IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY

(the "Company")

and

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

GRIEVANCE CONCERNING HANDLING OF UNASSIGNED POOL AND SPAREBOARD EMPLOYEES

SOLE ARBITRATOR: John Stout

APPEARANCES:
For the Company:
Richard Tanner – Legal Counsel
Peter Edwards – Vice President Human Resources and Labour Relations
Myron Becker – AVP Labour Relations
Dave Guerin – Sr. Director Labour Relations
Brian Scudds – Manager Labour Relations

For the Union:
Michael Church - Caley Wray
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

HEARINGS HELD IN TORONTO, ONTARIO ON JULY 6, 2016

AWARD

INTRODUCTION

1. This matter concerns a number of group grievances filed by the Teamsters Canada Rail Conference (the "Union" also referred to as "TCRC") alleging that the Canadian Pacific Railway Company (the "Company" also referred to as "CP") has violated a 2012 interest arbitration award issued by Arbitrator William Kaplan (the "Kaplan Award").

2. The group grievances are filed on behalf of all four of the Union's General Committee of Adjustment ("GCA"). 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). The two eastern GCAs represent the running trade members employed by the Company throughout the region known as Eastern Canada (Thunder Bay east).

3. The nature of the dispute is summarized in the Union's Ex Parte Statement of Issue, which reads as follows:

> **EX PARTE**
>
> **DISPUTE**
>
> Group grievances advanced by the Union in response to the Company's ongoing breaches of the 2012 Kaplan Award in regards to the handling of unassigned pool and spareboard employees who have less than maximum hours remaining on their mandatory clocks and the associated runaround claims.
>
> **STATEMENT OF ISSUE**
>
> On April 16, 2012, Arbitrator Picher ruled in *CROA 4102* with respect to the handling of unassigned employees with less than the maximum hours remaining on their mandatory eighteen-hour clock. The Arbitrator found "the Company must be viewed as estopped from abolishing the 1994 bulletin as it purported to do on March 4, 2011, during the currency of the collective agreement". Further, he directed the parties to bargain in good faith a mechanism in respect to the first in first out principles. Finally, the arbitrator directed the parties to review the outstanding claims and if necessary return to CROA for adjudication.
> The parties were unable to reach agreement on all outstanding claims. The Company has refused to pay claims in which the employee's maximum hour clock was greater than the bulletin but less than the crew that took the train took to complete their tour of duty.

Following *CROA 4102* and the reversion to the 1994 bulletin, several grievances and runaround claims were filed and claimed on the basis the Company was not adhering to the bulletin in violation of the award. The Company denied the grievances on a similar basis to the outstanding claims of *CROA 4102*.

On December 8, 2012, in conjunction with national negotiations and in resolve of *CROA 4102*, the parties reached an agreement that set out parameters by which employees who had the minimum hours (run time) for the subdivision would be called for duty. The parties' agreed the subdivision run times would be applied by the Company.

The Union filed grievances for instances where the employees are runaround who have less than the maximum hours remaining on their clock but who meet the requirements of the agreed upon subdivision run times. The Company has denied the grievances.

On or about February 2015, the Company's Operations Center began imposing an unwritten policy requiring employees at both the home and away from home terminals to be subject to rest and/or not calling the employees until they were off duty for a minimum amount of time. This policy has not been applied consistently. The Company has denied the Union's request for the policy.

THE UNION'S POSITION:

The Union contends the employees who have the available number of hours as defined by the applicable bulletin or the December 8, 2012 Kaplan Subdivision Run Times will be called for duty. Failure to call the employee with the set hours remaining on their maximum hour clock is a violation of the first in first out principle of the Collective Agreement.

The Union contends the Company's actions are in violation of Article 30 (LE) and Article 15 (CTY West) and Articles 14 and 15 (CTY East), CROA 4102 and the signed agreement dated December 8, 2012.

Further, it is the Union's position the Company's unwritten arbitrary policy is a violation of the Collective Agreements. In the alternative, the Company is estopped from imposing rest or deviating from the December 8, 2012 agreement.

The Union seeks a finding that the Company is in violation of the provisions as indicated above, and an order that the Company cease and desist the ongoing breaches as described.

In addition, the Union seeks all individual runaround claims be placed in line for payment, in addition to such further relief the Arbitrator deems necessary in order to ensure future compliance with the above provisions in question.

4. The position of the Company is reflected in their Ex Parte Statement of Issue filed in this matter, which reads as follows:

Company Position

The Company maintains that it has not violated the Collective Agreements with respect to runaround claims in any circumstance and disagrees with the Union's request for relief.

In March, 2015 following ongoing complaints raised by the Union during national bargaining and in the public domain about “fatigue” and the Company’s development of new analytical tools, CP instituted operational changes that enhanced rest practices in line with the principles of federal Work/Rest rules.

To further enhance safety and schedule predictability for employees and the public, employees are required to be off duty at the away-from-home terminal at least six hours, exclusive of call and eight hours at the home terminal, exclusive of call.

There are two elements to the Union’s submission that the Company requests be dismissed by the Arbitrator:

1. There is a runaround payment that should be paid and;

2. The Company cannot arrange schedules to ensure employees take some minimum rest.

The Company notes that these changes do not reduce costs or enhance operational efficiencies. The changes were implemented to address rest and time off issues, long pleaded by the Union and patterns of decisions made by employees that can now be reviewed in unprecedented detail. The purpose of this change is to:

1. Ensure that a minimum amount of rest is taken and that employees do not compress their schedule and;

2. Improve employee schedules /predictability

Lastly, the Company disagrees with the Union’s secondary argument that estoppel applies. The application of measures to enhance safety falls outside of the Collective Agreement and cannot be held to the next round of negotiations. Furthermore, the Collective Agreement is silent on minimum rest requirements.

3. Essentially the Union asserts that the Company has breached the first-in and first-out provisions of the Collective Agreements and failed to pay corresponding run-around fees to affected employees.

