**AH892**

**IN THE MATTER OF AN ARBITRATION**

BETWEEN:

**TEAMSTERS CANADA RAILCONFERENCE**

(the "Union")

- and -

**CANADIAN PACIFIC KANSAS CITY RAILWAY COMPANY**

(the "Company")

***Re: Belleville Run Through Material Change***
***(Locating Belleville Pool at Toronto)***

**Arbitrator:** Cheryl Yingst Bartel

**Date of Hearing**: September 3, 2024

**Date of Award**: October 2, 2024

**Appearances:**

**For the Union**:
Ken Steubing, Counsel
Wayne Apsey, General Chairman, CTY (East)
Ed Mogus, General Chairman, LE (East)
Brent Baxter, Vice General Chairman, CTY (East)
Sean Orr, Vice General Chairman, LE (East)
Maxwell Morin, Local Chairman, CTY (East)
Sean Lackey, Local Chairman, LE (East)

**For the Company**:
John, Bairaktaris, Director of Labour Relations,
Dave Guerin, Managing Director, Labour Relations
Alex Harrison, Manager, Labour Relations
Lauren McGinley, Director, Labour Relations

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## JOINT STATEMENT OF ISSUE

**Dispute**:

The issue in dispute is the Company's notice of material change dated April 19, 2024 indicating the intent to implement an operational change in working conditions under the auspices of the Material Change provisions (Articles 63 and 110) of the Collective Agreement in respect to the Smiths Falls to Toronto crew run, specifically a material change where crews will operate from a single home terminal of Toronto.

**Joint Statement of Issue:**

The Union opposes the Company's use of the Material Change provisions to place the Belleville Run Through crews in a conventional single pool location after over 50 years of operation in a double-headed, two terminal pool agreement.

The parties are in dispute whether the Company can use the Material Change provisions of the Collective Agreement in manner that would conflict with certain aspects of an existing, over-50-year-old material change agreement (agreed upon terms as well as those awarded by Arbitrator Weatherill).

Union Position:

For all the reasons and submissions set forth in the Union's grievance, which are herein adopted with all aspects being relied upon throughout this process (every position will not be reproduced here but, the Union relies on all of its' positions, and arguments put forth in the grievance), the Union contends that the Company is violating the agreed upon terms of Collective Agreement Articles 63 and 110.

As provided in our grievance and correspondence with the Company, the Union has outlined the history of the Belleville Run Through and its associated agreed upon terms and conditions as well as the Award of Arbitrator Weatherill many years ago. We have also provided what happened in 2005.

Simply put, the Belleville Run Through has worked for over 50 years with small, mutually agreed upon changes over time. At no time has the Company ever put forth a complaint that this Agreement was not working. All of this only came to fruition after Arbitrator Bartel released her decision which was provided in CROA NO. 5007. That Award protected the Locomotive Engineer (LE) Seniority Districts at Smiths Falls, where 2 distinct LE seniority districts were maintained.

During those more than 50 years, work on the Belleville Sub has been performed by Smiths Falls-home based crews under the Belleville Run Through Agreement. Further, the Belleville Run Through Agreement has been specifically incorporated into the parties'

Local Rules section of the Collective Agreement, including the Memorandum relating to the jurisdiction of work, Article 18, as well as Article 10.

The Company has now stated it has Management Rights to unilaterally eliminate the Belleville Run Through Agreement, provide a new material change and is now further attempting to once again remove the Arbitrator's jurisdiction to rule on the dispute. From day one the Union put forth its' positions/arguments that the Company could not do what it is attempting to do unilaterally. This is a rights arbitration, does the Company have the right to delete an agreed upon material change agreement between the parties as well as those decisions that Arbitrator Weatherill provided, all of it in existence for over 50 years.

The Company in their grievance response have stated:

> "To be clear, Smiths Falls will continue to be a Home Terminal."

This is true only to the point that Smiths Falls (SF) will continue to have crews operate on the Winchester Sub (SF to/from Montreal), and the Brockville Sub (owned by VIA Rail but a single Road Switcher crew operates 5 days per week servicing customers). Under CPKC's unilateral initiative, Smiths Falls will no longer employ crews in a distinct Run Through Pool (Conductors, Trainpersons, Locomotive Engineers) to work on the Belleville Sub.

2005 Agreement:

The Company misses the most important aspects that they themselves provide:

"It was evident that the Union was unwilling to make any changes to the grossly inefficient "equalization of dispatches" method. This resulted in the 2005 decision of the Company to have all crews operating on the Belleville run through be located at a single home terminal. A material change notice was issued to that effect.

<u>While the Union was opposed to either change</u> (modifying the equalization formula and relocating work from one terminal to another) <u>it elected to pursue a resolve that avoided the relocation of work</u>. In order to do so, it renounced all rights to the former equalization of dispatching practices as indicated in the 2005 Letter of Understanding:"

As can be seen in the 2005 material change the Union was opposed to the attempt then to have a new material change displace the existing contractual agreement. More importantly for the item that the Company was after the "parties" came to an agreement.

This change was a unilateral initiative but was only possible with the Union's assent. For the Company to now assert that in 2005 the Union somehow recognized that the Company could incorporate any changes it sought without agreement is ridiculous.

Memorandum Relating To Engineers' Work On The Ontario Seniority District, and District Local Rules LE:

The Company is incorrect in its assumption that they can just cancel local rules which are within the CBA. Appendix A of the Collective Agreement clearly outlines the jurisdiction of work shared and provided for per the BRTA which supports the Weatherill award regarding both Toronto and Smiths Falls terminals working the Belleville Subdivision past Trenton. That was the understanding between the parties in 1969 and so was enshrined in the Collective Agreement between the parties.

In response to the company's assertion that the Belleville is not mentioned in the agreements: Article 29.21 (b) recognizes the distinguishable fact that the Belleville LE working in Smiths Falls are entitled to their annual vacation allotment separate form the Winchester Sub LE. This language shows that the BRTA jurisdiction includes working conditions recognized for Belleville LE. Also, Articles 10 regarding ESR, and 18 regarding extended home terminal rest, both reference the Belleville.

October 2015 Hodges Award:

The Company provides in their grievance response their position as follows:

"the Company is not seeking the cancellation or abolishment of the material change agreement as the Union has alleged. The Company is seeking to make an operational change to its business and has issued a new material change notice and proposed how to address the adverse effects on employees flowing from the change, which is supported as demonstrated earlier in the reply and through jurisprudence."

The Company is absolutely abolishing the Belleville Run Through Agreement. It is not an operations change but a full-scale, brand-new material change which eliminates all work at the Smiths Falls Terminal for those employees who have worked the Belleville Sub to Toronto and return. Belleville employees will no longer have their positions on the Belleville Sub. To make such a bold statement that the Company is not cancelling/abolishing the current agreement is inaccurate at minimum.

The Company is not, per Article 10, attempting to modify something (which the Belleville was excluded from), but throwing the book at the wall to see how many pages might stick.

The Company then again puts forth its preliminary objections once again solely to disrupt and hopefully delay process.

The Union requests that the Company cease and desist from its unilateral initiative. The Union therefore seeks an order that the Company's unilateral changes and applicability of the material change provisions are found null and void. Simply put, there is no unilateral pull tab on this Agreement.

If the Company initiates their unilateral changes all loss of wages to employees of Smiths Falls affected be compensated in full with interest, from this improper material change (Belleville LE/Cndr, and all employees affected from the domino effect account of displacement/bumping).

Company Position:

The Company does not agree with the Union's position.

The Company relies on all of its' positions, and arguments put forth in the grievance response and will not reproduce them all here. Making an operational change such as the one at hand is an example of the Company exercising the fundamental right to manage it's business.

No operational change is eternal. This includes the 1969 Belleville Run Through operational change and the associated measures (established through agreement and arbitration) undertaken to minimize material adverse effects on employees.

It is a fundamental management right for a Company to organize its workforce as it sees fit. Any assertion that the Company has relinquished this right must be proven. It is the Union's onus in that regard to show that clear and unequivocal contract language exists demonstrating that the Company gave the Union a right of veto for organizational changes.

The Company has advanced the current operational change through the Material Change Provisions of the collective agreement (under the auspices of articles 63 & 110) and is adhering to the steps contained therein which includes negotiating measures to minimize material adverse effects on employees. Beyond these requirements, nothing restricts the right of the Company to reorganize crewing on the Belleville crew run. Local Rules certainly do not as all local rules have explicit or implied cancellation provisions.

Despite the Union's claim, it is not the case that the Belleville Run Through Agreement has been incorporated into the Collective Agreement. Examples cited are mere references to the "Belleville Pool" or Belleville "subdivision". The Union's claim that this enshrines and elevates the Belleville Run Through Agreement to special status making it eternally subject to the Union's permission to make any changes is false.

The reference to the (Belleville) "Memorandum of Agreement dated October 29, 1969" is only a reference within an Appendix of local rules, nothing more.

Regarding the Union's request *"….for all loss of wages to employees of Smiths Falls affected be compensated in full with interest…. and all employees affected from the domino effect account of displacement/bumping)",* the Company maintains that remedy requests for something that has not occurred are premature and inappropriate.

The Union's grievance should therefore be denied in its entirety.

[executed by the parties July 4, 2024]

## AWARD OF THE ARBITRATOR

### Introduction, Issue and Summary

*Introduction*

[1] The Smiths Falls to Toronto crew run operates on the Belleville Subdivision, in Ontario. Currently the crews servicing that work are terminalled in both Toronto and Smiths Falls, with each being the Away From Home Terminal ("AFHT") for the other.

[2] This current arrangement was put into place 55 years ago, when the Company chose to eliminate the mid-point of Trenton as an Away From Home Terminal ("AFHT") for these crews, and to establish a longer run between Smiths Falls and Toronto, with each terminal serving as the AFHT for the other. In this industry, this type of agreement is referred to as a "run- through" agreement, as the work now "runs through" a particular location; in this case Trenton.

[3] This Grievance has arisen due to the Company's desire to again change the home terminal for employees currently terminalled in Smiths Falls, who work on the Belleville Subdivision. By the Company's decision, the employees currently in Smiths Falls will now have their home terminal located in Toronto. Smiths Falls will remain a home terminal, but the crews operating on the Belleville Sub will not be located at that terminal. By this change, 18 positions will be relocated to Toronto.

[4] That change was initiated by the Company under the exercise of what are known as the "Material Change" Articles, which for these parties are Articles 63 and 110 (also referred to as the "Material Change provisions" in this Award) of the Consolidated Collective Agreement (the "Agreement").

[5] By those Articles, the parties must come to agreement on the "adverse effects" of certain types of Material Changes to Working Conditions ("Material Changes").[1] If the parties cannot agree on how to address those adverse effects, the Agreement stipulates that a CROA Arbitrator is then appointed to resolve those terms.

[1] There was no dispute this was a "material change", if the Union's arguments are not successful. Those Articles are reproduced, and discussed, below.

[6] The parties can also arbitrate whether the Material Change provisions apply. That is the type of Grievance which the Union has brought in this case.

[7] In brief, the Union's position is that the Company cannot implement its Material Change, as it has constrained its management rights to do so by the Belleville Run-Through Agreement (the "BRTA"), which was executed – and settled by arbitral award - in 1969 and 1970. It argued that in the BRTA, the Company has agreed to maintain two home terminals to service work on the Belleville Sub: Toronto and Smiths Falls.

