

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY COMPANY
(the “Company”)

and

TEAMSTERS CANADA RAIL CONFERENCE
(the “Union”)

**GRIEVANCES CONCERNING THE DISCONTINUANCE OF HUMP
OPERATIONS IN CALGARY, AB AND WINNIPEG, MB**

SOLE ARBITRATOR: John Stout

APPEARANCES:

For the Company:

Chris Clark – Assistant Director Labour Relations
David Pezzaniti – Labour Relations Officer

For the Union:

Ken Stuebing - Caley Wray
Dave Fulton - General Chair, TCRC-CTY West
Trent Haug – Local Chair Yard Calgary
Harvey Makoski – Sr. Vice General Chair LE-West
Matthew Yancuvk – Local Chair Yardman Winnipeg
Greg Edwards - General Chair TCRC –LE West
Doug Edward - Senior Vice General Chair, TCRC-CTY West
Ryan Finnson – Vice General Chairman Wynyard, SK
John Kiengersky – Vice General Chairman CTY Revelstoke, BC
Bill Pitts – Vice General Chairman CTY Moosejaw, SK
Brett Weisgerber – Vice General Chairman CTY Medicine Hat, AB
Wayne McCotter – General Secretary Treasurer CTY
Greg Lawrenson – Vice General Chairman LE Calgary, AB

HEARING HELD IN CALGARY, ALBERTA ON JUNE 2, 2017

AWARD

I. INTRODUCTION

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

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

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

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

[5] The two grievances arise from the Company’s decision in the late summer and early fall of 2012 to change from a “hump operation” to flat switching in Calgary, AB and Winnipeg, MB. The issues raised in the grievances are similar. The Company and the Union each filed one brief addressing both grievances.

II. THE CURRENT DISPUTE

[6] The parties were unable to agree upon a Joint Statement of Issue.

[7] The Union filed two separate Ex Parte Statements of Issue (one for each grievance). The Company did not file an Ex Part Statement of Issue. For the sake of brevity, rather than reproducing the Ex Parte Statements, I have summarized the nature of the dispute and set out the parties' respective positions:

- In the late summer and early fall of 2012 the Company notified the Union, through several bulletins cancelling yard jobs, that all humping operations in Calgary, AB and Winnipeg, MB would cease. The Company transitioned the hump operations in Calgary, AB and Winnipeg, MB to flat switching.
- The Union filed two grievances alleging a violation of article 34 (LE) and 72 (CTY). The Union asserts that the Company was required to provide notices of material change to the Union and initiate negotiations with the General Chairmen to minimize the possible significant adverse effects resulting from the discontinuance of humping operations in Calgary, AB and Winnipeg, MB.
- The Union seeks an order that the Company comply with their obligations with respect to material changes under articles 34 (LE) and 72 (CTY). The Union requests that all adversely affected employees be made whole for all losses associated with the Company's violation of the Collective Agreements.
- The Company disagrees and denies the Union's allegations. The Company does not dispute the fact that they made a change with respect to how they conducted business (moving from a hump operation to flat switching). However, the Company takes the position that the change was not a material change and employees did not suffer any significant adverse effects.
- The Company acknowledges that some employees were laid off. However, the Company takes the position that the conversion of the hump yards was not the sole source of the layoffs. Furthermore, the Company takes the position that those employees that were laid off had less than two years cumulative compensated service (CCS), which they submit cannot trigger a material change.

III. BACKGROUND FACTS

i. Hump Yards

[8] A hump classification yard is a part of a terminal where rail cars are sorted, stored and assembled into trains. The “hump” refers to the small hill over which strings of rail cars are pushed and then uncoupled at the crest and continue rolling by gravity towards their destination track in the class yard (the classification bowl). The cars are directed into the desired class yard tracks using remote-controlled switches. The speed of the cars rolling down the hump into the class yard is regulated using mechanical retarders.

[9] A hump yard operation requires the following assignments or crews:

- Hump assignments are the crews to release the cars at the crest of the hump
- Pusher assignments are the crews that assist the hump crews in positioning the cars at the crest of the hump.
- The Utility assignment is the employee that facilitates the hump operations by securing tracks, releasing hand brakes and assisting doubling cars over.
- Pull down assignments are the crews that gather cars at the far end of the hump yard.

[10] Flat switching takes place on flat ground or on a gentle slope. The flat switching may take place in a yard or enroute.

[11] Flat switching involves a locomotive pushing car(s) to their designated tracks. The switching is performed by the crew on the locomotive pushing the cars.

ii. The Calgary (Alyth) and Winnipeg Hump Yards

[12] The Company has operated a hump classification yard in the Calgary Terminal (Alyth) since at least the mid 1960s until they converted to flat switching in 2012.

