CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5083

Heard in Calgary, September 12, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Grievance regarding the contracting of Cando Rail Services to fulfill customer service requirements for the Mosaic potash mine(s), and the adverse effects experienced as a result.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On October 26, 2016 the Company issued Bulletin CMC 091-16 COR 1 which abolished Roadswitcher assignments effective November 7, 2016 for the Bredenbury Terminal. The assignments previously provided customer service to the Yarbo Subdivision for the Mosaic Potash mines (K1 and K2). Effective November 7, 2016 the service was transferred to, and performed by Cando Rail Services, an independent third party short line rail company.

The Union's Position

The Union submits that TCRC members were employed on the discontinued assignments described above; the work in question has been performed by members of the bargaining unit and is work belonging to the employees covered by the applicable Collective Agreements.

The Union asserts the Company has initiated and facilitated the above described work to be performed by Cando Rail Services. As such, the Union contends the Company has contracted the disputed work by entering into an arrangement with a third-party to perform work on its behalf. The Company's actions are in violation of the respective Collective Agreements and the Canada Labour Code.

In the alternative, the Union contends the described change in operations was initiated by the Company and constitutes a material change in working conditions as defined in the Collective Agreements.

The Union filed a grievance alleging a violation of the Canada Labour Code, Article 34 (LE) and Article 72 (CTY), which the Union contends requires the Company to provide notice of a material change to the General Chairmen and to negotiate benefits to minimize possible significantly adverse effects on Locomotive Engineers, Conductors and Trainmen at Bredenbury, SK.

The Union seeks an order that the Company cease and desist any and all arrangements which provides for the contracting of the disputed work to Cando Rail services. The Union also requests the Company reinstate the abolished assignments described above (or any other) required to provide all appropriate service to Mosaic potash mines (K1 and K2). The Union also seeks an order that all employees be made whole for their losses due to the Company's actions described above.

In the alternative, the Union seeks an order that the Company is required to comply with the respective Material Change provisions contained within the Collective Agreements (Article 72CTY/34LE), and initiate the appropriate negotiations to minimize all adverse effects. The Union requests that all employees adversely affected by the changes are made whole for all losses associated with the above breaches. The Company denies the
Union's allegations, claims and requests.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On October 26, 2016, the Company issued Bulletin CMC 091-16 COR 1 which abolished Roadswitcher assignments effective November 7, 2016 for the Bredenbury Terminal. The assignments previously provided customer service to the Yarbo Subdivision for the Mosaic Potash mines (K1 and K2). Effective November 7, 2016 the service was transferred to, and performed by Cando Rail Services, an independent third party short line rail company.

The Company's Position

The Company denies the Union's allegations, claims and requests.

The Union alleges that the work provided by Cando Rail Services belongs to their members; however, the Union has failed to substantiate their claim. Within their allegations, they have not provided a single Collective Agreement Article that supports their assertion.

The Union contends: "the Company has initiated and facilitated the above described work to be performed by Cando Rail Services." Again, these allegations are not supported by facts or proof. Jurisprudence has long held that the burden of proof for cases such as this lies with the Union. The Company cannot agree that the Union has met this requirement.

Further, Mosaic Potash Mines does not belong to the Company and the Company does not have control over the contractor they choose for servicing. Given the Company does not have this control, the Union's assertions regarding the Material Change provisions of the Collective Agreements are simply without merit.

Notwithstanding the Company's position that this is not a material change—which means the Company was not obligated to provide notice and further was not obligated to negotiate benefits—the Union has failed to identify any one who was adversely affected or even what those adverse effect may be.

As for the Union's request for a "cease and desist," given the Union has failed to identify a provision of the Agreement which has been allegedly violated, employees who have allegedly adversely affected, or any alleged adverse effects, the Company maintains this attempt to achieve a blanket award for all instances—future and present—would be grossly inappropriate.

Further, absent concurrence by both parties, the provisions of the Collective Agreements do not allow for the consolidation of multiple disputes into one grievance. Each grievance must address the specifics of each case. Each case in turn, must be assessed on its own merits.

The Company maintains that there is no violation of the Collective Agreements and requests that the Arbitrator dismiss the Union's grievance.

The Union's Position

The Union has filed their own Ex Parte Statement of Issue.

