

IN THE MATTER OF THE *RAILWAY CONTINUATION ACT, 2007*

and

THE CANADIAN NATIONAL RAILWAY COMPANY LIMITED

(“CN”)

and

THE UNITED TRANSPORTATION UNION

(“UTU”)

FINAL OFFER SELECTION AWARD

Andrew C.L. Sims, Q.C. Arbitrator

REPRESENTATIVE FOR UTU

Clinton J. Miller, III General Counsel
John W. Armstrong..... Vice-President, UTU
Robert W. Sharpe..... Vice-President, UTU

REPRESENTATIVE FOR CN

John A. Coleman Counsel
Kimberly A. Madigan Vice-President,
Labour Relations
Keith Creel Executive Vice-President,
Operations
Douglas Fisher Director, Labour Relations
Joe T. Torchia..... Senior Manager, Labour
Relations

AWARD ISSUED on July 20, 2007

IN THE MATTER OF THE *RAILWAY CONTINUATION ACT, 2007*

and

THE CANADIAN NATIONAL RAILWAY COMPANY LIMITED

(“CN”)

and

THE UNITED TRANSPORTATION UNION

(“UTU”)

FINAL OFFER SELECTION AWARD

CN Rail operates over 20,000 miles of track in Canada plus lines as far south as New Orleans in the United States of America. The United Transportation Union is the bargaining agent for about 2,800 employees of CN Rail in Canada, employed as Conductors and Yard Service Employees, under one of four collective agreements:

- Agreement 4.16, covering CN's Eastern Lines and about 1,200 employees;
- Agreement 4.3, covering CN's Western Lines and about 1,250 employees;
- Agreement 4.2, covering CN's traffic coordinators and about 200 employees;
- The B.C. Rail Agreement covering about 150 train service employees in the B.C. Rail System.

Bargaining took place between September 2006 and February 2007. In early February 2007 a strike occurred. On February 24, 2007 the CN and UTU bargaining teams signed a memorandum of agreement subject to ratification and the job action stopped. The UTU put the agreement out for ratification but the membership rejected it by a 79% - 21% margin. A further strike occurred. Parliament intervened and passed legislation containing four key features:

- 1) An end to the industrial action;
- 2) A continuation of the existing agreements;
- 3) A Final Offer Selection process, with each party submitting one final global offer to cover all changes to all four agreements; and
- 4) The freedom to negotiate mutually agreeable collective agreements during the arbitration process and the related strike and lockout free period.

The following sections of the *Railway Continuation Act, 2007* establish these features:

Resumption or continuation of railway operations

3. On the coming into force of this Act,
- (a) the employer shall resume without delay, or continue, as the case may be, operation of railway and subsidiary services; and
 - (b) every employee shall, when so required, resume without delay, or continue, as the case may be, the duties of that employee's employment.

Extension of each collective agreement

6(1) The term of each collective agreement is extended to include the period beginning on January 1, 2007 and ending on the day on which new collective agreements between the employer and the union come into effect.

Appointment of arbitrator

8. The Minister shall appoint as arbitrator for final offer selection a person that the Minister considers appropriate.

Obligation to provide final offer

10(1) Within the time and in the manner that the arbitrator may specify, the employer and the union shall each submit to the arbitrator

- (a) a list of the matters on which the employer and the union were in agreement as of a date specified by the arbitrator and proposed contractual language that would give effect to those matters;
- (b) a list of the matters remaining in dispute on that date; and
- (c) a final offer in respect of the matters referred to in paragraph (b).

Duties of arbitrator

11(1) Subject to section 13, within 90 days after being appointed, ... , the arbitrator shall ...

- (c) select, in order to resolve the matters remaining in dispute, either the final offer submitted by the employer or the final offer submitted by the union;
- (d) make a decision in respect of the resolution of the matters referred to in this subsection and send a copy of the decision to the employer and the union,
...

New collective agreements not precluded

13. Nothing in this Act precludes the employer and the union from entering into new collective agreements at any time before the arbitrator makes a decision and, if they do so, the arbitrator's duties under this Act cease as of the day on which the new collective agreements are entered into.

The Final Offer Selection Process

The Parliament of Canada, in ending the job action that proceeded this Act, chose to replace the parties' Canada Labour Code rights to strike and lockout with a particular form of interest arbitration; final offer selection.

When strikes and lockouts take place, both union and management adopt strategies and take risks to test the resolve of the other side. It is significant to this dispute that the union membership resolved to take strike action. However, it is equally significant that CN, faced with that action and its economic impact, resolved to resist that strike. The initial strike yielded the unratified collective agreement; the second strike, despite going on for many days, did not alter either the UTU or CN's determination.

When interest arbitration is used as a substitute for those economic and social forces that usually settle strikes and lockouts, the expectation is that the arbitrator will try to replicate what might otherwise be expected to have been the outcome of a dispute. Arbitrator Dorsey described this replication process (albeit for a public sector bargaining unit) in:

Re Board of School Trustees, School District No. 1 (Fernie) and Fernie District Teachers' Association (1982) 8 L.A.C. (3d) 157 at 159:

... the task of an interest arbitrator is to simulate or attempt to replicate what might have been agreed to by the parties in a free collective bargaining environment where there may be the threat and resort to a work stoppage in an effort to attain demands. This consensus accepts that an arbitrator's notions of social justice or fairness are not to be substituted for market and economic realities.

