IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC RAILWAY

(the "Company")

and

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

GRIEVANCES CONCERNING the Red Deer Interim Diversion Agreement cancellation and Red Deer employees operating to Scotford Yard

SOLE ARBITRATOR: John Stout

APPEARANCES:

For the Company:
Brianne Sly – Assistant Director Labour Relations
Chris Clark – Assistant Director Labour Relations
David Pezzaniti – Labour Relations Officer
David Guerin – Senior Director Labour Relations

For the Union:
Michael Church - Caley Wray
Dave Fulton - General Chair, TCRC-CTY West
Greg Edwards - General Chair TCRC –LE West
Cody Woodcock - Local Chair CTY Red Deer AB
Wayne McCotter- Local Chairman – CTY Edmonton AB
Ryan Finnson – Vice General Chairman CTY Wynard SK
Doug Edward - Senior Vice General Chair, TCRC-CTY West
Ryan Pfaff - Local Chair LE Edmonton AB
Tom Doherty – Local Chair LE Red Deer AB
Bill Pitts - Vice General Chairman CTY Moose Jaw SK
Morley Ropchan- Ex Local Chairman CTY Red Deer AB
John Kiengersky – Vice General Chairman CTY Revelstoke BC
Brett Weisgerber – Local Chairman CTY Medicine Hat AB

HEARINGS HELD IN CALGARY, ALBERTA ON DECEMBER 3, 2016

AWARD

I. INTRODUCTION

[1] I was appointed by the parties to hear and resolve a number of outstanding grievances pursuant to a Memorandum of Agreement (MOA) dated April 12, 2016.

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

[3] This award addresses three related grievances filed by the Teamsters Canada Rail Conference's (the "Union" also referred to as "TCRC") two western General Committees of Adjustment ("GCAs"). The two western GCAs represent the Union's running trade members employed by the Company throughout the region known as Western Canada (Thunder Bay west to British Columbia).

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

II. THE CURRENT DISPUTE

[5] The parties were unable to agree upon a Joint Statement of Issue. Instead, they each filed their own Ex Parte Statement of Issue. For the sake of brevity, rather than reproducing the Ex Parte Statements, I have summarized the nature of the dispute and set out the parties' respective positions.

[6] This matter arises from the Company's cancellation of the Red Deer Interim Diversion Agreement (IDA) and their assignment of Red Deer crews to operate east of the South Edmonton Yard to the Scotford Yard.

[7] In June 1999, the parties agreed to the IDA. The IDA was subsequently revised on two occasions (2004 and 2008). The IDA does not contain a provision addressing cancellation.

[8] On November 6, 2013, the Company wrote to the Union notifying them of the cancellation of the IDA effective December 11, 2013.

[9] Beginning in December 2013, the Company instructed Red Deer crews to operate trains to the Scotford Yard, which is approximately 30 miles northeast of the South Edmonton Yard.

[10] The Union's position is as follows:

- The Union contends that the Interim Diversion Agreement was mutually negotiated as a result of the Company originally serving proper notice of Material Change under the terms of Articles 72 (CTY) and 34 (LE). As a result, the agreement does not contain a cancellation provision, and therefore the Company is not at liberty to cancel the agreement.

- By cancelling the aforementioned agreement, the Company is required to revert back to the previous method of operation and jurisdiction between Red Deer and Edmonton employees. This service is described in Articles 1.24 CTY and 1.18 LE as being from Red Deer to South Edmonton. The current operation as imposed unilaterally by the Company is also in violation of our seniority provisions including Article 21 LE.

- The Union submits that the Company's position reflects an arbitrary change to the established Edmonton Yard Switching Limits in violation Articles 23 and 50 of the CTY Collective Agreement and Article 4 of the LE Collective Agreement.

- The Union further contends that Red Deer crews are being improperly tied-up at enroute locations contrary to the Collective Agreements, Article 29 CTY and Article 27 LE.

- In the event the Company requires Red Deer crews to operate on Edmonton territory, the Union contends all adverse effects must be recognized as the modification constitutes a material change as defined in Articles 72 (CTY) and 34 (LE). As such, the Union seeks a finding that the Company is required to initiate negotiations to properly minimize adverse effects for all affected parties as a result of the proposed change, prior to implementation.

- The Union has filed a series of individual grievances for both Edmonton and Red Deer employees claiming compensation on behalf of its members for their losses associated with the above breaches. The Union requests the Company immediately cease and desist these practices. Further, the Union seeks an order that the Company make all employees in both Red Deer and Edmonton whole for their losses associated with the above breaches in addition to such further relief the Arbitrator deems necessary in order to ensure future compliance with the Articles in question.

- The Union seeks a finding that the Company has violated the Collective Agreements as indicated above and an order that the Company cease and desist its ongoing breaches of the Collective Agreement.

- Additionally, the Union seeks a finding from the Arbitrator that the Company violated the Collective Agreement in not establishing an abeyance code in accordance with Appendix 30 of the 2007 Memorandum of Settlement.

[11] The Company disagrees and denies the Union's allegations. The Company's position is as follows:

- Interim Diversion Agreement – This document and the premium payment provided within, was a local agreement and therefore properly cancelled by the Company without ability for the Union to challenge.

