional assignments in the mid 1990’s that gave rise to the material adverse effects on employees at the two terminals.

[64] The Coquitlam Agreement and the Moose Jaw Agreement provided for specific RCLS assignments at each terminal. The language did not provide the Company with the right to unilaterally alter the specified assignments. The language did provide the Company with the ability to utilize “extra assignments”, but those extra assignments were to “supplement” the specified assignments found Appendix “A” of each agreement. The use of extra assignments was not authorized to replace any of the specified RCLS assignments.

[65] I acknowledge that section 1.8 of the Coquitlam and Moose Jaw RCLS Operating Agreements provided the Company with the right to use a “traditional crew” to operate any yard job. In such circumstances the RCLS operating agreements were to have no application. In my view, this provision does not provide the Company with the right to completely change operations by switching between RCLS assignments and conventional assignments. If that was the intent of the parties, then I would have expected that intention to be clearly stated in the language they chose. Rather, the language they chose merely acknowledges the Company’s right to operate any individual “yard job” with a traditional crew. In my opinion, the language permits the adhoc use of traditional crews to meet operational needs. The language does not permit the complete suspension of RCLS operations for an extended period of time.

[66] In my view, the language used by the parties in the RCLS Operating Agreements did not contemplate the wholesale reversion or suspension of the specified RCLS assignments. If the parties had contemplated such a situation,

then they would have used much more specific and clearer language to address what would occur in such circumstances.[10]

[67] The Coquitlam Agreement and the Moose Jaw Agreement both address the serious adverse effects upon the employees who had their conventional assignments replaced by specified RCLS assignments in the mid 1990s. The parties did not address what, if anything, would occur if the Company decided to discontinue those specific RCLS assignments by reintroducing traditional crews for an extended period of time (over many years) and then many years later abolish conventional assignments and reintroduce new and different RCLS assignments in their place. I find that the Coquitlam and Moose Jaw Agreements did not address the circumstances that are before me in this matter.

[68] I am supported in my finding by the decision of Arbitrator Schmidt in a recent award between these parties concerning notices of material change relating to the introduction of RCLS, **ADHOC 641**. The words of Arbitrator Schmidt are worth reproducing:

I also observe that the employer in the *CN RCLS* case originally included language in its proposal that would extend any agreement reached or awarded by arbitration to apply to all employees in the future adversely affected by the implementation of the technology. By the time the CN RCLS case reached arbitration the employer had pulled back from that initial position and limited its request to extend any agreement to future additional notices of material change to be issued that year. Arbitrator Picher refused this proposal as well. Arbitrator Picher's rationale in declining the Company's request is a persuasive now as it was then: the adverse impacts on a particular group of employees affected by a material change may vary substantially from location-to-location. He wrote:

> That being so, absent agreement of the parties on such an important issue, a board of arbitration should be reluctant to establish the terms of an agreement which will be of prospective application to as yet undefined circumstances governing unidentified employees at unidentified locations.

Having regard to what I view as a sound and fundamental rationale articulated by Arbitrator Picher in the above excerpt, the terms of this material change are to have application only to those assignments at the locations identified in the Company's latest

[10] See for example the Lethbridge to Fort Steele (ESR) Extended Service Run Agreement dated March 16, 2017.

proposal. The terms of this award have no application to "undefined circumstances and unidentified employees in unidentified locations." It is trite to say that to determine benefit entitlement, employees impacted by the material change must be identified individually. Therefore, if the Company wishes to establish further RCLS assignments at the locations identified in the February 23, 2016 proposal it must first provide notice of material change to the Union and an agreement must be reached prior to implementation. As such, and to be clear, the Company's proposals including the Notes at 1.3 of the most recent proposal as well as those at 1.7, 1.8, 1.9 must be rejected.

[69] Arbitrator Schmidt applied the rationale articulated by Arbitrator Picher in a similar situation (establishing terms of a material change agreement). In my view the rationale equally applies to the matter before me. I am of the opinion that an arbitrator ought to be extremely reluctant to infer the application of a material change agreement to future circumstances, involving unidentified employees.

[70] I agree with the Union that the Company's decision to revert back to traditional three-person crew assignments and eliminate all use of RCLS technology was a material change in working conditions. However, the material change provisions of the Collective Agreements were not triggered because there were no materially adverse effects from the Company's initiative to eliminate the use of RCLS technology. Furthermore, such a material change was not contemplated by the parties when they agreed to the Coquitlam Agreement and the Moose Jaw Agreement. As indicated earlier, if the parties contemplated such a situation, then I would have expected clear language addressing the issue.

[71] I agree with the Company's position that the Coquitlam Agreement and the Moose Jaw Agreement are binding on the parties.[11]However, the Coquitlam Agreement and the Moose Jaw Agreement addressed material changes in the mid 1990s. Those circumstances have materially changed in the time since they were agreed upon. The employees employed at the terminals in 2015 have been

[11] See the award of Arbitrator Picher in *Canadian Pacific Railway Company and Teamsters Canada Rail Conference (Replacement of Directional Pools and establishment of common pools at various terminals)* 2014 Can LII 77078.

significantly adversely affected by the reintroduction of RCLS technology. In my opinion, the events that occurred in 2015 constitute a material change in working conditions and the adverse effects upon the affected employees was not contemplated or addressed by those earlier agreements.

[72] The Company could have maintained RCLS operations at both Coquitlam and Moose Jaw. They negotiated the right to operate specific RCLS assignments and it was their right to maintain such assignments. However, the Company chose to completely abandon their right to operate those specific RCLS assignments. The Company, of their own volition, chose to use traditional three-person crews for an extended period of time. When the Company chose to reintroduce RCLS at both Coquitlam and Moose Jaw, they did not reintroduce the assignments specified in Appendix "A" of the Moose Jaw Agreement and Coquitlam Agreement. Instead, the Company created new RCLS assignments that were not contemplated by those earlier agreements. In these circumstances, I am compelled to find that notices of material change ought to have been provided to the Union.

[73] In my opinion, the Company was not exercising a contractual right under the earlier agreements. Rather, the Company was initiating a material change in working conditions, which has had significant adverse effects on the current employees working at these two terminals. Accordingly, for all the reasons I have set out above, I am allowing the grievances.

[74] In terms of orders, I am not of the view that it is appropriate to order the Company to revert back to traditional three-person crews. However, I note that it

is within the power of an arbitrator to make such an order and such a remedy may be ordered should a similar situation occur in the future.[12]

[75] In this case, I direct the parties to follow the material change provisions and negotiate measures to minimize the significant adverse effects associated with the 2015 reintroduction of RCLS at the two terminals.

[76] I remain seized to address any issues arising from my award and to address any issue fairly raised by the grievances but not addressed in this award, including but not limited to the appropriate remedy, if any, arising from the Company's breach of the Collective Agreements.

Dated at Toronto, Ontario this 31st day of August 2017.

John Stout - Arbitrator

[12] See *Canadian Pacific Railway Company and Teamsters Canada Rail Conference (Grievances concerning discontinuance of hump operations in Calgary AB and Winnipeg, MB)* 2017 CanLII 43214 (CA LA)