In the public sector, finding a yardstick in the "real world" to tailor an appropriate replicated or simulated award is an unscientific task. It must not be too rigid and static or it will stifle future bargaining by making the outcome of arbitration too easily predictable. At the same time, it must not be purely speculative or have no basis in rational matching of like circumstances. The award should pay close attention to the concerns of the parties and the information they produce, but it will necessarily be an impressionistic, instinctive assessment of the parties' circumstances, the times and the over-all economic health of the community. Much of that cannot be articulated.

In conventional interest arbitration, this attempt to replicate is left mostly to the arbitrator. Working with the parties' last offers, their arguments and submissions, often based on comparable settlements, the arbitrator must fathom, as best possible, where the parties might eventually have compromised on each of the issues in dispute. This is not just an intellectual exercise designed to assess what is "fair or reasonable" on each particular topic. Often, particular demands make sense in the abstract, but their value to one side is insufficiently strong

to outweigh the strength of the other's opposition. It is the arbitrator's task to assess the relative priorities attached to, as well as the merits of, the various outstanding proposals.

Parliament here selected a global position, final offer selection process, encompassing all four collective agreements. The terms of the Act specified what the parties had to submit as a final offer and the subsequent selection process. Sections 10 and 11, in full, provide:

Obligation to provide final offer

10(1) Within the time and in the manner that the arbitrator may specify, the employer and the union shall each submit to the arbitrator

- (a) a list of the matters on which the employer and the union were in agreement as of a date specified by the arbitrator and proposed contractual language that would give effect to those matters;
- (b) a list of the matters remaining in dispute on that date; and
- (c) a final offer in respect of the matters referred to in paragraph (b).

Contractual language

(2) The final offer must be submitted with proposed contractual language that can be incorporated into the new collective agreements.

Duties of arbitrator

11(1) Subject to section 13, within 90 days after being appointed, or within any greater period that may be specified by the Minister, the arbitrator shall

- (a) determine the matters on which the employer and the union were in agreement as of the date specified for the purposes of paragraph 10(1)(a);
- (b) determine the matters remaining in dispute on that date;
- (c) select, in order to resolve the matters remaining in dispute, either the final offer submitted by the employer or the final offer submitted by the union;
- (d) make a decision in respect of the resolution of the matters referred to in this subsection and send a copy of the decision to the employer and the union; and
- (e) forward a copy of the decision to the Minister.

Where no final offer submitted

(2) If either the employer or the union fails to provide the arbitrator with a final offer in accordance with paragraph 10(1)(c), the arbitrator shall select the final offer provided by the other party.

Contractual language

(3) The arbitrator's decision shall be drafted in such manner as to constitute new collective agreements between the employer and the union and, to the extent that it is possible, incorporate the contractual language referred to in paragraph 10(1)(a) and the final offer selected by the arbitrator.

The parties were advised, as part of my instructions for compiling their final offer, that:

Section 10(2) of the Act requires that the final offer (singular) must be submitted with proposed contractual language that can be incorporated into the new collective agreements (plural). After considering whether other possible options are allowed I have concluded that there can be just one final offer from each party resulting in the selection of just one of those offers which will then form the four collective agreements. I have concluded that there is no ability under the legislation to allow for separate selections for each collective agreement. Similarly, there is no ability to adopt any clause by clause process. Simply put the Act defines just one way this selection can occur.

There was no dispute concerning my appointment under s. 8. Bargaining between the parties produced no agreed upon items. Negotiations throughout had been for revisions to each of the four earlier collective agreements, with each party submitting proposals as additions, deletions, or variations to those four collective agreements and their ancillary documents (of which there are many). All submissions were submitted to me within the times specified, and subject to an argument made by CN addressed below, section 11(2) did not come into play.

What is notably absent from this legislation is any provision specifying criteria for the ultimate choice. Perhaps this is not surprising given the controversy in the U.S. when a bill, called the *McCain-Loft Bill*, proposed final offer selection, with a list of criteria, for the airline industry. What is always implicit in the use of a global final offer selection process is that most of the “heavy lifting” to be done in narrowing the gap between the parties, is to be done by the parties themselves. Final offer selection mechanisms presume it is in each party’s best interest to submit offers that compromise, to the greatest extent possible, their lower priority items. They each have an incentive to present the “leanest offer” they can live with so as to reduce their risk that the other side’s offer will be accepted instead.

The Employer, in its submission, referred to a case that describes, and provides useful guidance in relation to, this final offer selection process.

7 To attempt to assess what final offer best approximates where the parties would have ended up, if left to their own devices, is for these reasons an arduous task, for it appears unlikely that the parties would have ultimately agreed on either of their final offers. However, by the terms of the referral to arbitration, I cannot pick and choose items from one proposal or the other. I must take one proposal or the other in its entirety, even if some parts of that proposal are troublesome, even if some parts I would not have awarded had I the discretion to select the terms I considered most appropriate, and even if I do not consider the offer chosen to likely be where the parties themselves would have reached agreement had they bargained the collective agreement themselves. The Employers’ offer, for example, is exactly the same as its offer of May 25th, tentatively agreed to earlier by the Union and put to employees for ratification. The employees did not ratify it. I consider it less than likely that further bargaining would lead the negotiating team or the employees to agree to the very offer already rejected. Nevertheless, as the selector, I cannot reject the Employers’ final offer simply because the bargaining unit has

previously rejected it. The factors at play in a Final Offer Selection model are different than in a standard interest arbitration. The task with a Final Offer Selection is to pick the offer that comes closest to where the parties would have reached agreement, that comes closest to the norms established by other participants in the same context, or even better, established by the same parties in similar contexts. It may be that the last offer on the table remains the one closest to where negotiations would have taken the parties.

