IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE
(the "Union")

- and –

CANADIAN PACIFIC RAILWAY COMPANY
(the "Company")

Grievance Concerning Notices of Material Change Re:

Implementation of the Extended Service Runs ("ESR")
Chapleau to Schreiber, Ontario

Arbitrator:
Richard I. Hornung, Q.C.

For the Union:
Michael Church - Counsel
Douglas Finnson - National President TCRC
Roland Hackl - National VP TCRC
Wayne Apsey - General Chairperson CTY East (CP lines East)
John Campbell - General Chairperson LE East (CP lines East)
Greg Edwards - General Chair, TCRC - LE (CP lines West)
Dave Fulton - General Chair, TCRC-CTY West (CP lines West)

For the Company:
Brian Scudds - Manager Labour Relations
Guido DeCiccio - Senior VP CPR West
David Guerin - Senior Director Labour Relations
Chris Clark - Manager Labour Relations

Hearing Date
May 13, 2016;
July 21, 2016 (Conference Call)

Hearing Location:
Calgary, Alberta

I

JURISDICTION/PROCESS

No issue is taken with the Company's right to implement the type of material change contemplated in its January 20, 2016 notice giving rise to this arbitration.

The jurisdiction to address any adverse effects of a Company implemented material change in working conditions during the course of a collective bargaining agreement are found both in the Collective Agreements between the Unions and the Company (Thunder Bay and East - at Article 72 for the (CTY) Conductor/Trainmen/Yardmen; and Article 34 for the (LE) Locomotive Engineers) and, more specifically in this case, at paragraph 7 of the December 7, 2015 Award of Arbitrator Adams.

It is apparent from a reading of Articles 72.07 (CTY) and 34.04 (LE) that an arbitrator's jurisdiction is limited to dealing with the adverse effects arising from the changes. As set out in article 72.07:

> *"... The decision of the arbitrator shall be confined to the issues, or issues, placed before them which shall be limited to measures for* ***minimizing the adverse effects of the material change upon employees who are affected thereby...****" (Emphasis added)*

The purpose of the material change provisions are, as discussed by Arbitrator Picher in *CROA 3539*:

> *"... The essential concept of material change protection is that if the Company chooses, of its own volition, to materially alter its operations, employees should be given certain protective benefits which might not otherwise be available to them, where it can be shown that those employees would be adversely affected."*

The cases make it apparent that an Arbitrator acting under the material change provisions of the Collective Agreement is not entitled to amend or alter the provisions of the collective bargaining agreement itself.

Determinations by Arbitrators with respect to outstanding issues on material change, which the parties are unable to negotiate, are governed by considerations similar to the principles of interest arbitration. The principal consideration is to attempt to replicate the agreement the parties would have arrived at if left to their own designs. Where the parties are unable

to reach an agreement on their own, the most reliable process involves an attempt to arrive at determinations on the outstanding issues based on: what the parties had previously done; arbitration awards in similar situations; or, on a pattern of conduct by which a standard can be arrived at. In doing so, Arbitrators generally attempt to determine what a fair and reasonable outcome would be in the case before him/her.

II

STATEMENTS OF ISSUE

The parties were unable to arrive at a Joint Statement of Issues. Accordingly each provided an Ex Parte statement.

The Company's Statement of Issue provides as follows:

> ***DISPUTE****:*
> *The Company intends to implement an Extended Service Run (ESR) between Chapleau, Ontario and Schreiber, Ontario. The parties have been unable to agree on how potentially adverse effects would be addressed pursuant to the Material Change provisions outlined in the Collective Agreement.*
>
> ***EX PARTE STATEMENT OF ISSUE:***
> *On January 22, 2016 the Company served a notice of Material Change upon the Union pursuant to the Collective Agreement regarding its intention to implement the Extended Service Run (ESR) between Chapleau and Schreiber, ON. It is not anticipated that any bargaining unit employees will be laid off as a result of this initiative.*
>
> *Negotiations commenced on February 2-3, 2016 in Thunder Bay, ON and again on February 22, 2016 in Toronto, ON.*
>
> *A Board of Review was convened on March 22, 2016 in Toronto, ON. The Board of Review had a follow up conference (call) on April 18, 2016.*
>
> *Subsequent to the Board of Review, failing to reach agreement, the Company has withdrawn all previous proposals and provided the Union a final proposal on May 5, 2016.*
>
> *he parties have been unable to come to an understanding as to the measures for minimizing any potential adverse effects of the material change upon the employees. No agreement has bee reached. The Company requests that the arbitrator adopt the Company's May 05, 2016 in its entirety and so award.*

