

IN THE MATTER OF AN ARBITRATION

(AH 746)

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE

(the “Union”)

AND

CANADIAN PACIFIC RAILWAY

(the “Company”)

Re: Material Change: Calgary/Winnipeg Hump Closures (Adverse Effects)

ARBITRATOR: John M. Moreau QC

Appearing for The Union:

Ken Stuebing	- Counsel, Caley Wray
Dave Fulton	- General Chairman, CTY West
Greg Edwards	- General Chairman, LE West
Harvey Makoski	- Senior Vice-General Chairman, LE West
Greg Lawrenson	- Vice General Chairman, LE East
Doug Edward	- Senior Vice General Chairman, CTY West

Appearing for The Company:

Lauren McGinley	-Assistant Director, Labour Relations
David Pezzaniti	-Assistant Director, Labour Relations

A virtual hearing was held on August 13, 2021.

A. PARTIES TO THE DISPUTE

1. The parties before the Arbitrator are the Canadian Pacific Railway Company (hereinafter referred to as the "Company") and the Teamsters Canada Rail Conference (hereinafter referred to as the "Union").
2. For further clarification, this brief is being presented on behalf of the Union's two Western GCA's who represent the Union's running trades members employed by the Company throughout the region known as Western Canada (Thunder Bay west to British Columbia).
3. The dispute referred to the Arbitrator involves running trades employees governed by the Collective Agreement between the Union and Company as well as the *Canada Labour Code*.

B. JOINT STATEMENT OF ISSUE

4. On July 31, 2012, the Company issued a bulletin relating to the Calgary hump transition. In the bulletin, the Company advised that regular updates will be made available as the Company works through the process. On August 24, 2012, the Company issued a bulletin (Update 2) which notified employees that the Company expected to transition to full time flat switching by mid-September.
5. On August 16, 2012, the Company issued a bulletin advising that they intended to decommission the North hump in Winnipeg, with an expected completion date between September 10-14, 2012.
6. On September 3, 2012, the Company notified the Union that effective with crew change September 9, 2012, the Company will cease hump operations at Winnipeg, Manitoba. The Company stated that it did not anticipate a reduction in

yard crews at this time but the Car Retarder Operator positions would no longer be needed and would be abolished in line with crew change on September 9, 2012.

7. The Union advanced grievances alleging violations of the material change articles, asserting that the Company was required to provide proper notices of material change and initiate negotiations with the General Chairmen to minimize the significant adverse effects on employees resulting from the discontinuance of humping operations at Calgary, AB and Winnipeg, MB. The Union reserved the right to identify the adverse effects on employees during negotiations between the parties.
8. The Company responded to the grievances acknowledging the changes and that the work in question was reassigned to achieve greater efficiencies and does not constitute a material change. Further, the Company did not feel these changes fell under the description of "material change" nor did the Company feel that it was the Company's responsibility to make employees whole for the losses that resulted from these changes.
9. The parties were unable to resolve the issue and agreed to have Arbitrator Stout adjudicate the grievances.
10. On June 2, 2017, Arbitrator Stout heard the case and stated:

[46] I am of the view that the Union has clearly established a *prima facie* case. The evidence submitted in these proceedings demonstrates that the Company's change, discontinuing hump operations and changing to flat switching, had significant adverse effects. In this regard, I find that the change constitutes a material change under the Collective Agreements.

[47] The Union's evidence shows that several employees were materially impacted in a negative way with respect to their employment and work opportunities. The Utility and CRO positions were eliminated as a direct result of the changes initiated by the Company. The Union points out that several specific employees were displaced, transferred and laid off at least partly because of the change. I am satisfied that, in addition to a reduction in work opportunities, some of the layoffs at both Calgary (Alyth) and Winnipeg are also directly related to the cessation of hump operations.

11. Further, Arbitrator Stout concluded

[57] After carefully considering the submissions of the parties, I make the following findings:

- The discontinuance of the hump operations in Calgary (Alyth) and Winnipeg constitute a material change within the meaning of the Collective Agreements.
- The Company violated the Collective Agreements by not issuing notices of material change prior to discontinuing the hump operations in Calgary (Alyth) and Winnipeg.
- The Union's grievances are therefore allowed.

[58] In terms of orders, the Company is directed to issue the appropriate notices of material change. The parties are directed to engage in the material change process under the Collective Agreements.