4. The Company denies that they violated the Collective Agreements. The Company asserts that they have implemented a reasonable rule, pursuant to their management rights, requiring a minimum rest requirement following a tour of duty. The rule is called the “Enhanced Rest Procedure” (“ERP”) and it mandates that the Company will not call employees if they do not have six (6) hours of rest exclusive of call (2 hours) at the away-from-home terminal and eight (8) hours rest exclusive of call (2 hours) at the home terminal.

5. The parties referred this matter to me agreeing that I have jurisdiction to hear the group grievances and also adjudicate a number of claims arising from **CROA 4102**.

6. The parties 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.

THE STATUTORY AND COLLECTIVE AGREEMENT PROVISIONS

7. The Transport Canada Work/Rest Rules for Railway Operating Employees ("*Transport Canada's Work/Rest Rules*") are relevant to the determination of this matter. In particular, the maximum hours on duty rules require that the running trades employees cannot operate a train for more than 18 hours combined in two tours of duty in a 24-hour period without a reset ("the 18-hour clock"). The pertinent provisions of *Transport Canada's Work/Rest Rules* are set out below:

> 5.1 Maximum Duty Times
>
> 5.1.1 a) The maximum continuous on-duty time for a single tour of duty operating in any class of service, is 12 hours, except work train service for which the maximum duty time is 16 hours. Where a tour of duty is designated as a split shift, as in the case of commuter service, the combined on-duty time for the two on-duty periods cannot exceed 12 hours.
>
> b) When calculating on-duty time as outlined above, arbitrary time or allowances are not to be included. Preparatory and final times each shall not exceed 15 minutes.
>
> 5.1.2 Ticket splitting in order to circumvent compliance with subsection 5.1.1 is prohibited.
>
> 5.1.3 The maximum combined on-duty time for more than one tour of duty, operating in any class of service, cannot exceed 18 hours between 'resets' as outlined in subsection 5.1.4.

5.1.4 The following is required to 'reset' the calculation of combined on-duty time to zero:

a) at the home terminal, 8 continuous hours off-duty time, ‘inclusive’ of call time, when entering into yard service or;

b) at the home terminal, 8 continuous hours off-duty time, ‘exclusive’ of call time if applicable, when entering into road service or;

c) at other than the home terminal, 6 continuous hours off-duty, ‘exclusive’ of call time if applicable.

8. As indicated earlier, the Union relies on the first-in and first-out provisions found in each of the four applicable Collective Agreements. The relevant provisions of the Conductors, Trainmen and Yardmen (“CTY”) Collective Agreement (West”) are as follows:

ARTICLE 15 – FIRST IN AND FIRST OUT

15.01 First-in and First-out Rule

Unassigned crews in freight service and spare employees will run first-in first-out of terminals. When an unassigned crew has come on duty in turn and they have got their engine and commenced work, they will remain with the train called for, even though another crew comes on duty later and gets out of the terminal first.

A crew will have commenced work when all members of the crew have reported for duty at the time required and when it has received the engine from shop, tie up or other track, except that on run through trains a crew will be regarded as having commenced work when all members of the crew have reported for duty.

15.02 Run-Around Rule

Except as otherwise provided, a Trainperson or crew standing first-out when run-around will be paid 50 miles for each run-around and continue to stand first-out.

Article 24 – ROAD SERVICE -DEADHEADING

Turnaround Combination Service

24.07 Locomotive Engineer and/or Trainperson in through freight service will be run first in - first out.

9. The relevant language of the CTY (East) Collective Agreement is as follows:

14.01 When unassigned crews or spare Trainperson are available and are runaround at terminals, they will, except as otherwise provided in Article 15, be paid 50 miles for each runaround, and hold their turn out.

15.01 Through freight crews will be run first-in, first-out of the terminals on their respective subdivisions, except as otherwise provided in clause 15.02 of this Article.

15.02 (1) Trainpersons will be notified when called whether for straightaway, turnaround, or turnaround combination service (TCS) as provided in Article 24 and will be compensated accordingly. Changes from straightaway, turnaround, or TCS will not be made unless necessitated by circumstances which could not be foreseen at time of call, such as accident, locomotive failure, washout, snow blockage or where line is blocked, or as provided in Article 24.14.

(2) In the event a Trainperson books rest on a straightaway trip en route to an away-from home terminal and such trainperson is replaced by a relief Trainperson, the Company may change the call to turnaround service in order to comply with Article 29 or unforeseen circumstances. When a call is changed in the application of this clause, the Trainperson will be considered released from duty at the location at which rest was taken, or is turned, and will be paid as a straightaway trip to that location. The Company will provide or arrange for transportation for the Trainperson back to the home terminal either when replaced or after rest expires and he/she will be paid 100 miles.

(3) Except as provided in Article 24, Trainpersons will not be called for turnaround service when such service involves turning at terminal 100 miles or more distant from the initial terminal. In turnaround service, when the distance between the initial terminal and the objective terminal is less than 100 miles, the objective terminal may be regarded as a turnaround point and Trainpersons in unassigned service, when called for turnaround service, run in and out of such point on a continuous time basis. When the turnaround point is an intermediate station, Trainpersons may be called for turnaround service without regard to the distance between such station and the initial terminal. In TCS service, regardless of the distance between the home terminal and the away terminal, Trainpersons shall run in and out of such away terminal on a continuous time basis.

(4) Except as provided in Article 24, a crew in unassigned service called for a straightaway trip and released from duty at the objective terminal of that trip will not be run-around by an unassigned crew called for turnaround service or TCS over the same route.

(5) A crew in unassigned service may be called to make more than 1 short trip and turnaround out of the same terminal and paid actual miles, with a minimum of 100 miles for a day provided (1) that the road miles of all trips do not exceed 120 miles, (2) that the road miles from the terminal to the turning point do not exceed 30 miles, and (3) that the crew shall not be required to begin work on a succeeding trip out of the initial terminal after having been on duty 8 consecutive hours, computed from the time of departure from the outer main track switch or

designated point on the initial trip, except as a new day, subject to the first-in first-out rule or practice.