The Union's Statement of Issue provides:

DISPUTE:
The Company intends to implement an Extended Service Run between Chapleau, ON to Schreiber, ON. However the negotiations have not resulted in a mutual agreement on all measures to minimize the adverse effects on employees arising from the proposed Material Change.

EX PARTE STATEMENT OF ISSUE:
On January 22, 2016, the Company served notice upon the TCRC under the Material Change Articles ((CTY) Article 72 and (LE) Article 34), for their intent to operate trains in Extended Service Runs (ESR) between Chapleau, ON to Schreiber, ON without the need to change crews at White River.

Following this, on February 2 and 3, 2016, the Company and Union met in Thunder Bay in an attempt to negotiate a material change agreement. The Union provided a draft which was presented to the Company on February 2nd.

On February 15, 2016 the Company provided the Union with a draft proposal. The Company and Union met in Toronto on February 22, 2016 and were able to agree on some issues.

On February 26, 2016 a conference call between the Company and Union took place going over what was agreed upon and what if anything else could be agreed upon. The Company undertook to provide an updated document. On February 29, 2016 the Company provided an updated draft.

During this period, discussions took place on the date/location for the Board of Review which was suggested by CP that it would be held at the Toronto GYO boardroom on March 22, 2016 with Company members Tony Marquis and Myron Becker. The Union agreed on location and advised the Company that the Union members would be Roland Hackl and Don Ashley. Further during this period, the parties agreed on Arbitrator Hornung and chose the date of May 13, 2016 for this dispute to be heard.

On March 22, 2016 the parties met in Toronto as scheduled for the Board of Review. From the Board of Review further items were resolved and the Boards findings were put on hold while the parties attempted to further resolve outstanding issues. On March 24th the Union provided a new proposed draft to the Company containing the updated agreed upon items and outstanding items. The Company presented a counter proposal on April 1, 2016 and requested a conference call on Monday April 4th to discuss their document. The parties during this call were able to agree on more items and the Company agreed to later provide an updated document reflecting all agreed upon items and those outstanding.

On April 5th the Union emailed the Company what they saw as the outstanding items which were now at a total of 5 items. On April 7th the Company provided an updated document and agreed to the 5 outstanding items. Both parties concurred to what (5 items highlighted in yellow in final document exchanged) was outstanding on April 8th.
On April 8th it was agreed that due to scheduling, the Board of Review members would meet via conference call again on April 18th. No further meetings, calls or information have been exchanged or provided at this time.

The 5 (five) outstanding issues highlighted in bold text were:

***Items**:*
5.2---- ESR** crews who are deadheaded will be compensated 125 miles. For the purpose of this agreement, the terminals at either end of the ESR run are defined in item 1.1 of this agreement. **The preferred method of transportation will be passenger service.

5.3--- NR payment of $80.00 applies to all crews operating in ESR Service between Chapleau and Schreiber if crew is on duty over 10 hours.

***8.1.1**--- Employees at both home terminals**, at the time of implementation**, who successfully bid ESR service will require initial familiarization. Employees so familiarizing will be paid as if it were a working tour of duty.*
10.5**--- The parties remain open to discuss the **concepts associated with fatigue management with regard to the operation of ESR's.

Appendix A Clause 4.3**---- The opportunities that become available in clause 4.2 above will be bulletined not later than 12 months following implementation at the respective home terminal, provided there is a surplus of employees at Chapleau or Schreiber, as a direct result of this material change. **Should these opportunities not be taken in a given year, they will be banked and bulletined each year for eligible employees, for a maximum of three (3) years.