For the Union:	**For the Company:**
(SGD.) D. Fulton -and- **G. Edwards**	**(SGD.) S. Oliver**
General Chairmen CTY-W & LE-W	Manager, Labour Relations

There appeared on behalf of the Company:

A. Cake	– Manager, Labour Relations, Calgary
F. Billings	– Director, Labour Relations, Calgary
D. Biblow	– Director, Interline and Passenger West, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, CTY-W, Calgary
R. Finnson	– Vice President, TCRC, Ottawa
G. Lawrenson	– General Chairperson, LE-W, Calgary
J. Hnatiuk	– Vice General Chairperson, CTY-W, Vancouver
K. Joynt	– Local Chairperson, LE, Wynyard, *via Zoom*
S. Doyle	– Local Chairperson, CTY, Wynyard, *via Zoom*

AWARD OF THE ARBITRATOR

Introduction & Issue

[1] On October 26, 2016, the Company issued Bulletin CMC 091-16 COR 1 (the "Bulletin"), which abolished two Roadswitcher assignments (N02 and N04) at Bredenbury Yard, in Bredenbury, Saskatchewan. The abolishment was to be effect November 7, 2016.

[2] The work which had previously been performed by those two abolished assignments was work servicing two mine sites of the Mosaic Company ("Mosaic"). It was work which Mosaic desired to have performed by its own third-party contractor, Cando Rail Services ("Cando"). Cando is an independent, third-party short line rail company.

[3] The Company entered into a Trackage Rights Agreement with Mosaic in October of 2016, allowing Mosaic's choice of contractor to perform that work.

[4] The Union grieved the Company's decision. The Union also filed a preliminary objection concerning the Company's failure to reply to any stage of the Union's Grievance.

[5] The issues between the parties are:

a. Can the Company rely on its arguments in its *ex parte* Statement of Issue, given that it failed to respond to this Grievance at any stage of the Grievance procedure, or must the Grievance be dismissed?

b. Did the Company improperly contract out work - over which the Union had work jurisdiction? and, if not

c. Was the change in working conditions resulting from the abolishment of these two positions a "material change" which triggered the Company's obligations under the collective agreement?

Background

[6] Some background context is necessary to situate this dispute.

[7] Mosaic is one of the world's largest suppliers of potash and phosphate. In 2015, Mosaic was a client of the Company. It operated three potash mines in Saskatchewan, at Belle Plaine, Colonsay and Esterhazy.

[8] Two of its mine sites at Esterhazy, Saskatchewan were known as K1 and K2. A stretch of track 22.93 miles long connected the Company's Bredenbury Terminal to Mosaic's K1 and K2 mine sites. That track is known as the Yarbo Subdivision (or "Sub"). The Yarbo Sub was only used by the Company for the transportation of potash from K1 and K2 mines to Bredenbury Yard.

[9] From Bredenbury Yard, the potash was then transported by the Company to market.

[10] Prior to the effective date of the Bulletin, the two abolished assignments had serviced work for Mosaic. I am satisfied that in 2015, Mosaic desired to create "more fluidity at its mines and improve the entire operational cycle of its railcar fleet… It wanted rail switching crews on hand 24/7 to provide dedicated switching and railcar mechanical services."[1]

[1] Tab 6 of the Company's Materials

[11] The Company filed into evidence a letter dated July 20, 2015, sent from Mosaic to the Company, relating to the Belle Plain facility. That letter stated, in part:

> …this letter serves as formal notice that Mosaic Crop Nutrition, LLC is electing **to exercise its right to establish third party switching on-site** at Mosaic's Belle Plaine, SK facility pursuant to the terms of that certain Canadian Pacific – Mosaic Contract….dated April 30, 2012 between Mosaic and Canadian Pacific…***In order to effect this transition, however, Mosaic requires Canadian Pacific's immediate participation in the development of running rights agreements and an operating plan for the Belle Plaine, SK facility.***[2]

[12] While that notice related to the *Belle Plaine* facility, according to an email received from Mr. David Kirkpatrick, Senior Manager Rail Transportation for Mosaic (and filed into evidence), the Company's notice to CP on July 20, 2015 "electing to exercise its right to establish third party switching on-site" at its Belle Plaine Facility, was:

> … the start of the process *to implement third party switching* ***across all Mosaic's facilities****, which ultimately led to the expansion of third party switching at Esterhazy and Colonsay* ***and the 2016 operating rights granted [by the Company] to Esterhazy.***[3]"

[13] Mr. Kirkpatrick also indicated that following this notice, many discussions occurred for implementing this process at Esterhazy, relating to K1 and K2 mine sites.