8 In considering which offer to choose, it must be remembered that there were nine items in dispute at the time the final offers were presented for arbitration. In assessing the relative attraction of the two offers, the entirety of the packages or offers must be considered.

Innocon Inc. v. Teamsters, Local 230 (Legal Strike Grievance) [2000] [O.L.A.A.] 605

Replication was adopted as the yardstick in an final offer selection arbitration in

Re EMC Medical Care Inc. [2000] (unreported decision, Clarke)

In our opinion, the obligation upon this Board is to fashion a decision that will replicate the results the parties would have achieved had Bill 19 not been enacted and we had not entered upon the process. That is, to frame an award that the parties would have arrived at had they been successful in reaching a collective agreement in an atmosphere where free and unfettered collective bargaining had continued.

In a case cited by CN, Arbitrator Ashley expressed some hesitation over an arbitrator's ability to pick a final offer based on this "replication principle" in circumstances analogous to those at hand.

22 It is my understanding that none of the above cases deal with a situation where, as here, legal and/or illegal strikes had taken place, where legislation had been passed not only to end the strike but to impose the terms of the contract without resort to some sort of arbitration mechanism, and where the parties had not bargained with the anticipation that outstanding issues would ultimately be resolved by FOS. Rather, FOS was introduced into the collective bargaining relationship of these parties at the very last hour.

23 Accepting that the replication test is the one to be applied, one must also accept that applying it in this context is not an exact science. It is difficult to speculate about what the parties would have achieved in free collective bargaining had things not come to this point. ...

24 The "replication" test comes from the jurisprudence on interest arbitration and other FOS cases. My own subjective evaluation of what the parties would have agreed to through free collective bargaining would involve too much speculation to be useful. If one cannot, then, predict with any confidence what might have come from negotiation, one must try to determine which position is the most reasonable in the circumstances. As Arbitrator Beck stated in *Re University of Waterloo* [2000] (unreported), perhaps the role of the Selector is to find against the party that advocates the less reasonable offer.

25 An analysis to determine which offer is most appropriate in the circumstances must include a consideration of a number of objective factors, such as comparability, recruitment and retention, economic indicators and ability to pay. Each of these factors will be considered and given its appropriate weight.

Nova Scotia Government and General Employees' Union v. Nova Scotia (Final Offer Selection) [2001] N.S.L.A.A. 13 (Aug. 13, 2001, S.M. Ashley)

I agree that the result of final offer selection is often not truly a replication of what free collective bargaining might produce; the process itself, and the parties' caution in crafting their proposals, may itself alter that result. Nonetheless, I am less skeptical than Arbitrator Ashley about the ability to approximate replication by the use of the factors described, although I agree that it is not an exact science. In choosing between the two final offers, the arbitrator's assessment of which of the two final offers is most reflective of the likely results of ongoing free collective bargaining is still the appropriate yardstick and should not be jettisoned in favour of an abstract notion of reasonableness. As Arbitrator Dorsey held in *Fernie*, quoted above, abstract "notions of fairness and social justice are not to be substituted for market and economic realities" except, I hasten to add lest this seem an overly managerial view, the strongly held views of employees about issues of work life balance and similar issues themselves form part of that market reality.

In this case I also find myself in much the same situation as Arbitrator Don Munroe in:

University of Victoria v. University of Victoria Faculty Association [1995] B.C.C.A.A. 14

where he said:

I have been constrained in my deliberations by the parties' own submission to arbitration. Of course, the major constraining influence is the form of arbitration: global final-offer-selection. Under that form of arbitration, I am not permitted the slightest flexibility as between the parties' respective final offers to each other. I must choose one or the other, in total – even though I am not altogether comfortable with it.

My own discomfort comes from the belief that, had representational issues not clouded collective bargaining in this dispute, an agreement might have been achieved that offered greater rewards to both sides. As several cases note, parties forwarding final offers under the F.O.S. process are inherently conservative, foregoing to a significant degree the need for change for fear of an arbitrator favouring a proposal more closely aligned with the status quo. The Report of the Task Force on Part 1 of the Canada Labour Code – *Seeking a Balance* - alluded to this problem at page 161:

When FOS is part of a back-to-work package, the negative atmosphere which led to job action in the first place is reinforced by polarization and a "winner take all" resolution. In conventional interest arbitration involving multiple issue disputes, the panel, through its award, can try to bridge the gap between the parties. That is an option which is not available to the FOS selector.

The "winner" and "loser" approach becomes more acute when the issues separating the parties involve radical changes to work rules rather than money, a much more frequent occurrence recently. It is often impossible to offer part of a new work structure. The logic that FOS forces each side to minimize its demands simply fails to work effectively when the issues include complex work rules, seniority, pension or job security plans or similar difficulties.