On May 5, 2016, the Company advised the Union that all of its proposals were withdrawn.

The Union contends that the Company's changes are contrary to the collective agreement. The collective agreement does not allow for "meet and turn service" or 12 hours in turnaround service, nor the unilateral "assigning" of "unassigned trains".

The Company also served the Union with an Ex Parte Statement of Issue. The Company did not even try to negotiate a Joint Statement of Issue with the Union.

The Company's conduct is in bad faith and contrary to the collective agreement. It is improper. The Company cannot resile on "agreed to items". The Company is obliged to honour its agreed to items. The Union will raise their points as preliminary matters. The Union will object to any agreement, implementation of such or any award until this issue is resolved.

The Union relies upon its proposal submitted to the Company in connection with the mitigation of the adverse effects in this case. The Union submits the Arbitrator should award the Union's proposals.

III

PRELIMINARY ISSUE

At the outset, the seminal issue to be addressed is the Company's argument that it's offer to resolve any outstanding issues was contingent on an agreement being reached on all outstanding issues. And that, therefore, notwithstanding the consensus arrived at on certain issues leading up to the Board of Review and arbitration, the failure to reach such

a full agreement meant that all of the agreement remains in dispute before this board.

Irrespective of the variances in the two Ex Parte Statements of Issue, it is apparent that the parties proceeded through their normal course of negotiations (including the Board of Review) relative to this ESR. While a final agreement eluded them they were able, through those negotiations, to arrive at a consensus on a number of issues except for the 5 items which remained outstanding and are enumerated in the Union's Ex Parte Statement above.

It is apparent that the Company concurred with the list of outstanding issues enumerated (see: Tab 9 of the Union's Book of Documents). That said, it is also apparent that the Company's position was steadfast and resolute, As reflected in the clear statement by Mr. Becker in his email of May 7, 2016, that:

> *"... any outstanding item that has potential for a resolve was subject to an overall settlement of all issues - in other words if an agreement was not reached on all items, then all items would remain outstanding.."*

In point of fact, all of the Company's proposals and draft agreements included a header which clearly stated that they were:

> *"... contingent on an overall agreement being reached. The Company reserves the right to withdraw these proposals in their entirety should the parties fail to reach an overall agreement."*

In short, it took an "all or nothing" position on a full agreement with the Union and, failing such agreement, all the original items - including those already negotiated - would be on the table at arbitration as unresolved issues. Accordingly, on May 5, 2016, the Company advised the Union that in so far as a full agreement could not be reached, all of its proposals were being withdrawn.

The Company argues that its agreement on any of the issues, which were in the proposals or drafts leading up to the Board of review and this arbitration, was a qualified agreement on select provisions and should not be seen as binding. It cites contract law for the proposition that any agreement, in order to be binding, must be unqualified. In the result, the Company asserts that the determination of what measures should be taken to minimize the materially adverse effects on employees, as a consequence of the Company's notice of a Material Change, remains for this arbitrator to decide.

The Union takes the position that the Company is bound by the “agreements” reached with respect to the items leading up to both the Board of Review and this arbitration. And, that - since the Board of Review is limited to issues that remained outstanding before it - the Company’s attempt to now enlarge the items in dispute before me in arbitration amounts to an abuse of the process which has been in place between the parties for years.

Decision Preliminary Issue

It is a common practice, during the process of the negotiation of collective bargaining agreements, for the parties to make all of their contract proposals and agreements on issues contingent on a full agreement being reached. This is largely so because parties in negotiations generally begin with those issues in dispute on which they can agree subject to the larger issues (particularly monetary and important language) which are dealt with at the end of the negotiation process. Each of them negotiate the “smaller” issues with a view to levering their position for the negotiations on the final major matters.

I do not dispute the Company’s reference to the broad contractual principle that an agreement requires parties to be *ad idem* before it becomes binding. However, with respect, the issue that is before me is not one of the application of strict contract law. The parties here were, in fact, of similar mind with respect to the majority of issues. The Employer, while agreeing to the issues that remained outstanding, nevertheless relies on its caveat that its agreement on the intervening issues were subject to an entire agreement being reached.