[8] The Company argued it has not so constrained its management rights, and it can "layer" this new Material Change on the previously implemented Material Change which resulted in the BRTA (also referred to in this Award as "refreshing" a Material Change). The Company sought arbitral guidance in this area to "put this matter to bed once and for all in the interests of sound labour relations"[2]. It felt it had that answer through the lengthy litigation involving the Sparwood Run-Through Agreement (2013 to 2019), which involved three arbitration awards and two judicial review decisions, and which resulted from a Material Change in the Elk Valley, in B.C.

[9] The parties have agreed to my appointment to hear and resolve this dispute. The parties have provided an extensive Joint Statement of Issue, reproduced above. Extensive written submissions, documentary evidence and jurisprudence were also filed by the parties prior to the hearing. Oral submissions proceeded under the CROA process and no oral evidence was presented. The parties indicated they required a decision prior to October 16, 2024.

[10] Given the complexity of this issue, all of the evidence and jurisprudence were thoroughly reviewed by this Arbitrator prior to the hearing, in addition to the usual pre-hearing review of all of the written submissions, normally undertaken by this Arbitrator prior to a hearing. Appreciation is expressed to both parties for the thoroughness and organization of these documents, which was of great assistance in understanding the issues and the historical background and for resolving this dispute.

[11] As part of the deliberations leading to this Award, considerable time was devoted to reconciling the various jurisprudence filed (dating from 1970 forward), to determine the principles which are applicable to these agreements, in this industry. Certain of that jurisprudence was determined prior to the Supreme Court of Canada's adoption of the "modern principle of interpretation" in 1998.[3]

[2] Company Submissions, para. 30.
[3] Further discussed, below.

[12] While the analysis in this Award seeks to apply a purposive and principled approach to resolve this dispute by the application of the modern principle of interpretation, not all of the jurisprudence in this area, over the last 50 years, can be neatly reconciled. Where that reconciliation is not possible - and the reasoning in a particular line of cases is preferred over another - the reasoning for that choice is explained, to support a principled approach.

[13] The current Union was not always the representative who bargained on behalf of these railway employees. However, in this Award, as in other jurisprudence, the TCRC and predecessor unions are referred to collectively as the "Union".

*Issue and Summary of Decision*

[14] At the crux of this dispute is whether the Company can "layer" or "refresh" a Material Change (the 2024 Material Change) on an earlier Material Change (the BRTA) in the absence of a cancellation clause.

[15] After thorough consideration of the parties' extensive submissions, evidence and jurisprudence – and for the reasons outlined below – the Grievance is dismissed. The Company has not fettered its management rights to "refresh" the BRTA with the 2024 Material Change.

## Historical Background

[16] An understanding of the factual context leading to the negotiation of the Material Change provisions is necessary to situate this dispute.

[17] As noted by the Court of Queen's Bench in *TCRC v. CP*[4], the idea of "Material Change" negotiations is "unique to railway labour relations". As also recognized in the jurisprudence, the parties in this industry are the heirs to one of the longest-standing collective bargaining relationships in this country, pre-dating even modern labour relations boards. It is also an industry with a rich history, foundational to our country's formation.

[18] Given that lengthy history, it is not surprising it is also an industry which has seen its share of technological change over more than a century of operation.

[19] This dispute arises from one such change. When the diesel engine was introduced in the mid 20th century, it required much less maintenance than steam engines: Diesel trains did not need to stop for coal/water/crew change every 125 miles, as did steam

[4] 2019 ABQB 517 (McLeod, J.); Judicial Review of the Arbitration Award of T. Hodges, dated June 2, 2016, at para. 9.

trains. As a result, diesel trains became capable of "running through" certain servicing stops which had been previously established due to the limitations of steam engines.

[20] These efficiencies led to a desire of railway employers to implement "extended crew runs" or "run throughs", which would eliminate those traditional servicing locations and "run-through" to a further terminal. This resulted in longer – or "extended" - runs.

[21] This change had significant consequences not just for the railway and its employees but - in a larger context - for the communities which had sprung up along the railway lines, based on the needs of the steam engine. In some cases, removing those crew bases would have a significant detrimental effect on an entire community, and not just the employees affected. Not surprisingly, the unions resisted these changes.

[22] In the mid 1960's, Justice Freedman was appointed by the government of the day to address concerns at CN, where workers had staged a one day 'sick out' based on CN's intention to "run through" certain stops in Alberta and Ontario. While Justice Freedman was to "…make recommendations on the current dispute and set principles for the future"[5], his recommendations were just that: recommendations for what he determined "should" occur when such significant changes were implemented by a railway employer.

[23] One of Justice Freedman's recommendations included a "veto" to the Unions on the implementation of such changes, with the issue to be bargained at the next opportunity. I accept the Company's point that Justice Freedman's recommendations – while lauded by unions - were not universally accepted. In particular, no "veto" power was given to Unions over such changes to working conditions, as a result of Justice Freedman's Report.

[24] The Company also pointed out it was not a party to the process which resulted in the Freedman Report. However, the evidence established its negotiations with the Union were impacted by that process. During bargaining in 1966, a Conciliation Board was appointed to assist these parties to reach an MOA to settle the terms of their collective bargaining, under the auspices of the *Industrial Relations and Disputes Investigation Act*, with Justice Little, presiding. It was noted in the Recommendations issued by that conciliation board that "…*little real bargaining had taken place"* between the parties during that round of bargaining in 1966 "*because of the implications contained in the report of the Honourable Mr. Justice Samuel Freedman on the Canadian National Railway "Run-Throughs*"[6].

[5] At p. 144.
[6] As noted by Justice W. Little in his Recommendations from Conciliation; August 9, 1966.

[25] What did result after the Freedman Report - at both railroads - were what are called "Material Change" Articles. These Material Change terms have been recognized as resulting from the introduction of the diesel engine[7]. The agreements contemplated by those Articles are to mitigate the "adverse effects" of a "Material Change" which is to be implemented by the Company. These agreements are referred to collectively in this Award as "Material Change Agreements".

[26] As between these parties, the Article for "Material Change in Working Conditions"[8]; was negotiated in 1969. Those Articles are the predecessor Articles to Articles 63 and 110. Similar provisions exist in agreements between CN and the Union, which is relevant to this dispute, given that certain of the jurisprudence filed and relied upon by the parties involves that railroad. As noted by the Company, those provisions have evolved in tandem in the two railroads.

[27] Given the passage of time since these provisions were first introduced, it can be the case that an employer desires to make further change(s), which impact an earlier Material Change Agreement, already in place. As earlier noted, this is referred to as "layering" a Material Change on a Material Change, or as a "refreshed" Material Change.

[28] Providing a "refreshed" Material Change relating to the Belleville Subdivision is what the Company has done in this case.

**Collective Agreement Provisions: The Material Change Articles**

[29] Article 63 in the Collective Agreement is the Material Change provisions which apply to Locomotive Engineers; Article 110 contains the Material Change provisions which apply to Conductors.

[30] Article 63 states, in part[9]:

> **Article 63 Material Change in Working Conditions**
>
> 63.01 Prior to the introduction of run-throughs or relocation 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

[7] As recognized by the Alberta Court of Queen's Bench in *TCRC v. CP,* July 2019,; at para. 9.
[8] Appendix "A", to the Mediated Agreement dated March 21, 1969.
[9] Emphasis added.

to the consequent changes in working conditions, but in any event not less than: … [timing set out]

(2) Negotiate with the Union measures other than the benefits covered by clause 63.11 of this Article to minimize significantly adverse effects of the proposed change on Locomotive Engineers, which measures may, for example, be with respect to retraining and/or such other measures as may be appropriate in the circumstances.

63.02 The negotiations referred to in sub-clause (2) of 63.01 shall be conducted between the General Manager and the General Chairman and shall commence within 20 days of the date of the notice specified in 63.01(1). The parties agree, at the initial meeting, to review the available dates for the board of review and anr arbitration hearing with consideration to the timelines set out below.

If the negotiations do not result in mutual agreement within 30 calendar days (day 50) of their commencement the issue, or issues, remaining in dispute will be advanced within 7 days (day 57) of the cessation of negotiation, be referred to 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 sub-clause 63.01(1) and a summary of the items agreed upon.

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 this article.

…[Board of Review timelines] … If the Board is unable to arrive at a decision within the time limits specified herein or such extended time limits as provided in clause 63.03, or if its recommendations are not agreeable to either party, a Joint Statement of Issue, or Issues, remaining in dispute may be referred within seven days (day 107) by either party to a single arbitrator who shall be the person from time to time occupying the position of Arbitrator for the Canadian Railway Office of Arbitration and Dispute Resolution.

… [separate statements of issue]…

The Arbitrator shall hear the dispute within 30 days (day 137) from the date of the request for arbitration and shall render a decision together with reasons therefore in writing within 15 days (day 152) of the completion of the hearing.

….

63.04 The decision of the arbitrator shall be confined to the issue, or issues, placed before such arbitrator and shall also be limited to measures for minimizing the significantly adverse effects of the proposed change upon employees who are affected thereby.

…

63.07 The effects of changes proposed by the Company which can be subject to negotiation and arbitration under this Article do not include the consequences of

changes brought about by the normal application of the Collective Agreement, changes resulting from a decline in business activity, fluctuations in traffic, traditional reassignment of work or other normal changes inherent in the nature of the work in which Engineers are engaged.

63.08 The applicability of this Article to run-throughs, relocation of main home terminals and unmanned locomotives producing tractive effort which are located at any point in the train but separated from and operated independently of the controls used by the Engineer is acknowledged. A grievance concerning the applicability of this Article to other material changes in working conditions shall be processed directly to the General Manager within 60 days from the date of the cause of the grievance.

…

63.10 This Article is intended to assist employees affected by any technological change to adjust to the effects of the technological change and Sections 52, 54 and 55, Part V of the Canada Labour Code do not apply.

The provisions of this Article are intended as well to specify procedures by which matters relating to the termination of employment of employees represented herein may be negotiated and finally settled and Sections 214 to 216, of the Canada Labour Code do not apply.

63.11 **Relocation Expenses**

(1) The benefits set forth hereunder shall be allowed, where applicable, to an eligible employee. They shall apply to an eligible employee only once for each change.

(2) Eligibility…..

(3) Relocation Benefits…

**Maintenance of Basic Rate**

63.12 An identified employee will be entitled to a Maintenance of Basic Rate (MBR) if, as a result of the change the employee's earnings are reduced.

…

**Layoff Protection**

63.21…

**Eligibility for Layoff Benefits**

63.25…

**Early Separation**

63.27…

**Appendix "A" – Appraisal Procedure**

When an affected employee desires to sell their home under the provisions of sub-clause 63.11(3)(6.1) of this Article, of which this Appendix "A" forms part, the following procedure will apply.

…

[31] Article 110 is the Material Change provision which applies to Conductors, in the Collective Agreement. While similar to Article 63, it also has some differences. It provides, in part[10]:

**Article 110 – Material Change in Working Conditions**

Section 1
110.01 **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 Chairman 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 1 of this Article.

110.02 **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.

110.03 While not necessarily limited thereto, the measures to minimize adverse effects considered negotiable under clause 110.2 may include the following:
(1) Appropriate timing.
(2) Appropriate phasing.
(3) Hours on duty.
(4) Equalization of miles.
(5) Work distribution.
(6) Adequate accommodation.
(7) Bulletining.
(8) Seniority arrangements.
(9) Learning the road.
(10) Eating en route.
(11) Work en route.
(12) Lay-off benefits.
(13) Severance pay.

[10] Emphasis added.

(14) Maintenance of basic rates.
(15) Constructive miles.
(16) Deadheading.

The foregoing list is not intended to imply that any particular item will necessarily form part of any agreement negotiated in respect of a material change in working conditions.