A single issue dispute may be ideally suited to FOS. Several of those who advocated this approach appeared to assume that money, or proposals easily reducible to money, were inevitably the issues involved in labour relations. That view is outdated. Collective bargaining, in an increasingly competitive economy, generates many complex issues not easily amenable to win or lose answers. Applying FOS to such complex matters forces one side to say "yes" to a major change and the other side to say "no". If "yes" is imposed, employees feel that they have lost everything and may be unwilling to buy into the change being forced upon them, which in itself may doom the chances for real success. If the answer is "no", an employer may be unable to introduce change, perhaps realistically needed to meet competition, for the full term of the collective agreement.

In this round of bargaining CN articulated a need for change to its workplace rules, but also a willingness to pay more and provide more job security if those changes could be achieved. Their final proposal pulled back from this approach, but also from its *quid pro quo*. The parties should not forget their opportunity to address needed and mutually beneficial change mid-contract. If there is the appetite, agreements can be reached before the next round of collective bargaining that will now take place in about three years. I remind the parties that Section 16 of the *Railway Continuation Act, 2007*, provides:

Amendment of New Collective Agreements

16 Nothing in this Act shall be construed so as to limit or restrict the rights of the parties to agree to amend any provision of the new collective agreements referred to in section 14, other than a provision relating to their term, and to give effect to the amendment.

Barriers to Voluntary Resolution

The strike that led Parliament to pass this legislation involved very important collective bargaining issues. However, it also took place against a backdrop of considerable internal strife within the UTU. There were also moves afoot by another trade union to seek the right to represent these units of employees. Much litigation, I am told, took place, and perhaps continues to take place over the *inter* and *intra* union issues and representational rights and responsibilities.

Notwithstanding this, Parliament mandated this final selection process between CN and the party entitled, from time to time, to speak as the bargaining agent. Section 1(1)'s definition left open the possibility for change, but the UTU has represented the bargaining unit, through its constitutionally designated spokespersons, throughout the process; and, I should add, they have carried out that representation vigourously.

There is no doubt the two parties came to this dispute in different circumstances. CN has sought, through bargaining, a new approach to working conditions and operating rules. Put simply, and

doing little justice to the complexity of its issues, it has offered the promise of higher wages and increased job security if it can get modified working conditions that allow it to better match its customer's needs, its capital assets, and its human resources.

On the Union side there has apparently been much debate about representational issues, including of course, what should be the appropriate response to CN's quest for change. CN thus perceives itself to have a reluctant and distracted bargaining partner. The UTU agreed to a one year proposal to end the first strike but was unable to get it ratified. In the face of that it has been reluctant, despite again being encouraged to do so during this process, to pursue a voluntary settlement as provided for in Section 13 of the Act. The Honourable Minister, Jean-Pierre Blackburn, also encouraged ongoing discussions and a voluntary resolution. Regrettably, it proved to be "not in the cards," and final offers were in due course received.

Comparing the Final Offers

There are a number of provisions in the two final offers that are the same. Nothing is to be drawn from these common aspects to influence a final choice, one way or the other. These items are:

- 1) Changes to the Extended Health Care and Dental Plans including:
 - (a) The elimination of the waiting period;
 - (b) The eligibility for dependent spouses;
 - (c) The increase to the weekly STD and Sickness and Maternity Leave benefits (as clarified by the Employers July 10, 2007 letter)
 - (d) The annual updating of the dental fee guide and the Alberta rate equivalency provisions;
 - (e) The increase to the maximum amounts;
- 2) Renewal of the Train Passes
- 3) Renewal of the Employee Share Investment Plan

The areas of difference are:

- 1) The rates of pay, term and retroactivity;
- 2) A proposed increase to the lifetime extended health care maximum;
- 3) Three UTU proposals for operating condition changes dealing with

- a) lunch and coffee time;
 - b) overtime for road switching on General Holidays;
 - c) two consecutive days off for Spare Boards;
- 4) Six CN proposals designed to address issues raised by the UTU during bargaining or the F.O.S. process:
- a) establishing a post-retirement health care plan;
 - b) increase to the weekly training rate in agreements 4.3 and 4.16;
 - c) investigations at home base;
 - d) audio recording of certain meetings;
 - e) annual meetings;
 - f) addressing outstanding grievances.

I will address each of these points of difference below.

Is the UTU Offer Compliant?

Section 10(1) of the Act provides in part:

10(1) Within the time and in the manner that the arbitrator may specify, the employer and the union shall each submit to the arbitrator ...

- (b) a list of the matters remaining in dispute on that date; and
- (c) a final offer in respect of the matters referred to in paragraph (b).

(2) The final offer must be submitted with proposed contractual language that can be incorporated into the new collective agreements.

Section 11(2) and (3) provides that:

11(2) If either the employer or the union fails to provide the arbitrator with a final offer in accordance with paragraph 10(1)(c), the arbitrator shall select the final offer provided by the other party.

(3) The arbitrator's decision shall be drafted in such manner as to constitute new collective agreements between the employer and the union and, to the extent that it is possible, incorporate the contractual language referred to in paragraph 10(1)(a) and the final offer selected by the arbitrator.

CN, in its reply to the UTU's final offer, argues that the UTU offer is non-compliant. Partly it argues the UTU offer is not in keeping with the principles of interest arbitration. That argument only goes to how one might choose between the two offers and does not need to be addressed under this heading. However, it also says the offer fails to comply with s. 10(1)(a) of the UTU's

list of matters in dispute, with the Act, and with its proposals. This argument relates to the differences over the three year term. In my view this argument is at least partly answered by s. 14(2) of the Act.