[13] The Calgary (Alyth) hump yard required the following assignments or crews:

- 2 hump crews on the west end
- 1 hump crew on the east end
- 1 utility person in the class yard
- 2 pull down crews at the east end

[14] The Company also had hump operations in Winnipeg, MB since at least the 1960s. The hump operations in the Winnipeg Terminal took place at what was known as the “South Hump” and the “North Hump”. The North Hump classified trains arriving from the east and south. While the South hump classified trains arriving from the west and north. All traffic originating in Vancouver, BC and bound for Toronto, ON and Montreal, QC and all traffic moving in the reverse direction was funneled through Winnipeg. The Winnipeg hump operations were also the hub of eight subdivisions. Westbound freight trains were often completely disassembled and re-marshalled at Winnipeg, with a view to blocking groups of cars so they could be set off at various destinations across the system.

[15] Another distinguishing factor associated with Winnipeg hump operations was the use of Car Retarder Operator (CRO) positions. A CRO was responsible for operating car retarders to control the speed of the cars down the back side of the hump and an electronic switching control panel to direct cars switched at a hump location. While hump operations were largely automated, CROs were also on hand for situations when the automated system required manual intervention (cars that would not roll freely due to various reasons including sticking brakes).

[16] From approximately 2009-2012 CROs were only being utilized in the North Hump. The use of CROs and all associated bulletined positions at the South Hump were abolished by the Company.

[17] The abolishment of CROs at both Calgary (Alyth) and Winnipeg (South hump) had been the subject of material change notices.

[18] In September 1997, the Company served the Union with a notice of material change at the Calgary (Alyth) hump yard regarding the abolishment of the CRO positions. The parties negotiated a February 12, 1998 Material Change Agreement to address the adverse effects of the abolishment of four positions.

[19] In January 2003, the Company issued a material change notice regarding the abolishment of the CRO positions at Winnipeg (South hump). The parties negotiated a May 5, 2003 Material Change Agreement to address the adverse effects of the abolishment of four positions. The negotiated benefits included early separation allowances and severance payments.

iii. 2012 Hump Operations end in Calgary and Winnipeg

[20] A sea change occurred in mid 2012, with the appointment of Hunter Harrison as President and CEO. Mr. Harrison sought to find efficiencies, which included the closing of hump yards and utilizing flat switching instead.¹

[21] In June 2012, the Company issued bulletin CMC 046-12, with respect to the Calgary (Alyth) yard, which noted the cancellation of seven yard assignments and the creation five new assignments. These changes were to take effect on June 17, 2012. At this point in time there were 68 CTY yard jobs, 24 Locomotive Engineer jobs, 4 Utility jobs and 6 road assignments. At this time, no employees were laid off.

[22] The Company subsequently issued bulletins that altered the way the work was being performed in Calgary (Alyth) yard.²

[23] On July 31, 2012, the Company issued bulletin C-174-12 relating to the Calgary (Alyth) hump transition. In this bulletin, the Company advised that Calgary (Alyth) had changed from a hump operation to flat switching. The relevant portions of the bulletin state:

¹ See Q2 2012 Earnings call on July 25, 2012 and Shareholder-Analyst call on December 4, 2012.

² See Bulletins CMC 047-12, CMC 053-12, CMC 056-12, CMC 057-12.

There has been a lot of discussion regarding changes to how Alyth currently processes traffic, specifically transition of the hump to a flat switching operation.

It is a fact that a flat switching operation will turn cars faster, improving asset utilization and increasing effective service to our customers.

The reason for Alyth changing from a Hump Operation to Flat Switching is that Alyth's current infrastructure does not allow us to process enough cars over the hump to reach our operational requirements to service customers locally and down the line efficiently.

The Hump contributes to increasing dwell - a car that is not moving / not being loaded is not being used efficiently; and therefore, is not constructively contributing to our Company Operating Ratio.

There is a plan created to utilize the yard in 4 zones, these zones will be used for:

1. Block Swapping
2. Flat Switching
3. Staging Cars till the next departure, or customer spot.

We have been working with Service Design to have the base plan changed to ensure success. Regular updates will be made available as we work through this process.

[24] The Company issued bulletins abolishing and creating jobs to change their operations from hump operations to flat switching. Because of these changes, the Utility positions in Calgary (Alyth) were eliminated.

[25] On August 16, 2012, the Company issued a bulletin advising that they intended to decommission hump yards in Winnipeg, with an expected completion date by September 14, 2012.

[26] On September 3, 2012, the Company's Director, Labour Relations issued a notice to the Union's general Chairmen indicating as follows:

This letter is to advise that effective with crew change September 9, 2012, the Company will cease hump operations at Winnipeg, Manitoba.