[14] I am satisfied from the evidence that Mosaic wanted the Company to enter into a Trackage Rights Agreement, to allow switching and rail car maintenance relating to Mosaic's business to be performed *by* Mosaic's choice of third party contractor, rather than the Company's employees. It was not disputed that the Company's competitor, CN, also had lines leading to the mine, and that the work from the Mosaic mine sites had in the past been serviced by CN.

[15] Mosaic therefore had choices. It is not a leap to recognize it was in the Company's interests to satisfy its customer's request, to maintain its business relationship with its industrial customer, Mosaic.

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[2] Emphasis added.
[3] Emphasis added.

[16] The Trackage Rights Agreement was in fact entered into by the Company, effective October 30, 2016.

[17] Given confidentiality concerns, the details of that Agreement will not be outlined in this Award. Suffice it to say, a third party chosen by Mosaic performed work on the Company's lines, relating to the transportation to the Bredenbury Yard of Mosaic's product.

[18] I am satisfied from a careful review of that Agreement, that the work could not have taken place without the Company's agreement, and that the Company maintained the ability to ensure the third party's training and operation met its requirements.

Collective Agreement Provisions

> ARTICLE 34 – Material Changes In Working Conditions
>
> 34.01 Prior to the introduction of run-throughs or relocations of main home
>
> terminals, or of material changes in working conditions which are to be initiated solely by the Company and would have significantly adverse effects on Engineers, the Company will:
>
> (1) Give to the General Chairman as much advance notice as possible of any such proposed change with a full description thereof along with appropriate details as to the consequent changes in working conditions, but in any event not less than:
>
> a) three months in respect of any material change in working conditions other than those specified in subsection (b) hereof;
> b) six months in respect of introduction of run throughs, through a home terminal or relocation of a main terminal;
>
> (2) Negotiate with the Union measures other than the benefits covered by Clause 34.11 of this article to minimize significantly adverse effects of the proposed change on Locomotive Engineers, which measures may, for example, be with respect to retaining and/or such other measures as may be appropriate in the circumstances…
>
> Conductors Trainmen and Yardmen (CTY Agreement) Article 72 – Material Change In Working Conditions
>
> **72.01** Notice of Material Change
>
> The Company will not initiate any material change in working conditions that will have materially adverse effects on employees without giving as much advance notice as possible to the General Chairperson concerned, along with a full description thereof and with appropriate details as to the contemplated effects

upon employees concerned. No material change will be made until agreement is reached or a decision has been rendered in accordance with the provisions of Section I of this Article.

71.02 A grievance concerning the meaning or alleged violation of any one or more of the provisions of this Collective Agreement shall be processed in the following manner:

Step 1 - Presentation of Grievance to the Designated Supervisor

Within 60 calendar days from the date of the cause of grievance the employee may present the grievance in writing to the designated Company Officer who will give a decision in writing as soon as possible but in any case within 60 calendar days of date of the appeal, or this Step may be bypassed by forwarding the grievance to the Local Chairperson who may initiate the grievance at Step 2.

Step 2 - Appeal to the Designated Company Officer

If a grievance has been handled at Step 1, within 60 calendar days from the date decision was rendered under Step 1 the Local Chairperson may appeal the decision in writing to the designated Company Officer.

If Step 1 has been bypassed then, within 60 calendar days of the date of the cause of grievance, the Local Chairperson may present the grievance in writing to the designated Company Officer who will give a decision in writing as soon as possible but in any case within 60 calendar days of date of the appeal.

The appeal shall include a written statement of the grievance along with an identification of the specific provision or provisions of the Collective Agreement which are alleged to have been misinterpreted or violated.

Step 3 - Appeal to General Manager

Within 60 calendar days from the date decision was rendered under Step 2, the General Chairperson may appeal the decision in writing to the General Manager, whose decision will be rendered in writing within 60 calendar days of the date of appeal. The decision of the General Manager shall be final and binding unless within 60 calendar days from the date of their decision proceedings are instituted to submit the grievance to the Canadian Railway Office of Arbitration and Dispute Resolution for final and binding settlement without stoppage of work.