10. The relevant language of the Locomotive Engineers' (LE) Collective Agreement (West) is as follows:

Article 30 – Handling of Locomotive Engineers

30.01 Pooled Engineers will run first-in first-out, except as otherwise provided.

30.02 Engineers on spare list will run first-in first-out, except as otherwise provided.

30.03 If run around avoidably Engineer will be entitled to 50 miles at minimum passenger rate.

Article 5 - Turnaround Combination Service

5.02 (7) Locomotive Engineer and/or Trainperson in through freight service will be run first in first out.

Article 11

11.07 The Company will make every effort to return Engineer to his home terminal as soon as possible.

11. The relevant language in the LE Collective Agreement (East) is identical to the LE (West) Collective Agreement articles 30 and 5.02(7). However, the LE (East) Collective Agreement does not contain article 11.07.

12. The parties also referred to the rest provisions found in the Collective Agreements. The parties referenced the provisions that allow employees to book up to eight hours rest plus a two-hour call at the away-from-home terminal and up to 24 hours rest plus a two hour call at the home terminal upon completion of work. The relevant provisions in the CTY East and CTY West Collective Agreements are found at Article 29.01, which provides as follows:

> 29.01 Employees will have the right to book up to 24 hours rest at home terminals and up to 8 hours rest at away-from-home terminals if desired. Such rest must be booked upon tie up. Employees will not be required to leave the terminal until they have had the amount of rest booked, except as provided in Clause 29.02.

13. Identical language is found at article 27.01 of both LE Collective Agreements.

14. It was also noted that the Company permits employees to take “earned days off”, which are based on an employee’s availability over a four-week rotating period with credits bankable up to 12 at a time for future use. These can be taken three at a time and cannot be denied. Employees also have the ability to book “unfit for duty” in advance of being called for work under the Collective Agreement. Since January 2015, employees are also permitted to take 48 hours of consecutive voluntary rest when certain mileages are run.

BACKGROUND FACTS

15. In order to fully appreciate the dispute between the parties, it is useful to set out some relevant background facts.

16. The Company is a class 1 railway operating across Canada. According to the Company, the Company has statistically the highest safety record of all class 1 railroads.

17. The Union represents the Company’s running trades employees across Canada.

Bulletin TT00052

18. On February 21, 1994, (following the Hinton Collision Inquiry) the Company issued Bulletin TT00052 regarding the scope and application of its maximum hours on duty policy consistent with the *Railway Safety Act*. This bulletin, provided for specific “run times” for subdivisions that allow employees to go to work from either the home terminal or the away-from-home terminal with less than a full 18-hour clock pursuant to section 5.1.3 of *Transport Canada’s Work/Rest Rules*.

19. In Bulletin TT00052, the Company outlined when employees would be called in the event they had less than a full 18-hour clock. By way of example, on the Brooks subdivision, Bulletin TT00052 established guidelines of seven hours eastward and seven hours westward would apply. Bulletin TT00052 indicated that employees who did not have sufficient time remaining on their 18-hour clock to perform the trip in question would be ineligible for the tour of duty.

Turnaround Combination Service (TCS) tours of duty

20. In 1995, the Honourable George Adams Q.C. issued an award under the *Maintenance of Railway Operations Act* (the "1995 Adams Award"). The 1995 Adams Award provided the Company with the ability to call Turnaround Combination Service (TCS) tours of duty.

21. Bulletin TT00052 came into effect prior to the 1995 Adams Award, therefore the bulletin did not contemplate or provide for a TCS tour of duty.

22. On November 25, 1997, Arbitrator Michel Picher issued **CROA 2906**. **CROA 2906** considered a grievance filed by the Brotherhood of Locomotive Engineers (BLE). The grievance concerned Locomotive Engineer Florence and an allegation that the Company had violated article 26 (c), the first-in and first-out provision of the Collective Agreement. Locomotive Engineer Florence stood first out and had only 8 hours and 21 minutes remaining on his 18-hour clock. Instead of calling Locomotive Engineer Florence, the Company called Locomotive Engineer Maniquet who had 10 hours remaining on his 18-hour clock.

23. After considering the parties' arguments, Arbitrator Picher dismissed the grievance. Arbitrator Picher found that Locomotive Engineer Florence did not have sufficient time on his 18-hour clock to perform the assignment in question, Arbitrator Picher held:

> Even on the language of this provision the Arbitrator could not sustain the grievance. Clearly the Company, which must maintain its operations so as to respect the law and regulations which govern railroading, could not, in practical terms, avoid running around Locomotive Engineer Florence in the circumstances disclosed. Nor, in the Arbitrator's view, was it compelled to call him merely because there was some chance that he might, by gratuitous circumstance, be able to accomplish the assignment within the time remaining on his clock. A miscalculation in that regard would obviously have put the Company to considerable dislocation and expense, a risk which in my view goes beyond the standard of avoidability contemplated within article 26.
>
> For all of the foregoing reasons the grievance must be dismissed.

CROA Case No. 4102

24. In March 2011, the Company sent the Union a letter indicating that it would no longer refer to the guidelines established under Bulletin TT00052 in the Western Region. Instead, the Company indicated that it will be "governed by the guidance provided through **CROA 2906**."

25. The Union's Western Canada General Chairmen jointly responded and insisted that crews be called first-in and first-out as required in the Collective Agreements. The Union subsequently filed a group grievance and advanced several examples to arbitration.

26. The parties' Joint Statement of Issue in that dispute summarizes the nature and scope of the dispute that was referred to Arbitrator Michel Picher:

> On March 4, 2011, the Company advised the Union that the Company will no longer refer to or gain guidance from the bulletin noted herein and will henceforth be governed by the guidance provided through CROA 2906.
>
> Immediately, the Company commenced determining whether any operating employee has the appropriate amount of time remaining under maximum hours legislation for "valid business reasons," regardless of their position on the working list.
>
> The Union contends that the arbitrary practice of randomly calling crews with short maximum hours clock is in violation of Article 15 CTY and Article 30 LE contained within the respective Collective Agreements.