- Operating Red Deer Crews within Edmonton Terminal – The Collective Agreement provides clear language that crews can operate anywhere within the Final Terminal and such language cannot be altered through arbitration.

- Operating Red Deer Crews to Scotford;

    - This location is within the Edmonton Terminal and therefore allowed under the collective agreement language.

- Even were it not within the Edmonton Terminal, the Expansion to Yard Switching Limits language in the Collective Agreement provides a mechanism to do such and the Union has unreasonably withheld its consent and consent is not required prior to implementation.

- Even were it considered a Material Change, the provisions of the Material Change Articles cannot be triggered as the Union has failed to discharge its burden to demonstrate that the employees have been significantly adversely affected in these locations given the manpower shortages.

- Even were it a Material Change and even if the Union could demonstrate significant adverse effects, the parties could only be directed to handle the significant adverse effects as the change cannot be directed to be undone, given jurisprudence and the realities of the South Edmonton Yard location.

III. BACKGROUND FACTS

i. The fixed rate applicable between Red Deer and South Edmonton

[12] The collective agreements provide for a "fixed mileage method of pay". The fixed mileage method of pay is found at articles 1.18(8) LE-West and 1.24 (8) CTY-West. The fixed mileage method of pay is based upon the following:

- actual running miles of subdivision
- average initial time and final time(s)
- T&J and designated pay point times
- road overtime (East of Thunder Bay)
- miles generated performing wayfreight service enroute

[13] Red Deer crews are paid a fixed rate for their trips between Red Deer and South Edmonton. The fixed rate from Red Deer to South Edmonton provided under the collective agreements is as follows:

BETWEEN	AND	FIXED MILEAGE	THRESHOLD (MINUTES)
Red Deer	**South Edmonton**	**125**	**204**

The threshold minutes included with a fixed mileage are described in the note in articles 1.18 (3) LE-West and 1.24 (8) CTY-West.

> **Note**: Thresholds are based upon average initial and final times plus an additional sixty (60) minutes for all terminals except for trains in and out of Coquitlam, Mayfair, Port Moody, Sapperton, Vancouver, Alyth, Winnipeg, Montreal, Toronto, Detroit and Buffalo, which will be seventy-five (75) minutes.

[14] This language provides compensation for a period of time working within terminals. Crews working between Red Deer and South Edmonton are required to work off the 60 minutes of threshold prior to receiving any compensation above the fixed rate.

ii. The Edmonton Terminal

[15] A "terminal" is formed at the convergence of subdivisions. In **CROA 479**, Arbitrator Weatherill indicated that the meaning of "terminal" was not clearly defined in the collective agreements, at least not for the purpose of determining the area within which initial and final terminal switching may be performed. Arbitrator Weatherill went on to find that the "yard switching limits would appear to be the appropriate limits for such work."

[16] The terminal limits act as a "neutral zone", where individual subdivisions exist within the boundaries of the terminal. In **CROA 194**, Arbitrator Weatherill noted that "work within the terminal cannot properly be said to be on another subdivision."

[17] South Edmonton (formerly Strathcona) was established as a "Home Terminal" by a Company Bulletin dated March 30, 1931. This was confirmed in a letter to the Union dated August 25, 1939. Subsequent correspondence between the Company and the Union between February 11, 1966 and April 18, 1967 lists South Edmonton as a Home Terminal and an "Away From Home Terminal" for Red Deer.

[18] The collective agreements also clearly designate South Edmonton as a Home Terminal. As pointed out by the Company, the parties have used the terms South Edmonton and Edmonton interchangeably. There is no dispute that South Edmonton Yard is within the Edmonton Terminal. There is a dispute with respect to the current limits of the Edmonton Terminal.

[19] The Company submits that the Edmonton Terminal is not limited to the South Edmonton Yard. It is the Company's position that the limits of the Edmonton Terminal includes Scotford Yard, which is approximately 30 miles northeast of the South Edmonton Yard.

[20] The Union disagrees and submits that the established eastern switching limit of the Edmonton Terminal is mile 159.8. The Union takes the position that South Edmonton Yard is the final terminal and Scotford Yard is outside the Edmonton Terminal.

[21] The Union provided documents that set out the historical switching limits for the Edmonton Terminal. The documents indicate, that since September 15, 1980, the established eastern switch limits for the Edmonton Terminal is mile 159.8.

[22] The Union also provided a September 18, 2008 local agreement regarding Scotford Yard, which addressed payment and working conditions for crews commencing and concluding their work assignment at Scotford Yard. The agreement applies to Locomotive Engineers, Conductors and Trainpersons with "home terminal Edmonton".

[23] I was also provided with the *Edmonton Best Practices Guide 2015*, produced by the Edmonton Workplace Health and Safety Committee, which includes an "Edmonton Terminal Reference Map" that does not include Scotford Yard.

[24] The Company provided me with Summary Bulletins, which they suggested indicate Scotford Yard is within the limits of the Edmonton Terminal.