12. On July 8, 2017, the Company issued Notice of Material Change for the closure of the Calgary and Winnipeg hump operations and advised the Union that the Company sees no measurable adverse effects related to the above-mentioned closures.
13. The Company and Union have had several meetings as well as conference calls to negotiate measures to minimize the significant adverse effects. On March 30, 2020, the Union provided a comprehensive list of assignments affected by the change along with the dates and bulletins indicating the respective abolishments.
14. In accordance with the Collective Agreement Material Change provisions, the parties met on January 8 and 15, 2021 for a Board of Review; however, the Board of Review was unable to resolve the outstanding issues.
15. The outstanding issues are:
 1. Confirmation of Adverse effects
 - Union
 - Arbitrator Stout has already determined employees were adversely affected
 - Res judicata – the Company cannot re-litigate the adverse effects that was determined by Arbitrator Stout. The Company is bound by the Arbitrator's award and findings.
 - Company
 - Confirmation that adverse effects are limited to Car Retarder Operator positions;
 - Obiter dictum – Arbitrator Stout opined on adverse effects;

however, his comments cannot be taken as final determination as this matter is at Arbitration under Article 110.07.

- Without prejudice or precedent to the foregoing, should adverse effects be found by the Arbitrator, that measures to minimize these adverse effects should not apply to adverse effects caused by other changes including by not limited to implementation of RCLS at Alyth/Winnipeg, operating change related to Winnipeg to Thief River Falls, employees making seniority moves that result in bumping or displacements and changes in traffic volumes.

2. Eligibility Requirements

- Union
 - Eligibility is determined by the Material Change Article of the Consolidated Collective Agreement
- Company –
 - Eligibility for benefits to be subject to a 24-month cumulative compensated service (CCS) requirement.

3. Maintenance of Basic Rates and/or lump sum payments

- Union
 - Lump sum payment for affected employees that reflects a 5-year MBR.
- Company
 - Maximum 3-year duration
 - Replication of other standard provisions (rest provisions)

4. Early Separation Allowances

- Union
 - Consistent with 2016 RCLS agreement and previous CRO agreements.
- Company
 - Such benefits, if any, should only be provided if a surplus of employees, directly attributable to these closures, is demonstrated. For the purposes of demonstrating a surplus, the standards established by the parties in the Vancouver RCLS material change agreement from 1996 ought to apply.

5. Relocation Expenses

- Union
 - As per the Consolidated Collective Agreement

- Company
 - No application under the circumstances.
6. Severance Pay
- Union
 - 20 years - \$80k, 12 to 19; \$75K, 8 to 11, \$70K consistent with the 2016 RCLS agreement
 - Company
 - Such benefits, if any, should only be provided if a surplus of employees, directly attributable to these closures, is demonstrated. For the purposes of demonstrating a surplus, the standards established by the parties in the Vancouver RCLS material change agreement from 1996 ought to apply.
7. Lay-off Benefits
- Union
 - Layoff protection as per the Consolidated Collective Agreement that reflects a 5 year duration
 - Company
 - Maximum 3-year duration
 - Replication of other standard provisions
8. Remedy
- Union – as prescribed by Arbitrator Stout:
 - \$2500 to each affected employee regardless of anything that is determined by the material change agreement and/or arbitration to compensate for the Company's continual denial of any adverse effects.
 - \$20000 to each Union Divisions affected
 - Company
 - Objects to all requests for remedy as this was not requested in the grievance procedure.
 - Objects to all requests for remedy as such are not timely, contrary to the sound principles of labour relations and the Company is unfairly prejudiced based on the foregoing.
 - The material change process is the remedy.

Union Position:

16. The Union argues the Company has, to date, not provided a proper notice to the Union with a full description thereof with appropriate details as to the

contemplated effects upon employees concerned. As such, there is no Company description with appropriate details as to the contemplated effects upon employees concerned to be provided to the Board of Review as required by the Collective Agreement and by Arbitrator Stout.

17. On March 30, 2020, the Union provided a comprehensive list of assignments affected by the change along with the dates and bulletins indicating the respective abolishments. The Company is well aware of the adverse effects and chooses to ignore them and their employees. Instead, the Company claims there are no measurable adverse effects regardless of the grievance correspondence and the Arbitrator Stout's award.
18. The Company is barred from relitigating this point by the principle of *res judicata*. The At paras 46-47, Mr. Stout plainly held that the Company's change as outlined by the Union had significant adverse effects on the employees affected by the Company's initiative.
19. Mr. Stout's clear findings are binding on the parties. The purpose of the instant proceeding is to quantify the impacts of the Company's initiative on the affected employees and ensure that sufficient terms are reached to offset those adverse effects.