> The Union contends the Company's new practice does not meet the arbitral jurisprudence in regards to a Policy. Further, the Union contends that the Company's new vague and arbitrary practice and corresponding reliance on "valid business reasons" is a violation of the Collective Agreement and inconsistent with *CROA 2906*.
>
> The Union requests that the Company cease and desist from violating the first in first out provisions and randomly running around the crews. Further, the Union requests the Company re-institute the guidelines contained in the 1994 Bulletin or alternatively, provide the Union will a clear unambiguous policy not inconsistent our Collective Agreement Rights. The Union also seeks a declaration that absent any clear policy or guideline from the Company, the strict provisions of the first in/first out provisions of our Collective Agreement must be adhered to. Finally, the Union requests all individual runaround claims be placed in line for payment.
>
> The Union argued before Arbitrator Picher that it had become unpredictable—essentially random—for crews to anticipate when they will be called at the AFHT without regard for who is first out. The Company, for its part, was unable to identify any specific policy or guidelines for applying the first in first out rules in the above examples.

27. After carefully considering the parties submissions, Arbitrator Picher allowed the Union's grievance. At the end of his decision, Arbitrator Picher made the following finding and issued the following direction:

> For the foregoing reasons the grievance is allowed, in part. The Arbitrator finds and declares and the Company's notice of March 4, 2011, effectively abolishing its bulletin of February 18, 1994, is an option which was not available to the Company by the operation of the doctrine of estoppel. The Arbitrator directs the Company to bargain in good faith with the Union at the current bargaining table the possibility of finding a suitable guideline or other mechanism which might assist employees in better understanding their status in respect of the application of the first-in first-out principles found in both collective agreements in relation to the assignment of crews at terminals in Western Canada. The Company is likewise directed to review with the Union the merits of the run-around claims which have been filed in tandem with this policy grievance, in an effort to resolve them, failing which they may be returned to this Office for adjudication.
>
> Should the parties be in any disagreement with respect to the interpretation or implementation of these directions, those matters may be spoken to.

28. Following the issuing of **CROA 4102**, the Company and Union met to discuss the outstanding run-around claims. Unfortunately, as of the date of this

hearing many of the claims are unresolved. The parties agreed to refer all outstanding claims to me for resolution.

Subdivision Run Times Agreement (December 8, 2012)

29. Following Arbitrator Picher's award in **CROA 4102**, the parties engaged in negotiations, to agree upon subdivision run-times that would be applied by the Company. These negotiations were completed on December 8, 2012, during collective bargaining. The Company and all four GCAs agreed to a letter of understanding (the "December 8, 2012 LOU").

30. In the December 8, 2012 LOU, the parties agreed upon specific subdivision runtimes, which are intended to provide employees with the minimum hours requirements in order to be given a call for duty on a given subdivision. The December 8, 2012 LOU sets out the runtimes to be applied in the course of determining whether an employee may stand first out for a given assignment. The relevant portions of the December 8, 2012 LOU are set out below:

> The parties agree that the appended subdivision runtimes will be applied by the Company. These runtimes are intended to provide employees with the minimum hours requirements in order to be given a call for duty on a given subdivision.
>
> These run times are applicable to Straightaway Service calls from original terminal to objective terminal. Calls in Turn Service will be governed by the collective agreement. Employees called in TCS will not run around crews with the same, or greater than, hours remaining on their maximum clock.
>
> Any deviation from these run times due to planned/long term outages will establish a minimum of ten (10) hours for all affected subdivisions. In such circumstances, these changes will be advertised via bulletin and VRU. Local management will notify the applicable Local Chairpersons of the change, and LR will notify the applicable General Chairpersons of any changes.
>
> Short term outages or short term operational issues which affect subdivision runtimes, will not necessitate a change to the run times listed below.

31. The parties also agreed to review the agreement in six months and any changes could only be made upon mutual agreement.

32. The December 8, 2012 LOU was incorporated by reference into the Kaplan Award on December 19, 2012, which notes at item 2:

> 2. Subdivision Run Times: Resolved as per agreement of the parties reached at the hearing.

33. The Kaplan Award also addressed "fatigue management" at item 3 of the award adding the following new language to the Collective Agreements:

> An employee being physically unfit for duty will report same to the crew management centre, so that the employee may not be called. The employee will not be disciplined for "booking unfit".

The Fatigue issue and bargaining

34. In July 2014 the Union released the results of an informal survey of their membership. The survey results indicated that fatigue was a very serious issue that needed to be recognized and addressed.

35. The most recent round of negotiations commenced on September 13, 2014. The issue of fatigue and rest was one of the many issues discussed during bargaining.

36. The Union made public statements during bargaining and in the media indicating that a significant number of their members were suffering from fatigue to the extent that their operation of Company locomotives posed a danger to themselves and the general public. The Union asserted that the fatigue was caused by the Company's conduct. The Union provided the Company with a list of 17 employees that they asserted were being worked to the point of exhaustion.

37. On October 7, 2014 the Union published an article on its' website referring to the CBC news story stating the following:

- 75% of freight train engineers report nodding off, being exhausted.
- Rail workers warned that chronic exhaustion, amoung locomotive operators, is one of the biggest issues facing the industry.
- The Union's expert, Clinton Marquardt, claimed a fear that a catastrophe like Lac Megantic may occur that is attributable to fatigue.
- Employees admitted falling asleep, missing stop signals and putting lives and communities at risk.
- The Union's survey found that three quarters of those surveyed reported falling asleep while working at least once per month.
- An unidentified CP Rail engineer reported going to work tired because, "we are all slaves to the dollar".
- Mr. Marquardt noted a specific concern over a collision in North Portal Saskatchewan where he discovered that the engineer worked 28 shifts in the previous 30 days. The shifts were within the existing "work/rest" rules, but each shift started at a different time of day. Mr. Marquardt conducted an analysis that concluded the engineer was so sleep deprived on six shifts that it would be as if he was "drunk".