110.4 **Negotiations – Procedure – Arbitration**
… [negotiations to be conducted between General Manager ("or their delegate") and the General Chairman; and timeline….Board of Review]
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 110.05.
…
110.05 [if recommendations of a Board of Review are not agreeable] … if its recommendations are not agreeable to either party, a Joint Statement of Issue, or Issues, remaining in dispute may be referred within seven days (day 107) by either party to a single arbitrator who shall be the person from time to time occupying the position of Arbitrator for the Canadian Railway Office of Arbitration and Dispute Resolution.
…
110.7 The decision of the Arbitrator shall be confined to the issue 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, and to the relaxation in schedule rules considered necessary for the implementation of the material change, and shall be final and binding upon the parties concerned.
…

110.13 **Dispute on Application of this Article**
A dispute concerning the applicability of this Article to a change in working conditions will be processed as a grievance by the General Chairman direct to the General Manager, and must be presented within 60 days from the date of the cause of the grievance.

110.14 **Relocation Expenses**
…
110.15 **Relocation Benefits**
…
Section 5 **Maintenance of Basic Rate**
….
**Layoff Protection**
110.29…
**Eligibility for Layoff Benefits**
110.33

**Early Separation**
110.35
**Appendix "A" – Appraisal Procedure**

## Facts

[32] At a meeting on May 14, 1968, the Company indicated to the Union that it intended to make changes to how its work was organized on the Belleville Subdivision. That meeting was held *before* the Material Change Articles had been negotiated into the Collective Agreement in early 1969. While there is reference to the Company "serving notice" at that meeting of what it intended, no formal "Notice" was able to be located by the parties when requested by this Arbitrator, and the details of those discussions were not filed into evidence. The parties agreed before Arbitrator Weatherill in 1970 that their discussions on May 14, 1968 constituted the required "notice" of that change.

[33] An agreement relating to Locomotive Engineers was entered into by the parties on October 29, 1969, with a further agreement relating to "Conditions to be Implemented with the Introduction of Run-Through Train Operation Between Smiths Falls and Toronto" entered into on the same day. Those conditions related to such matters as the conditions of the engines (heating was to be improved); that switching would be minimal; that held-away-from home time would be kept to a minimum; and that engineers in run-through service would continue to go on and off duty at Toronto Yard. Regarding this last statement, it was stated that if a change in that position was found to be necessary [by the Company] at a later date, "sufficient advance notice" would be provided to the Union "to permit consideration to be given to what is planned".

[34] The parties were unable to agree on all terms of the BRTA, and came before Arbitrator Weatherill in mid 1970 to have the final terms settled.[11] The BRTA was therefore settled both by negotiation and by arbitral award.

[35] Several Material Change Agreements resulted as different agreements were executed for different personnel. These agreements were executed through late 1969 and 1970. Collectively, those decisions are referred to as the Belleville Run-Through Agreement or BRTA.

[36] In 2005, the Company issued another Material Change Notice for work on the Belleville Subdivision. This change was to move all employees to the Smiths Falls Terminal (the same change as now proposed being "one" terminal, but the opposite

[11] Of Arbitrator Weatherill, dated July 2, 1970.

direction of what is now proposed). Ultimately, the parties agreed to amend the BRTA to address a difficulty the Company had been experiencing with work distribution between Smiths Falls and Toronto. The Material Change Notice was withdrawn; and the BRTA remained intact. This 2005 Agreement is further discussed, later in this Award.

[37] On April 19, 2024, the Company issued a further Material Change Notice relating to the Belleville Subdivision (the "2024 Material Change"). The 2024 Material Change Notice advised the Union the Company intended to:

> …implement an operational change regarding the Smiths Falls to Toronto crew run. **Specifically, upon implementation of this Material Change, crews will only operate from a single home terminal at Toronto.**[12]
>
> The change…is expected to result in the relocation of approximately 18 positions from Smiths Falls to Toronto.[13]

[38] Attached to this Notice was a list of employees who owned permanent positions in the West pool at Smiths Falls.

[39] The Union has resisted this change to the BRTA. In addition to its arguments regarding limitation of management rights to make this change, it has noted the longevity of the BRTA and the significant impact the 2024 Material Change Notice will have on the families based in Smiths Falls, which have organized their lives around that home terminal.

**Arguments**

[40] Both parties have referred in detail to their Arguments in their Joint Statement of Issue.

*The Union*

[41] The Union argued that the 2024 Material Change is not a permissible Material Change Notice. The Union argued that the Company is seeking to delete Smiths Falls as a home terminal, where the Belleville Sub work is concerned, which is contrary to the BRTA and the District Local Rules. It argued the Company has made contractual obligations in the BRTA, which include obligations to organize this workforce in two pools, terminalled in both Toronto and Smiths Falls. The Union argued that to move either pool

[12] Emphasis added.
[13] Letter dated April 19, 2024 from F. Billings to E. Mogus and W. Apsey.

is contrary to those mandatory terms, on which the parties agreed. The Union relied on Articles 2, 4 and Item 10 of Appendix A of the BRTA.

[42] It points out that Appendix A outlines the "Directional Pool system that will be use for through freight trains between Smiths Falls and Toronto"[14]. It argued Arbitrator Weatherill noted the parties agreement on this issue in his award setting the terms.[15] It pointed out that the Company acknowledged that the agreement "allowed for cycling of crews in such a manner as to provide equal sharing of available work between the two pools".[16] It argued this term was unambiguous and mandatory. . It argued the "core terms" of the BRTA have been in operation and "remained intact" for 55 years.

[43] It argued the BRTA addressed "far more than the adverse effects of the original material change" and that it "constitutes immutable contractual agreements as to how the operations will be run from cycling of crews, designate trains, payment, switching, work enroute etc".[17] It argued this distinguished the BRTA from other Material Change Agreements, including that in **CROA 913**, relied upon by the Company.

[44] Its position was that – as there is no cancellation clause in the BRTA – the Company cannot now act unilaterally to alter, cancel, abolish or resile from these commitments through the "guise" of a further Material Change Notice which would change this work distribution to one terminal. It argued the lack of a cancellation clause was a critical fact in this dispute and distinguished this Material Change Agreement from other agreements which established Directional Pools. Even if it did contain a cancellation clause, that would result in the re-establishment of Trenton as the AFHT for both terminals.

[45] The Union argued the Company cannot make its change in reliance on Articles 63 and 110 and must negotiate any change to those working conditions with the Union. It argued that absent the Union's concurrence, the Company could not have altered the BRTA in 2005.

[46] The Union also argued the BRTA has been incorporated by reference into the Collective Agreement and into Local Rules, with the result that the Company cannot unilaterally change its terms, without the approval of the Union. It argued that in main table collective bargaining, the parties have reached "further, ancillary agreements that were predicated upon and expressly recognized the continuance of the Belleville-Run-

[14] At para. 55.
[15] At p. 7.
[16] Union Tab 11.
[17] Para. 83.

Through Agreement: Articles 8, 10, 18 and 29. It argued the BRTA has become *status quo ante* entrenched in the Collective Agreement. It pointed out that in the current round of collective bargaining, the Company proposed the modification of Article 10 to remove the exclusion of the BRTA from that Article.

[47] The Union also pointed out that the "District Local Rules on behalf of the Locomotive Engineers employed on the Ontario District Agreement" further incorporates the BRTA as *status quo*. It argued those Rules detail the jurisdiction of work for the members of Division 658 (Smiths Falls LE seniority), "to operate trains working out of Smiths Falls to Toronto as per the BRTA".[18]

[48] The Union further argued the 2024 Material Change Notice was a retributive response to this Arbitrator's Award in **CROA 5007**.

*The Company*

[49] The Company's position was that it maintains the right to change how the work on the Belleville Subdivision is serviced, and need only negotiate the "adverse effects" resulting from the 2024 Material Change, as required by Articles 63 and 110.

[50] The Company argued it did not constrain what are its fundamental management rights to organize its workforce, when it agreed to the BRTA. The Company argued the BRTA is not "eternal", as no business decision is ever "once and forever" and no operational context is eternal. It maintained the Union has not gained what I will refer to in this Award as "ownership rights" for the fundamental management right of where this work is located - which is part of the Company's rights to determine how it will organize its workforce - when the parties negotiated the BRTA. It argued that clear and unequivocal language would be required to so limit an employer's management rights to organize its business in the manner argued by the Union.

[51] The Company argued there is nothing within Articles 63 and 110 of the Collective Agreement which provides for negotiation of the Material Change itself, only its adverse effects. It argued that clear and unequivocal language would be required to constrain the Company's rights in that manner, which does not exist in either the BRTA or in the Collective Agreement. It argued the Union bore the onus to demonstrate that language and has failed to meet that onus, in this case. It argued the Union did not *explicitly* protect the BRTA in the Collective Agreement. It argued that where a Material Change is incorporated into the Collective Agreement, that reference is explicit, such as for the

[18] Para. 69.

Sparwood Run Through Agreement. Therefore, it can refreshed the BRTA – resulting from an earlier Material Change – with a "refreshed" Material Change.

[52] The Company argued that Material Changes have been "refreshed" in this industry, relying on several examples where that has occurred. It pointed out that CN Material Change provisions are overall the same as the Company's, and both originated in the late 1960's and evolved in tandem. It argued these Articles themselves contemplate changes which are more extraordinary and impactful than what are contemplated here, including relocating home terminals and introducing "run-throughs". It pointed out that Hamilton was once a home terminal, but is now an outpost terminal. It also pointed to the changes resulting from its sale of the Dominion Atlantic Railway. It provided other, recent examples of other Material Changes.

[53] The Company argued the purpose of the BRTA was to "mitigate adverse effects at the time".[19] It argued the fact they are temporary is "obvious", with a finite duration, which are limited to the initial recipient. The underlying change is one made unilaterally by the Company. It pointed out that in 1969, it could have had a single headed pool on the Belleville run, but it chose not to do so. Had it done so, then other measures would have been considered to mitigate the adverse effects flowing from that decision.

[54] The Company placed reliance on **CROA 913**, which it argued was substantially similar to the operational change made in the 2024 Material Change. It pointed out the Arbitrator in that case allowed that change to impact a previous material change, and the Union's permission was not necessary.

[55] The Company noted that it had the ability to make the change proposed in 2005, but that the parties came to agreement on changes to the BRTA, so that change was ultimately not necessary. It disputed the Union's claim that it could not have made that change, had the parties not come to an agreement.

[56] The Company also pointed out that the Sparwood Run-Through litigation resulted in the Company's ability to make the very significant change in that case, without the Union's agreement.

[57] The Company argued it has provided the proper Material Change Notice and is prepared to undertake the negotiations required to mitigate the adverse effects of its decision. The Company pointed out that the bulk of the extended service runs on its lines are serviced by crews terminalled in one location. It also argued the BRTA has not

[19] At para. 77.

been incorporated by reference in the Collective Agreement, and that Local Rules are subject to cancellation and do not make this agreement "eternal".