Company Position:

20. The Company maintains there were no measurable adverse effects related to the above-mentioned closures. At no time, prior to December 2020, did the Union make the Company aware of any objection to the sufficiency of the July 2017 Notice. Accordingly, the Company must submit the Union's objections are not timely. Without prejudice or precedent to the Company's position that the notice is proper, the Company is unfairly prejudiced by this untimely allegation in that that Company did not have the ability to respond formally to the allegation and was unable to review and, if necessary, issue any additional details. The Company maintains this is inconsistent with the sound principles of labour relations. Accordingly, the Company will object to any request by the Union for remedial relief, including damages, based on this alleged breach.

21. In the event the Union's request for remedial relief, including damages, extends beyond their allegations pertaining to Notice, the Company must object as this request is entirely without justification.
22. Regarding measures to minimize adverse effects, the Company maintains that despite numerous discussions between the parties, the Union has failed to identify which employees have, or may have been, adversely effected. Regarding the Award of Arbitrator Stout, specifically paragraphs [46] and [47], the Company submits the Union's reliance mischaracterizes his findings. Arbitrator Stout was acting as a rights arbitrator regarding determining if the change in question constituted a material change under the provisions of the Collective Agreement. While he commented on adverse effects, the Company cannot agree this was properly before him and as such his comments cannot be taken as final determination.

FOR THE UNION:



Greg Edwards
General Chairman LE TCRC

FOR THE COMPANY:



Lauren McGinley
Assistant Director, Labour Relations



Dave Fulton
General Chairman
CTY TCRC

June 10, 2021

AWARD

INTRODUCTION

As noted in the Joint Statement of Issue, there are a number of outstanding issues arising as a result of the transition in 2012 from the hump operations to flat switching in both Calgary and Winnipeg.

Arbitrator Stout found in his decision of June 27, 2017 that the discontinuance of hump operations amounted to a material change in working conditions and ordered the Company to issue a Notice of Material Change pursuant to the collective agreement requirements. Arbitrator Stout went on to find that certain employees were adversely affected by the closure of hump operations and that the parties should engage in the negotiation process mandated under the collective agreement in order to minimize the adverse effects resulting from the material change to the hump operations.

The Company issued the Notice of Material Change on July 8, 2017, in compliance with the direction of Arbitrator Stout. It took the position that there were no measurable adverse effects related to the hump closures and that Arbitrator's Stout's comments were simply his non-binding views on the Company's initiative. The Board of Review that was struck pursuant to the collective agreement as part of the material change process was unfortunately unable to resolve the outstanding issues through mediation and have left them for this arbitrator to decide pursuant to the jurisdiction conferred under s. 63.02 and 110.05 of the collective agreement. This is a challenging task given that the arbitrator is being asked to look back to circumstances that existed almost 10 years ago.

ANALYSIS

Dealing with the issues as set out in the Joint Statement, my findings are as follows:

Confirmation of Adverse Effects:

The Union takes the position that the findings set out in Arbitrator Stout's award of June 27, 2017 decision is subject to the equitable doctrines of *res judicata*, *estoppel* and *stare decisis*, as noted in Brown and Beatty, Canadian Labour Arbitration at 2:3220:

2: 3220- Res judicata and issue estoppel

It is accepted by many arbitrators that the doctrine of *res judicata* and issue estoppel can apply in labour arbitration, as can the doctrine of abuse of process. But because the relationship of the parties to a collective agreement is a continuing one, and because the same clause in the collective agreement may be the subject of interpretation and application on successive occasions, the doctrine has been qualified to some extent. So unless the collective agreement expressly provides that an arbitration decision binds the employer in future cases involving identical circumstances, *the prevailing view is that the doctrine of res judicata does not apply, nor is the arbitrator strictly bound by a prior award as to the construction of the agreement. Rather, it is said that the prior award should be followed as a matter of principle unless the arbitrator has a clear conviction that the earlier interpretation is wrong.*

(emphasis added)