38. During collective bargaining, the Company sought to have changes made to the Collective Agreements, which would eliminate voluntary rest and instead implement assigned work and scheduled days off with a maximum 10 hours rest (plus 2 hour call) at the home terminal and maximum eight hours rest (plus 2 hour call) at the away-from-home terminal. The Company proposal was rejected by the Union and not awarded at interest arbitration.

39. The Company also issued a letter to the Union on November 20, 2014 advising that employees may only book rest in whole hours.

40. A legal strike commenced on February 15, 2015. The Union published an article on the same date titled "Why is there at strike a CP?" the article indicated that the strike "is not about money; it's about fatigue, safety, quality of life with dignity and respect."

41. The strike ended when the parties agreed to have the dispute resolved by interest arbitration. The parties also entered into a "Return to Work Agreement" dated February 16, 2015. The Return to Work Agreement provided, amoung other things, that "all members of the bargaining units shall be returned to work

on the same terms and conditions that applied to each member respectively prior to the commencement of the strike".

42. The Minister of Labour appointed the Honourable George Adams Q.C. as the interest arbitrator. The parties engaged in mediation/arbitration and an award was issued on December 7, 2015 (the "2015 Adams Award"). Item 3 in the 2015 Adams Award provided that "rest shall continue to be booked in hours and minutes and CP shall withdraw its notice of November 20, 2014. Arbitrator Adams also awarded up to 48 consecutive hours voluntary rest.

The Company investigates the fatigue issue and implements the ERP

43. Between the fall of 2014 and the spring of 2015, the Company reviewed the rest habits of the 17 employee examples provided by the Union during bargaining. The Company used their Crew Management Application ("CMA") data to initially analyze the work habits of three employees from the Union's list.

44. The data related to the three employees revealed the following:

DB:

- Duty times were not excessively long (6-10 hours).
- 153 hours worked in the employee's mileage month (21 trips).
- Ample time off between shifts, equating to 15 days off in addition to the time off for earning miles and on EDO.
- Numerous occasions where available personal rest hours were waived by the employee.
- Employee triggered 3.5 days of continuous time off mid-month by triggering two EDOs.
- A generous 6.2 days of continuous time off (for miles) at the end of the month.

CB:

- Duty times were not excessively long, many were between five to six hours with only one exceeding 10 hours.
- 195 hours worked in the employee's mileage month (26 trips).

- Ample time off between shifts (including a nearly three day block of continuous time off mid-month) equating to 22 days off in addition to the time off for earning the miles.
- Numerous occasions where personal rest hours were waived by the employee (particularly home terminal)

DG:

- Duty times were not excessively long. Many were less than five hours (most were five to seven hours with only one exceeding 10 hours.
- 176 hours worked in the employee's mileage month (28 trips).
- Ample time off between the vast majority of shifts equating to 19 days off in addition to the time off (three days) for EDO.
- Numerous occasions where personal rest hours were waived by the employee. On eight occasions all rest was waived.
- Employee triggered five days of continuous time off mid-month by triggering three EDOs.

45. At the hearing, the Company also provided charts that illustrated their findings. The Company discovered that when given a choice between taking adequate time off to rest, or the ability to enhance their lifestyle by compressing their schedule, a significant number of employees chose to compress their schedule in order to optimize their potential earnings or maximize their time off work. The Company concluded that the choice to compress their schedules was the likely cause of their alleged fatigue and had the potential to place their health and safety, and public safety at risk.

46. The Company also conducted an analysis of a Revelstoke Conductor, who they considered an "extreme example of an employee who compressed his schedule".

47. At my request, the Company produced the Revelstoke Conductor's work history. The Revelstoke Conductor has been an employee with the Company since 1988. The Revelstoke Conductor's work record demonstrates no personal injuries and no motor vehicle accidents. The Revelstoke Conductor has been involved in four train accidents between 2000-2008, but none of these accidents were found to be his fault. The Revelstoke Conductor has no demerits on his

current record. There was no dispute that the Revelstoke Conductor's work record is more than acceptable and does not raise any safety concerns.

48. The Company advises that it felt obligated to take action and it did so by introducing the ERP. According to the ERP, the Company stopped calling employees if they did not have six hours rest exclusive of the two-hour call at the away-from-home terminal and eight hours rest exclusive of the two-hour call at the home terminal. According to the Company, the ERP ensures that employees have the ability to achieve maximum rest between tours of duty.

49. The ERP was implemented in March 2015. The Company asserts that the ERP is consistently followed, except when there is absolutely no rested employees who could be called to operate trains and the needs of service require a particular train to operate in the time slot. In such cases the crews are called in accordance with the December 8, 2012 LOU provided that the employees have the minimum time remaining to operate over the subdivision.

50. According to the Company, the ERP has been applied at a rate of 99% at the home terminal and 96% at the away-from-home terminal.

51. The Union provided a number of examples (most if not all grieved) of how the Company has implemented the ERP. The following are a few of the examples:

- On February 27, 2015 Conductor Tuchscherer tied up at the away-from-home terminal following a trip. He booked two hours and 30 minutes rest. He went to sleep at a hotel expecting to be called for a train upon his rest expiring on February 28, 2015. When he awoke, he realized the train he was expecting had already been called with another crew.

- On February 28, 2015 Conductor Getz was called in turn service on the Brooks subdivision and on duty a total of three and 50 min. He tied up in Medicine Hat, home terminal, and still had over 12 hours on his 18-hour clock. Conductor Getz booked minimal rest in order to commence another tour of duty. Conductor Getz was informed that "employees are now required to always have 8 hours rest at the home terminal".

- On November 15, 2015, Conductor Irwin was called in straightaway service at 1605 in Medicine Hat and reported off duty at 2300 the same day in Swift Current (away-from-home terminal) with a total time on duty of six hours and 55 minutes. Conductor Irwin was first out and available in Swift Current with 11 hours 5 minutes remaining on his 18-hour clock.