The process for negotiation and implementation of ESR agreements, is grounded both by the Collective Agreements and the directive of Arbitrator Adams in his December 7, 2015 award. Articles 72 and 34 specifically deal with the issue of the provision of notices of material change as well as a process designed to minimize the adverse effects of the same. In that respect, Article 72.04 provides as follows:

> *72.04 Negotiations - Procedure - Arbitration*

> *The negotiations referred to in Clause 72.02* ***shall be conducted*** *between the General Manager (or their delegate) and the General Chairperson and shall commence within 20 days of the date of the notice specified in Clause 72.01. If the negotiations do not result in mutual agreement within 30 Calendar days of their commencement,* ***the issue, or issues, remaining in dispute shall****, within 7 days of the cessation of negotiations, be referred to the Vice-President, Industrial Relations, of the Company and the Vice-President of the Union for mediation by a Board of Review composed of two senior Officers from each party.* ***Such referral shall*** *be accompanied by a Joint Statement of Issue or Issues, remaining in dispute together with a copy of the notice served by the Company on the Union under Section 1, Clause 72.01 and a summary of the items agreed upon. (Emphasis added)*
>
> *In the event neither party desires to submit the issue, or issues, remaining in dispute to a Board of Review the dispute shall be referred to the Arbitrator as provided in Clause 72.05.* (Emphasis added)

The Article directs ("shall") that negotiations are to be conducted by the parties and sets out the time-lines and the manner in which such negotiations are intended to proceed. It specifically allows that following negotiations between the General Chairperson and the General Manager:

> *"...the issue, or issues,* ***remaining in dispute*** *shall, within 7 days of the cessation of negotiations, be referred to the Vice-President, Industrial Relations, of the Company and the Vice-President of the Union for mediation by a Board of Review."*

It directs, as well, that the referral to the Board of Review must be:

> *"...accompanied by a Joint Statement of Issue or* ***Issues remaining in dispute*** *together...and a* ***summary of the items agreed upon****."* (Emphasis added)

In the circumstances here, a number of items were "agreed upon" albeit with the Company's caveat that its assent was contingent on a full agreement being reached. While I acknowledge that the Company's position was consistent and clear, that process and strategy of negotiating ESR agreements does not appear to me to be in keeping with the spirit of either the relevant Collective Agreement provisions or the directive of Arbitrator Adams.

As pointed out repeatedly by other Arbitrators, the provisions related to material change recognize that a material change decision is essentially in the hands of the Company, dictated by circumstances beyond its control, which can normally impact railway operations. The purpose of the Material Change provisions in both Collective Agreements is not to re-negotiate the Collective Agreement, but rather to minimize the adverse effects of the,

Company instituted, material change and focuses on providing employees with:

> *"...protective benefits which might not otherwise be available to them, where it can be shown that those employees would be adversely affected"* (Supra: CROA 3539)

The Company correctly points out that Article 34 of the LE Agreement does not contain the same language as Article 72 as set out above. While that is correct, the negotiation process for the LE in this case is nevertheless dictated by the directive of Arbitrator Adams which provides both the specific jurisdiction and the process by which the ESR agreement is to be arrived at. Arbitrator Adams, in paragraph 7, sets out the following process directive:

> *"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 meetings 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"* |

In my view, both the Collective Agreement and the decision of Arbitrator Adams presupposes that the negotiations on an ESR agreement would escalate through the directed process using the General Manager and the General Chairperson and thereafter the Vice-Presidents of the Union and the Company who would take the ***"Issue or Issues remaining in dispute****...and a summary of the items agreed upon"* to the Board of Review for resolution. Where no agreement is reached on the issue or issues remaining in dispute, or in the event neither party desires to submit the issues to the Board of Review, the dispute shall be referred to arbitration.

While I understand the Company's desire to ensure the give and take of negotiation in the long haul on these agreements, the distinctions between an ESR agreement driven by a material change initiated by the Company and the larger collective bargaining agreement are substantial. There is no need for me to delve into the same in that all of the parties before the Board are sophisticated in the collective bargaining process and the levers available to each of them in negotiating the same.