14(2) The new collective agreements may provide that any of their provisions are effective and binding on a day that is before or after the day on which the new collective agreements become effective and binding.

The second leg of this objection is that two proposals lack sufficient contractual language. They are the wage provision and the three operating condition provisions (which are said to lack sufficient language to deal with their retrospective application). While, given my overall view of the two proposals, I do not specifically need to decide these points, I find that the ordinary rules of contractual interpretation as to the retrospectivity of arbitrated collective agreement clauses are sufficient to validate these proposals. I have therefore assessed each proposal on its merits and have not rejected the UTU proposal for reasons of technical non-compliance.

The February 24, 2007 settlement that failed ratification

One piece of information before me is the settlement arrived at on February 24, 2007 between CN and the UTU. That tentative agreement was accompanied by an end to the first strike action. However, that agreement also failed to get the necessary support for ratification. The terms of the agreement, in summary, were as follows (applying to all four agreements):

1. 1 year term from January 1, 2007.
2. 3% wage increase to all rates.
3. A lump sum of \$1,000 per employee bonus, conditional on early ratification.
4. Adjustments to the Extended Health Care and Dental Plans including:
 - (a) the elimination of the new hire waiting period;
 - (b) the ability to add spouses who lose their own coverage as dependents;
 - (c) extended life maximum lifetime benefit;
 - (d) income from \$590.00 to \$600.00 to the STD weekly maximum benefit;
 - (e) The 2007 Dental Association Fee Guide;
 - (f) a \$100 increase to the maximum annual dental benefit.
5. Pre-existing train pass program continues.

CN provided several cases that discussed what, if any, use an arbitrator might make of a memorandum of settlement that has been rejected by the Union's membership. In CN's view this memorandum, although rejected, remains relevant to the replication task. A Conciliation Report

by Arbitrator Kevin Burkett, one of Canada's preeminent arbitrators, reviewed the views of three other very senior practitioners in the following passage:

The issue of the admissibility and/or weight to be given to a rejected Memorandum of Settlement has arisen in the context of interest arbitration.

...

At one end of the spectrum is Arbitrator Martin Teplitsky who, in both *Ottawa Board of Education* Aug. 24, 1997 (unreported) and *Peel Board of Education* May 4, 1981 (unreported) takes the position that a Memorandum of Settlement made subject to ratification that is rejected by the membership is, for sound policy reasons, inadmissible. It is his position that the same policy reasons which dictate that failing settlement the offers that have been advanced by the respective parties are without prejudice, dictate that the terms of the rejected memorandum be inadmissible before an interest arbitrator. He concludes that "if ratification does not occur then the parties are free to adopt any negotiating posture they choose". Arbitrator Teplitsky believes that if the rejected memorandum is not admitted it cannot be relied on as a floor by the party that has rejected it. He reasons that absent the comfort of knowing that a Memorandum of Settlement will be admitted at arbitration parties will be more likely to ratify.

...

At the other end of the spectrum is Arbitrator Brown who, in both *Sydenham District Hospital* May 8, 1972 (unreported) and *City of St. Catharines* Jan. 8, 1980 (unreported), found that a rejected memorandum was not only admissible but should be given considerable weight. He reasons that if the objective of interest arbitration is to replicate the results of free collective bargaining a Memorandum of Settlement negotiated between the respective bargaining committees "... is an admissible document ... and is relevant in the determination of the issues in a like manner of reference." Similarly in re 57 Ontario Hospitals Dec. 22, 1978 (unreported) this arbitrator concluded that a memorandum, although rejected, constitutes "evidence of a package which was seen by the negotiating committees as a realistic basis of settlement in the circumstances of the case."

Professor Paul Weiler adopted a position between the Teplitsky approach and that of Arbitrator Brown. In re 65 Ontario Hospitals (June 1, 1981) (unreported) he concluded that the rejected memorandum was admissible but not determinative. He held that it was open to the union, whose members had rejected the memorandum, "... to persuade the arbitrator that the initial bargain, however bona fide in its inception, was and is clearly inappropriate now." However Professor Weiler was careful to point out that, in any event, the Memorandum of Settlement served to establish the "ballpark" within which an award should fall. He stated:

If seasoned representatives produce a comprehensive package out of the give and take at the bargaining table, in pattern-setting negotiations ... the product of their work must be treated as strong prima facie evidence of an economically-sound bargain. In the world of fully free collective bargaining, where Union members do have the option of rejecting such a settlement, everyone knows that any further improvements will take place within the general parameters of this initial package. It would be counterproductive for the union negotiator to return to the table with his first lengthy shopping list of demands, many of which he had already dropped or compromised, and also to adopt a radically different view of an appropriate wage increase. This would be a recipe for an immediate breakdown in talks and a lengthy strike.

Thus, as and when the Union goes to arbitration, it should not be able to treat the initial memorandum as just the plateau from which it now presses a host of additional, rich concessions. The arbitrator, like the negotiators themselves, should treat the settlement as fixing the ballpark figures for the new contract.