- Conductor Olshanoski was called in straight away service for a train from the away from home terminal of Swift Current to the home terminal of Moose Jaw called on February 21, 2016 at 0640. Conductor Olshanoski tied up at 1055 after having been on duty four hours 15 minutes. Conductor Olshanoski remained available after tie up, allowing himself to be called for another tour of duty. The Company instead unilaterally ran-around Conductor Olshanoski on two occasions that day. First was for a deadhead called at 1300, the second was called for 1420. Conductor Olshanoski had 13 hours 45 remaining on his 18-hour clock.

- Conductor Inverarity worked a train from Moose Jaw to Swift Current on December 14, 2015 with an order time of 0700 and off duty in Swift Current at 1200 (5 hours on duty). Conductor Inverarity had full intentions going back to work and took no rest upon her completion of her tour of duty. Conductor Inverarity was the first out available Conductor in Swift Current and should have been called for a train at 1230 to take back to Moose Jaw. Instead a TCS crew was called to taxi from Moose Jaw to Swift Current at 1045 to take the train back to Moose Jaw. Conductor Inverarity and her crew were never asked to protect the train. The TCS crew was on duty for 7 hours and 15 minutes (including two hour taxi time). When the TCS crew took possession of the train at Swift Current they would have 10 hours remaining on their 12 hour tour of duty. Conductor Inverarity had a 12 hours on her clock and should have been called for the train at Swift Current.

- On January 20, 2016 Conductor Eley tied up turn service at the away-from-home terminal, Swift Current at 0325 and did not book any personal rest. Conductor Eley was then automatically assigned rest by the Company until 0925. The Company rejected Conductor Eley for a train at 0534, another train at 0534 and 0539, and one other train at 0618. Ultimately, a manager then “overrode” Conductor Eley’s rest at 0623 and called Conductor Eley for a train at 0820, and after being off duty four hours and 55 minutes.

- On January 01, 2016, Conductor Kamboj was called in straight away service from Medicine Hat to Calgary, Alberta on a train with an off-duty time of 2045 and did not book any personal rest. The records indicate that the Company asked Conductor Kamboj if he wanted to do a turn around, which means they can’t take rest if they agree. The Company then automatically assigned Conductor Kamboj rest until 0245. The Company rejected Conductor Kamboj twice for a train at 2347 and 2356. Subsequently, a manager “overrode” Conductor Kamboj’s rest at 2359 and called him for a train after being off duty only 5 hours and 05 minutes.

52. The Company asserts in their material that they have recently invited the Union to meet and discuss the issue of fatigue and rest.

53. The Company provided me with copies of communications between the parties as follows:

- January 14, 2016 - letter from Myron Becker (Assistant Vice-President Labour Relations) to Doug Finnson (TCRC President) outlining concerns and inviting Mr. Finnson to a February 17, 2016 meeting.
- January 29, 2016 - email from Mr. Finnson responding to concerns and proposing an alternative date for scheduling the meeting.
- February 2014 – emails concerning scheduling a meeting.
- March 28, 2016 – letter from Mr. Finnson addressing issues of fatigue and inviting Mr. Edwards to a one on one meeting.
- March 30, 2016- letter from Mr. Edwards to Mr.. Finnson offering additional dates to meet and raising concerns about fatigue.
- April 21, 2016 –letter from Mr. Edwards to Mr. Finnson.

54. On May 10, 2016 an “off the record” meeting was held at CP’s offices, which was attended by Mr. Edwards and Mr. Finnson, along with senior management (Mr. Harrison and Mr. Creel) and union representatives (Mr. Edwards, Mr. Fulton, Mr. Apsey and Mr. Campbell).

55. A subsequent meeting was held on May 20, 2016. In attendance were Mr. Becker, Mr. Edwards and Guido Deciccio (Senior Vice-President Operations on behalf of the Company and Mr. Finnson, Mr. Edwards, and Mr. Fulton on behalf of the Union. The Company brought up the issue of rest management and provided the Union with information concerning an employee who had the “worst compressed schedule for the first quarter of the year”.

56. At the hearing, the Company played an April 2, 2016 Global News segment titled “Fatigue on the Rails”.

57. The Company advises that the ERP is an “interim preventative procedure” that will remain in place until the parties can negotiate a solution or Parliament passes legislation that addresses the issue.

THE PARTIES’ POSITIONS BRIEFLY STATED

58. As indicated earlier, the parties filed extensive briefs outlining their positions. I have only briefly summarized their positions in this award.

59. It is the Union’s position that the Company violated the Collective Agreements by exercising management rights to impose a rule or policy that conflicts with the rights agreed upon in the Collective Agreements. The Union points out that the Collective Agreements have enshrined the first-in and first-out principle. The Union argues that the ERP undermines the first-in and first-out principle, without any justification.

60. The Union submits that the ERP has never been reduced to writing, it is not uniformly enforced and it is unreasonable. The Union asserts that the ERP actually creates unpredictability, leaving crews in a state of uncertainty and inability to plan their work/rest cycles.

61. The Union points out that the government regulators have already put in place *Transport Canada’s Work/Rest Rules*. The Union argues that the addition of the ERP is not necessary to comply with the government rules.

62. In terms of the Company’s ability to make unilateral rules, the Union relied on the well accepted test enunciated in *Re KVP Co. and Lumber & Sawmill Workers’ Union, Local 2537* (1965), 16 L.A.C. 73 (Robinson) (the “KVP test”). The Union argued that any unilateral rule imposed by management must be consistent with the Collective Agreement and must be reasonable.

63. The Union also relies on the following additional authorities to support their argument: *Metropolitan Toronto (Municipality) v. C.U.P.E., Local 43* (1990), 69 D.L.R. (4th) 268 (Ont. C.A.); *Fisher Scientific and United Food & Commercial Workers, Local 1000A*, (1990) 13 L.A.C. (4th) 350 (Brunner).