Although we do not anticipate a reduction in yard crews at this time, it is important to note that the Car Retarder Operator positions will no longer be required. These positions will be abolished in line with crew change (WPP) September 9, 2012.

[27] The evidence discloses that at the time of conversion, there were no employees laid off at either Calgary or Winnipeg.

[28] According to the Company, by January 2013 there were 47 Winnipeg employees on layoff and 32 Calgary employees on layoff. The Company suggested that not one of the employees laid off had over two years CCS.

[29] The Union's evidence suggests that on January 13, 2013, 56 Calgary employees were on layoff. The Union's evidence was that 6 Locomotive Engineers positions, 36 Yard Foreman/Heper positions and 4 Utility positions were eliminated as a direct result of the cessation of hump operations in Calgary.

[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 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.

[31] The Winnipeg South Hump positions were abolished in April and May 2009. The Union pointed to Company bulletins that abolished jobs at the South Hump and re-established positions at the North Hump.

[32] The Union's evidence is that while no one was laid off in April 2012, by April 2013 there were 39 employees laid off in Winnipeg.

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

- Between April 1, 2012 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.
- Matt 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.

iv. The grievance process

[34] The Union (both LE and CTY) filed their grievance with respect to the cessation of the Calgary (Alyth) hump operations at step 2 on November 9, 2012.

[35] The Company responded to the grievance on January 6, 2013. The relevant portions of the response are as follows:

Over the past 6 months, Alyth yard has gone through tremendous change. This change has been rapid and would not have been possible without the involvement from the TCRC and its members.

Over the years, the Alyth hump yard has been used to process traffic and make blocks for other yards to avoid switching at these locations. Essentially, the biggest change made was to keep traffic moving to destination without stopping and by having other yards and terminals handle their own traffic. For example, why have an east-destined car originating in Vancouver stop for processing in Calgary just to continue east again. As pointed out in your grievance, other yards are handling traffic, but only traffic destined to them for processing.

...

...

The change was primarily design-based to move customer shipments quicker through the network. The Company does not feel these changes fall under the description of "material change" nor feel it is the Company's responsibility to make employees whole for all losses that have resulted from this change.

[36] The Union (both LE and CTY) filed their grievance with respect to the cessation of the Winnipeg Hump operations on November 8, 2012.

[37] The Company responded to the grievance on February 6, 2014. The language found in the Company's grievance response is virtually identical to the response to the grievance respecting Calgary (Alyth), save and except for reference to Winnipeg instead of Alyth.

IV. DECISION

[38] The Collective Agreements have similar language that applies to material changes in working conditions. The relevant articles of the Collective Agreements are as follows:

LOCOMOTIVE ENGINEERS (LE-West)

ARTICLE 34 – MATERIAL CHANGES IN WORKING CONDITIONS

34.01 Prior to the introduction of run-throughs or relocations of main home terminals, or of material changes in working conditions which are to be initiated solely by the Company and would have significantly adverse effects on Engineers, the Company will:

(1) Give to the General Chairman as much advance notice as possible of any such proposed change with a full description thereof along with appropriate details as to the consequent changes in working conditions, but in any event not less than:

(a) three months in respect of any material change in working conditions other than those specified in subsection (b) hereof;

(b) six months in respect of introduction of run throughs, through a home terminal or relocation of a main terminal;

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

CONDUCTORS TRAINMEN AND YARDMEN (CTY-West)

ARTICLE 72 – MATERIAL CHANGE IN WORKING CONDITIONS

72.01 Notice of Material Change

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

72.02 Measures to Minimize Adverse Effects

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

[39] The material change provisions are unique to the railroad industry. The provisions have their genesis in the mid 1960's *Report of the Industrial Inquiry on Canadian National Railways "Run-Throughs"* (the Freedman Report).

[40] The material change provisions found in these Collective Agreements provides a process for notification and negotiations relating to Company initiated changes in working conditions.

[41] I have recently had occasion to address these provisions in a matter between these parties. In *Canadian Pacific Railway and Teamsters Canada Rail Conference (Termination of GO Commuter Rail Service)* 2017 31781 (ON LA), I summarized the principles applicable to the material changes provisions as follows:

The principles that apply with respect to the material change provisions of the Collective Agreements are well established. In **CROA 1167** Arbitrator David Kates indicated that in order for the notice requirements contemplated under the material

change provisions to be triggered, the onus rests on the Union to establish two factors:

- The Union must demonstrate that the alleged changes in working conditions were initiated by the Company and such changes are “material” changes; and
- The Union must also establish that the proposed changes, if implemented, would not only have an adverse effect on the affected employees, but such changes must bear “significantly” adverse effect on the affected employees.