Although I am not strictly bound by the decision of Arbitrator Stout, I agree with the the Union's submission that his findings should be adopted "as matter of principle", following the common law doctrine of *res judicata*. Those findings were based on the extensive evidence and submissions that were presented to him at the hearing on June 2, 2017 and which is substantially the same evidence which has been presented once again before me. I find his comments to be persuasive in my review of the adverse effects of the hump closures in Calgary and Winnipeg based on the principles set out in the

Brown and Beatty text. Arbitrator Stout concluded in the *Decision* portion of his award that “several specific employees” were impacted by the closures. He states at para 47:

The Union’s evidence shows that several employees were materially impacted in a negative way with respect to their employment and work opportunities. The Utility and CRO positions were eliminated as a direct result of the changes initiated by the Company. The Union points out that several specific employees were displaced, transferred and laid off at least partly because of the change. I am satisfied that, in addition to a reduction in work opportunities, some of the layoffs at both Calgary (Alyth) and Winnipeg are also directly related to the hump operations.

The list of those “specific employees” who were “materially impacted in a negative way”, according to Arbitrator Stout, is found at paragraphs 30 and 33 of his award:

[30] The Union provided specific examples of Calgary employees who they insist were adversely affected by the elimination of the hump yard operations in Calgary. Those specific employees are as follows:

- Pete Cigui was a set up Locomotive Engineer prior to the change and later became a Trainman on a switcher.
- Aaron Wood was a set up Locomotive Engineer in the pool prior to the change and later became a Conductor in the pool.
- Stanley McLellan was a set up Locomotive Engineer in the pool prior to the change and later became a trainman on the spareboard.
- Chris Shuttleworth was a Conductor in the pool prior to the change and later became a trainman on the spareboard.
- Sean Hicks was Conductor in the pool prior to the change and later moved to the yard spareboard.
- Paul McKinnon was working a regular yard position prior to the change and later moved to the yard spareboard.
- Ryan Dorr was working a pool position prior to the change and later was laid off as a Conductor.
- Tim Whelan was a junior employee who was laid off.

[33] The Union provided specific examples of Winnipeg employees who they insist were adversely affected by the elimination of hum operations in Winnipeg. Those specific examples are as follows:

- Between April 1, 2021 and April 1, 2013 there were three Locomotive Engineers lost to attrition and three others lost their position.
- Brian Green a car retarder was accommodated as a CRO prior to the change, but retired when he lost his CRO position.
- Charlie Brow and John Ladd, also retired after losing their CRO positions.
- Mat Morrissey and Dave Gregory lost their CRO positions and went to yard positions.
- Sean Keir and Wes Geiler went from Conductor positions in the pool prior to the change to a Trainmen on the spareboard.
- Jacob Laye and Maurice Showers went from working regular yard positions prior to the change to being laid off.

It is significant in my view that in addition to the above name individuals, Arbitrator Stout had before him the same statistical information, including numerous flow-charts, which was also provided to this arbitrator with respect to the Union's submission regarding what the Union terms as the "cascading adverse effects" on the Winnipeg and Calgary employees.

In keeping with the principle of acceptance of the findings of the previous arbitrator on the same facts, I am in agreement with the Company's position that Arbitrator Stout considered the submissions of the Union on the impact of the hump closures and limited his findings to the specifically named employees set out in the Union's brief as being directly affected by the hump closures. As the Company points out in its reply submission, the use of the word "several specific employees" (para 47) runs counter to the Union's submission of the "vast impact" and "cascading effect" on the numerous positions that were directly affected by the hump closures.

In the end, I agree with the Company that the Union's submission of the extensive adverse effect on the ranks of employees far exceeds the findings of Arbitrator Stout. Had Arbitrator Stout found there to be other positions that were adversely affected by the hump closures, he would have so indicated in his findings.

I find no principled basis to disturb the findings of Arbitrator Stout in regards to those named individuals who were directly related to the closure of the hump operations. There shall be no further benefits available to employees as a result of the hump closures other than those named above in paragraphs 30 and 33 of the Stout award.

