IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY

(the "Company")

and

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

NOTICE OF MATERIAL CHANGE RE: EXTENDED SERVICE RUN BETWEEN WINNIPEG AND THIEF RIVER FALLS TERMINALS

SOLE ARBITRATOR: John Stout

APPEARANCES:
For the Company:
David E. Guerin – Sr. Director Labour Relations
Chris Clark – Assistant Director Labour Relations

For the Union:
Ken Stuebing - Caley Wray
Steven Weisman – Student-at-Law
Wayne Apsey – General Chair, TCRC – CTY East
John Campbell – General Chair, TCRC –LE East
Greg Edwards - General Chair TCRC –LE West
Harvey Makoski - Senior Vice General Chair, TCRC-LE West
Dave Fulton - General Chair, TCRC-CTY West
Doug Edward - Senior Vice General Chair, TCRC-CTY West
Ed Mogus – Senior Vice General Chair, TCRC CTY East

HEARINGS HELD IN TORONTO, ONTARIO ON SEPTEMBER 20, 2016

AWARD

INTRODUCTION

1. This matter concerns a dispute between Teamsters Canada Rail Conference (the "Union" also referred to as "TCRC") and the Canadian Pacific Railway Company (the "Company" also referred to as "CP").

2. The dispute affects the Union's two western General Committees of Adjustment (the "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).

3. The matter involves allegations of a violation of two separate collective agreements:

- Collective Agreement between CP and TCRC on behalf of Locomotive Engineers, Thunder Bay and West ("LE-West"); and

- Collective Agreement between CP and TCRC on behalf of Conductors, Trainmen and Yardmen, Thunder Bay and West ("CTY-West")

4. The parties disagree about the applicability of the Material Change in Working Conditions articles contained in Article 72 of the CTY West Collective Agreement and Article 34 of the LE-West Collective Agreement.

5. The nature of the dispute is reflected in the Ex Parte Statement of Issue filed by the Union, which states as follows:

EX PARTE STATEMENT OF ISSUE

DISPUTE:

The applicability of the Material Change in Working Conditions articles contained at Article 72 of the Collective Agreement between the Canadian Pacific Railway and the Teamsters Canada Rail Conference Conductors, Trainmen, Baggagemen Car Retarder Operators, Switchtenders and Yardmen ("CP – TCRC (CTY-West)") and Article 34 of the Collective Agreement between

Canadian Pacific Railway and the Teamsters Canada Rail Conference Locomotive Engineers ("CP – TCRC (LE-West)").

STATEMENT OF ISSUE:

On or about January 22, 2016, the Company served a notice of Material Change in working conditions outlining the Company's intention to run an extended service run between the terminals of Winnipeg, Manitoba and Thief River Falls, Minnesota, without need to change crews at Emerson, MB or Noyes, MN.

It is the Company's intention that Winnipeg-based crews would be required to operate between Winnipeg and Thief River Falls. Additionally, operations over the Winnipeg / Thief River Falls corridor would be shared with American crews based in Thief River Falls. The Company's notice cites Items 7 and 16 of the Honourable G.W. Adams' December 7, 2015, decision in support of its ability to implement this change.

THE UNION'S POSITION

The Union contends that Arbitrator Adams' decision does not alter the legal landscape as comprehensively set out in Arbitrator Stout's December 9, 2015 decision regarding the Company's prior notice of material change regarding cross-border service runs. It is the Union's position that nothing in Arbitrator Adams' decision permits the Company to alter express terms of the Collective Agreements which proscribe the unilateral implementation of cross-border service runs.

The Union contends that Company's initiative improperly utilizes the Material Change in Working Conditions Articles in an effort to change the Seniority Districts and geographical territories governed by the CP – TCRC (CTY-West) and CP – TCRC (LE-West) Collective Agreements. The Material Change provisions contained in each Collective Agreement are limited solely to the geographical territories and Seniority Districts specifically identified therein. The Company's proposed initiative is in violation of the Seniority Districts provisions of the relevant Collective Agreements, including, but not limited to, Articles 41 and 43 of the CP – TCRC (CTY-West) Collective Agreement and Article 21 of the CP – TCRC (LE-West) Collective Agreement.