*Rebuttals*

[58] In rebuttal, the Union rejected the proposition that the BRTA is stale or "spent" in any way. It argued it still governs the work on the Belleville Sub. The Union argued that its original agreement was required before the Company could operate through Trenton at all over the past five decades, and that it is not open to the Company to change the home terminal of the Smiths Falls employees. It argued that the Company's management rights are limited and it is "deeply unfair" for the Company to overturn decades of binding obligations and practice. It reiterated this is a response to CROA 5007. It argued the absence of a cancellation clause meant the parties intended the BRTA to remain in place "save and except for mutually agreed revisions". It argued it did not seek a right of "veto", but rather that the Company honour its contractual commitments It argued that it is *status quo ante* as was the original Sparwood Run Through Agreement addressed by Arbitrator Kates. It argued that Articles 63 and 110 do not reserve to the Company any discretion to countermand terms of a "standing" material change agreement". It argued the Company is trying to "manufacture" a cancellation clause. It argued CROA 913 and AH648 relied on by the Company were distinguishable. It argued that in 2005, the Company sought a change and the Union negotiated it with them. It argued that the Company's jurisprudence was distinguishable. It also argued the Company is violating the freeze provisions of the *Code.*

[59] The Company argued it does not have to convince the Union of the merits of the Material Change in order to pursue it, as Material Changes are *unilateral* changes initated by the Company in the exercise of its management rights. It argued that the Material Change articles recognize the Company can abolish an entire terminal as a crew change location. It is consistent with common sense to understand that the Company can determine where that crew base is located. It urged it is not "deleting" the BRTA but is making a completely "normal and valid operational change". To accept the Union's argument is to accept a complete "stasis" of operations over time. It further argued that 71% of the nearly 8300 individual employee trips year to date our of Smiths Falls have nothing to do with the Belleville Sub, and that work will remain. It also argued that in 2005 it did not need to negotiate a solution with the Union to make the proposed change, but the parties rather chose to make that change and the Company then withdrew its Notice. The Company noted that the Freedman Report recognized that the "ability to unilaterally establish Run-throughs was a residual/management right and legal". The Unions were

not granted the rights recommended by Justice Freedman. It noted that the Union's reliance on Arbitrator Hodges 2015 Award fails to recognize his subsequent 2016 Award in the Company's favour, that was upheld on judicial review. The Company refreshed an all new Material Change in the Sparwood dispute.

## Analysis and Decision

*Introduction*

[60] Although the submissions, evidence and jurisprudence filed by the parties are quite extensive, the issue to be determined is narrow: Can the Material Change process be used by the Company to make the 2024 Material Change, given the existence of the BRTA, including the fact it has no cancellation clause? For the reasons which follow, the answer to this question is "yes".

[61] The jurisprudence surrounding Material Changes has been issued by CROA Arbitrators[20]. In this case, that requirement is stipulated in the Material Change Articles. In *CP v. TCRC*[21] a judicial review of **CROA 4695-M**, it was recognized that in the CROA process, historically decisions were very short[22]. While not a CROA issue under the normal process, many of the decisions relating to Material Change issues have also historically been short. The brevity of decisions in this industry can sometimes make it difficult to fully understand the reasoning, or which arguments were made by the parties. A further limitation in this particular area is that the bulk of the decisions relied upon by the parties *pre-date* the Supreme Court of Canada's directions in its leading decision of *Canada (Minister of Citizenship and Immigration) v. Vavilov*[23], which was issued in late 2019. As a result of *Vavilov*, Arbitrators are now required to outline their reasoning with greater detail, with the result that even CROA decisions are generally now longer, with more detailed reasoning, than was historically the case. When it is noted in this Award that an earlier decision contained limited reasoning, or made a broad general statement beyond the issues before that Arbitrator – an *obiter* comment - that is not to suggest a fault of the particular Arbitrator, but rather reflects the reality of the historically short CROA decisions, and the short timelines in which they were generally produced.

[20] See Article 63.02 and Article 110.05.
[21] 2020 ONSC 6683.
[22] See for example the Court's recognition of this fact in *CP v. TCRC* 2020 ONSC 6683, at para. 14. ROA 4695-M which was under review, was issued *prior to* the Supreme Court's directions in *Canada (Minister of Citizenship and Immigration) v. Vavilov.*
[23] 2019 SCC 65, issued December 19, 2019.

*General Legal Principles*

[62] Prior to addressing the specifics of this dispute, certain general legal principles are appropriately summarized.

[63] As noted by Justice Macleod in *TCRC v. CP*, "…[T]he contractual arrangements governing the relations between the Teamsters and the CPR are somewhat complex and subject to continuing evolution".[24]

[64] At the risk of significant understatement - these parties are experienced, sophisticated and well-versed in the strategy and art of collective bargaining. CROA Arbitrators practicing in this area likewise work to become educated in this technical, complex and evolving industry.

[65] This is a contract interpretation Grievance. This issue must be determined by giving the Material Change Agreement a purposive interpretation, consistent with the Supreme Court's direction regarding interpretation of contracts, which is known as the "modern principle" of interpretation. That principle requires that – in addition to giving a plain and ordinary meaning to the words used in the contract, consideration must also be given to the "ends" to be achieved by the contract, to determine the parties' objective meaning[25].

[66] The modern principle of interpretation requires a "purposive" approach for interpreting contracts. This includes consideration of the "object" of a contract, which are the "ends" it was meant to achieve. The modern principle of interpretation requires an interpretation that is "harmonious" with those ends. That a contract must be understood in the context of the *"nature of the bargain"* and the "*benefits gained"* – its "objects" - was recognized by Arbitrator Picher in **AH348**, a decision which pre-dated the Supreme Court's adoption of the modern principle of interpretation.[26]

[67] In applying such an approach in this case, the distinction between the "adverse effects" from a "Material Change in Working Conditions"– which must be negotiated with the Union; and the "underlying change" itself – which does not, looms large.

[68] The Court of Appeal of Alberta has explained that the goal of contract interpretation is "… *not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a*

[24] At para. 11.
[25] As recognized by Professor Driedger, the author of the "modern principle".
[26] See in particular the discussion at pp. 10-11.

*whole and from the factual matrix*"[27]. It later clarified that evidence of the *subjective* intentions of the parties – what each party thought the words meant; or the problem the words were introduced by a party to solve - was therefore always irrelevant to that exercise: *AUPE v. AHS*.[28]

[69] As much of bargaining evidence is clothed with subjective intentions, it is largely irrelevant to an interpretive exercise, including "why" the Company made the proposal it during the current round of bargaining regarding Article 10. The Union's argument is asking this Arbitrator to consider what were the Company's speculative subjective intentions, which is not a proper inquiry. That evidence has no relevance.

[70] A further and well-established principle is that an Arbitrator does not have the prerogative to change the parties deal through means of a creative interpretation, whether to pursue her own interests of fairness or policy; or to give to a party flexibility which it did not bargain to receive. Rather, an Arbitrator must take the parties' agreement as she finds it, to determine the parties' objective meaning. In doing so, an Arbitrator is to apply a well-reasoned, principled and purposive approach.

[71] Three further general – and guiding - principles frame the following analysis.

[72] The first is that "residual management rights" remain alive and well in labour relations in this country. That concept recognizes that rights which an employer has *not* specifically restricted by its negotiations with a union are rights which it has "retained" to itself, and which can therefore be exercised to unilaterally operate its business. While the Union focused on Justice Freedman's Report in its submissions, the concept of residual management rights has survived Justice Freedman's inquiry. In exercising its management rights, an employer need not justify the measures it takes to a union in operating that business, nor is it necessary to present a "business plan" to that union, to support its choices, assuming the collective agreement does not otherwise require it to do so.

[73] The second general principle is that management's prerogative to schedule and assign work is recognized as "fundamental" in labour relations. This industry is not exempt from that concept. In **CROA 3595,** Arbitrator Picher commented on the importance to an employer of the ability to schedule and assign work. He recognized than an employer could give this "most important decision making power" to the Union, *but that grant would require clear and unequivocal language:*

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[27] *IFP Technologies (Canada) Inc. v. Encana [*xx], at para. 8.
[28] 2020 ABCA 4.

> It is of course, open to a company to effectively give to a union what might arguably be the most important decision making power with respect to the administration of its operations. That is what the Union effectively claims in the case at hand. There are few managerial prerogatives more important than the scheduling and assignment of work. A surrender of authority over such a key issue, however, should obviously be supported by clear and unequivocal language.[29]

[74] A final principle is that there is no *stare decisis* in labour arbitration amongst arbitrators, although arbitrators *are* bound by Court decisions. Other previous arbitration decisions will have varying degrees of persuasive value, depending on the facts and arguments made before that Arbitrator. When an Arbitrator chooses to depart from a decision involving the same parties and the same collective agreement provisions, that departure is not done lightly, and the Arbitrator is expected to provide reasons for that choice.

*The 2024 Material Change*

[75] Returning to the specifics of this dispute, while the Union is correct that the concept of addressing the "adverse effects" brought about by an employer's decision had its genesis in the Freedman Report, the Company is also quite correct that the full flavour of that Report was not ultimately adopted, neither was its recommendation that unions should enjoy a "veto" over Material Changes. What was eventually adopted by the parties were the "Material Change" provisions. In **CROA 3539**, Arbitrator Picher explained what was protected by these provisions**:**

> This Office has had considerable opportunity to consider the meaning of "material change". Essential to the concept is the notion that a change is essentially initiated as a result of a decision of the employer, rather than being dictated by circumstances beyond its control, such as the closing of a client's business or plant, fluctuations in traffic or other such factors which can normally impact railway operations. The essential concept of material change protection is that **if the employer chooses, of its own volition, to materially 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.[30]

[76] Material Changes cannot be implemented which are inconsistent with the Collective Agreement, unless the need for such changes is recognized as open to be

[29] At p. 6- emphasis added.
[30] At p. 5, emphasis added.

negotiated, by the Material Change Articles. This is illustrated by two decisions filed by the Union. In *CP v. TCRC (Thief River Falls, November 17, 2015)* the Company issued a Material Change Notice, to implement an extended service run between Winnipeg, Manitoba and Thief River Falls, Minnesota. While the Arbitrator noted there was "absolutely nothing wrong with the Company seeking more efficient means of operating", he also noted it could not do so through a Material Change Notice which would be inconsistent with the collective agreement.[31] He determined the type of arrangement contemplated – having both Canadian and American crews sharing work in this corridor – was inconsistent with the right of crews to book rest, which was protected in the collective agreement. The second decision is *CN v. TCRC*[32], a case involving CN and the Union, CN sought to use its employees from Eastern Canada to work across its historical border into Western Canada and vice versa. That work was governed by collective agreements relating to different lines. It was determined that the Company could not use the Material Change provisions to "effectively disregard the long-standing geographic bounds of the operation of these collective agreements"[33].

[77] This Grievance must also be distinguished from those cases where the employer believes it has no obligations to make its change under the Material Change provisions: see for example *CP v. TCRC (RCLS Assignments at Moose Jaw and Vancouver)*[34]; and *CP Rail v. TCRC (Discontinuance of Hump Operations in Calgary and Winnipeg)*[35]. In this case, the Company has filed a Material Change Notice.

*What is the "Plain and Ordinary Meaning" of the Material Change Provisions?*

[78] The "ends" or purpose of the Material Change Articles – which then flow into the resulting Material Change Agreements - is pivotal to the resolution of this dispute. A consideration of that purpose or "object" also provides the basis from which to reconcile the jurisprudence in this area.

[79] The *purpose* of the Material Change Articles has been addressed by the parties themselves, within the actual Articles. Article 63.10 states: "*This Article is intended to assist employees affected by any technological change to adjust to the effects of the technological change…*" Article 110.17 mirrors that purpose, for Conductors.

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[31] At para. 27.
[32] 2010 CarswellNat 6406.
[33] At para. 34.
[34] July 26, 2017 (Stout).
[35] Arbitrator J. Stout, June 27, 2017.

[80] As a starting point, I am satisfied that giving Articles 63 and 110 a "plain and ordinary" meaning; with consideration to the factual matrix which existed at the time of negotiation of the Material Change Articles; and considered harmoniously with the purpose of the agreements that result, there is nothing in either of Articles 63 or 110 which requires the Company to first seek the Union's approval for the material change(s) it intends to make to its operations; what will be referred to as its "operational" decision(s).