22.02 Grievance concerning wage claims or alleged violations of the collective agreement A grievance concerning the meaning or alleged violation of any one or more of the provisions of this Collective Agreement shall be processed in the following manner:

Step 1 - Presentation of Grievance to the Designated Supervisor

Within 60 calendar days from the date of the cause of grievance the employee may present the grievance in writing to the designated Company Officer who will give a decision in writing as soon as possible but in any case within 60 calendar days of date of the appeal, or this Step may be bypassed by forwarding the grievance to the Local Chairman who may initiate the grievance at Step 2.

Step 2 - Appeal to the Designated Company Officer

If a grievance has been handled at Step 1, within 60 calendar days from the date decision was rendered under Step 1 the Local Chairman may appeal the decision in writing to the designated Company Officer.

If Step 1 has been bypassed then, within 60 calendar days of the date of the cause of grievance, the Local Chairman may present the grievance in writing to the designated Company Officer who will give a decision in writing as soon as possible but in any case within 60 calendar days of date of the appeal.

The appeal shall include a written statement of the grievance along with an identification of the specific provision or provisions of the Collective Agreement, which are alleged to have been misinterpreted or violated.

Step 3 - Appeal to General Manager

Within 60 calendar days from the date decision was rendered under Step 2, the General Chairman may appeal the decision in writing to the General Manager, whose decision will be rendered in writing within 60 calendar days of the date of appeal. The decision of the General Manager shall be final and binding unless within 60 calendar days from the date of his decision proceedings are instituted to submit the grievance to the Canadian Railway Office of Arbitration and Dispute Resolution for final and binding settlement without stoppage of work.

Article 71 Grievance Procedure – Wage Claims and/or Alleged Violations of the Collective Agreement

71.01 A wage claim not allowed will be promptly returned and the employee advised the reasons therefore. If not returned to the employee within 30 calendar days the claim will be paid.

When a portion of a claim is not allowed the employee will be promptly notified and the reason given, the undisputed portion to be paid on the current payroll.

Article 22 – Grievance Procedure

22.01 Wage claim not allowed

A wage claim not allowed will be promptly returned and the employee advised the reason therefore. If not returned to the employee within 30 calendar days the claim will be paid.

> When a portion of a claim is not allowed the employee will be promptly notified and the reason given, the undisputed portion to be paid on the current payroll.

Arguments

The Union

[19] The Union raised a preliminary objection that the Company had failed to respond to the Union's Grievance, in breach of both the collective agreements in place at the time, and the CROA Memorandum of Agreement, which sets out the rules of this expedited process. It argued the mandatory language of the collective agreements in place at the time of this Grievance required a response by the Company at each stage of the Grievance procedure, which was not given. It also argued that the CROA Agreement, section 6 also requires that disputes must be processed "through the last step of the grievance procedure", and this was not done, given this lack of response.

[20] It also argued the Company did not submit its first *ex parte* Statement of Issue until April 12, 2020 and it had no right to do so then, since it had not responded to the Grievances earlier. It argued the Arbitrator should not "reward" the Company for failing to respond to the Grievance, in breach of the collective agreement.

[21] The Union also urged that the Company's complete lack of response has frustrated the Union's ability to respond to the Company's position. It argued that none of the positions advanced in the Company's *ex parte* Statement of Issue were ever raised in the Grievance procedure. It argued the Company should not be permitted to rely on issues that were not earlier outlined, in the Grievance procedure and should be barred from submitting its own positions to this Arbitrator. It further argued the Grievance should be allowed when the Company does not respond.

[22] Regarding its position on the merits, the Union first argued the Company consented to the third party contractor performing bargaining unit work, previously performed by its membership. It argued the Company's arrangement with Mosaic has effectively resulted in a third party performing bargaining unit work, which was a breach of the collective agreement, which did not allow contracting out. In the alternative, the Union argued that abolishing these positions constituted a material change under Articles

72 and 34 of the respective agreements and so triggered the obligations in those Articles for the Company to provide notice to the Union and to negotiate the impact of adverse effects. It argued that, as the Company's assent and agreement was required for this work to occur, it is not accurate to suggest the change was *not* initiated by the Company and these provisions did not apply. It pointed out that without the Company's agreement, the work could not have been transferred to Mosaic's contractor.

[23] The Union argued that these changes resulted in a substantial impact on its membership including the impacts of cascading bumping and the loss of six employees, as N01, N02, N04 and N09 all had three TCRC members, and after the change, N01 and N09 were left with six employees, resulting in a net reduction of six employees.