The Company cannot purport to reassign employees who are home terminalled and work in the territory governed by their applicable Collective Agreements to perform work assignments into territory governed by a different collective agreement, absent the Union's agreement. This was confirmed by Arbitrator Stout in his December 9, 2015 decision.

In light of Arbitrator Stout's December 9, 2015 decision, the Union contends that the Company cannot purport to unilaterally assign employees governed by either the CP – TCRC (CTY-West) or CP – TCRC (LE-West) Collective Agreements to perform work assignments into territory governed by different collective agreements. The work on the line between Emerson, Manitoba and Thief River Falls, Minnesota has customarily been performed members of the SMART and

BLET US Unions and belongs to employees covered by those unions' collective agreements with the Company. The Company's proposed initiative would violate those unions' exclusive bargaining rights and respective collective agreements.

Alternatively, the Company is estopped from unilaterally implementing the changes set out in its January 22, 2016 letter. Estoppel precludes the Company from assigning employees to work across the geographic boundary of their Collective Agreements. The TCRC has come to rely on the Company's longstanding recognition of the territorial jurisdiction of each Collective Agreement, which ends at the Canada-U.S. border. As such, the Company cannot now vary that territorial jurisdiction without the Union's consent.

As many Arbitrators including Arbitrator Stout have found, the Company is prohibited from implementing a Material Change that is contrary to the provisions of the Collective Agreement. The Union contends that the Company's January 22, 2016 initiative would require alteration of the specific terms of the Collective Agreement and therefore seeks an order that the material change provisions do not extend to permitting the Company the right to unilaterally implement a cross-border extended service run.

THE COMPANY'S POSITION:

The Company disagrees with the Union's position. The Company contends that the very nature of the Material Change provisions contemplated in the Collective Agreement provides the Company with the unfettered right to make the changes in question. Historical documents and arbitral jurisprudence are replete with examples of the Union's recognition and understanding of the right of the Company to implement change at its discretion.

The Company is therefore compelled to seek an order from the Arbitrator that the material change provisions of the Collective Agreement do extend to the implementation of an ESR between Winnipeg, MB and Thief River Falls, MN.

6. The parties referred this matter to me, agreeing that I have jurisdiction to hear and resolve the dispute.

7. The parties also agreed to utilize the Canadian Railway Office of Arbitration & Dispute Resolution (CROA) process for hearing and resolving grievances. The CROA process involves the parties filing an extensive brief, which includes a written statement of their position together with evidence and argument. The arbitrator has jurisdiction to make such investigation, as he or she deems proper, including whether or not oral evidence is necessary for resolving the dispute.

8. It is the Company's position that the Material Change provisions found in the Collective Agreements provide them with the ability to implement the proposed Extended Service Run (ESR) between Winnipeg, Manitoba and Thief River Falls Minnesota (across the Canada-United States of America border), which could include CP operations in the United States of America (U.S.) and Soo Line Railroad Company (SLRC) operations in Canada.

BACKGROUND FACTS

The previous ESR proposal

9. This is not the first time that the Company has sought to utilize the Material Change provisions to implement an ESR between Winnipeg, MB and Thief River Falls, MN.

10. On June 26, 2013, the Company served notice of a material change in working conditions outlining a plan to implement an ESR between Winnipeg MB and Thief River Falls, MN utilizing both CP and SLRC crews. The Company indicated their intention to have CP crews on duty up to a maximum of 12 hours during a single tour of duty without the ability to provide notice of rest. The Company served a similar notice of material change on the Unions representing SLRC employees in the U.S. (BLET and SMART).