[81] The management rights of the Company to organize its workforce and assign work have not been limited by Articles 63 and 110. What the Company must do is negotiate the "adverse effects" of its management decision. By Article 63.01[36], the Company is required to do three things when it seeks to implement a Material Change in Working Conditions. The Company must provide the Union with :

a. "as much advance notice as possible of any such proposed change [the "Material Change Notice"]; with
b. "…full description thereof"; along with
c. "…appropriate details as to the consequent changes in working conditions".'

[82] In fact, the provisions assume that the Company has first made a "Material Change in Working Conditions" under its own initiative, which would occur when it chooses to exercise its management rights.

[83] Put another way, the Company does not "give up its management rights" to operate its business just because it is required to enter into a Material Change Agreement by Articles 63 and 110. What *is* mandated by the Material Change Articles is that the Company must negotiate with the Union *to mitigate the adverse effects on the employees impacted by that operational decision,* which the Company has made for its own reasons and purposes. Nothing further than this ability to mitigate "adverse effects" was gained by the Union in the negotiation of those Articles.

[84] Negotiation to ease those adverse effects is therefore the "object" or "ends" of the Material Change Agreement to be reached between the parties. That is the "*nature of the bargain*" and must impact a consideration of the "*benefits to be gained*" through that Agreement, in an interpretive exercise.

[85] There is also nothing in the language of the Collective Agreement that would suggest that when a Material Change is made by the Company, the Company intends to

[36] The same requirements are noted in Article 110.

offer to the Union a grant of the "important decision making power" to organize its workforces by that Agreement. That type of conclusion is not consistent with the "objects" the Material Change Agreement is meant to achieve, which are as referenced in **CROA 3595**.

[86] That leaves the BRTA itself. The history of the BRTA itself; the "object" or "ends" that were to be achieved by that contract - the "nature of the bargain" and the "benefit gained" (in the words of Arbitrator Picher) - must be carefully reviewed, to determine if the Union has gained the rights it now seeks to protect. That purpose will also inform the impact of a cancellation clause.

*What is the "Factual Context" of the Negotiation of the BRTA?*

[87] The origins of the BRTA date back to the late 1960's. The Company's intention wa at that time was to modify its operations by "running through" Trenton, which to that point had been the mid-way point between Toronto and Smiths Falls. As the mid-point, Trenton had historically served as the AFHT for each of the Toronto and Smiths Falls crews.

[88] Arbitrator Weatherill himself noted that the material change was the "proposed run-through operation". For the reasons which follow, I am satisfied the "run-through" operational decision of the Company was *both* to eliminate Trenton and *also* to make Smiths Falls and Toronto the AFHT for each other[37].

[89] As required by the Material Change provisions, in the late 1960's, the parties therefore entered into negotiations to mitigate the adverse effects from the Company's decision to make this change by establishing a "run-through operation". It is not disputed the BRTA was negotiated under what were – at that time - Material Change Articles in the Collective Agreement which were very "new" to both parties. The parties were unable to come to agreement on all terms, and the matter was therefore brought before Arbitrator Weatherill, then a CROA Arbitrator, to settle the final terms[38]. Ultimately, the terms of the BRTA were therefore settled by both negotiation of the parties and by arbitral award. The BRTA *was* a "Material Change Agreement".

[90] As earlier noted, the right of an employer to assign its workforce is a fundamental aspect of the exercise of its management rights. While there is no dispute that a party can fetter any right it has, the Union bears the onus to establish that the Company has fettered

[37] At p. 5. .

[38] Several agreements were executed between October 1969 and mid 1970, relating to the various personnel. Arbitrator Weatherill's decision was dated July 2, 1970.

its management rights to organize the workforce in the BRTA, through clear and unequivocal language.

[91] It has not met that onus, in this case.

*What is the "Purpose" of the BRTA?*

[92] The Union argued that the BRTA was "more" than a Material Change Agreement. It argued the Company has contractually agreed to limit its management rights to organize the workforce in any other manner by its terms. It argued the requirement for the Company to maintain two pools to service the work on the Belleville Sub; one located in Smiths Falls and one in Toronto was enshrined in the BRTA.

[93] The Union points to the statements about the reorganization itself which were included in the BRTA as demonstrating the Company had agreed to fetter its rights to organize its workplace. For the following reasons, I cannot agree that is the impact of those references.

[94] I am satisfied the Company entered into the BRTA because it was required to mitigate the "adverse effects" from its decision to implement a "run-through operation" on the Belleville Sub, as described by Arbitrator Weatherill. I am further satisfied that this "run-through" operation was the decision to eliminate Trenton as an AFHT and establish Toronto and Smiths Falls as the AFHT for the other.

[95] The Company's decision to eliminate Trenton meant that *operationally* there would – *by necessity* – need to be a *change* in the AFHT for each of the crews then based in Toronto and Smiths Falls, which historically had been using Trenton as the AFHT. These two decisions were how the Company operationalized its decision to create this "run-through operation" on the Belleville Sub. The Company had the management rights in 1968 to operationalize its decision *by making Smiths Falls and Toronto the AFHT for the other.* This was not a decision the Union had any right to influence at the time the BRTA was entered into. The Company would have had to first make this operational decision in order for there to even *be* any "adverse effects" to negotiate in the BRTA, since it is those anticipated adverse effects that are to be mitigated.

[96] The Union relied on Articles 2, 4 and Appendix "A" of the BRTA to support its arguments. Those Articles state:

> Article 2. Engineers with home terminals at Smiths Falls and Toronto will man through freight trains between Smiths Falls and Toronto under schedule rates and conditions except as otherwise provided hereunder.
>
> …

Article 4. Run-through trains will be manned in accordance with the provisions of Appendix "A" attached hereto. This Appendix "A" is subject to change by mutual agreement.

…

Appendix "A"

1. Two pool boards will be maintained at each home terminal, one for the home terminal pool engineers and one for the "away-from-home" pool engineers.

…

[97] Also relevant to is Article 4 of Appendix "A", which provides that there is to be an "equal division of run-through dispatches, including deadhead dispatches" between the two crews. This aspect of work distribution - which was part of mitigating the adverse effects of the decision to have Toronto and Smiths Falls as the AFHT for the other - later caused the Company difficulty, and lead to the negotiation of an agreement between the parties in 2005 to amend the work distribution aspect of the BRTA, as further discussed below.

[98] Articles 2 sets out the Company's operational decision for engineers at both home terminals to man through freight trains between Smiths Falls and Toronto. The establishment of those two pools at those locations was how the Company operationalized its Material Change to "run-through" Trenton. Article 4 notes the application of Appendix "A" for how "[r]un-through trains will be manned". The Appendix notes that two pool boards will be maintained, one at each terminal. Each was to be the AFHT for the other. The Union pointed to no language which would have given it any say in this organization of the work on the Belleville Sub into two different terminals, or in the maintenance of two pool boards.

[99] According to Articles 63 and 110, the object of the BRTA – the "ends" it sought to achieve and the "nature of the bargain" made - was rather to address the "adverse effects" from the Company's choice to maintain two pools in Smiths Falls and Toronto and so establish each as the AFHT for the other. This was not the only way that change could have been operationalized by the Company. The Company could have chosen to locate the crews in one or the other of those locations at that time, and would have been within its managements rights to make either choice. The Union would not have had any influence on that decision. Whether the Company chose to operationalize its change using one pool from one location, *or* two pools from two locations, was within its management rights to determine. This decision was the "material change" which triggered the negotiations leading to the BRTA.

[100] Articles 63 and 110 only required the Company negotiate with the Union to mitigate the resulting adverse effects from that operational decision to reorganize its workforce and maintain two pool boards, with each terminal being the AFHT for the other; those Articles did not require that the Company to negotiate with the Union for how it would operationalize its decision to "run-through" Trenton in the first place, or how it chose to organize that work in this "run-through operation".

[101] Once the Company did make its decision, there would be "adverse effects" on employees from that "underlying" operational change. In the words of Arbitrator Picher, there would need to be "protective benefits" for employees to which they would otherwise not have a right. For example, if the Company's decision required individuals to move, their relocation expenses had to be addressed; if individual's chose to take early severance in view of this necessity to take longer runs and not have Trenton as their AFHT, that could be addressed. If hours of work needed to be changed to accommodate the longer runs, that could be addressed; if a house had to be sold, that could be addressed.

[102] Work distribution between the two terminals was also addressed in the BRTA in Appendix "A", including how that work would be "equalized". That need for equalization would have been an "adverse effect" from having this work shared between two terminals, that would have had to have been mitigated through negotiation, which it was. These were the types of adverse effects that were under negotiation; not the underlying decision of how to organize that work once Trenton was eliminated as an AFHT.

[103] This distinction between a) the underlying change made by the Company and b) the adverse effects flowing from that decision will become a repeating theme throughout this Analysis.

[104] It was obviously necessary to recognize and outline in the BRTA *what* the underlying change for the workforce – made by the Company - actually was. Without that recognition, there was no "adverse effects" to anticipate. However, that underlying operationalizing of how the work would be performed - once Trenton was eliminated - was not a term that was required to be *negotiated* by the parties in the BRTA. That is key context that must be kept in mind when interpreting the BRTA, in a manner which is consistent with the modern principle of interpretation, and in particular with the "ends" it was meant to achieve, or the "nature of the bargain".

[105] From a review of the authorities and submissions of the parties – and Articles 63 and 110 - I am satisfied that the reference to the substance of the Company's material

change located within the BRTA in Articles 2, 4 and in Appendix "A" is simply an acknowledgement of the material *change which the Company was going to make, when it decided to "run-through" Trenton and redesignate Toronto and Smiths Falls as AFHT's for the other.*

[106] By noting in the BRTA its choice to organize the workforce in this manner, the Company was not demonstrating any clear and unequivocal intention to give up its fundamental management rights to organize its workforce on the Belleville Sub at that point or going forward. That is not the context in which that Agreement was entered into; that was not the purpose or "object" of the Material Change Agreement; that was not the "nature of the bargain" that was reached, as required by the Material Change Articles.

[107] A review of both the rights the Union had before the BRTA; and how similar references have been treated in the jurisprudence supports this conclusion.

*What Did the Union Have Before the BRTA and What Did it Gain by the BRTA?*

[108] Prior to the negotiation of the BRTA, it cannot be said that the Union had any "rights" to impact the decision of the Company to choose to locate the crews for work on the Belleville Sub in two pools, at two different locations, in two different pools. The Union did not point to any clear and unequivocal language in the Collective Agreement that would have given it the right to influence the Company's decision regarding how and where to organize its workforce on the Belleville Sub.

[109] The terms of a contract must not only work harmoniously with each other,[39] but must also be read *consistently* with the underlying "ends" that contract was meant to achieve. Given that the object of the BRTA was not the underlying change itself, but its anticipated "adverse effects", the BRTA did not – and could not – create any "ownership rights" in the Union to that underlying change, when none existed previously. That is not the context in which the agreement was negotiated nor was it the purpose for that Agreement in the first place. The only rights given to the Union were those contained in Articles 63 and 110, which were to negotiate what Arbitrator Picher referred to as "protective benefits" for employees.

[110] In my view, the Union's position fails to account for the underlying purpose of the BRTA; it fails to account for the crucial and important distinction between:

[39] A recognized "canon of construction" for contractual interpretation.

a. The underlying material *change* which was initiated and instituted by the Company by exercising its management right and was *not* subject to negotiation with the Union; and

b. The *mitigation of the adverse effects* which resulted *from It*hat underlying change, which *were* to be negotiated with the Union, by virtue of the Material Change articles.