Eligibility Requirements:

The Company submits that, dating back decades, the parties have agreed that employees with less than 2 years of cumulative compensated service ("CCS") would not be entitled to benefits. For the purposes of replication, which the Company submits is a core principle which should be adhered to in these proceedings, the Company argues that I should rely upon the 2007 material change provisions and the relevant historic material change agreements. In that regard, the Company submits, by way of example of the numerous agreements reached between the parties, the following: Expedited Service Runs ("ESR") Memorandum of Agreements March 7, 2013 (ESR Kenora to Thunder Bay) and September 10, 2013 (ESR Toronto, London, Buffalo). The Company also notes that the 2016 Remote Control Locomotive Systems ("RCLS") Agreement, which the Union proposes for consideration, required at least two years of CCS for benefits eligibility. Further, on the matter of the accepted 2 years CCS minimum, the Company cites Arbitrator Picher in **Ad Hoc 353 E:**

The next point in dispute concerns whether, as the Company proposes, the agreement should be restricted to employees with two or more years of cumulative compensated service, a proposition contested by the Council. It does not appear disputed that that restriction is common in job security and employment security agreements within the railway industry, and has been for decades. It has, further, been incorporated into arbitration awards, including the 1989 and 1990 belt-pack awards issued in relation to hump yard operations. In the arbitrator's view, the position of the Company in respect of this issue is reasonable, and should be awarded.

The Union, for its part, noted in its brief at paragraph 124 that the parties have not expressly provided for the two years CSS in general applicable terms:

As it was clear to Mr. Stout, there is no general two-year eligibility threshold in the Collective Agreement-such eligibility threshold must only be applied where the parties have expressly deemed it appropriate (e.g. relocation expenses and early separation).

Although there is a lengthy history of the application of the two-year CCS requirement, Arbitrator Stout in his Award elected to follow the principle of *expressio unius exclusio alterius* set out in *Cambrian College of Applied Arts and Technology v. Ontario Public Service Employees Union* [unreported, Bental, May 2005] an authority provided by the Union, at p. 8:

On the basis of the principle of interpretation *expressio unius exclusio alterius*, we have every reason to doubt the parties ever intended bereavement leave to replace vacation leave in the circumstances revealed in this case. Why, one must ask, did they spell out that vacation leave is to be rescheduled in the event of hospitalization, yet remain silent on the consequences of a death in the family during vacation leave? The only satisfactory answer to this question is that they did not intend that bereaved employees should have the right to reschedule vacation leave.

Arbitrator Stout made a similar finding beginning at paragraph 48:

[48] I disagree with the Company's assertion that the material change provisions do not apply to situations involving employees with less than two years CCS. There is no doubt that some of the benefits, such as relocation expenses in 34.11-LE and 72.14-CTY, will not be granted to employees with less than two years CCS. However, the parties have not

used such qualifying language to trigger the general application of the material change provisions to articles 72.01 CTY and 34.01 LE

[49] Quite frankly, it only makes sense that certain employees would be limited in the benefits that they might receive due to the adverse effects of a material change. Just as job security accumulates with seniority, so too would benefits that apply to those adversely affected senior employees.

Adhering to the principle of *res judicata* as it is applicable in these types of proceedings, I accept the reasoning of Arbitrator Stout with respect to employees with less than two years of service. As noted in the Brown and Beatty excerpt above, I have no clear conviction that his interpretation of the collective agreement is manifestly wrong. Accordingly, I find that the eligibility for benefits, unless specified otherwise in the current collective agreement, is not subject to a 24-month CCS as proposed by the Company.

Maintenance of Basic Rates

For the reasons set out above, and in the absence of specific language indicating otherwise for MBR in the collective agreement, eligibility for MBR shall not be subject to a 24-month CCS as proposed by the Company.

The Company proposes that the MBR should only extend for a maximum 3-year duration and cites in support for replication purposes the March 7, 2013, Kenora to Thunder Bay Memorandum of Agreement. The Company also seeks replication of the provisions found in that Memorandum of Agreement, including the standard provision which deals in particular with rest periods. In addition, the Company notes a similar agreement was reached containing a 3-year provision in the May 2, 2019 ESR Coquitlam, Roberts Banks and Kamloops Memorandum of Agreement. The Union proposes a 5-year wage protection period for maintenance of earnings.

Bearing in mind the duplication principle found in the interest arbitration process, I am persuaded that the terms of the 2003 Memorandum of Agreement with respect to the elimination of the 4 CRO positions in the South Hump of the yard in Winnipeg is the most appropriate and the closest comparator for purposes of fixing the MBR. In that case the parties were able to negotiate a lump sum of \$9000.00 per employee.