... the Weiler approach is to be preferred. While the fact of the rejection is evidence that there are clearly matters of serious concern to the membership that must be taken into account, **the memorandum establishes the “ballpark” within which the conciliator’s recommendations should fall.** This result also flows from the duty to bargain in good faith. In circumstances where the union membership duly constitutes a bargaining committee and where that bargaining committee enters into a Memorandum of Settlement it cannot be that the fact of the membership rejection allows the union to simply wipe the slate clean and start over with a fresh set of demands. Rather, the concept of good faith dictates that the specific problem areas be identified and prioritized. [emphasis added]

*Canadian Air Traffic Control Association and NAV Canada, Report of Conciliation
Commissioner Kevin Burkett, July 17, 1999*

In may well be open to parties to make their memoranda of settlement without prejudice, but in this case they did not do so. Indeed, during this process the UTU representatives pointed to the failure of ratification to explain the vigour with which they now advanced a number of provisions and resisted others. Far from presenting the failed agreement as irrelevant, they emphasized that strong vote (at 79%), plus the strike action that followed, as proof of the bargaining priorities of the UTU membership, particularly in resisting any incursion into protections over scheduling and hours of work. In my view these are relevant considerations in assessing the bargaining priorities of the parties and in selecting the award that most closely replicates the bargain the parties might ultimately have struck. I therefore adopt the Weiler approach described above in accepting and assessing this part of the evidence.

Related Bargaining Units

Both parties referred me to aspects of the settlements CN has arrived at with other trade unions representing employees of CN within Canada. There are five such unions.

1. The Canadian Auto Workers (CAW)

The CAW represents about 4,000 employees in three separate units:

- Shopstaff
- Clerical and Intermodal
- Excavator Operators

2. The Teamsters Canada Rail – Conference (TCRC)

The TCRC represents about 1,900 employees in three separate units:

- Locomotive Engineers Western
- Locomotive Engineers Eastern

- Rail Traffic Controllers
3. The United Steelworkers of America (USWA)

The Steelworkers represent approximately 2,800 truck maintenance workers.

4. The International Brotherhood of Electrical Workers (IBEW)

IBEW represents about 660 signal maintenance employees.

5. The Canadian National Railway Police Association (CNRPA)

The CNRPA represents about 70 CN Rail special agents.

The UTU itself represents about 1,300 conductors and traffic coordinators employed in CN's US operations. These employees perform essentially the same tasks as the majority of the employees represented by the UTU in Canada.

I will refer to the settlements in respect to these various comparable units as I review the differences between these two proposals.

1. The Monetary, Term, and Retroactivity Proposals

CN's offer is for 3% effective each of July 23, 2007 and July 23, 2008 and July 23, 2009. In addition, it proposes a lump sum in lieu of a retroactive pay increase calculated to equal a 3% wage increase retroactive between January 1, 2007 and July 23, 2007. This sum would not change the base rate for the first increase, but it does represent a significant lump sum payment. Lastly, CN proposes a \$1,000 signing bonus for each employee, justified, in CN's view, by the comparable CAW package.

The UTU's proposal is for a 4% per year increase retroactive to January 1, 2007 with 4% increases on January 1, 2008 and January 1, 2009. The term of the contract would expire on December 31, 2009. Thus CN's proposal would reach out about 8 months further than the UTU's proposal.

In support of its position, CN points firstly to the rejected memorandum of understanding which, over a 1 year term, provided for a 3% increase. It quotes a prominent Union leader saying, at the

time of the initial strike, that “money was not the central issue of the disagreement” and later “It’s not about money, its about working conditions.”

The UTU argues that a 4% wage pattern was set by CN's TCRC locomotive engineers agreement of May 18, 2005. As employees working in the same operating environment, the UTU argues that this represents the best comparable. That 5 year agreement began with three 3% increases (plus three off-the-grid lump sum payments totaling \$3,000 over the first three years) followed by 4% for each of the 2007 and 2008 calendar years.

CN replies that the TCRC agreement included provisions of advantage to the company in the form of a reduction in guarantees and in the mechanics of spare board operations. In addition, it argues, the UTU, along with the CAW, were offered initially, and as extensions, the TCRC 4th and 5th year settlements, in exchange for extended wage stability, but that they declined.

CN's prime comparable is the recent agreement it negotiated with the CAW, which is for four years at 3%, 3%, 3% and 4% plus a \$1,000 signing bonus. This, it maintains, is the most recent and most valid internal comparator. The UTU points out that the CAW agreed to the 3% figures in part due to the post-retirement health benefit. The extra 1%, not the benefit, is the UTU's priority, but it is nonetheless something of significant monetary value.

The UTU refers to the IBEW 4 year agreement which includes a 4% increase for 2007, following three earlier 3% annual increases.

CN refers to several other agreements. An agreement with UTU for the North Quebec International Shortline includes a 3% increase for 2007. The majority of CN – UTU agreements in the US provided for four 3% increases, followed by a 4% final year. CN refers to an as yet unratified maintenance of way employees agreement between the TCRC and CP Rail; CN's main competitor. That agreement provides for 3% in 2007, 4% in 2008 and 3% in 2009, plus a 1% signing bonus funded from the Employment Security Fund.

In support of the reasonableness of its overall wage proposal, CN argues that the UTU ought not to be rewarded with superior wage increases without having negotiated either working rule changes or a longer term agreement that might justify such rates. It notes that the wages paid to members of this bargaining unit are significantly higher than those paid to CAW employees. The rates in its proposal, it suggests, are competitive in the marketplace as shown by a lack of recruitment and retention problems.