[111] Given that purpose, I cannot agree with the Union that the recognition and acknowledgement of the Company's change which was included within the BRTA - that two pools were to be created once Trenton was eliminated - *transformed* that initial management rights decision of the Company into one which the Union had an ability to influence from that point forward.

[112] To accept the Union's argument is to give to the Union "ownership rights" to the organization of this work - through the back door of the BRTA - *when it had no entitlement to those rights via the front door of the Collective Agreement itself, or through the application of the Material Change articles.*

[113] **CROA 3945** supports the purposive interpretation that statements acknowledging the underlying change do not transform to an agreement to maintain that change, in Material Change Agreements. That is a 2010 decision of Arbitrator Picher. That case involved a situation where CN was attempting to layer a material change on a previous material change by servicing work out of Edmonton when it had previously been serviced by engineers who were home terminalled in Calgary, under an earlier Material Change Agreement. The Union argued that the earlier Material Change Agreement [referred to as "Special Agreements" in CN jurisprudence] stated that "[t]he work South of Mirror on the Three Hills Subdivision will be transferred to Calgary home station." The Union argued this reserved the work to Calgary-based crews.

[114] This is the exact same argument made by the Union in this case, based on the same type of references in that Agreement to statements which acknowledge and state the Company's underlying change. The Arbitrator did not accept the argument of the Union. He preferred the Company's position that the Company *had* the ability to make the change, relying on **CROA 3459** and **CROA 3332**, and citing extensively from the latter case.

[115] While not explained in the same purposive approach in which it has been described in this Award, the Arbitrator implicitly rejected the Union's argument that *the reference to the change itself* contained in the Special Agreement gave to the Union

"ownership rights" over that state of affairs, when he noted that any "*limitation on the prerogatives of the Company would…require clear and unequivocal language to support it*",[40] which did not exist in that case, in those statements. The Arbitrator did not find those references to be the "clear and unequivocal" language necessary to fetter the Company's rights.

[116] It should be noted that there was no cancellation clause in the Material Change Agreement at issue in **CROA 3945**. He held the lack of a cancellation clause did not act to "perpetually" freeze how work was performed.

[117] In **CROA 3945**, the Union had argued alternatively that the Material Change provisions were triggered by the change. The Arbitrator agreed that the Material Change provisions *did* have to be used by CN. That earlier Material Change Agreement did, however, provide to Union members the right to have any further material change addressed through those Articles. He reasoned:

> **Can it be suggested that the Company has undertaken to perpetually assign the grain block service on the Three Hills Subdivision to spare employees at the Calgary home station, given that the Special Agreement has no date of termination or notice provision by which it can be terminated? I think not. Clearly, in the normal course, the Company could initiate a change away from the restrictions of that Special Agreement as part of its normal prerogative to manage its business.** However, in the Arbitrator's view, given the express stipulations of the Hanna and Mirror Special Agreement, **any change in respect of the handling of grain on the Three Hills Subdivision must be dealt with through a proper material change notice**. At a minimum, it must be deemed that **employees who are generally entitled to the protections of the Special Agreement can only be deprived of them through the material change provisions of the collective agreement which allow for the fashioning of terms which minimize the adverse impact of any such additional change.** To conclude otherwise would effectively nullify the Special Agreement in respect of Hanna and Mirror, itself fashioned to minimize adverse impacts, in part, on employees home terminalled in Calgary. [41]

[118] This reasoning is persuasive. While not expressly stated, this quotation recognizes the distinction between a) the management right to make the material change – which survives an early material change agreement *even without a cancellation clause* and b) the adverse effects flowing *from* that change, which *are* subject to negotiation.

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[40] At p. 9.
[41] At p. 13, emphasis added.

[119] That distinction was also recognized very early on by Arbitrator Weatherill in *obiter* comments, in **CROA 913.** That decision was issued in March of 1982, 13 years after the BRTA was negotiated. That Award was also a decision involving CN. It considered a Notice issued under the Material Change provisions in the agreement between that employer and the Union regarding the division of work between the Canora and Dauphin terminals, on the Togo Subdivision. As in this Grievance, the Company's Notice had served to "layer" a material change on a previous material change. That dispute was brought before Arbitrator Weatherill to impose the remaining terms to mitigate the adverse effects of that employer's Notice.

[120] Similar to the BRTA, the early material change agreement in **CROA 913** also had a statement acknowledging the operational change that *"all freight traffic handled between Dauphin and Canora on the Togo Subdivision would be handled by crews home-terminalled at Dauphin and Canora on an equal mileage basis, with no added cost to the Company".* In that case, CN had in fact incurred "added cost" from this existence of this agreement relating to adverse effects, and sought to make changes to it.

[121] **CROA 913** was not a grievance concerning whether CN could initially make a further change to address this impact. It was a hearing to set the terms to mitigate adverse effects from that change, when the parties could not agree. However, at the hearing, the Union argued that CN Company could not make the changes in question, due to the commitments it had made in the previous material change agreement regarding that work, in the statements quoted above. The Union argued essentially that CN could not layer a material change on a previous material change, due to these references to how the work was to be organized.

[122] This is the *same* argument made in this Grievance. The Arbitrator was not convinced. While he held that the union's argument regarding CN's ability to make the change was not the dispute before him, given that he was appointed to settle the adverse effect terms, he *also* chose to make several statements, in *obiter,* regarding the ability of CN to "layer" a material change upon a previous material change. He held:

> In my view, the Memorandum of 1974, as amended by that of 1976, constituted an "agreement" of the sort contemplated by Article 139 [Material Change provisions] with respect to measures to minimize the adverse effects of the material changes made at that time, and which related to the transfer of the home terminal of certain employees form Kamsack (which is on the Togo Subdivision), to Canora. Persons affected by that change would have been entitled to the benefits provided under the 1974 Agreement, as amended.

> What is involved in the instant case is a further, and different material change in working conditions, namely a reassignment of work on the Togo and Preeceville Subdivisions. To some extent, this reassignment is a response by the Company to the difficulties it has had in "equalizing" the work to which Dauphin and Canora crews were entitled, although there are other reasons as well for the change. Whatever the reasons, there is a material change proposed. **The agreement of 1974, as amended, was a response to the material change then proposed. It did not prevent the Company from later making other changes, if it was felt that circumstances required them. This is what has occurred**.[42]

[123] While these comments were made in *obiter,* they represent a very early recognition of the importance of the *purpose* of the material change agreements when interpreting those contracts, including the distinction between a) the material change proposed, which is not subject to negotiation; and b) the adverse effects flowing *from* that change, which *are* subject to negotiation. In recognizing *why* the Material Change Agreement was initially negotiated, Arbitrator Weatherill was ahead of his time, as **CROA 913** was decided before the Supreme Court adopted the modern principle of interpretation.

[124] While the Union noted that was a different employer, the type of distinction between the *purpose* and *adverse effects* of Material Change Agreements exists for both the CN collective agreements, and that of this Company. That distinction is not, therefore, persuasive.

[125] The Union argued that Arbitrator Weatherill in his 1970 Award settling the terms of the BRTA determined that the parties had "agreed" that both Smiths Falls and Toronto would be retained as home terminals. For several reasons, I cannot agree this statement is persuasive.

[126] First, even if the Union is correct, Arbitrator Weatherill had no jurisdiction to determine what the parties did or did not agree to in the BRTA. That question was not before him. His jurisdiction had been limited by the parties to settling the terms that remained in dispute. Therefore, he had no jurisdiction to determine any interpretation of the terms already settled. Any statement he made on what the parties did or did not agree to in the BRTA was *obiter.* Second, as recognized in the jurisprudence, the recognition of that organization within the body of a Material Change Agreement does not in itself create a contractual obligation to maintain that work, in that manner, in perpetuity, whether or not a cancellation clause is included in that agreement. Such a result would be

[42] At p. 2, emphasis added.

inconsistent with the underlying *purpose* of the BRTA, and with what was provided by the negotiated Material Change provisions. As earlier reasoned, it was necessary for the parties to outline what the Material Change made by the Company *was* in the BRTA, in order to appropriately mitigate the adverse effects *of that underlying decision.* Third, to interpret a one sentence statement in the manner urged by the Union would result in inconsistency with that same Arbitrator's reasoning in **CROA 913**. Such an interpretation should be avoided. Fourth, the fact that the Material Change provisions were used in the first place supports that the decision to alter the working conditions in the manner undertaken by the Company was a unilateral one *made by the Company, in the exercise of its fundamental rights* and fifth, there is no basis outlined by the Arbitrator in his 1970 decision that this underlying change itself was what was "agreed" on by the parties. He provides no support that the parties discussions included that type of fundamental transfer of management rights.

*What is the Impact of the Lack of a Cancellation Clause?*

[127] The Union has also focused on the lack of a cancellation clause as determinative of the rights it claims it obtained through the BRTA. It calls the existence of this clause a "critical fact". With respect to this characterization by the Union, I cannot agree that the lack of a cancellation clause is a critical fact which gives the Union the rights it seeks.

[128] The *purpose* of a cancellation clause must relate back to the *purpose* of the Material Change Agreement that it purports to cancel. At the risk of being unduly repetitive, the BRTA was negotiated in order to mitigate adverse effects of an underlying change. If in fact either party was dissatisfied with the agreement it had made to mitigate those adverse effects and the parties chose to include a cancellation clause (perhaps because all adverse effects were not yet clear, for example), then that agreement could be revisited by the parties as to those effects. Such a clause would also allow the parties to continue to negotiate adverse effects if such effects became clear over the passage of time. In this manner, either the Company or the Union could make that request, given their unique perspectives on the impacts of those changes.

[129] Arbitrator Picher in **CROA 3945** (decided in 2006) noted that the existence of a cancellation clause also meant that the Company must use the material change provisions to make any *further* change, and could not do so unilaterally, even if its change would not otherwise have attracted those provisions. That would be a further benefit gained by a cancellation clause. However, I cannot agree with the Union that a lack of such a clause serves to *transform* an agreement *to mitigate adverse effects* into another and *different* form of agreement – one which fundamentally limits the Company's

fundamental management rights to manage its workforce by "locking in" that first underlying material change made by the Company.

[130] The jurisprudence which I find persuasive does not support that approach.

[131] In **AH648** it was argued that CN had improperly used the Material Change provisions to try to resile from its commitments in a previous Material Change Agreement, which existed relating to Hanna and Mirror Home Stations. It was noted in that case that there was no cancellation clause. The Union made similar arguments that the Company had limited its management rights, including the absence in that case of a cancellation clause. Arbitrator Silverman did not accept that argument, relying on Arbitrator Picher's Award in **CROA 3945** that although the Hanna-Mirror Agreement were "not made in perpetuity", any "change" in grain handling on a subdivision covered by that Agreement "*had to be initiated through the material change process in order to give the trade unions an opportunity to negotiate the ramifications*"[43]. She found the Company had properly used that process.

[132] For its part, to support its arguments, the Union relied on a one sentence "guiding principle" comment made by Arbitrator Picher on July 21, 2014, in *CP v. TCRC (Directional Pools)*, (referred to as the "Directional Pool Award" in this decision).

[133] In the Directional Pool Award, Arbitrator Picher was addressing the issue of whether the Company could unilaterally abolish directional pools in a terminal, and replace them with a common pool. In the Directional Pool grievance, the Union challenged the Company's ability to unilaterally make that change. There was no Material Change Notice at issue in that Award.