[25] The collective agreements address yard switching limits and provides a process for the expansion of yard switching limits by negotiation between the parties. Article 23 – Road Service – Extension of Yard Switching Limits of the CTY-West (Article 4.17 LE-West) provides as follows:

> **23.01** The necessity of changing or re-establishing recognized switching limits, in order to render switching services required because of extension of industrial activities and/or territorial extension of facilities must be recognized.
>
> **23.02** The present switching limits will be designated by general notice at all points where yard engines are assigned and will only be changed by negotiations between the proper officers of the Company and the General Chairperson. The concurrence of the General Chairperson will not be withheld when it can be shown that changes are necessitated by industrial activities and/or territorial extension of facilities. Yard limit signs may or may not indicate switching limits. In the extension of switching limits, the rights of road employees thereon will be conserved by negotiations respecting the allocation of work therein between Road and Yard Service employees.
>
> **23.03** This Article is not intended to prevent the Company from using Yardpersons to switch industrial tracks within reasonable distance of existing terminal switching limits.

[26] The collective agreements clearly contemplate that yard switching limits are subject to agreement and they will only be changed by negotiations between the parties. Furthermore, the Union's consent cannot be withheld if the Company can demonstrate the necessity of changes for industrial activities and/or territorial extension of facilities.

[27] I prefer the evidence provided by the Union, which specifically addresses the issue of the eastern switching limits of the Edmonton Terminal. These documents illustrate a specific agreement, which I view is more compelling than the more general documents provided by the Company. Furthermore, a specific agreement between the parties is consistent with the terms of the collective agreements. Accordingly, I find that the Edmonton Terminal's eastern limit is mile 159.8 and does not include Scotford Yard.

iii. The Interim Diversion Agreement (IDA)

[28] Prior to the IDA agreement in June 1999, Red Deer Crews would yard their trains at the South Edmonton Yard.

[29] The Union initially asserted, in their grievances, that the IDA was entered into as a result of a material change notice. However, it is clear that the IDA was entered into as a result of issues relating to a build up of CN traffic in February 1999.

[30] CN has large operations in the Edmonton area. In early 1999, it was noted that congestion in the CN Yard adversely impacted the Company's operations at the South Edmonton Yard. A plan was made for the Company to divert traffic to another interchange within the Edmonton Terminal, which would reduce congestion.

[31] Company documents indicate that there was a dispute between the parties with respect to who could perform the work. The Union took the position that the work belonged to Edmonton crews. The Company disagreed taking the position that Red Deer crews could perform the work because it was within the limits of the Edmonton Terminal.

[32] On June 29, 1999, the parties agreed to the IDA, which permitted Red Deer Crews to divert trains to CN or Lambton Park and Clover Bar yards rather than running to the South Edmonton Yard.

[33] The IDA provided an additional payment to all Red Deer crews operating past South Edmonton Yard, which was over and above the fixed mileage rate between Red Deer and South Edmonton.

[34] The IDA was amended on September 27, 2004 to expand the payment to include non-fixed rate trips, including those between Hardisty and South Edmonton and Stroick turns.

[35] An additional amendment was agreed upon on July 14, 20108 to allow for an "RD" claim code within (CMA) to be utilized by crews for payment.

[36] The Amended IDA provided as follows:

June 29, 1999

Red Deer Conductors and Trainmen:
Red Deer Locomotive Engineers:

Re: Diversion Trains
As an interim measure prior to the Diversion Agreement being reached between UTU and the BLE and the Company the following has been agreed by all parties:
Southward trains -- all time paid in addition to the fixed rate trip from on duty time to the time entered on to the Leduc Sub.
Northward trains – all time paid in addition to the fixed rate trip from time entered on to the Scotford Sub to time off duty. In addition, if the train is delayed at South Edmonton on the Leduc Sub waiting to enter on to the Scotford Sub (e.g. at 23rd ave.) for in excess of one hour, all time in excess of the one hour will also be paid in addition to the fixed rate trip.

The following is inserted into this agreement on September 27, 2004. Please be advised that the company has agreed to pay the diversion local agreement premium on all non-fixed trips. (e.g. Stroick turns and trains between Hardisty and Edmonton).

To claim this convert the time spent miles and on the secondary tie up screen us the "RD" mileage claim code. In the remarks section at the bottom of the screen explain the claim. As an example:

RD = diversion time on the Scotford sub 2100-2230.
For trips made in the last few weeks you will have to submit a miscellaneous "RD" claim citing the train, times involved and miles claimed.

Signed

Morley D. Ropchan	K.J. Plaisant
UTU LCR 1828	BLE Rel. Vice-Local Chairman
Red Deer/Edmonton	Red Deer Division 355

R.T. Bay
Manager Operations
Red Deer/Edmonton

Note: This agreement has been reviewed and updated on July 14, 2008. By Arnold Werbiski TCRC LC Engr. Murray Armstrong TCRC LC Cndr/Trnm, Dan Hovorka Manager Operations Canadian Pacific Railway (Scotford Sub/RD claim Code updated).

iv. The cancellation of the IDA

[37] In 2012-2013 the Company was in the midst of a transformation of all its' operations. Management wanted to operate "more efficiently".