2. Increase to the lifetime extended health maximum

The UTU and CN proposals are largely the same on health and dental benefits. The one exception is that the UTU proposes, and CN does not, that:

Effective the first of the month following the Arbitrator's decision, increase the maximum lifetime benefit from \$46,000 to \$47,000.

Effective January 1, 2008, increase the maximum lifetime benefit from \$47,000 to \$48,000.

Both CN and UTU, for health and dental benefits generally, draw a comparison to other settlements. The UTU refers to the 2005 TCRC – CN agreement which includes these increases. CN refers to the CAW settlement of January, 2007 which does not, thus explaining the difference.

3. UTU's Working Condition Proposals

The UTU's proposal includes three changes to operating conditions. It selected these three for inclusion in its final offer from a number of other proposals that it initially put forward. It has thus compromised significantly on those of its own proposals to which CN expressed opposition. The remaining UTU proposals and CN's position on them are as follows.

3(a) UTU Lunch Time

For Agreements 4.3 and 4.16 (the Eastern and Western Lines) the UTU proposes to add the lunch and coffee break provisions from the B.C. Rail agreement, in the following terms:

Yard Crews will be allowed 30 minutes for lunch between 4 and 5 ½ hours after starting work, without deduction in pay.

Yard Crews will not be required to work longer than 5 ½ hours without being allowed 30 minutes for lunch, with no deduction in pay or time therefore.

Yard Crews will be allowed a fifteen (15) minute coffee break after two (2) hours on duty and a further fifteen (15) minute coffee break after six (6) hours on duty without deduction in pay. It is understood that the scheduling of these coffee breaks will not interfere with efficient switching operations.

CN replies that the B.C. Rail agreement said to justify this proposal is an hourly rated agreement. The UTU rejected all proposals to move to an hourly rated system early on in bargaining. This language does not fit well with the type of payment system and working conditions in the other agreements. Further, it argues, its current lunch and break provisions are consistent with CN's

TCRC agreements and with practices at CP Rail. A clause from an hourly wage based agreement covering 150 employees does not, it argues, justify a change for 2650 employees operating under dissimilar conditions.

3(b) UTU Road Switching on General Holidays

The UTU proposes an addition to Agreements 4.16 and 4.3 to provide time and one half for work on a general holiday, which it says is supported by a similar benefit for yard crews, who do similar work. It would read:

Employees working on Road Switcher Service and/or Customer Service Assignments who are required to work on a General Holiday shall be paid time and one half for such work.

CN opposes this change. It argues that, in the eastern agreement road switchers are only doing “similar work” to yard service employees because of a new provision, negotiated in 2000, that allowed returning road switchers to work in the yard. That flexibility it argues, was purchased with an increase of \$2.00 per hour. That same flexibility was rejected in the west.

3(c) UTU – Two Consecutive days off for Spare Board

For Agreement 4.16 the UTU seeks a two days a week off work without penalty clause which it models on a benefit the locomotive engineers in the same territory enjoy. It would read:

Employees assigned to Spare Boards covered by Agreement 4.16 on the 18th Seniority District on territory Montreal East to Joffre shall be entitled to two (2) consecutive days off per week without penalty.

CN argues that the locomotive engineers have the proposed benefit only “if practicable.” Those two words, in my view, make a significant difference. In addition, there are penalties (in the form of lost guarantees) if employees make themselves unavailable. The UTU proposal, CN argues, is both incomplete and unreasonable.

4. CN’s Six Proposals to meet UTU demands

CN put forward six proposals in response to issues it says were raised by the UTU during negotiations. As a general point, CN argues that its overall proposal is the more reasonable in that it responds to the UTU’s issues, both over health and dental benefits, and with these six

specific proposals not originally advanced by CN. In contrast, it argues, the UTU has addressed none of CN's concerns, particularly as they relate to restrictive operating rules. CN refers to a decision of Arbitrator Stanley where he said:

My understanding of the theory of final offer selection is that it compels both parties to compromise. It requires both parties to evaluate the other's position and to modify their own proposals in such a way as to incorporate the concerns and recognize the legitimate interests of the other party. Both proposals put to me for selection were "fair and reasonable." In selecting one of two "fair and reasonable proposals" it is my view that the process ought to favour the proposal which goes the furthest in addressing the legitimate concerns and interests of the party opposite. In other words, the proposal which is the best blend of the legitimate interests of both parties.

Mount Allison University and Mount Allison Faculty Association [1999] (unreported decision, Stanley)

Whether one proceeds on the basis of what is the more reasonable, or on the replication principle, this approach is generally sound. Even with the traditional resistance to anything seen to be a "roll-back", it is only in unusual cases that some compromise is not reached on at least some of each side's proposals.

4(a) Post-Retirement Health Care Plan

CN's offer on health and dental benefits to the CAW in January 2007 included a commitment to establish a post-retirement health care plan. It makes the same proposal for the four UTU agreements. That is:

Effective January 1, 2008, or as soon as the administrative systems are available, the company will establish a Post-retirement Health Care Plan for the payment of post-retirement health care benefits. The provisions of the Plan are summarized in [an attachment].

That plan provides a form of Health Care Spending Account yielding retirees \$35 per year of service up to a maximum of \$700 per year to be paid from retirement to age 65, with a 55% survivor's benefit.