The Company

[24] For its part, the regarding the preliminary objection, in its Reply, the Company argued the Union's objection is not timely. It argued the Union was aware of the Company's filing of its *ex parte* since 2020*,* but did not raise this issue until September 6, 2024. It argued that both the Company and the Union have filed *ex parte* Statements of Issue for many years before this Office and not once has this argument been brought forward by the Union.

[25] It argued the issue was not properly before this Arbitrator either, given section 14 of the CROA Memorandum of Agreement, and that this Arbitrator has no jurisdiction over that argument.

[26] Further, it argued the Union was relying on language relating to wage claims and not grievances generally regarding allowing a grievance not responded to in a timely manner: **CROA 507**. It argued that language does not allow a grievance not responded to, other than for a wage claim. It argued it is not a "wage claim" to argue the Grievor be "made whole", so the current dispute is not a "wage claim" dispute. It argued the Union was "lying in the bushes" with that argument, as it was a new argument raised on the doorstep of arbitration.

[27] Regarding the merits, the Company argued it has not contracted out work to either Mosaic or its third party; it has not engaged Mosaic's third party to do that work; and it is

not privy to that financial arrangement, which is a matter between Mosaic and its contractor.

[28] Even if it could be said it has contracted work to Mosaic, the Company argued there is no language preventing it from contracting out work, which is demonstrated by the fact the Union has not referred to any provision in the Collective Agreement against what the Company has done in this case. It argued the lack of that type of language has been confirmed by other arbitrators, along with the fact that such a limitation is not implicit and must be bargained: **CROA 2249; AH577**, which the Union has not been able to do successfully for this Agreement. It argued an arbitrator has no jurisdiction to "read in" such a limitation, as to do so would be to amend the Collective Agreement.

[29] The Company argued the Union bears the burden to establish the Material Change provisions apply and it has not met that burden to establish what it referred to as the "cornerstone requirements" from CROA 3083, in this case. It argued the changes do not constitute "material changes", given that those changes were not solely initiated by it, but by Mosaic, who demanded to take control over its own potash cars. It argued the Union does not have "exclusive rights to work within customer facilities and to tracks leaded (by way of trackage rights agreements or other agreement) by a customer" which it argued is "illogical, not factual and canot be found anywhere in any agreement between CP and the TCRC".[4] Once the Trackage Rights Agreement was entered into - the two Roadswitcher positions were no longer needed and were abolished. It argued there was a loss of business as a result of Mosaic's decision. It further pointed out that no employees were adversely affected in any event.

[30] It further argued it was unaware of any "significantly adverse effects" on Union members of Division 649, as alleged by the Union. It argued there was no reduction of employee base for Division 649. While the Union bore the onus of proof, the Company provided data there was no reduction of the employee base. All employees who existed prior to the job abolishment remained following the abolishment and during the time of

[4] At para. 67 of its submissions in Chief.

the step 2 and step 3 grievance submissions. While two employees retired in March of 2017, that is not related to the job abolishment.

Analysis and Decision

The "ex parte" Issue

[31] This Arbitrator has already considered the issue of whether the Company could file its *ex parte* Statement of Issue in a pre-hearing conference call and allowed the filing of that *ex parte* Statement of Issue at that time.

[32] It was determined that - as Arbitrator Hornung had *already* accepted the Company's *ex parte* Statement of Issue in April of 2020 - the Office had previously determined that issue and the Company could proceed to file its *ex parte* Statement of Issue.

[33] Even were this not the case, it would have been determined the Union's objection to the Company's ability to offer a position, made four years after that position was first communicated, was untimely.

"Contracting Out" Arguments

[34] Regarding the first argument of the Union relating to work jurisdiction, *even if* the Union were correct that bargaining unit work had been "contracted out" to Mosaic and therefore to Cando - and it is not necessary for the purposes of this Award to consider if that occurred - there is no provision in the parties' agreement which prohibits the Company from doing so.

[35] There are in fact multiple cases where this Office has determined that if the collective agreement does not prohibit contracting out in express language, an employer is entitled to do so: See for example **CROA 2249**; **CROA 850**; **CROA 1003**; and **CROA 1004**.

[36] In **CROA 2249**, the Arbitrator stated:

> It is well-settled, within Canadian labour law, that an employer who is party to a collective bargaining relationship is deemed to have the right to contract out work which might otherwise be performed by members of a bargaining unit, unless there is clear and unequivocal language within the collective agreement which would prohibit the employer from doing so.