Although taken for good operative reasons, the material change decision is essentially unilaterally made by the Employer. The only discussion that remains is to ensure that the adverse effects of that decision on employees is minimized through negotiations between the parties. It is apparent that, in addressing that goal, the provisions of the Collective Agreement, and the spirit and language of Arbitrator Adams' award, mandates both the initial negotiation and an escalation of negotiation on unresolved issues.

Accordingly, the Company's repeated caveat that it will not be bound by any agreements on any items unless a total agreement can be arrived at, flies in the face of the collective agreement language itself (as well as the Adams decision) which both presupposes that there will be agreement on some issues and makes provision for referring the remaining outstanding issues to the Board of Review or arbitration.

The above determination also makes common sense from an interest arbitration perspective. Even if I was not satisfied (as I am) that the provisions of the collective agreement and the Adams' award direct the process which I have discussed above, I would have found the agreements arrived at on the preliminary issues - prior to the matter being referred to the Board of Review and to arbitration - to be compellingly persuasive in assisting me to arrive at what the parties would have negotiated on their own. In short, acting in my capacity as an interest arbitrator relative to the material change provisions, I would have relied on the "*Agreed upon terms*" which the parties arrived at.

Accordingly, those issues that were resolved leading up to the arbitration are deemed to be resolved. The only outstanding issues left before me to determine are those as set out

in the Union's Ex-Party Statement of Issue and confirmed in the email exchange between the Union and the Company on April 5-7, 2016.

I understand the Company's concern that it should not be "*cornered*" into an agreement by the piecemeal resolution of individual issues without an overall agreement that addresses its concerns. Where such concessions are made in the course of negotiations, with the declared intent to extract a *quid pro quo*, that fact and the nature of the same should be made clear at the arbitration. Interest arbitrators, in reaching their determinations, will generally look at the larger picture and the concessions already acceded to in arriving at a balanced conclusion.

IV

OUTSTANDING ISSUES

Having regard to the above, I will deal with the outstanding issues between the parties, as reflected in their email exchange, at the conclusion of the Board of Review process. For ease of reference the 5 issues remaining in dispute will be enumerated as set out in the Union's Ex Parte Statement of Issue. The language in actual dispute is set out in bold print.

1. ***5.2---- ESR*** *crews who are deadheaded will be compensated 125 miles. For the purpose of this agreement, the terminals at either end of the ESR run are defined in item 1.1 of this agreement.* ***The preferred method of transportation will be passenger service.***

2. ***5.3****--- **NR payment of $80.00 applies to all crews operating in ESR Service between Chapleau and Schreiber if crew is on duty over 10 hours.***

3. ***8.1.1****--- Employees at both home terminals**, at the time of implementation**, who successfully bid ESR service will require initial familiarization. Employees so familiarizing will be paid as if it were a working tour of duty.*

4. ***10.5****--- The parties remain open to discuss the **concepts associated with fatigue management with regard to the operation of ESR's.***

5. ***Appendix A Clause 4.3****---- The opportunities that become available in clause 4.2 above will be bulletined not later than 12 months following implementation at the respective home terminal, provided there is a surplus of employees at Chapleau or Schreiber, as a direct result of this material change.* ***Should these opportunities***

not be taken in a given year, they will be banked and bulletined each year for eligible employees, for a maximum of three (3) years.

V

DECISION

1. ***5.2---- ESR*** *crews who are deadheaded will be compensated 125 miles. For the purpose of this agreement, the terminals at either end of the ESR run are defined in item 1.1 of this agreement.* ***The preferred method of transportation will be passenger service.***

The only point where this clause deviates from that in the consensus arrived at by the parties, is the Union's request to include the phrase "*the preferred method of transportation will be passenger service*."

The Union added the provision out of concern that, unless reference was made to the mode of transportation, the Company could require employees to deadhead on the engine consist which, according to the Union will, on average, take 10 hours per trip. The Union's attempt to ensure that the employees involved will not be required to spend 10 hours deadheading on the engine consist is a legitimate one which directly addresses an aspect of the adverse effects of the 2 hour increase in the time employees are required to work.