Although this \$9000.00 figure is dated given that the closure took place some 18 years ago, it fits within what I find is a close and reasonable comparator for those employees who were adversely affected in the same way as the closure of the north hump in Winnipeg and the Alyth yard in Calgary. It also fits within the calculations provided by the Union for a 5-year MBR when comparing, for example, the difference between an RCLS foreman (YSE) to a Yard Foreman over the course of 5 years from 2012 to 2017. I also accept the Union's rationale that the rest provisions and the other standard conditions found in the March 7, 2013 Kenora and other agreements should not be retroactively applied given the passage of time.

Accordingly, employees from the list set out in Arbitrator's Stout's June 27, 2017 award who would have qualified for MBR shall receive \$9,000.00 each.

Early Separation Allowances

The Union submits that given the material change and the proven adverse effects due to the hump closures, the number of early retirement opportunities should be the agreed upon formula for the positions lost as determined by Arbitrator Stout. The Union suggests that the proper formula to use for these purposes is found in prior comparable

negotiated material change agreements, including the 2016 RCLS agreement and CRO agreements.

The Company maintains that the Union has not met its burden to establish that a reduction of work associated with the humps created a surplus of eligible employees. The Company submits that the Union has offered no fact-based proof of a surplus of employees directly attributable to the material change of the hump closures. The Company points to the fact that numerous changes such as the introduction of longer trains and the use of other yards to switch trains (Calgary), for example, contributed to manpower reductions during the closure period.

With respect, I disagree with the Company. In my view, that matter was dealt with by Arbitrator Stout when he determined the specific employees who were adversely affected by the hump closures as a result of the abolishment of their positions.

I agree with the Union that the only remaining question is whether the agreed upon formula set out in the current collective agreement should be adopted here. The Union notes that the parties negotiated 4 separation allowance and severance payment opportunities as early as the 2003 Winnipeg CRO Agreement. The more recent 2016 RCLS agreement dealt with the elimination of assigned yard positions. The parties negotiated the following formula in the 2016 RCLS agreement:

8.1 The early separation plan as outlined herein will be made available to employees who have more than 2 years CCS at the time of implementation and have worked continuously at the affected terminal or outpost terminal for at least one year as a bargaining unit employee immediately prior to the date of acceptance of early separation. This one year requirement may be waived by the General Chairs.

8.2 The number of attrition opportunities available, consisting of early separation allowances and severances, will be equal to the number of assignments reduced multiplied by 1.25. Fifty percent of the opportunities that become available will be

bulletined not later than January 31 of the year following implementation. These will be awarded to Locomotive Engineers only. Should these opportunities not be taken in a given year, they will be banked and re-bulletined each year for Locomotive Engineers only, until exhausted.

As noted by the Union, this benefit formula has been adopted and applied more broadly to include the current CTY agreement. In 2016, the same formula set out in 8.2 above was adopted by Arbitrator Schmidt in **AH 641**, a decision issued on September 21, 2016. As noted, it is now incorporated in the material change provisions of the collective agreement.

The Company's hump closures in 2017 (similar to the RCLS closures in Winnipeg a year earlier in 2016) resulted in the elimination of assigned yard positions at both the Calgary and Winnipeg locations. It is my view, subject to the requirement specified in the collective agreement of 2 years of CCS, that the same formula set out in the 2016 RCLS Agreement and referred to in **AH 641** should be applied here.

Accordingly, the number of the early retirement benefits to be made available to those eligible employees from the list set out in the June 27, 2017 Stout award will be calculated using the same formula set out in the current collective agreement of 50% of the number of assignments multiplied by 1.25.

Relocation Expenses

Arbitrator Stout notes at paragraph 48 of his award that the two-year CCS rule applies to affected employees seeking relocation expenses:

There is no doubt that some of the benefits, such as relocation expenses in 34.11-LE and 72.14 CTY, will not be granted to employees with less than two years CCS.

The Company maintains that no lay-offs occurred of employees with the minimum of 2 years of CCS at either the Calgary or Winnipeg locations. Accordingly, the Company maintains that no relocation benefits are owing under the circumstances.

The Union properly submits in my view that any employee who meets the 2-year CCS requirement, and are found to have relocated following the closure of the two hump sites, should be entitled to claim relocation expenses. Their relocation must be a direct result and contemporaneous with the closure of the two humps sites in order to qualify for retroactive relocation expense reimbursement.