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

As the party pursuing a claim under the terms of article 78.2 of the collective agreement the Council bears the onus of proof. To bring itself within the terms of the article the Council must establish that there has been a material change, that it was initiated solely by the Company and that it "... would have significantly adverse effects on employees". This Office has had prior occasion to consider the meaning of significantly adverse effects. In CROA 1167 the following comments appear:

In considering the second factor referred to above I am also satisfied that it would not suffice for the Trade Union to show that the engineers involved were merely adversely affected by proposed changes. The Trade Union must demonstrate "significantly" adverse effects. That is to say, it must be established that such proposed changes in working conditions will have the adverse effect of rendering the engineer redundant or superfluous to the Company's manpower exigencies or otherwise undermine his job security. ...

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

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

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

[43] The issue to be decided in this matter is whether the events giving rise to these grievances, the discontinuance of hump operations in Calgary (Alyth) and Winnipeg, can be characterized as material changes under the Collective Agreements.

[44] As noted above, the material change provisions are triggered by decisions initiated by the Company, of its own volition. There is no dispute that the Company initiated the change in this situation. The Company clearly intended to discontinue the hump operations in both Calgary (Alyth) and Winnipeg. The Company wanted to find efficiencies and it was their view that flat switching would be more efficient. There is no dispute that it is well within the Company’s right to make such a decision and find such efficiencies.

[45] There is a dispute between the parties with respect to whether the Union has met the onus of demonstrating significant adverse effects. Arbitrator Picher provides insight into the determination of this issue in **CROA 3539**, where he stated as follows:

The question of whether a given case satisfies the requirement of significant adverse effects is one to be determined on a case by case basis, having regard to the specific facts. For example, in **CROA 2225**, where the evidence before the arbitrator gave no indication of any layoffs, transfers, displacements or of any employee being required to exercise seniority as a result of any reduction in work, the grievance was dismissed for lack of evidence of any adverse impact.

In other cases, on the other hand, it may be difficult to know at the time of the notice whether or to what extent there may be significant adverse impacts. In those circumstances, as occurred in **CROA 2139**, where the Union has established a *prima facie* case of material change which would in all likelihood cause some dislocation of employees, the matter of material change may be examined as a separate head, in light of more detailed evidence which might only be available after the fallout of the implementation of the change.

[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.

[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 pursuant 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.

[50] I also note that the material change provisions are not limited to only addressing layoffs. The language is broader and encompasses other negative impacts with respect to employment and general work opportunities, see for example **CROA 2139**. The evidence in this proceeding clearly demonstrates a

negative impact with respect to employment and general work opportunities for employees, including employees with more than two years CCS.

[51] I am satisfied that the Union has established that the discontinuance of hump operations in Calgary (Alyth) and Winnipeg were a material change and the Company ought to have issued a material change notice.

[52] In terms of remedy, the Union submits that providing notice is a precondition to the Company initiating any material change. Therefore, the Union argues that I ought to order the Company to return to the *status quo ante* (i.e. return the hump operations to Alyth and Winnipeg). The Company disagrees and takes the position that a failure to provide notice does not nullify the change.

[53] I acknowledge that the language in both Collective Agreements indicates that notice is required prior to instituting a material change. However, the parties have not indicated in either Collective Agreement that failure to provide notice results in a nullity.

[54] In **SHP 229** Arbitrator Weatherill made the following comments with respect to remedy for failure to provide notice, which are instructive:

Notwithstanding the requirement in Article 8 that notice be given under that article in cases of technological, operational or organizational change of a permanent nature which will have adverse effects on employees, the cases have dealt with situations where such changes have been effected without the proper notice being given as cases calling for a remedy, but not as cases where the remedy is based on the notion that the change was a nullity and never took place. Rather, the usual principles relating to damages for violation of an agreement have been applied. These cases, it may be noted, antedate the negotiation of the present agreement by some time.

[55] I am of the opinion that where the parties do not directly address the issue of remedy, then the arbitrator has wide discretion to provide an appropriate remedy, which may include ordering the Company to return to the former state of affairs or providing damages.

[56] In this case, I cannot see any labour relations reason to order the Company to return the hump operations in Calgary (Alyth) and Winnipeg. Rather, it is my

view that this is an appropriate situation to remit the issue of remedy to the parties to discuss when they address the terms and conditions of the material change agreement contemplated under the Collective Agreements. I shall remain seized to address any remedial issue(s) if the parties are unable to reach an agreement or the issue(s) are not addressed through the material change process.

V. CONCLUSION

[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.

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

Dated at Toronto, Ontario this 27th day of June 2017.

A handwritten signature in dark ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

John Stout - Arbitrator