[38] According to the Company, a dramatic increase in oil transportation by rail resulted in a significant shift in customer demand in the Edmonton area. The Company reviewed its' operations in the Edmonton area and determined that the South Edmonton Yard no longer met its' needs. The Company decided to focus its' manpower in other Edmonton area yards.

[39] During the transformation period the Company began cancelling local agreements, including those in the Edmonton area.

[40] On November 6, 2013 the Company issued a notice to the Union advising that the IDA was cancelled effective December 11, 2013.

[41] The Union filed a grievance challenging the Company's decision to cancel the IDA.

v. The operation of Red Deer crews since December 2013

[42] In December 2013, the Company began instructing Red Deer crews to operate specific trains to Scotford Yard rather than delivering them to Clover Bar Yard. According to the Company this change only affected two trains.

[43] The evidence indicates that Red Deer crews are not being transported to South Edmonton to end their tour of duty. Rather, the Red Deer crews have been tied up at hotels in Fort Saskatchewan and Sherwood Park. According to the Company the choice of hotel to put up a crew is linked to the guaranteed rooms and preferred rates that they receive at certain hotels in the Edmonton area.

[44] The Union filed grievances challenging the Company's use of Red Deer crews operating to Scotford Yard.

[45] In its January 14, 2014 grievance, the Union requested that the Company establish an abeyance code for Red Deer unassigned crews to track each event. A similar request was made for Edmonton crews on January 28, 2014. The Company declined to establish abeyance codes for either Edmonton or Red Deer crews.

[46] The Union produced an email from the Company dated March 24, 2015 indicating as follows:

> The Company no longer sets up abeyance codes. If you have a dispute, follow the grievance procedure for handling.

vi. Evidence relating to South Edmonton and Red Deer work

[47] The evidence indicates that the Company is redeveloping the South Edmonton Yard. In this regard, a vast majority of the track has been removed and condominiums have been built on the location. As such, there is no dispute that the South Edmonton Yard has changed significantly.

[48] The Union suggests that Edmonton and Red Deer crews have suffered adverse effects due to the Company's actions. The Union provided material indicating that Edmonton employees have suffered a reduction in assignments and unassigned crews. The Union also points out that Red Deer crews are operating beyond the South Edmonton Yard without additional compensation for their efforts.

[49] The Company on the other hand suggests that the Red Deer crews are performing essentially the same work, with the exception of handling their train over a greater distance.

[50] The Company points out that both Red Deer and Edmonton have manpower issues related to recruiting and retaining employees given the proximity to the area's oil industry operations. The Company noted that they have hired 67 new employees into Red Deer and 101 in Edmonton. Only 36 of the 168 new employees remain with the Company.

[51] The Company also referred to a January 8, 2014 agreement between the parties permitting temporary transfers to address the manpower issues in Red Deer and Edmonton. The Company asserts that 21 temporary transfers have occurred under the agreement (Red Deer 10 and Edmonton 11). In the Company's view, the existing Red Deer and Edmonton crews cannot handle the current amount of traffic.

vii. Post grievance discussions between the parties

[52] Subsequent to the Union filing the grievances, in June 2015 and May 2016, the Company has communicated with the Union about the Edmonton Terminal limits.

[53] On May 20, 2016, the Company offered to resolve the issue of compensation by providing a new fixed mileage rate for the crews operating from

Red Deer to Scotford Yard. The parties did not agree upon a new fixed mileage rate.

[54] The Company also indicated that they have advised the Union of the shift in customer service in the Edmonton area. The Company asserted that the nature of the oil transport business resulted in Scotford Yard becoming of greater importance to service the Company's customers. In this regard, the Company asserts that the Union has unreasonably withheld consent to extend the Edmonton Terminal's switching limits contrary to article 23 of the CTY-West collective agreement (article 4.17 LE-West). I note that the Company did not produce any specific written request to the Union asking to expand the Edmonton Terminal's switching limits. The Company did provide a meeting agenda and email correspondence of discussions relating to the Edmonton Terminal.

IV. DECISION

i. Can the Company cancel the IDA by giving 30 days notice?

[55] The IDA does not have a cancellation clause. Nevertheless, I find that the Company properly gave 30 days notice to cancel the IDA.

[56] In my view the IDA is a local agreement. The parties indicated as much in the September 27, 2004 amendment, which begins by stating "Please be advised that the company has agreed to pay the diversion local agreement premium to all non-fixed trips".

[57] The Company asserts that a local agreement without a cancellation clause may be cancelled upon 30 days notice pursuant to Appendix 37 of the collective agreements.

[58] Appendix 37 provides as follows:

> **Appendix 37 – Letter – Local Rules**
>
> December 5, 2007

...

> This refers to the Company letter dated September 9, 2006, in connection with the abolishment of local rules.
>
> The Company's intent is to review, simplify, document and standardize local rules.
>
> In order to facilitate this in an orderly manner, the following process will take place:
>
> 1) The Local Chairs and Local Managers at each location will provide all existing local rules, practices, agreements etc., as a single package to the appropriate General Chair and to the Director of Labour Relations. This will include any verbal agreements which will be put into writing.
>
> 2) The General Chair and Director, or their representatives, will review all local rules and will document those that they can agree to. In addition, the parties shall review and sign off on local rules specific to the respective terminals.
>
> 3) If there are issues with the local rules package, they will be returned to the Local Chair and Local Manager to resolve the issue within 30 days. Issues not resolved locally will be escalated for resolution.
>
> 4) As part of this process, it is agreed that local rules without cancellation clauses will now be subject to a standard 30 day cancellation clause that can be triggered by either party.