11. Prior to June 2013 the Company's Canadian crews (represented by the Union) would operate Company trains on the Emerson Subdivision south of Winnipeg, MB to Noyes, MN (just south of the Canada-U.S border). The train would be exchanged in Noyes, MN with SLRC American crews (represented by BLET and SMART) based out of Thief River Falls, MN. The American crew would take the exchanged train to Thief River Falls, MN and the Canadian crew would tie up at Emerson, MB waiting for the next train north, which they would take back to Winnipeg, MB.

12. The parties engaged in some discussions about the proposed ESR between Winnipeg, MB and Thief River Falls, MN but did not follow the material change process provided under the Collective Agreements. Eventually, the Union filed a grievance on December 6, 2013 alleging, amoung other things, that the Company improperly utilized the material change provisions in the Collective Agreements to propose the Winnipeg MB to Thief River Falls, MN, ESR.

13. On June 13, 2014, the Company advised the Union that they planned to operate trains between Winnipeg, MB and Thief River Falls, MN with American crews (SLRC employees).

14. On June 21, 2014, the SLRC implemented a new freight pool of American crews operating between Thief River Falls, MN and Winnipeg, MB. BLET and SMART filed grievances, which are to be decided by an American arbitration board.

15. The grievance between TCRC and CP was referred to me for resolution.

16. On December 9, 2015, I issued an award (the "December 9, 2015 Award") allowing the Union's grievance. In allowing the grievance I made the following finding, which is relevant to this matter:

> [49] Therefore, after carefully considering the evidence and submissions of the parties, I find that the material change provisions of the Collective Agreements do not extend to allowing the Company to require Canadian crews to work an ESR on duty up to a maximum of 12 hours during a single tour of duty without the ability to provide notice of rest. Furthermore, the material change provisions also do not extend to permitting the Company the right to assign bargaining unit work to American crews employed by their subsidiary Soo Line. Any arrangement involving altering the specific terms of the Collective Agreements regarding rest and bargaining unit work must be the subject of negotiation and agreement with the Union.
>
> [50] Having regard to my findings in this matter, the Company is ordered to cease violating the Collective Agreements by assigning bargaining unit

work to the American crews employed by their subsidiary, Soo Line. I remain seized to address any issues arising from my award.

The Adams Award

17. The parties were unable to reach an agreement during the most recent round of collective bargaining. As a result, the Union commenced a legal strike on February 15, 2015. The strike was resolved by agreement of the parties to have their dispute resolved by interest arbitration. The Federal Minister of Labour appointed the Honourable George Adams Q.C. as the interest arbitrator.

18. On December 7, 2015, Arbitrator Adams issued his award (the "Adams Award"). The Adams Award provided for amendments to the Material Change provisions and ESR provisions of the Collective Agreements. Relevant to these proceedings are the following amendments:

7. Material Change

I award a side letter applicable only to the following proposed ESRs:
a) Chapleau to Schreiber
b) Lethbridge to Ft. Steele
c) Minnedosa to Wynyard

Its content shall provide:

The following process, with suggested timing for intermediate steps, shall be completed in no later than 120 days provided that an arbitrator has made a decision before any implementation:

- Day 1 — 1) Notice with full disclosure
  2) Parties then immediately agree on dates for Board of Review and adhoc hearing with CROA Arbitrator.
- Day 20 — 3) 1st meeting within 20 days of Step 1
- Day 50 — 4) 2nd meetings within 30 days thereafter
- Day 80 — 5) Board of Review or date as agreed at step 2
  6) Board of Review results

- Day 110 7) Arbitration hearing or date as agreed at step 2
- Day 120 8) Arbitration decision or as determined by the arbitrator

9) Implementation

Amendments to material change provision in the body of collective agreement are:

1) that Boards of Review must meet within 30 days and, if union is not able to meet within this required timeframe, CP is entitled to proceed to the next step, and

2) the LE shall use CROA arbitrators.