64. The Company takes the position that they have exercised their management rights in order to provide for a safe working environment. The Company argues that they have a duty to provide a safe workplace and limit any real and significant hazards that the rail industry poses to the public at large. The Company asserts that the ERP is a reasonable rule that has been created as a stopgap measure to protect employees, the public and Company assets.

65. The Company points out that the Union has made public statements that their members are operating locomotives when they are not fit for duty. These public statements include an employee survey that illustrates employees complaining about fatigue.

66. The Company also submits that they have analyzed data and determined that employees are compressing their work and declining to take rest, which are significant contributing factors to employee fatigue. The Company asserts that when given a choice between taking adequate time off to rest, or the ability to enhance their lifestyle by compressing their schedule, a significant number of employees chose to compress their work schedule to optimize their potential earnings or maximize their time off work. According to the Company this choice has the potential to sacrifice employee safety.

67. The Company accepts the KVP test as being the accepted test applied by arbitrators when they assess a unilaterally imposed employer rule.

68. The Company asserts that the ERP is not inconsistent with the Collective Agreements. The Company argues that the first-in and first-out provisions do not

specify that employees must be called if their regulatory clocks have not been reset.

69. The Company points out that it is required to take action to protect their employees pursuant to Part II of the *Canada Labour Code,* RSC 1985, c. L-2, the *Railway Management System Regulations* and the common law. The Company argues that these duties provide the basis for overriding any provision that may be violated.

70. The Company also argues that the ERP is reasonable and required to fulfill the Company's duty to provide a safe workplace.

71. The Company acknowledged that they did not issue a formal written policy or rule. However, the Company takes the position that the rule was well known and in such circumstances, there is no need to reduce the rule or policy to writing.

72. The Company relied on the following additional authority to support their argument: Donald J. M. Brown and David M. Beatty, *Canadian Labour Arbitration (4th ed.)*, loose leaf, vol. 1, at topic 4:1500.

DECISION

73. The dispute between the parties is whether the Company can implement the ERP. After carefully considering the submissions of the parties and the language in the Collective Agreements, I find that the ERP is an unreasonable rule that violates the Collective Agreements. The reasons for my finding are detailed below.

74. I begin my analysis by addressing the ability of management to make rules to provide for the safety of their employees, assets, and the general public.

75. The Union points out that the Collective Agreements in this matter do not have a management rights clause. In my view, the lack of a management rights clause is not an impediment to management's ability to make reasonable rules to provide for the safety of their employees, assets and the general public.

76. A collective agreement is to be interpreted as a whole and in context. The context of a collective agreement includes the parties' and employees' statutory rights and obligations.

77. Furthermore, under the *Canada Labour Code*, arbitrators have the power to interpret, apply and give relief in accordance with a statute relating to employment matters, regardless of whether or not there is a conflict between the statute and the collective agreement, see s.60 (1)(a.1) of the *Canada Labour Code*.

78. In the matter before me, the Company has a statutory obligation to provide a safe workplace, see Part II, section 124 of the *Canada Labour Code*. In addition, the Company also has a continuing statutory obligation to conduct analyses of its railway operations to identify safety concerns, see the *Railway Safety Management Systems Regulations, 2015* SOR/2015-26.

79. In my opinion, management has the inherent right to make reasonable rules and regulations in order to fulfill their statutory obligations. However, management's rights must be exercised reasonably so as to not create conflict or undermine the rights conferred under the provisions of the collective agreement, see *Metropolitan Toronto (Municipality) v. C.U.P.E (C.A.), supra*.

80. The parties both agree that the KVP test is applicable to the matter before me. The framework for reviewing a unilaterally imposed employer rule as enunciated in KVP is as follows:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of employees affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced.

81. In my view, the ERP is inconsistent with the first-in and first-out provisions of the Collective Agreements and the Kaplan Award. The parties have clearly agreed upon the first-in and first-out principle in all four Collective Agreements. The parties also agreed to subdivision run times on December 8, 2012, which were incorporated into the Collective Agreements, by the Kaplan Award. The parties have also agreed upon a penalty for any runaround that violates the first-in and first-out rule. Reading the Collective Agreements as a whole and in context leads me to the conclusion that the ERP is inconsistent with the terms of the Collective Agreements, which enshrines the first-in and first-out rule.

82. I accept the Company's submission that a unilaterally promulgated rule may violate an express provision in a collective agreement, if required to comply with a statute. In this case, the Company directed me to the *Transport Canada's Work/Rest Rules* and Arbitrator Picher's award in **CROA 2906**.

83. I agree with the comments of Arbitrator Picher in **CROA 2906**, where he stated:

> It is well established that the parties to a collective agreement cannot negotiate terms in their collective agreement, or apply and administer such terms, in a manner that is inconsistent with public law, be it statute or regulations. In the case at hand it is obvious that the first-in-first out calling provisions of the collective agreement must be rationalized and applied in a manner that is consistent with the federal regulations in respect of mandatory limits on duty, which the Company has taken to apply.

84. However, this case is very different from the facts in **CROA 2906**. In **CROA 2906** the context was Company guidelines, not agreed upon subdivision run times. In addition, the facts in **CROA 2906** demonstrated a situation where a Locomotive Engineer did not have enough time on their 18-hour clock to complete the runtime afforded in the Company guidelines. This is much different from the matter before me, where employees are being forced to rest in situations where they have more than enough time on their 18-hour clock to perform the agreed upon subdivision runtime.

85. I do not see how the language in the Collective Agreements, including the first-in and first-out provisions and the December 8, 2012 subdivision runtimes, violate any statute, so long as the maximum times in *Transport Canada's Work/Rest Rules* are honoured. Furthermore, there is no evidence before me to suggest that the ERP is necessary to comply with any legislative requirement, including *Transport Canada's Work/Rest Rules.*

86. It would appear that the Company seeks to implement a more stringent rule or policy (the ERP), relying only on their general duty to provide a safe workplace. However, the duty to provide a safe workplace does not provide the Company with the legal authority to violate specific terms of the Collective Agreements, which on their face do not violate any statute.