[59] Arbitrator Michel Picher had an opportunity to consider Appendix 37 in a July 7, 2014 award between these parties relating to the replacement of directional pools and the establishment of common pools at various terminals, see *Canadian Pacific Railway Company and Teamsters Canada Rail Conference* 2014 CanLII 77078 (ON LA).

[60] Arbitrator Picher's award is instructive and portions are worth reproducing:

> Perhaps most significantly, as a general rule, traditionally local rules have contained provision for either party to serve notice on the other with respect to cancelling or amending a local rules agreement. In 2007, the parties expressly negotiated language giving either party the ability to trigger a cancellation clause upon 30 days' notice. That is reflected in paragraph 4 of the Appendix 37 reproduced above.

It is not substantially disputed before the Arbitrator that directional pool arrangements as they may have existed across the system are essentially a form of local rule. As such, I am compelled to conclude, on the basis of the material before me, that such rules are not eternal, and that they may be properly terminated by either party, subject to adherence to the proper notice requirements. That, in my view, is manifestly the case for those local agreements concerning directional pools which are the subject of this dispute.

It would, of course, have been open to the Union to negotiate within the four corners of the collective agreement clear language identifying existing freight pools at various locations, and limiting the Company's ability to amend or abolish those pools. There is, however, no such language in the collective agreements which has been referred to the Arbitrator by the Union. I am compelled to agree with the Company's submission that over time the Union did not seek to protect directional pool running within the terms the collective agreements. That concept was left to be regulated by local rules which, by their very nature, are generally subject to cancellation by either party, as has been explicitly provided for all local rules by the provisions of paragraph 4 of Appendix 37 of the collective agreements governing Locomotive Engineers and Trainpersons both East and West.

How, then, must this dispute be resolved? For all of the reasons elaborated above, I am compelled to the conclusion that the parties have not negotiated within the terms of their collective agreements any limitation on the ability of the Company to either establish or abolish directional pools nor any limit on the ability of the Company to establish common pools to handle multi-directional service. There can be little doubt but that on a system-wide basis, for both Locomotive Engineers and Conductors, pool arrangements evolved as local agreements made between the parties. Clearly, as of December 5, 2007 and the execution of Appendix 37 those local rules became subject to a 30 day cancellation clause available to either party. In that context it was entirely open to the Company to put the Union on notice that local rules in respect of the establishment of directional pools were to be abolished and that employees would thereafter be placed into common pools for the purposes of their work assignments.

...

In the result, I am satisfied that this matter can be dealt with, at least at this stage of the proceedings, by the expression of certain guiding principles by the Arbitrator. Firstly, at those locations in Canada where directional pools have been established pursuant to local rules, and where the agreement does contain a cancellation clause, it is fully open to either party to terminate that arrangement in accordance with the notice provisions. Secondly, in locations where directional pools have been established on the basis of local rules which do not contain any cancellation clause, by the operation of Appendix 37 such local rules can be cancelled by either party on 30 days' notice. Thirdly, 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.

[61] I agree with Arbitrator Picher and his reasons are equally applicable to the matter before me. Local rule agreements that do not contain a cancellation clause can be cancelled by either party on 30 days' notice pursuant to Appendix 37.

[62] The Union argues, in this matter, that the Company has "abandoned" the Appendix 37 process, so they can no longer rely on the 30 day cancellation clause found in paragraph 4. I do not accept the Union's submission on this point.

[63] First, I disagree with the Union that just because the Company did not follow through with the entire process outlined in Appendix 37, they are somehow precluded from relying on the 30 day cancellation clause in paragraph 4. The process under Appendix 37 is a mutually agreed upon process. It appears that both the Company and the Union are content to ignore the process to review, simplify and document all local rules. However, there is no evidence to suggest that either the Company or the Union abandoned their specific agreement that local rules without a cancellation clause could be cancelled on 30 days' notice. Moreover, it appears clear that the Company has relied on the specific provision in the matter heard by Arbitrator Picher. In my view, the Union's argument is tantamount to saying one should throw the baby out with the bath water, which is an argument that I reject.

[64] Second, I note that the Union could have raised such an argument in front of Arbitrator Picher, but for whatever reason chose not to do so. In my opinion, the Union cannot now raise this new argument to avoid the consequences that flow from Arbitrator Picher's award. Permitting such an argument, at this point, would be tantamount to allowing a collateral attack upon Arbitrator Picher's award, which arguably would be an abuse of process.

[65] Therefore, I find that the Company can rely on the 30 day cancellation clause found in paragraph 4 of Appendix 37.

[66] The Union also relies on an award of Arbitrator Picher dated April 21, 2014 relating to the cancellation of Calgary time pools and split timed window spareboards, see *Canadian Pacific Railway Company and Teamsters Canada Rail Conference* 2014 CanLII 76888 (ON LA). The issue in dispute in that matter involved two agreements between the parties (one CTY and the other LE) respecting the CanAlert 1997 Agreement.