All other material change modification requests are dismissed.

19. In addition, the Adams Award provided for amendments to the terms on ESRs as follows:

16. Extended Service Run-ESR 12 hours

Belleville is excluded from the following award:

1) Up to 12 hours - in and off duty at place of rest - existing language

2) Only to get train into terminal- and not to work crew at initial or final terminal- save and except, at initial terminal, work in connection with own train and at final terminal as per conductor only CTY to apply to both crafts.

3) No home terminal closures for ESRs.

4) Any adverse effects on any terminals must be addressed through the collective agreement material change articles.

5) An agreement must be reached in order to modify an existing ESR agreement. CP must provide 30 days' notice and provide full particulars for the basis of the request to reopen the agreement and to provide notice of all subsequent adverse effects (for example, including but not limited to Toronto, Buffalo, London ESR agreement). At a minimum, the agreement must include the following incentives:

i. fixed mileage (as per existing ESR agreements);

ii. NR payment (10 hours on duty);

iii. address held away (as per existing ESRs agreements);

iv. a deadhead payment of 125 miles.

If no agreement is reached within 60 days of notice on modifying an existing ESR agreement, CP may implement and TCRC can proceed to ad hoc arbitration (CROA Rules/Style) and the arbitrator has jurisdiction to resolve any outstanding issues

20. The parties agree that the Company may institute an ESR of up to 12 hours (in and off duty at place of rest) as a result of the Adams Award. In this regard, my December 9, 2015 finding that the Company could not require crews to work an ESR on duty up to a maximum of 12 hours during a single tour of duty without the ability to provide notice of rest is no longer applicable under the current Collective Agreements.

21. It should also be noted that in the previous matter before me, while the Company initially sought to utilize American and Canadian crews, they actually implemented the change by only utilizing American crews operating exclusively between Thief River Falls, MN and Winnipeg, MB.

The past practice of crossing the border

22. Historically the Company's Canadian crews, represented by the Union, have operated across the Canada-U.S. border to the following locations:

- Rouses Point, NY
- Buffalo NY (CSX and Norfolk Southern Yards)
- Detroit MI (CSX and Norfolk Southern Yards)
- Noyes, MN
- Portal ND

- Sweetgrass MT
- Eastport, ID

23. All of the U.S. locations were transfer terminals that are approximately 10 miles or less from the border. In no situation are any of the Canadian crews subject to U.S. regulation.

24. The parties have utilized the material change provisions to implement ESRs that crossed districts and crossed the border (Toronto and London to Buffalo, NY). However, the agreements implementing the ESRs were entered into on a without prejudice or precedent basis. Moreover the work involved was work exclusively performed by employees who worked under the applicable collective agreements.

DECISION

25. The issue in dispute is whether the Company is permitted to utilize the Material Change provisions in the Collective Agreements to operate an ESR between Winnipeg, MB and Thief River Falls, MN, without the need to change crews in Emerson, MB or Noyes, MN.

23. It is useful to begin by quoting the words of Arbitrator Picher in **CROA 3539**, with respect to the meaning of the material change in the railroad industry:

> 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 initiated as a result of a decision of the employer, rather being dictated by circumstances beyond its control, such as closing of a client's business or plant, fluctuations in traffic or other such 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 change 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.

24. I also had occasion to comment on the applicability of the material change provisions in my December 9, 2015 award, at paragraphs 30-31 where I stated:

> [30] Thus the material change provisions do not apply to every change initiated by the Company. The material change provisions do not apply to changes that are beyond the Company's control. Rather, the material change provisions only apply to Company initiated changes that would have significant adverse effects on employees in the bargaining unit. In this regard, the material change provisions mandate negotiation of measures to minimize any adverse effects. If the parties can't agree on the necessary measures to minimize the adverse effects, then an arbitrator is empowered to make a final and binding decision.
>
> [31] The material change provisions are not a process for providing the Company with an opportunity to implement a material change that is inconsistent with the specific terms of the Collective Agreements.[1]

25. There is no dispute that generally the material change provisions apply to Company decisions to initiate an ESR. There is a dispute with respect to whether the material change provisions apply to this ESR as proposed on January 22, 2016, which involves the use of both Canadian and American crews operating within Canada and the United States beyond the points that they have traditionally exclusively operated.