Severance Pay

The Company maintains that, in addition to the eligibility requirement of 2 years CCS, any severance can only be considered if a surplus of employees, directly attributable to the closures is demonstrated. The Company notes that none of the employees who were laid off for any period of time had greater than 2 years CCS nor has a surplus of employees directly attributable to these closures been demonstrated.

The Union maintains in its brief that the Company's position is "both impractical and contrary to the spirit of this exercise undertaken to minimize adverse effects to require a surplus out of [the] gate".

The Union submits and I agree that the measures to minimize the adverse effects are analogous to the 2016 RCLS agreement. In that regard, it is also appropriate in my view to follow the formula of Arbitrator Schmidt in her September 16, 2016 **AH 641** at p. 23:

In light of the above, I accept the Union's proposal that the number of the early retirement benefits it urges be made available is appropriate and consistent with the actual assignments reduced with a relief factor of 1.25 as per the replication of the RCLS agreements. These benefits will accelerate the retirement of senior employees and thereby favour the retention of junior employees. As for severance opportunities, I think it appropriate to make such opportunities available to employees in any given location if after any pay out of early retirement benefits there is a surplus of employees. The standard for a surplus to be established is where an employee(s) is required to be laid off for nine out of 12 months. It may be that no surplus will arise, but if one does emerge, payments are to be made available as found in the RCLS agreements. (emphasis added)

I note that the 2016 RCLS agreement also adopts the following language for the establishment of a surplus:

9.15 The standard for a surplus to be established is where an employee(s) is laid off for nine (9) out of 12 months.

Given the interest arbitration nature of these proceedings, I also find that the appropriate severance formula to be the one set out in the 2016 RCLS agreement:

- a) 20 years or more cumulative compensated service: \$80,000
- b) 12 to 19 years, inclusive, cumulative compensated service: \$75,000
- c) 8 to 11 years, inclusive, cumulative compensated service: \$70,000

Accordingly, any employee from the list of employees named in the Stout award of June 27, 2017 shall be entitled to severance pay should they meet the qualification and eligibility requirements provided herein.

Lay-off Benefits

The Company maintains that, in addition to the eligibility requirement of 2 years CSS, any layoff benefit should continue for a maximum of 3 years, as set out in the March 7, 2013 ESR Kenora to Thunder Bay Memorandum of Agreement.

The Union submits that the 3-year duration is arbitrary, particularly in light of the scale of material change involving the two hump closures. Further the Union submits that the current layoff benefit language in the collective agreement does not contain an express term that two years of CCS is required. The Union points out in that regard the supporting comments of Arbitrator Stout in his award (paragraph 48) where he notes that the parties have not used such qualifying language in the layoff protection clause in the current collective agreement.

In keeping with the reasoning of Arbitrator Stout, and in the absence of any provision in the Layoff Protection article stating something different, I find that the two-year CCS limitation should not be applied to those named employees in the above list who would otherwise be eligible for layoff protection.

Nor do I find a basis to limit the lay off benefit to 3 years, as proposed by the Company. The 2016 RCLS agreement, from my reading, also does not limit the duration of the layoff benefit. I also note the comments of Arbitrator Schmidt at p. 17 where she states:

In the circumstances, the Union's proposal, which replicates the RCLS Agreements, is to be preferred over the Company's. Further, I see no rationale for disqualifying employees who do not own positions from access to layoff protection. Finally, since the entitlement to protection resides with the employee affected by the implementation of the material change, there is no rational basis to limit the duration of the entitlement. (emphasis added)

Accordingly, eligible employees named in the list set out by Arbitrator Stout shall be entitled to layoff protection without the 3-year limited duration proposed by the Company and shall not be subject to a minimum requirement of two years CCS.

Remedy

I do have some sympathy for the Union and the fact that some of the named adversely affected employees should have had the benefit of a timely material change agreement.

However, in the interests of labour relations and respecting the elaborate provisions set out in the collective agreement involving the material change process, I am not disposed to award the damages requested by the Union. That would in my view not be adhering to the principle and spirit of replication which the parties have asked me to undertake in this matter.

CONCLUSION

This matter is remitted back to the parties in order that they can draft the appropriate language based on the above findings. As requested, I will remain seized of any issues that may arise between the parties from this matter.



JOHN M. MOREAU, Q.C.

October 12, 2021