87. The Company was unable to point me to any decision where the general duty to provide a safe workplace was found to permit an employer to violate specific provisions of a collective agreement. In my view, the ERP goes much further than is required by any federal statute or regulation. In addition, the Company has not proven that ERP is reasonable and necessary to provide a safe workplace.

88. I do not wish to minimize the Company's duty to provide a safe workplace in any way, shape or form. However, this extremely important duty

does not provide the Company with *carte blanche* to implement any rule or policy that is inconsistent with the provisions of the Collective Agreements.

89. I can foresee situations where the Company may be put in a situation where applying the first-in and first-out principle might run afoul of *Transport Canada's Work/Rest Rules*. Such situations might include a situation where some event occurs on a run (such as a derailment or fire), which could reasonably lead the Company to conclude that the agreed upon subdivision runtime is no longer accurate until the situation on the run is resolved. In such situations, it may well be reasonable for the Company to conclude that the additional time necessary to complete the run might make it impossible for certain employees to complete the work within their 18-hour clock. Another situation might be one where the Company may not permit a certain employee to work when they have reasonable cause to believe that such employee is unfit, either due to intoxication or even fatigue. None of these situations are before me in this matter. In this matter, the facts before me only suggest a general concern for employee fatigue. I was not provided any evidence suggesting that any of the employees who filed grievances were unfit for duty for any reason.

90. I accept that the Company has a legitimate safety concern relating to fatigue. However, I do not believe that the ERP is a reasonable response to the Company's legitimate concern.

91. The issue of fatigue was a live issue during the last round of collective bargaining. Both parties made proposals addressing the issue during collective bargaining. It appears that the Company was not satisfied with the result obtained in bargaining or the 2015 Adams Award. As a result, they have implemented the ERP as a stop-gap measure to address the issue until the parties negotiate what the Company believes to be a more reasonable alternative.

92. The Company relies on evidence (data) of a concerning pattern of employees compressing their work schedules. However, the Company did not follow up on the data by interviewing these employees. The Company has assumed that the employees are fatigued as a result of their own failure to take rest and compressing their work schedule to maximize days off. However, there is no direct or expert evidence on this point.

93. The Company described the Revelstoke Conductor as the most extreme example of an employee who compressed their work schedule by not taking appropriate periods of rest. However, the Revelstoke Conductor's work record had no safety violations or at-fault accidents. The Revelstoke Conductor's work record is by all measures satisfactory, despite his apparent preference for a compressed work schedule.

94. The Company has provided absolutely no evidence, expert or otherwise, to demonstrate that mandatory rest after every run (regardless of length) will reduce fatigue and make the workplace safer.

95. Frankly, the issue of fatigue is just not as simple as mandating rest after every run. If such was the case, one would expect legislated rest after every run. Instead, the *Transport Canada's Work/Rest Rules* provide for maximum times on duty and mandate rest after 18 hours.

96. The evidence in this matter illustrates a number of situations where the mandatory ERP was applied in situations where employees were only on duty for a short period of time and did not request or appear to require any rest. This leads me to conclude that he affect of the ERP is to force rest on employees who may not need or desire any rest.

97. I note the situations involving Conductors Getz, and Olshanoski. Both conductors had been on duty less than five hours. Applying the ERP would require both employees to take rest (eight hours of rest exclusive of the two hour

call) before being called for another run. In both situations the next run would be more than 15 hours after their initial runs, during a time when one might expect their internal clocks may be telling them to get some rest.

98. I also note the examples of Conductor Eley and Kamboj where the Company did not consistently apply the ERP. The situation involving Conductor Kamboj is extremely concerning as it appears that he and his crew had accepted a turnaround and expected to return with their train. Later, Conductor Kamboj and his crew were mandated rest for just over five hours until they ultimately were sent back out on a run.

99. The examples of Conductor Eley and Kamboj also stand in contrast to the claim of the Company that they have had compliance of 99% at the home terminal and 96% at the away-from-home terminal

100. The situation involving Conductor Inverarity is an example where the application of the ERP resulted in a TCS crew taking a train with less time on their 18-hour clocks than Conductor Inverarity and her crew.

101. The Company has provided absolutely no evidence to prove that the ERP actually addresses the issue of fatigue and provides a safer workplace. By their own admission, the ERP is a stop-gap measure until the parties can negotiate something else or Parliament passes legislation addressing the issue.

102. Therefore, after carefully considering the evidence and submissions of the parties, I find that the ERP violates the Collective Agreements and is an unreasonable rule.

103. Before concluding, I am compelled to make mention of the fact that the role of an arbitrator is to interpret the collective agreement between the parties. As noted earlier, part of the interpretive process includes interpreting and applying employment related statutes. However, where the collective agreement

provisions do not violate any statute, then it is improper for an arbitrator to do anything other than enforce the parties' agreement.

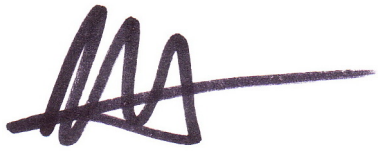
104. I acknowledge that fatigue is a matter of safety that affects both the Company, the Union's members and the general public. Addressing fatigue is in the best interests of both parties to this proceeding. The issue should be addressed in collective bargaining either by agreement or in an interest arbitration award. It is not the role of a rights arbitrator to set public policy or rewrite the parties' collective agreement.

105. In conclusion, having regard to my findings in this matter, the Company is ordered to cease and desist violating the Collective Agreements. The Company is directed to comply with their obligations under the Collective Agreements, including the Kaplan Award.

106. The parties are directed to contact my office to schedule a date for having all outstanding runaround claims resolved.

107. I remain seized to address any issues arising from my award and to resolve all outstanding claims.

Dated at Toronto, Ontario this 3rd day of August 2016.



John Stout - Arbitrator