[67] The CTY agreement indicated that it could be amended or extended by "mutual agreement" or "cancelled upon 30 days notice." The LE agreement on the other hand only referenced amending or extending by "mutual agreement." In this context Arbitrator Picher found that the Company could not unilaterally cancel the LE agreement. Arbitrator Picher found that the LE agreement could only be terminated by mutual agreement. It is not surprising that Arbitrator Picher would reach such a conclusion in the context of one agreement containing a cancellation clause and another requiring mutual agreement.

[68] I am of the view that Arbitrator Picher's April 21, 2014 award is clearly distinguishable from the matter before me. In this matter, the IDA does not contain a clause indicating that it may only be altered by mutual agreement. Rather, the IDA is completely silent with respect to alteration and cancellation. Furthermore, Arbitrator Picher's April 21, 2014 award does not address Appendix 37. While on the other hand Arbitrator Picher's subsequent July 7, 2014 award does address the significance of Appendix 37.

[69] Accordingly, I find that the IDA was a local agreement that could be cancelled upon 30 days notice pursuant to Appendix 37. Therefore, the Company did not violate the collective agreements when they cancelled the IDA with 30 days notice.

ii. Can the Red Deer Crews operate to Scotford?

[70] The next issue to be addressed is whether the Company can instruct Red Deer crews to operate to the Scotford Yard.

[71] The Union takes the position that if the Company is permitted to cancel the IDA, then the Red Deer Crews must return to the *status quo ante*, and yard their trains at the South Edmonton Yard.

[72] The Company disagrees, asserting that that they can operate road crews anywhere within the Edmonton Terminal, which they say includes Scotford Yard.

[73] In my view, the cancellation of the IDA results in the parties being bound by the current provisions of the collective agreements. In this regard, I agree with the Company that they are permitted to operate Red Deer crews within the Edmonton Terminal.[1] However, the Scotford Yard currently does not fall within the Edmonton Terminal's limits.

[74] As indicated earlier in this award, I have found that Scotford Yard is outside the limits of the Edmonton Terminal. In the absence of an agreement with the Union to extend the terminal switching limits, the Company cannot require Red Deer crews to operate to Scotford Yard without incurring liability under the collective agreements.

[75] I recognize that the Company approached the Union seeking to expand the Edmonton Terminal switching limits beginning in June 2015 and offered to resolve the issue of compensation by providing a new fixed rate for Red Deer crews operating to Scotford Yard. However, this offer came well after the Company decided to cancel the IDA and require the Red Deer crews to operate to Scotford Yard.

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[1] See article 10.02 (4) CTY West collective agreement and **CROA 1081, 2016** and **2225**.

[76] The Company asserts that the Collective Agreement language does not restrict their right to implement expanded switching limits prior to the finalization of negotiations. I disagree.

[77] The language in article 23 CTY-West (article 4.17 LE-West) is mandatory and states that the switching limits "will **only** (emphasis added) be changed by negotiations".

[78] The Company also asserts that the Union has unreasonably withheld consent to expand the switching limits and therefore it was proper for them to implement this expansion notwithstanding the lack of agreement. I also disagree with this argument.

[79] Quite frankly, it is somewhat disingenuous to assert that the Union is being unreasonable when the Company acted unilaterally and well before they sought the Union's agreement. The time for requesting a change to the terminal switching limits was before the Company began instructing Red Deer crews to operate to Scotford Yard.

[80] The words of Arbitrator Weatherill in *Canadian National Railway Company and United Transportation Union* (**AH-58)** are instructive:

> The provisions of the collective agreements in this respect are clear. As a general matter changes in switching limits are to be negotiated and this implies that it would be open to the general chairmen to refuse to concur with the company's suggested changes in some cases. Where it can be shown, however, that changes" are necessitated by industrial activities and territorial expansion of facilities", then the concurrence of the general chairman is not to be withheld. Clearly there is an onus on the company to make such a showing where it seeks, as it does here, a determination that the general chairman's concurrence in a particular change has been improperly withheld. The issue now to be decided therefore, is whether, on the material before me, it has been shown that the changes in switching limits proposed by the company are "necessitated by industrial activities and territorial expansion of facilities."

[81] In my view, the Company has not yet adequately provided the evidence supporting their request to extend the switching limits. The Company asserts a

shift in customers requiring service and a change in the nature of the oil transport business. However, the Company has not provided sufficient details as they had when seeking to expand the Calgary switching limits.[2] There may well be a case for changing the switching limits, but I cannot make that determination based on the material before me. Moreover, I cannot fault the Union for not consenting at this time.

[82] If the Company still wishes to change the Edmonton Terminal switching limits, then they must present the Union with the necessary information to make an informed decision demonstrating that the change is necessitated by industrial activities and/or territorial extension of facilities.

[83] In the absence of an agreement to extend the Edmonton Terminal switching limits, I find that the Company has breached the collective agreements by requiring Red Deer crews to operate to Scotford Yard.

iii. Should the Company have issued a material change notice?

[84] The Union argues that if the Company is permitted to cancel the IDA, then they ought to have issued a material change notice. The Company disagrees.