26. In my view the material change provisions do not permit the Company the right to initiate the proposed January 22, 2016 ESR between Winnipeg, MB and Thief River Falls, MN without the need to change crews in Emerson, MB or Noyes, MN.

27. In my December 9, 2015 Award I found that the material change provisions do not permit the Company to use the material change provisions to re-assign employees to routes that are outside the geographic and seniority districts of the applicable Collective Agreements. I based my decision on an award of Arbitrator M. Picher in *Canadian National Railway and Teamsters*

[1] See Canadian Pacific Railway Ltd. and Teamsters Canada Rail Conference (Sparwood Material Change Grievance) unreported award dated October 13, 2015 (Tom Hodges) at page 15.

Canada Rail Conference (2010), 196 L.A.C. (4th) 207. My comments at paragraphs 39-41 are worth repeating:

> [39] Arbitrator Michel Picher dealt with a similar, although not identical, situation involving Canadian National Railway ("CN") and the Union and a material change notice. In *Canadian National Railway and Teamsters Canada Rail Conference* (2010), 196 L.A.C. (4th) 207, Arbitrator Picher addressed four grievances concerning CN's attempt to use the material change provisions to re-assign employees to routes that were outside the geographic and seniority districts of the applicable collective agreements. The Union took the position that the material change provisions do not contemplate the unilateral ability of CN to make assignments beyond the geographic limits of each particular collective agreement. Arbitrator Picher agreed with the Union. The following comments at paragraphs 35, 38 and 39 of Arbitrator Picher's award are particularly relevant to this matter:
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> > 35 To be clear, in the Arbitrator's view the collective agreements do, by their express and implied terms, affirm that work within the geographic areas described within them is to be performed exclusively by employees who hold seniority under those collective agreements. That, in my view, is a conclusion which must be drawn by necessary implication from the very scheme and framework of the four collective agreements. If it were otherwise, and the submission of the Company is correct that there can be no claim of exclusive work ownership in these geographic areas, what would prevent the Company from hiring an entirely separate cadre of employees to perform work in the same territories, in disregard of the terms of the collective agreements? What would prevent the Company from assigning employees from Eastern Lines to perform various kinds of work on Western Lines, as needs dictate, over territory in which they hold no seniority? To simply ask these very fundamental questions is to answer them. To allow the position of the Company and dismiss these four grievances would be to disregard the most fundamental jurisdictional underpinnings of the collective agreements and, in my view, the well entrenched understanding of the parties over many years.
> >
> > …
> >
> > 38 If I am incorrect in my interpretation of these collective agreements and the limitations on the Company's prerogative with respect to implementing a material change with trans-territorial consequences, I would also be inclined to accept the union's submission with respect to the application of the doctrine of estoppel. There is no suggestion on the record before me that the Company has ever asserted that it can assign work across the territorial divide of these collective agreements. While I recognize that it was on a without prejudice basis, it obviously considered it appropriate to specifically negotiate a trans-territorial work assignment in circumstances of the Kinghorn Subdivision Agreement in 2003. More significantly, notwithstanding that it has