The UTU's response is that this proposal was put forward by CN unilaterally. It comments that: "While this offer appears to be beneficial to retired members of the bargaining unit, it apparently comes at a cost to active members." In my view, this benefit, while it accrues immediately to retired members, will increasingly be of benefit to those current active members as they reach retirement age. Moreover, I note, in the UTU's original submission in favour of a 4% increase, it rationalized the CAW 3% settlement, now relied upon by CN, in the following terms:

Moreover, while CAW negotiated only 3% for the first three years of its contract with CN (2007-09), it is clear the CAW chose to negotiate a "Post-retirement Health Care Plan" for its Members, and this is not found in the TCRC Agreement. CAW obviously chose to negotiate a new provision and did not pursue the pattern wage increase of 4% set by the TCRC and IBEW for the years 2007 and 2008.

CN replies that in fact the UTU did initially propose just such a post-retirement benefit, and that proposal was in fact discussed at the bargaining table.

4(b) Increase to Weekly Training Rules

CN's proposal contains an increase to current training rates, to accord with the \$800 per week now being paid. The UTU notes that this falls somewhat short of its proposal in that it does not cover Agreement 4.2 or the B.C. Rail agreement.

4(c) Investigations at home base

CN's proposal responds to the UTU request that investigations take place at the place where the employee normally reports for duty.

4(d) Audio Recordings of Meetings

CN's proposal responds to a Union concern about disciplinary meetings by proposing a new clause providing for an audio recording, followed by a transcription of investigatory meetings. The UTU believes the addition of taping will add little to the process as questions and answers are already recorded.

4(e) Annual Meetings

In answer to concerns raised by the UTU, CN's proposal offers the following new letter of understanding:

During the course of our discussions, you raised issues relating to the Company's handling of discipline, meals and break periods. To ensure systemic issues, as you suggest, are addressed, we agree to hold annual sessions at one major CN terminal and/or office per year, over the next three (3) years, with the senior representatives of both organizations to discuss business trends and other issues of mutual concerns. The

company will make the necessary arrangements and pay the costs associated with these sessions.

The UTU recognizes the value of such structured meetings, but feels they should occur more than annually.

4(f) Outstanding Grievances

In response to the UTU concerns about the current backlog of outstanding grievances, the CN proposal offers the following new letter of understanding:

Within 60-days of the effective date of this agreement, the parties will discuss a process to facilitate the resolution of our grievance accumulation.

In the event the parties agree to mediate any or all of the outstanding grievances, the parties will select a mutually acceptable mediator. Should the parties be unable to agree on the mediator, the Federal Mediation Conciliation Service will be asked to appoint one.

Within the same period of time, a grievance tracking system (GTS), developed by CN to submit, answer and track future grievances, will be demonstrated to the union leaders and thereafter implemented.

Selection

Having weighed all these factors, I find the CN proposal to be the one that more closely reflects both the reasonableness and the replication principles. While their appears to be a full 1% per year difference between the positions, the CN proposal narrows that gap somewhat with its proposal for a lump sum payment and the addition of the retiree health benefit.

Also, the CN proposal goes at least a little way to recognizing issues raised by the UTU in bargaining, while the UTU proposal does not respond to CN's issues. On a broader basis, I find that CN approached this round of bargaining hopeful, in exchange for job security and superior wages, it could achieve some significant working rule changes that would assist it with its economic performance and with enhancing its ability to serve its clients. Those working rules proved, however, to be issues that invoked some strong employee opposition; some of it directed at CN, and some at the UTU itself.

I fully appreciate the strength of feelings many employees have about their hours of work and the impact those hours have on their home lives and their outside activities. Working hour or mileage and time guarantees give them some measure of control over their schedules. However, at the same time, railroading is a competitive industry which, of necessity, must rely upon employees

moving backwards and forwards along the tracks. One of the industry's principal competitors is road transportation. Certainly truckers too complain of uncertainty of schedules and a lack of predictable time at home. That industry exhibits a flexibility which, if they are to prosper, both CN and its unions must match, seeking in the process to reconcile both their interests.

Overall, I am satisfied that CN's willingness to offer a higher end economic settlement was dependent on obtaining some *quid pro quo*. Its proposal, although lower than the UTU's in economic terms, best reflects that reality of bargaining. The three working rule changes proposed by the UTU run counter to the direction CN has been trying to take. CN would, I believe, have remained resolute in its opposition to such changes.

I wish to express my gratitude to the representatives of both parties; bargaining representatives and counsel alike, for their cooperation during this process. They provided me with much valuable insight into the very specialized world of railroading. While making a final offer selection is not easy, the task was lightened considerably by the skill and passion with which each side's representatives explained their points of view.

The collective agreements, awarded pursuant to s. 11 of the *Railway Continuation Act, 2007*, effective on July 23, 2007, are as follows:

The terms of the collective agreements are compiled from the following eight documents, attached to this award and marked as Schedules 1-8 respectively.

- Schedule 1 – Agreement 4.16
- Schedule 2 – CN's Final Offer for the Agreement 4.16 portion
- Schedule 3 – Agreement 4.2
- Schedule 4 – CN's Final Offer for the Agreement 4.2 portion
- Schedule 5 – Agreement 4.3
- Schedule 6 – CN's Final Offer for the Agreement 4.3 portion
- Schedule 7 – Agreement
- Schedule 8 – CN's Final Offer for the B.C. Rail portion

In applying each of Schedules 2, 4, 6 and 8 to their respective prior collective agreements,

- The “contract language to effect changes” attached to those schedules are to be made as specified to the prior agreement language.