[85] The relevant language found in the LE-West and CTY-West collective agreements relating to the material changes in working conditions are similar and the relevant provisions are as follows:

> **LE-WEST COLLECTIVE AGREEMENT**
>
> **ARTICLE 34 –MATERIAL CHANGES IN WORKING CONDITIONS**
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> 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

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[2] See January 14, 2002 letter Dave Sissons to General Chairpersons Schillaci and Curtis.

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 Clause34.11of this article to minimize significantly adverse effects of the proposed change of Locomotive Engineers, which measures may, for example, be with respect to retaining and/or such measures as may be appropriates in the circumstances.

...

34.04 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.

...

34.06 The changes referred to in Clause 34.01 will not be made until the procedures for negotiation, and arbitration if necessary, have been completed.

34.07 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 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.

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CTY-WEST COLLECTIVE 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 1 of this Article.

72.02 Measures to Minimize Adverse Effects

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

...

[86] The material change language is unique to the railroad industry. In **CROA 3539**, Arbitrator Michel Picher stated the following with respect to the meaning of "material change":

> 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 being dictated by circumstances beyond its control, such as 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 change 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.

[87] The material change provisions do not apply to every material change initiated by the Company. Rather the material change provisions only apply in situations where the material change initiated by the Company would have significant or material adverse affect upon employees.

[88] Determining what changes fall within the material change provisions must be examined in context and based on the facts. The words of Arbitrator Picher in **CROA 2975** are instructive in this regard:

> ...Needless to say, what does or does not constitute a material change in working conditions within the meaning of such a provision is a matter of fact to be determined within the circumstances of each individual case. Prior awards of this Office have determined, for example, that mere changes in assignments, or the home terminal of an assignment, or indeed the reduction of yard assignments for greater efficiency, do not constitute a material change in working conditions (see **CROA 1167, 1444** and **2893).**

[89] Arbitrator Picher in **CROA 3083** noted that it is the Union that bears the onus of demonstrating that a Company initiative qualifies as a material change. Arbitrator Picher's words are worth repeating:

> As the party pursuing a claim under the terms of article 78.2 of the collective agreement the Council bears the onus of proof. To bring itself within the terms of the article the Council must establish that there has been a material change, that it was initiated solely by the Company and that it "... would have significantly adverse effects on employees". This Office has had prior occasion to consider the meaning of significantly adverse effects. In **CROA 1167** the following comments appear:
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> > In considering the second factor referred to above I am also satisfied that it would not suffice for the Trade Union to show that the engineers involved were merely adversely affected by 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. ...
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> A similar note was struck in **CROA 2364**, where the following comment is found with respect to the material change provision in the collective agreement then in effect between the same parties:
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> > ... That provision is, I think, drafted in contemplation of minimizing real consequences on individual employees whose lives are negatively impacted in a meaningful way, as regards their earnings, their work opportunities, the possibility of demotion, lay-off and the like. ...

[90] The Union points to what they describe as a similar situation that occurred in October 1999, when the Company served a material change notice relating to their intent to utilize Red Deer based conductor only crews to run from Red Deer north on the Leduc subdivision 95.6 miles and then east on the Willingdon (Scotford subdivision) 38.5 miles to either spot or lift new grain at a new terminal facility located in Star, Alberta. The Union notes that the material change notice indicated that the Company did not foresee adverse effects to either the Edmonton or Red Deer Terminals.

[91] I do not see this earlier situation as being helpful to the Union's cause. It appears to me that the Company, exercising an abundance of caution, issued a material change notice in 1999 even though they did not foresee any adverse effects. This singular event, in my view, does not mean that the Company must always issue a material change notice in similar circumstances. Although it might be wise to do so as to avoid any litigation with respect to whether a material change notice should have been issued.

[92] The collective agreements specifically contemplate that disputes may arise with respect to the applicability of the material change provisions. Article 72.13 of the CTY-West collective agreement provides as follows:

> A dispute concerning the applicability of this Article to a change in working conditions will be processed as a grievance by the General Chairperson direct to the General manager, and must be presented within 60 days from the date of the cause of the grievance.[3]

[93] In my view, the Company is free to utilize the material change provisions to initiate discussions with the Union about any proposed change. This is regardless of whether the Company believes that such a change falls within the material change provisions. The Company is also free to not issue a material change notice in circumstances that they believe does not fall within the material change provisions. However, the Union has the right to challenge such a decision and have the matter resolved through the grievance and arbitration procedure. It would not surprise me that the Company might issue a notice of material change in circumstances where they might be unsure of the applicability of the material change provisions so as to avoid a dispute and any associated delay in implementing such a change.

[94] Turning to the circumstances in this matter, the Company makes a point that there has been no cancelled assignments directly associated with the change in operations because the handling of two trains northbound and two

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[3] Article 34.08 of the LE collective agreement has similar language

trains southbound would not constitute enough work to require additional assignments. The Company asserts that any reduction in assignments is due to better efficiencies achieved by the Company and not as a direct result of this change. The Company points out that the Red Deer crews are essentially working under the same working conditions. The Company also relies on material indicating a chronic manpower shortages in both Red Deer and Edmonton.