> implemented many changes system wide for decades, the Company has never previously asserted that it can assign employees from Eastern Lines to work on Western Lines or vice versa. At a minimum, its actions and practice over many years must, I think, be taken as a representation by conduct that even if the material change provisions of the collective agreements can be properly interpreted as allowing trans-territorial assignment, it has effectively represented to the Union that it would not make any such assignment, whether in the implementation of extended runs or otherwise. That is particularly affirmed by the manner in which it implemented the exceptional adjustment with respect to the Kinghorn Subdivision Agreement.
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> 39 For all the foregoing reasons the Arbitrator finds and declares that the material change provisions of the four collective agreements do not extend to permitting the Company to assign employees who hold seniority and work under one territorial collective agreement to perform work over lines which fall under another territorial collective agreement. Any such arrangement must be the subject of negotiation and agreement with the Union. Alternatively, should the Arbitrator's analysis be incorrect, the Company is estopped from implementing any such change until such time as the parties return to the bargaining table for the renewal of the collective agreements.

> [40] The decision of Arbitrator Picher is informative and I agree with the Union that the reasoning is equally applicable to the grievance before me. In particular, the Union has been certified to represent "all running trades employees…working on the Canadian lines of Canadian Pacific Limited and its subsidiaries and leased lines." The Collective Agreements also confirm the Union's exclusive representational rights. The employees covered by the Collective Agreements also have seniority rights based on geographical districts.[2]
>
> [41] The Company cannot ignore the rights and the commitments found in the Collective Agreements and just assign work in Canada, that has been previously exclusively performed by Canadian crews represented by the Union, to American crews working for their subsidiary Soo Line.

28. This same rationale equally applies to the current matter before me. The Collective Agreements cover work in Canada, which is to be performed exclusively by Canadian crews represented by the Union. The use of American crews represented by a different trade union is not permitted beyond the established practice of crossing the border to a transfer terminal.

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[2] See Article 21 of the LE –West Collective Agreement and Articles 41 and 43 of the CTY-West Collective Agreement.

29. I acknowledge the award of Arbitrator M. Picher in *CP Rail System, IFS-Canada and Canadian Council of Railway Operating Unions (UTU-BLE) (Grievance re Material Change Notice for the Operation of Trains between Smith Falls, Ontario and Ste. Therese, Quebec)* dated April 4, 1995 (**Ad Hoc 354**) relied upon by the Company. In that case Arbitrator Picher addressed a material change involving the Company's intention to operate conductor-only freight trains from Smith Falls, Ontario to Ste. Therese, Quebec, which would eliminate two Montreal-based assignments. The work previously belonging to Montreal crews was being placed in the hands of Smith Falls' crews from a separate seniority district. Arbitrator Picher found the following:

> It appears to the arbitrator that the concept of mileage equalization, which is itself contained in collective agreements and has long been recognized within the industry, is an appropriate instrument to balance the equities as between the two groups…

30. In my opinion, the matter before Arbitrator Picher in **Ad Hoc 354** is distinguishable from the matter before me. **Ad Hoc 354** involved two seniority districts under one collective agreement. The work in question was still being performed exclusively by employees under the one collective agreement. In those circumstances, mileage equalization was clearly an appropriate way to address any inequities caused by the material change amoung seniority districts under the one collective agreement.

31. This matter is much different as it involves a material change affecting seniority districts under different collective agreements, which arise under different legislation in two different countries with vastly different laws applicable to employees who operate on the rails.[3]

[3] See Questions and answers for Winnipeg based crews with respect to Winnipeg-Thief River Falls Extended Service Run (ESR) found at Tabs 12 and 13 of the Union's Brief.

32. The Company also asserts that there has been a “clear and consistent past practice” of employees historically operating across the Canada-U.S. border.

33. It is true that employees have historically crossed the Canada-U.S. border. However, the evidence is clear that Canadian crews only crossed over the border to a transfer terminal (located generally within 10 miles of the border). There is no evidence to suggest that any Canadian crews have operated beyond transfer terminals on U.S. rails and subject to U.S. regulation, as the Company proposes in this matter. There is also no evidence to suggest that American crews have ever operated trains beyond the transfer terminals.