Although Arbitrator Adams provides for deadheading on tail-end locomotives (at para. 4) in his award , those references appear to be specific to the locations he enumerates and contain directives on conditions that must be met. In all events, if the deadheading issue was one that required a broader application, provision is made in the Adams award to return it to him for resolution.

Faced with a similar concern Arbitrator Hodges, in a decision dated June 2, 2016, directed that the employees be deadheaded home by "*taxi, except in case of road closure*".

Here, the Union's phraseology that the *"preferred method of transportation will be passenger service*" is both consistent with practices employed elsewhere and, at the same time, provides more liberal opportunities for the Company to arrange transportation via

passenger train or another method other than the engine consist which is the crux of the Union's concern.

In the circumstances, I accept that the phrase: "*the preferred method of transportation will be passenger service*" be included in Article 5.2.

2. ***5.3--- NR payment of $80.00 applies to all crews operating in ESR Service between Chapleau and Schreiber if crew is on duty over 10 hours.***

In Arbitrator Adams award (para. 16.5) he makes it clear that:

> *"An agreement must be reached in order to modify an* ***existing*** *ESR agreement. ... At a minimum, the agreement must include the following incentives:*
> *...*
> *(ii) NR payment (10 hours on duty) "*

In its argument at the initial hearing, and subsequently in the conference call and material which flowed from it, the Company made the point that the provisions of the collective agreements provide for the NR payment to be made as a premium or incentive for those employees who gave notice and were unable to get off work within 10 hours or for those who had not given notice but were required to work beyond their 10 hour shifts - up to 12 hours. It asserts that providing the $80.00 NR payment on an essentially "automatic" basis for employees who now worked 12 hours would fly in the face of the Adams Award which specifically provides for employees to be scheduled for 12 hours.

The Company also argues that employees in an ESR pool voluntarily bid to work 12 hours without discretion to book off by the 5th hour. In addition it points out that the NR payment was not intended to be universal - as witnessed by the fact that it does not apply to Turnaround Combination Service (where employees are required to work up to 12 hours). Finally, it points out that Arbitrator Adams directs (in paragraph 16) that in the extant ESR situation the Employer can require employees to work up to 12 hours and that, accordingly, it is not required to negotiate the 12 hour shift aspect here.

That said, it is clear that Arbitrator Adams - when ordering that the NR payment would apply to all **existing** renegotiated ESR agreement - did not order that the NR payment only

applies to those existing ESR agreements and, *perforce*, does not apply to **new** ESR agreements. Rather, it leaves the issue of an NR payment for employees who bid 12 hour work on new ESR agreements to be negotiated between the parties.

The Union's position, set out both in its original submissions and the material flowing from the conference call, is that the $80.00 payment is incorporated in both the collective agreements (CTY: Article 29.12/29.13 and LE: Article 27.11/27.12), the language of CROA Supplementary Award 4078 and all of the ESRs negotiated to date.

While I am cognizant of the Employer's concerns regarding the seemingly "automatic" nature of an NR payment, it nevertheless stands to reason that if the NR payment for employees who are on duty for 10 hours is a minimum requirement for modifying any existing ESR agreement going forward, that same payment should apply to employees where a new ESR is negotiated as is the case here. The concept of a such a uniform application is appealing and makes logical sense. Although a strict reading of the language does not compel it in the circumstances here, from an interest arbitration perspective the payment is also consistent with that already envisioned in the parties' existing Collective Agreements as reflected in the Supplementary Award (April 14, 2014) of Arbitrator Picher (#4078) where he states:

> *"... that employees who are required to work over 10 hours, having given the requisite notice to book rest at five hours, are entitled to the premium payment of eighty dollars, regardless of the work they may be required to perform beyond the ten hour limit. That direction, in my view, merely enforces the agreed to provisions found in Articles 29,12 and 29.13 of the collective agreement"*

The Union's request for an NR payment of $80.00 operating in the ESR service between Chapleau and Schreiber, if the crew is on duty for more than 10 hours, is awarded here

3. ***8.1.1**--- Employees at both home terminals**, at the time of implementation**, who successfully bid ESR service will require initial familiarization. Employees so familiarizing will be paid as if it were a working tour of duty.*

At the hearing, I was informed that this issue was resolved.