[37] In **CROA 1003** it was noted the collective agreement did not "prohibit" contracting out. In **CROA 1004**, it was found that

> …nothing in the Collective Agreement entitles an employee to claim as of right certain work which is done for the Company's account by persons other than it's own employees…nothing allows a full-time employee such as the grievor to require the Company not to contract out the work, but to assign it to him on an overtime basis.

[38] While the Union argued that its scope close sets out that it applied to individuals who work on the Company's rail lines - and the disputed work was on the Company's rail lines - I am satisfied that clause is in reference to *identifying* the individuals covered by the Union's certification, as opposed to an express prohibition on contracting out work which may occur on the Company's rail lines.

[39] I am supported in this conclusion by **CROA 850,** where the Arbitrator held that setting out the classifications of persons who come within the bargaining unit is <u>not</u> an express prohibition against contracting out.

[40] An Arbitrator has no jurisdiction to "read in" such a prohibition where none exists, *regardless* of whether the Company is permitted – or not permitted – to file an *ex parte* Statement of Issue. That is a result that must be obtained by the Union through bargaining.

<u>*Was this a "Material Change?*</u>

[41] The Union's alternative argument was that this was a "material change", triggering the process under Articles 72 and 34.

[42] The Union bears the onus of proof to establish that allegation.

Summary

[43] For the following reasons, I am satisfied that – while the Union has established that the Company *did* have control over whether to give Mosaic what it requested and so to abolish those positions – the Union was also required to establish that the adverse effects on its membership from this decision was "significant". An Arbitrator cannot "infer" such effects occurred just from the fact the positions were abolished. The Union has failed to establish any adverse effects occurred on its membership, as a result of this change. As it bore the burden to do so, the "change" made by the Company was not a "material" one, on these circumstances.

Analysis

[44] The Material Change provisions are unique to the railway industry. The history of the development of those provisions - and what they require - was recently and thoroughly canvassed by this Arbitrator in **AH892** and will not be repeated here.

[45] To summarize, such provisions are designed to protect employees from the adverse effects of technological changes to working conditions, by providing to them protections they would not otherwise be entitled to, in the absence of such clauses.

[46] However, it has also been established in the jurisprudence which followed the introduction of these provisions (in the 1960's) that the mere *fact* of a change in working conditions is not sufficient to trigger the obligations under Articles 72 and 34. Rather, the changes must be "significant" changes: **CROA 3083**.

[47] To meet its burden of proof therefore, the Union must establish not only that such changes were initiated by the Company due to its control over the arrangement with Mosaic, but also that significant adverse effects felt by its membership.

[48] It is this second aspect of the Union's burden of proof that has not been met, in this case.

Is This a "Change" Initiated by the Company?

[49] From a review of the jurisprudence in this industry, I am satisfied that the elements of control and agreement which were required by the Company in this arrangement serve to satisfy the *initial* question under Articles 72 and 34, that the Company has initiated this change. One of those cases is **CROA 3539.** In that case, CN agreed with Ontario Northland Railway (ONR) to replace certain of its crews who had operated runs for the ONR, with crews employed by the ONR.

[50] Like in the case before me, this change was at ONR's initiation. It came about because the ONR was seeking cost efficiencies. That decision resulted in the abolishment of twelve positions. Similar arguments were made in **CROA 3539**, as have been made in this case. The Company in that case argued that the agreement came about because of "ONR exercising its "right" to utilize its own running trades crews in the operation of the Northlander trains", so the decision was not initiated by it. As in this case, the Union argued the decision was a joint one between the two companies, which could not have come about without CN's full agreement. Also as in this case, the Union argued this was a material change that was "essentially planned and agreed to by CN", so the material change provisions applied.

[51] The Arbitrator agreed. He noted that - had ONR simply ceased operations, resulting in the abolishment of the twelve positions - there "could be no case made for a material change", as that would be a change that was the result of a "fluctuation in the traffic or the operation of influences inherent to work within the railway industry".

[52] However, that was not what occurred. Rather, CN retained "*full control over the decision as to which trains will operate over its lines, and which crews will operate those trains*" and CN had not given an "*unfettered "right"* to ONR to operate the Northlander with its own running trades employees between North Bay and Toronto".