[134] This was therefore not a decision in which Arbitrator Picher was contemplating whether a Material Change could be layered on a previous Material Change and on that basis alone, it can be distinguished from the line of jurisprudence that was specifically addressing this issue. Material Changes were not the *ratio* of his comments. However, that Arbitrator made several comments in *obiter,* on which the Union relies.

[135] Arbitrator Picher noted that Directional Pools had not been protected by the Union in the collective agreement at issue and were the product of "local rules, agreements and practices".[44] In finding that the parties had not negotiated any limitation in the collective agreement which limited the ability of the Company to establish or abolish Directional Pools, he determined that such local rules were subject to a 30 day cancellation clause,

[43] At para. 9.
[44] At p. 3.

which was available to either party. The Arbitrator also recognized that the Union had brought forward to the Arbitrator's attention certain "material change agreements", including the Souris Agreement of October of 1979, to support its arguments. Without any reasoning or reference to the Material Change provisions or the purposes of such contracts, the Arbitrator simply stated: "I agree with the Union that contractual agreements of this kind must be respected absent any cancellation clauses".[45] He then repeated that statement in his "expression of guiding principles" in the next paragraph, where he said:

> …where agreements have been made by the parties, as for example in the Material Change Agreement relating to Souris, Manitoba, where directional pools are expressly established and no cancellation provision is provided, it is not open to the Company to unilaterally cancel or abolish those directional pools. Any change in that regard must await renegotiation of the collective agreement".[46]

[136] Arbitrator Picher's comments were short, and couched as "general principles", given that the issue of layering a Material Change on a previous Material Change was not directly before him. It is difficult to accept as persuasive authority his statement relating to material change issues, void as it is of any reference to the Material Change provisions of the collective agreement; the purpose of those provisions; what the collective agreement required; and the factual context of what those provisions were intended to achieve. There is also no mention of his finding eight years earlier, in **CROA 3945**. Without reasoning – or this context – it is difficult to find a basis on which to find these statements compelling.

[137] While the comments in **CROA 913** were also made in *obiter,* unlike in the Directional Pool Award, those statements were made by an arbitrator who was acting at the time as an arbitrator appointed under the specific Material Change provisions; with arguments before him from both parties of what those provisions required; and who recognized the distinction in those Articles between the "change" at issue and the adverse effects caused by it.

[138] Arbitrator Picher's "guiding principles" also lack persuasive value as he came to a *different* conclusion not just in **CROA 3945**, but also several months earlier, in *CP v. TCRC (Material Change Cranbrook/Fort Steele).* In that earlier case – which *did* involve an attempt to "layer" a Material Change on an earlier Material Change, he found:

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[45] At p. 9.
[46] At p. 10.

> I am satisfied the Company was contractually at liberty to change its operations to better meet its customers' needs at a number of coal mines and to depart from the more restrictive provisions of the Sparwood Run-Through Agreement. I must conclude the material change proposed by the Company is proper and does meet the requirements of the Collective Agreements.[47]

[139] Those comments were not made in *obiter.* The *Material Change Cranbrook/Fort Steele* Award was ultimately set aside on judicial review as that Court found the Arbitrator had not provided sufficient reasoning to support his conclusions. The contradictory positions of the Arbitrator regarding the Company's management rights to make a further Material Change were noted by the Court on that review.[48]

[140] These two decisions were not the only Material Change decision authored by Arbitrator Picher where the *ratio* contradicted the *obiter* "guiding principle" noted in Directional Pool Award. Six years before the Directional Pool Award, Arbitrator Picher contradicted the "guiding principle" from the Directional Pool Award in another case where a Material Change was layered on a previous Material Change: **AH577** (*Outremont Yard*). That material change notice was triggered by the sale of the Company's Outremont Yard. That Yard had been subject to an earlier material change agreement, whereby a shortline company had maintained operations in that yard, and the Company had maintained one road switcher assignment. With the subsequent sale, that roadswitcher position was then being abolished by the subsequent Material Change. While in that case the earlier Material Change Agreement *did* contemplate further material changes, the Arbitrator also held, in *obiter,* that *even if it did not,* there was "…*nothing within the language of the Trois-Riviere Agreement* [the first Material Change Agreement] *which can fairly be construed as restricting the fundamental discretion of the Company to implement material changes in its operations, in any event*".[49]

[141] Given the lack of reasoning in the Directional Pool Award; its characterization as *obiter;* its contradiction with the *ratio* of two earlier cases when the issue of Material Change was squarely before the same Arbitrator; and the fact it is inconsistent with Arbitrator Weatherill's comments in **CROA 913**, the Directional Pool Award lacks persuasive value on this issue. I decline to follow the bare *obiter* statement on this point in the Directional Pool Award. I find that jurisprudence which has "picked up" Arbitrator Picher's statement to support that same conclusion carries with it the same limitations in

[47] At p. 6.
[48] *TCRC v. CP;* March 17, 2015; (Simpson, J. Court of Queen's Bench of Alberta), at p. 12.
[49] At p. 5.

persuasive value. I prefer the reasoning in **CROA 913,** supported by the conclusions reached in **CROA 3945** and **3332; AH648** and **AH677.**

[142] To the extent that the language of Arbitrator Picher in the Directional Pool Award has been "picked up" by later Arbitrators, that reliance suffers the same limitations as the decision itself. I decline to follow the decisions which rely on the Directional Pool Award to find the Company has limited its management rights in material change agreements. For example, in *CP v. TCRC (Lambton Yard; BRTA and Buffalo/Toronto ESR*)[50] the Arbitrator stated:

> It is well accepted that absent any cancellation clause, neither party can unilaterally resile from agreements negotiated pursuant to the material change provisions of the collective agreement, see for example *Canadian Pacific Railway and teamsters* [sic] *Canada Rail Conference (Sparwood Material Change)* October 13, 2015.[51]

[143] At issue in that case was what constituted "Toronto Yard" for the purposes of the BRTA. That Arbitrator also quoted the Directional Pool Award to support this statement.

[144] However, Arbitrator Hodges in his later, *2016* Award in the same litigation held the Company *could* in fact make the changes it desired to the Sparwood Run-Through Agreement. While the Teamsters sought judicial review of that decision, that review was not successful.[52] I therefore do not consider the 2015 decision of Arbitrator Hodges to have "well accepted" the proposition for which he was quoted in that Award. As a result, I decline to follow the reasoning in that case. The limitations of the Directional Pool Award, also relied upon by the Arbitrator, have already been discussed.

[145] That Arbitrator also stated that the "parties agreed" in the BRTA that Smiths Falls and Toronto were to remain as home terminals. The basis for that conclusory statement is unclear. That Arbitrator does not refer to any evidence or collective agreement provision that would have given the Union a voice in determining which AFHT's were to be maintained or in what locations. It is therefore unclear how that Arbitrator determined that retaining Toronto and Smiths Falls as home terminals was something the parties had "agreed" to maintain in the BRTA, given that it was an operational decision which would have to be made by the Company, in order for there to be an "adverse effects" to mitigate from that decision, in the first place. If that Arbitrator's statement arises from the wording of Articles 2, 4 and the Appendix, then I prefer the reasoning in both **CROA 3945** and **CROA 913** that those types of statements in a Material Change Agreement are <u>not</u> clear

[50] February 7, 2017 Award, (Stout).
[51] At para. 44.
[52] See the later section on the "Sparwood Litigation" in this Award, for further discussion.

and unequivocal limitations on the fundamental management rights of the Company to make further Material Changes.

*The 2005 Agreement*

[146] The Union also relied on a 2005 Agreement between these parties, arguing that it prevented the Company from making its proposed change. Some background is necessary to address this argument.

[147] In 2005, the Company issued a Material Change Notice that it intended to have the work between Toronto and Smiths Falls terminalled at Smiths Falls.

[148] This is the same *type* of change the Company is now seeking to make in the 2024 Material Change, but that Material Change Notice it involved moving crews to Smiths Falls, instead of Toronto.

[149] In its submissions, the Company argued the decision was taken in 2005, as certain aspects of the BRTA were not cost-effective, namely the need to equalize dispatches between the two terminals, resulting in a need to "deadhead" crews between Toronto and Smiths Falls. It is not disputed the Union resisted the change. The Material Change was not made, and the process was ultimately abandoned, as the parties came to an agreement between themselves to make certain changes to the equalization requirements in the BRTA. With those changes, the Company was then prepared to keep the work operating out of two pools in Toronto and Smiths Falls. The parties' agreement over this issue is referred to as the "2005 Agreement".

[150] The Company pointed out in its submissions that the 2005 Agreement was *not* a Material Change Agreement, as once it had an agreement from the Union, the Company withdrew its Material Change Notice and chose not to proceed with its management right to reorganize the workforce in the manner in that Notice. While the Company also argued the agreement was tilted in its favour, and the Union did not receive a great deal in return, nothing turns on that argument. It is not for an Arbitrator to speculate on what a Union did – or did not receive – by its own agreement.

[151] The parties entered into the 2005 Agreement on September 7, 2005. It stated, in part:

> "Memorandum of Agreement Between Canadian Pacific Railway and the TCRC – Trainpersons and Locomotive Engineers of Divisions 295, 658, 318 of Toronto Ontario and Smiths Falls, Ontario Governing Train Operations on the Belleville

Subdivision and Superceding Certain Terms and Conditions Identified in the Belleville Run-Through Agreement".

Scope

This agreement will supersede certain terms of the Belleville Run-Through Agreement, which govern the handling of crews and the general train operations on the Belleville Subdivision, in-line with the following criteria.

1) Effective October 2, 2005, the Company will no longer be required to equalize dispatches between Smiths Falls and Toronto crews…
2) ….
3) The rules regarding relief work and the present requirement to utilize certain crews for this work beyond the dividing line at Trenton, will be modified and will permit the Company to utilize Smiths Falls or Toronto crews for this work, based on operational requirements and a deemed crew shortage (i.e. no availability in the pool or road spareboard) at either terminal. Should crews be utilized beyond the dividing line at Trenton, as per the circumstances identified herein, they shall not be called in turn service out of the away from home terminal. …
4) ….
5) …..

This Memorandum of Settlement supersedes any conflicting application/article contained within the Belleville Run-Through Agreement(s) dated October 29, 1969 and July 21, 1970 respectively.

…

Notice to review the terms of this agreement may be served via thirty (30) days written notice by either party. Should this clause be enacted, the parties will meet within seven (7) days to attempt to rectify the situation. This agreement may be changed or modified by the parties upon mutual agreement.[53]

Dated this 7th day of September, 2005

[152] The Union has argued that the last sentence Agreement foreclosed the Company's ability to make any changes to the underlying BRTA which it superseded and modified, as that sentence states "[t]his agreement may be changed or modified by the parties upon mutual agreement". For the following reasons, I cannot agree this is the result of that statement.

[153] First, that statement must be read in the *context* of the two sentences which immediately precede it. Those sentences contemplate that the parties may chose to make changes *to the 2005 Agreement.* The 2005 Agreement *only* changed the

[53] Emphasis added.

equalization requirements of the BRTA – which had been negotiated to address the adverse effects of the elimination of Trenton as an AFHT and the division of the work between the two terminals of Smiths Falls and Toronto. It did not impact any other provisions of the BRTA.

[154] Second, by the 2005 Agreement, notice can be given to make changes to the 2005 Agreement, and there is set out a time limitation for the parties to "attempt to rectify the situation" if either party choose to give notice to review it. The final sentence then simply recognizes that the parties ***can*** agree to modify the 2005 Agreement. There is nothing unusual about that provision. The parties came to agreement in the 2005 Agreement, and that sentence recognizes they "may" so again, to change or modify the 2005 Agreement.