34. The Company also pointed to cross border ESRs that were implemented through the material change provisions. The Company placed particular relevance on the ESRs (implemented through the material change provisions) from London, ON and Toronto, ON to Buffalo, NY. The Company noted a September 12, 2013 agreement to operate separate ESRs across the Canada-U.S. border onto track owned by CSX and Norfolk Southern.

35. I acknowledge that the material change process was used to initiate the cross-border ESRs utilizing Toronto, ON and London, ON crews operating to Buffalo, NY. In my view, there is nothing wrong with utilizing the material change provisions to initiate a dialogue with respect to any ESR. In fact, it is clear to me that a notice of material change is necessary to initiate an ESR, see **CROA 3539**. However, that does not mean that the material change provisions can be utilized to permit the Company to unilaterally alter the provisions of the Collective Agreements.

36. Article 72.13 of the CTY Collective Agreement specifically contemplates that disputes may arise with respect to the applicability of the material change provisions.[4] Article 72.13 provides as follows:

> A dispute concerning the applicability of this Article to a change in working conditions will be processed as a grievance by the General Chairperson direct to the General manager, and must be presented within 60 days from the date of the cause of the grievance.

37. The above referenced language acknowledges that there may be circumstances where a dispute can arise as to whether the material change provisions apply to any given situation and such an issue will be addressed in the grievance and arbitration process.

38. In my opinion, the Company is free to engage the material change process to initiate discussions with the Union about any proposed change. The Union is equally free to challenge the Company's utilization or failure to utilize the material change provisions of the Collective Agreements. In other words, there is nothing preventing the party's from engaging the material change process to discuss and then agree to alterations to the Collective Agreements. However, absent mutual agreement, the material change provisions cannot be utilized to unilaterally alter the terms of the Collective Agreements.

39. The previous cross border ESR agreements between the Company and the Union (relied upon by the Company) were entered into on a without prejudice or precedent basis. Therefore, these agreements can't be relied upon in this proceeding.

40. Even if the Company could rely on these agreements, both the Toronto, ON to Buffalo, NY and London, ON to Buffalo, NY ESRs involved work that has

[4] Article 34.08 of the LE Collective Agreement has similar language.

been exclusively performed by Canadian crews under their respective Collective Agreements. The work in question only crosses the border to a historical transfer point, close to the border, and there is no evidence of American crews performing any of the work.

41. Finally, the Company argues that estoppel applies and the Union should not be permitted to reverse the "long standing practice of utilizing the material change provisions to implement cross border ESRs.

42. There is no doubt that an arbitrator can apply the equitable doctrine of estoppel in a manner consistent with labour relations principles, see *Nor-Man Regional Health v. MAHCP* [2011] 3 S.C.R. 616. However, in my opinion, the doctrine of estoppel has no application in these circumstances.

43. First and foremost, there has been no representation by the Union that the material change provisions may be utilized to implement an ESR that is similar to the one proposed by the Company in this case. In fact, the last time the Company proposed a similar ESR (between Winnipeg MB and Thief River Falls, MN) the Union filed a grievance, proceeded to arbitration and was successful, see my December 9, 2015 Award.

44. As indicated earlier, the previously agreed upon cross border ESRs from Toronto, ON and London, ON to Buffalo, NY were entered into on a without prejudice or precedent basis. Therefore these agreements can't be relied upon to support an estoppel argument.

45. Most importantly, the work in the other cross border ESRs, is work that historically was performed exclusively by Canadian crews. Such is not the case in the matter before me, which involves utilizing Canadian and American crews operating beyond the traditional transfer points.

46. Accordingly, for all of the reasons stated above, I find and declare that the material change provisions of the Collective Agreements do not permit the Company the right to initiate the proposed January 22, 2016 ESR between Winnipeg, MB and Thief River Falls, MN without the need to change crews in Emerson, MB or Noyes, MN.

47. I remain seized to address any issues arising from my award .

Dated at Toronto, Ontario this 17th day of October 2016.

John Stout - Arbitrator