[53] The Arbitrator went on to reason:

> …***it could only go to such an operation with the agreement of CN.*** In such a commercial contract, unlike a collective agreement, **the assent of CN could be withheld for any reason, and could not be subject to any test of reasonableness. In effect, the Company held an unreviewable veto *over whether the Northlander would be operated by its own employees or the***

> ***employees of the ONR. To that extent, it is difficult to conclude other than that it was central and instrumental in the decision to change the operation of the Northlander, to the extent it would no longer be manned by CN crews from and After April of 2005*".**[5]

[54] The Arbitrator in that Award further relied on **CROA 2975**, where a change implemented by the ONR pursuant to an agreement with CNR resulted in the abolishment of one yard assignment and triggered the material change provisions; and **CROA 2159**, which involved the "*hand-in-glove facilitation of a contracting out arrangement in favour of CP's industrial client*" whereby there was "*instrumental involvement of the Company in suggesting, identifying and facilitating, both by physical works and by a legal contract, the transfer to Railserve Inc. of the industrial switching work at Gatineau which previously belonged to it*".

[55] In this dispute, while it may well be the Company felt it had no choice but to agree with Mosaic's request - to maintain its business relationship and not lose a client to a competitor - it still retained the level of control referred to in **CROA 3539,** over whether it would allow Mosaic to control its own potash cars on its lines and in the Bredenbury Yard**.** Whatever the motivation for undertaking that arrangement, the Company maintained "an unreviewable veto" over whether it would occur.

[56] Like the Arbitrators in **CROA 3539**; **2975** and **2159**, I am satisfied the control Mosaic sought over the work relating to its movement of potash to the Bredenbury Yard could not have been obtained without the Company's agreement to enter into the Trackage Rights Agreement; and further without the Company's willingness to engage in managing the underlying operations to facilitate that arrangement.

[57] That said, that does not make it a "Material Change" as that term is understood in this industry. it is well-established in the jurisprudence relating to this industry that not *every* change triggers the protections of "material change" provisions (in this case Articles 72 and 34). The change must be "significant".

[5] Emphasis added.

[58] In **CROA 3083**, the Arbitrator quoted **CROA 1167**, which held:

> *…I am satisfied that it would not suffice for the Trade Union to show that engineers involved were merely adversely affected by the proposed changes.* ***The Trade Union must demonstrate "significantly" adverse effects. That is to say, it must be established that such proposed changes in working conditions will have the adverse effect of rendering the engineer redundant or superfluous to the Company's manpower exigencies or otherwise undermine his job security.***[6]

[59] In that case, the Arbitrator found there was:

> *…no objective evidence of any adverse effect on any employee by reason of the cancellation of assignment 584 on the Monfort Subdivision, much less evidence upon which a board of arbitration can conclude that any employee suffered "significantly adverse effects .. the Council has failed to discharge the onus of proof which is upon it in this claim. The grievance must therefore be dismissed.*[7]

[60] I am drawn to the same conclusion in this case.

[61] The Union has not met its burden to establish there were significant adverse effects suffered by its *membership*, who *occupied* the Roadswitcher positions before they were abolished.

[62] While the Union argued there were adverse effects from the very *fact* of the abolishment of the positions, and there was a negative effect from cascading bumping, and while its Step 3 Grievance material alleged that there was a "measurable reduction of the employee base for Division 649", that statement was not accompanied by any objective evidence that was in fact the case.

[63] It is one thing to "state" these impacts, but another to establish it with evidence on which an Arbitrator can rely. No evidence was filed by the Union that the individuals whose jobs were abolished suffered *any* adverse effects whatsoever, let alone adverse effects of significance.

[64] For example, there was no evidence filed that the individuals occupying the two abolished positions were unable to move into other positions, or that any job losses

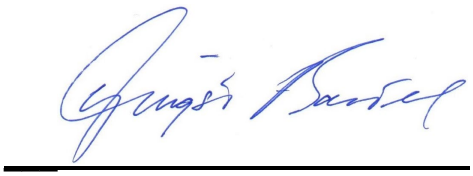
[6] At pp. 2-3.
[7] Emphasis added.

actually resulted to *any* member from the job abolishment. That is evidence within the Union's power to obtain from its membership, but was lacking.

[65] Without that type of evidence, no determination can be made of whether there were – or were not – any adverse effects, let alone effects of significance. As the Union carries the burden to do so, it has not been met in this case.

[66] The Grievance must be dismissed.

I reserve jurisdiction to address any issues arising from the implementation of this Award; to correct any errors, and to address any omissions, to give this award its intended effect.



December 13, 2024

CHERYL YINGST BARTEL
ARBITRATOR