[95] The Union on the other hand has provided material that indicates adverse effects on both Edmonton and Red Deer crews. The Red Deer crews are travelling further, beyond the Edmonton Terminal limits, without additional compensation. The Union also points out that Edmonton crews have lost work resulting in the reduction of assignments and unassigned crews.

[96] I am not entirely convinced that the adverse effects are directly attributable to cancelling the IDA and having Red Deer crews operate to Scotford Yard. I was provided with some evidence about the alteration of the South Edmonton Yard. It is not clear if these alterations to the South Edmonton Yard have had any bearing upon the work. It may well be that the other changes in the Edmonton area contributed to the adverse effects, but that is not a matter before me at this time.[4]

[97] I am also unsure as to whether the Company could have addressed all the issues by seeking the Union's approval to extend the Edmonton Terminal's switching limits and negotiating a new fixed rate without providing a material change notice.

[98] Based on the material before me, I find that the Union has not met the onus of establishing that the cancelling of the IDA and requiring Red Deer crews

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[4] The Union indicated in their brief that they filed additional grievances relating to "closing or moving the South Edmonton Terminal".

to operate to Scotford Yard has caused material or substantial adverse effects upon employees.

[99] I wish to make it clear that I am not making any decision with respect to any of the other changes that occurred in the Edmonton area, which were alluded to by the parties in their briefs (including the changes at the South Edmonton Yard). My decision in this matter only addresses whether the Company ought to have served a notice of material change in relation to cancelling the IDA and operating Red Deer crews to Scotford Yard. I make no decision with respect to whether these events coupled with other subsequent events may have triggered the obligation to serve a notice of material change.

iv. Should the Company have established an abeyance Code?

[100] Appendix 30 contains the process for establishing an abeyance code. The following provisions are relevant to this matter:

> This refers to our discussion during bargaining concerning the process for establishing an abeyance code.
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> During our conversations it was recognized that the purpose of an abeyance code was to track multiple claims relating to a specific dispute at a location, while a grievance related to pay was being resolved.
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> In order to ensure clarity regarding the process for establishing a code, the following was confirmed:
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> - A grievance is filed regarding a claim for payment.
> - If it is expected that this circumstance will occur on a regular basis during the grievance procedure, the local chair may make a request to the local manager that an abeyance code be established.
> - The local manager will review the matter with Labour Relations to ensure that the requested code falls within the purpose of the codes as outlined above.
> - When in accordance with the purpose, labour Relations will that the CMC establish an abeyance code and issue a bulletin detailing when the code should be used and what supporting information, if any, is required.

[101] It is clear that the parties have agreed to a process to track multiple claims relating to a specific dispute at a location giving rise to a grievance. This

matter clearly involves grievances, which include multiple claims arising on a regular basis with respect to the specific dispute of having Red Deer crews operating to the Scotford Yard.

[102] The Company does not dispute that an abeyance code was not established. In fact, the evidence is clear that the Company advised the Union on March 24, 2015 that they no longer set up abeyance codes. At the hearing, the Company informed me that they subsequently approached the Union requesting that they advise them of which grievances required the establishment of an abeyance code.

[103] I agree with the Union that the Company ought to have established an abeyance code for both Red Deer and Edmonton crews. The Union provided the Company with notice on the face of the grievances. The Company flat out refused to establish an abeyance code despite their agreement to do so in appropriate circumstances. The Company's subsequent request does not detract from the fact that they ought to have established the abeyance code when the Union first made the request. Accordingly, I find that failure to establish an abeyance code is a violation of Appendix 30.

V. CONCLUSION

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

- The IDA is a local agreement that the Company could cancel upon 30 days notice.
- The Scotford Yard does not fall within the limits of the Edmonton Terminal. The Company cannot have Red Deer crews operating to Scotford Yard without incurring liability unless the Union agrees to extend the switching limits.
- The Company was not required to issue a notice of material change based only on the cancellation of the IDA and the operation of Red Deer crews to Scotford yard.

- The Company ought to have first requested that the Union agree to extend the switching limits of the Edmonton Terminal before they instructed Red Deer crews to operate to Scotford Yard.
- The Company ought to have established an abeyance code.

[105] In terms of orders, I order the Company to immediately establish an abeyance code for Red Deer crews and Edmonton crews in accordance with the Union's request as outlined in this award.

[106] At this time, I am not prepared to order the Company to cease and desist operating Red Deer crews to Scotford Yard. Rather, I am remitting the matter back to the parties and direct that they seek to resolve the outstanding issues, including the issue of extending the switching limits and reviewing the fixed rate between Red Deer and South Edmonton.

[107] I also direct the parties to discuss and attempt to resolve any and all outstanding claims for damages arising from these grievances (including any related grievances) and my findings in this award.

[108] If the parties cannot resolve the outstanding issues then they may bring the matter back before me for further direction.

[109] I remain seized to address any issues arising from my award and to address any issue fairly raised by the grievances but not addressed in this award, including but not limited to the quantum of damages arising for the Company's breach of the collective agreements.

Dated at Toronto, Ontario this 2nd day of January 2017.

John Stout - Arbitrator