4. ***10.5**--- The parties remain open to discuss the **concepts associated with fatigue management with regard to the operation of ESR's.***

The Union proposes the language as above.

The Company proposes:

> *"The parties remain open to discuss the work/rest experience associated with the operation of this ESR."*

The language, proposed by the Union, replicates that arrived at in negotiation/arbitration in a previous ESR Agreement relative to *Coquitlam/Roberts Bank/Kamloops (Oct 13, 2015)*. There, Arbitrator Hodges directed the following language:

> *The parties remain open to discuss the concepts associated with fatigue management with regard to the operation of this ESR.*

The Employer takes the position that the Union's use of the plural "ESR's" would broaden the purview to other ESR's not at issue here. It suggests the following language:

> *"The parties remain open to discuss the work/rest experience associated with the operation of this ESR."*

In an earlier decision (*Kenora to Thunder Bay/Kamloops to Roberts Bank/Medicine Hat to Brandon*) this issue was discussed. As I stated there:

> *"In my view, the development of a fatigue management plan in the circumstances here, is one that is rightly to be addressed in bargaining. I am concerned that providing the Union with the language it requests, which specifically directs that parties meet and "discuss the operation and the development of a fatigue management plan" will put the issue beyond addressing the specific adverse effects in the ESR's at play. And, might be taken to compel the negotiation of such a plan on the limited basis of the ESR agreements at play here rather than on a broader collective bargaining agreement scale where, it appears, it had been addressed before."*

My perspective in this respect has not changed. While I accept the broad principle that extending an employee's day by 20% may result, in some cases, in additional workplace fatigue, my jurisdiction here is restricted to addressing only the issues placed before me relative to the implementation of this material change and providing resolutions which minimizes *"... the adverse effects of the material change upon employees who are affected thereby*" in this ESR. I remain of the view, as set out in my earlier award, that the broader of issue of a fatigue management plan should be addressed in bargaining (as it was before) to ensure uniformity.

In my earlier award: *Kenora to Thunder Bay (supra)*, I directed that the following language be included:

> "*12.4 - The parties remain open to discuss the concepts associated with work, time off and address held away issues with regard to the operation of ESRs.*"

Keeping in mind the principles of interest arbitration discussed above, and the fact that my jurisdiction is focused on the specific employees adversely affected here, I direct that the following Article be included in the within ESR Agreement:

> *"The parties remain open to discuss the concepts of work/rest and time off experiences associated with the operation of this ESR."*

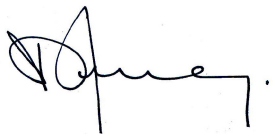
5. ***Appendix A Clause 4.3****---- The opportunities that become available in clause 4.2 above will be bulletined not later than 12 months following implementation at the respective home terminal, provided there is a surplus of employees at Chapleau or Schreiber, as a direct result of this material change.* ***Should these opportunities not be taken in a given year, they will be banked and bulletined each year for eligible employees, for a maximum of three (3) years.***

The Union sought the inclusion of the above highlighted portion to ensure that those employees whose jobs might be affected by the prospective 20% reduction in the workforce required on the respective routes, be secured over a longer period than the initial year. Its concern is that the full effect of the increase to 12 hours on the workforce will not shake out until after a year or more of its implementation.

The Company unhesitatingly stated that the material change being instituted here will not result in any job reductions. As a result: *"... early retirement and separation allowances will not be necessary as the implementation of this ESR will not result in an excess of employees".* It referred to Ad-Hoc decisions 321 and 337 in support of its argument that the inclusion of the Union's proposed amendment in unwarranted here.

Given both the fact that the Company is compelled by this award to make the concession on the $80.00 NR as ordered and in light of the comments contained in the ad hoc awards referred to, I direct that *Appendix A Clause 4.3* be included in the ESR agreement without the Union's proposed highlighted portion included.

Dated at the City of Calgary this 3rd day of August, 2016.



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