[155] Third, even if the Union were correct that the Union's agreement is required for *any* changes, the only "agreement" which that final sentence could relate to *is the 2005 Agreement*. That same sentence is not included in the BRTA. To extrapolate from that final sentence in the 2005 Agreement that nothing about *the BRTA* can be changed *unless* the parties agree, is a weight that sentence simply cannot bear. There is no clear and unequivocal language that the Company has foreclosed any future change to the organization of its workforce, without the Union's agreement because of that sentence

*The Sparwood Litigation*

[156] The term "Sparwood Litigation" - as used in this Award - stems from a lengthy dispute between the parties between 2013 and 2019 relating to a proposed Material Change to alter the organization of its workforce in the Elk Valley, B.C.

[157] The dispute began with a Material Change Notice dated June 10, 2013. That Material Change was to "refresh" an earlier Material Change which resulted in the 1993 Sparwood Run-Through Agreement (the "1993 Agreement"). That 1993 Agreement had itself refreshed an earlier Material Change Agreement from 1984 (the "1984 Agreement"), relating to the servicing of the coal mines in the Elk Valley, which itself had refreshed *an even earlier* "Coal Agreement" between the parties. The history of this litigation was thoroughly canvassed by Arbitrator Hodges who issued two Awards in 2015 and 2016 relating to this dispute, which are referenced below, and will not be repeated here.

[158] The Sparwood Litigation can be distinguished from the matter before me, on at least two bases.

[159] First, the 1993 Sparwood Run-Through Agreement which was being changed in that case contained a cancellation clause which was impacted by a letter agreement

regarding when that clause could be used. Second, a further article in that Agreement was found to have acted to "revive" the earlier 1984 Agreement, should the 1993 Agreement be cancelled.

[160] The complexity of those distinctions alone distinguishes the BRTA from the type of Material Change Agreements considered in the Sparwood Litigation. Given these significant differences between the BRTA and the Sparwood Litigation, I have considerable difficulty finding common ground between those Agreements and the BRTA.

[161] In the Company's view, it felt the Sparwood Litigation had resolved in its favour the issue of whether a Material Change could be layered on a Material Change. I am inclined to agree with this assessment, given a close reading of the decisions involved in the Sparwood Litigation.

[162] As the Company has pointed out, after all of the multiple Awards, the Company was able to proceed with its very significant Material Change initiative in the Elk Valley[54]. In 2016, Arbitrator Hodges determined the Company's reliance on the Material Change Articles was proper; ordered the parties to negotiate adverse effects; attempted to mediate when they could not agree; and ultimately determined the terms of that Material Change in his 2016 Award. The Company was able through the decisions of Arbitrator Hodges - and as evidenced in the multiple Material Change Agreements which were utilized in the Elk Valley between the late 1960's to 2019 – to "layer" Material Changes on Material Changes. It was also able to "layer" its latest 2013 Change on the 1993 Agreement. In his final paragraph of his 2016 Award, Arbitrator Hodges stated:

> The ultimate material change agreements between the parties in this instance will supersede all previous governing coal agreements, whether material change, ancillary or otherwise. *Cancellation of these new agreements in the future by either party will result in reversion to the basic terms of the collective agreement. Any subsequent alterations will only be possible by either mutual agreement, through national bargaining, or via a refreshed material change process.*[55]

[163] I am satisfied by this statement that Arbitrator Hodges recognized three methods by which the parties could alter his terms:

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[54]The decisions of Arbitrator Hodges are noted in *CP v. TCRC (Sparwood Material Change Grievance);* October 13, 2015; and *CP v. TCRC (Sparwood Material Change Grievance)* [#2]; June 2, 2016. His latter decision was upheld by the Alberta Court of Queen's Bench, on judicial review: *TCRC v. CP (*Macleod, J.; July 6, 2019).

[55] At p.25, emphasis added.

a. Mutual agreement;
b. National bargaining; and
c. "*via a refreshed material change process*"

[164] While the Union sought a judicial review of Arbitrator Hodges 2016 decision, that review was dismissed in 2019.

[165] On its application for review, the Union argued the Arbitrator had not considered its arguments that the 1984 Agreement prevented this "layering" of a subsequent Material Change, given Arbitrator Kates' recognition they were part of the collective agreement. Ultimately, however, the Union was unable to find traction with that argument.

[166] While disappointing for the Union, a close review of the 1984 Kates Award demonstrates that the *ratio* of that Award does not in fact support the broad statement of principle that the parties must negotiate any underlying change, when it is carefully considered within the context of what was decided. While impossible to determine, this may be why the argument failed to gain traction before Justice Macleod, on review.

[167] To explain: In the Fall of 1983, the Company chose to issue a Material Change to establish Sparwood as an AFHT for crews which manned unit coal trains in the Elk Valley. This Material Change impacted certain earlier "Coal Agreements". Arbitrator Kates was appointed to decide certain terms of that 1984 Material Change, as the parties were unable to agree on all terms. That resulted in what is referred to in the jurisprudence as the 1984 Kates Award. When the Arbitrator considered the appropriate "adverse effects" positions of the parties, he commented that the Company wished to "…apply the final terminal time and final detention time (at the AFHT), to make up the 100 miles (or 8 hour day) before payment for such final terminal time will accrue", given that the distance between the AFHT of Sparwood and Fort Steele was *less* than 100 miles (at 79 miles), while most of the coal runs to and from the Cranbrook-Fort Steele terminal were *in excess* of 100 miles.

[168] In seeking to do so, Arbitrator Kates found the Company was itself trying to mitigate *its own* protection from the "adverse effects" of its Material Change, given its commitments made in the earlier Coal Agreements to pay terminal time. He held the following:

> ***What the Company is trying to achieve*** by adding "home terminal time" to the constructive time allowed employees for runs that are less than 100 miles ***to alleviate itself from the adverse effects of its own proposed change.*** I do not hold that the company can unilaterally withdraw (or cancel) the commitments it has made to the trade unions provided in the Coal Agreements without the latter's

> consent. In my view those Agreements have supplanted these provisions of the collective agreement behind which the company now seeks refuge. I have concluded that the company must continue to adhere to the status quo ante the proposed material change until such time as the parties might negotiate a different accommodation. In sum, on this issue the trade union's position must prevail.[56]

[169] The Union argued Arbitrator Kates's statements about the inability of the Company to "unilaterally withdraw" from its commitments support the broad proposition that the Company must negotiate *any* changes to earlier Material Agreements and it has further argued the BRTA has also become *status quo ante*.

[170] While on first blush, the statement of Arbitrator Kates *appears* broad, they must be considered *against the background facts faced by that Arbitrator*, to determine the *ratio* of his decision. Undertaking *that* task, I find I cannot agree with the Union that Arbitrator Kates's intended a broad statement regarding all terms of a previous Material Change Agreement, when he made his comments. Factually, Arbitrator Kates determined that the Company had to keep paying the terminal time, as had been previously agreed in the Coal Agreements. He determined that what the Company was seeking to do *in the negotiations relating to adverse effects* was to protect itself from the "adverse effect" of its own proposed change, which was improper.

[171] Importantly, - and key - he did not find that the Company could not make the *underlying Material Change to establish Sparwood as an AFHT; even given the terms of the Coal Agreements.* The terms of *that* Material Change were what were in fact ultimately being settled by his Award. The only provision he noted was the attempt by the Company to escape its own adverse effects.

[172] Therefore, I cannot agree that Arbitrator Kates' Award supports the Union's position that a Material Change cannot be layered on a previous Material Change, without the Union's approval, or that the Company could not layer a new Material Change. Rather, it supports the Company's ability to do so, *but it also recognizes that in settling terms to mitigate "adverse effects", it is not the Company that is to be protected from the "adverse effects" which result from the proposed change, but rather Union members*.

[173] This Award therefore is consistent with the analysis made, above, that recognizes there is a distinction between a) modifying the underlying change with a future Material Change and b) modifying its adverse effects.

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[56] At p. 3, emphasis added.

*Miscellaneous Arguments*

Lack of Business Case for the Change

[174] The Union has pointed out the Company has not given any reason for its decision. I am not convinced the Company is required to do so. The Material Change provisions outline what is required from the Company in making a Material Change. There are three requirements, as earlier noted. Explaining to the Union the business case behind its choice is not one of those three requirements.

What is the Impact of **CROA 5007**?

[175] The Union maintained that the Company is implementing this change as a response to **CROA 5007**, to avoid complying with that decision, and as retribution. The Company has denied this allegation, stating that this change is consistent with how the bulk of its crew runs operate.

[176] Whether or not the Union is correct in its suspicions, is immaterial to the resolution of the issues in this case. I agree with the Union that - once the Company chose to crew the Belleville Sub in a certain manner, if it wanted to *materially change that choice in the future*, it was restricted to doing so through the Material Change articles and could not – without that process – use those employees in another manner. However, that is a different proposition than stating that the Company is prevented from making any *future* change to that arrangement of work, at a later date, in the exercise of its management rights through *another* Material Change process by the BRTA, assuming it appropriately follows the dictates of that process, and so long as that change is not inconsistent with the collective agreement. The Company would not be the first employer to choose to change its operations when an arbitration decision did not fall its way. It is not required to demonstrate its business case to the Union before making a further Material Change, even though to do so would assist Union members to understand the disruption to their lives. There is nothing sinister or in bad faith about such a decision, assuming the Company enjoys the underlying management rights to carry out its plan. Its action are not inconsistent with **CROA 5007**.

Is the BRTA Incorporated into the Collective Agreement by Reference?

[177] The Union also argued that the BRTA has been incorporated by reference into the Collective Agreement. As such, the Company is not entitled to make any changes to that Agreement without the Union's consent. It is recognized by the Alberta Court of Appeal that for extrinsic documents to be incorporated by reference into a collective agreement, "clear and precise language indicating such an intention…" is necessary: *ATA v. Buffalo*

*Trail Public Schools Regional District No. 29*[57]*.* The Union points to several references: Article 8 (Held Away from Home Terminal) for the reference "this also applies to the Belleville Run Through Pool"; Article 10 (Extended Service Runs) which contain the words "Belleville is excluded from this provision"; Article 18 (Road Service Rest) where "up to 48 hours rest also applies to…" "Belleville"; and Article 29 (Annual Vacation) where the Annual Vacation for Smiths Falls Locomotive Engineers is discussed. The Union argued the BRTA has become *status quo ante,* entrenched into the Collective Agreement.

[178] I cannot agree that these references serve to incorporate the BRTA into the Collective Agreement, *even if* it were established each reference was referring to how work was organized on the Belleville Subdivision. The references are a "passing reference" to the existence of certain organization of work on the Belleville Sub. Those references are not "clear and precise language" which would indicate an intention to have the BRTA itself incorporated. In any event, *even if* the Union were correct that the BRTA *were* incorporated by reference, that does not take the Union to the result it seeks. That incorporation would not change the ultimate character of the BRTA – its "ends" – *as it would still fall to be interpreted by its own terms,* keeping those "ends" in mind, whether incorporated into the collective agreement or not.

**Conclusion**

[179] For all of the reasons above, the Grievance is dismissed. The Company enjoys the management rights to "layer" a Material Change on a Material Change and by doing so impact the organization of its workforce on the Belleville Subdivision.

I retain jurisdiction to address any issues arising from the implementation of this Award. I also retain jurisdiction to correct any errors and address any omissions to give it the intended effect.

**DATED** and **ISSUED** this 2nd day of October, 2024 at Wheatland County, Alberta

**CHERYL YINGST BARTEL**
**ARBITRATOR**

[57] 2014 ABCA 407, at para. 9