IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY

("the Company" / "the Employer")

- AND -

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), LOCAL 100

("the Union")

CONCERNING grievances regarding the requirements of the Company to provide training to employees under the Trades Modernization Agreement in Appendix 10 of Agreement 12.

Christopher J. Albertyn - Sole Arbitrator

APPEARANCES

For the Union:	John Moore-Gough, CAW National Representative
	Bryon De Baets –President, Local 100
	John Gouveira, Vice-President, Local 100
	Drew Ratajewski, Local Chair, Lodge 110
For the Company:	Andre Giroux, Counsel
	Ross Bateman, Senior Labour Relations Manager
	Doug Fisher, Labour Relations Director
	Jim Danielwicz, Chief Mechanical Officer

Hearings held in TORONTO on February 10, May 25 and July 28, 2005

Award issued on May 16, 2006.

PRELIMINARY AWARD

THE DISPUTE

1. The parties did not submit a joint statement of issue. The Union filed a draft joint statement of issue which was not signed by the Company. From the Union's draft I understand the dispute between the parties to be the Union's claim that the Company has not complied with its obligation to provide training to employees in order to achieve tradesperson status within their trade, as required under Appendix X (the Trades Modernization Agreement) of Agreement 12 (the parties' collective agreement) and Attachment #10 of the Memorandum of Agreement between the parties of March 6, 2001. The Union contends the purpose of the Trades Modernization Agreement ("TMA") is that the skills of existing employees be enhanced by training to red seal (inter-provincial) status so that they can achieve portability of their trades outside of the rail industry.

2. The TMA was concluded originally on September 10, 1996, following railway strikes and lockouts in March 1995, and mediation-arbitration. The TMA provided for the elimination of the seven shopcraft trades which existed then and their replacement by three new trades: heavy duty mechanic, car mechanic and

electrician. The TMA established a Joint Committee on Trades Modernization which was to monitor the progress of the Company's training of those occupying the new trades.

3. The Union's Statement of the Issues in dispute sets out a long history of the parties' disagreement regarding the Company's implementation of the TMA, and of the Union's efforts to have the TMA training done in the manner the Union anticipated. The Union contends that the loss to its members by the Company's failure to fulfil its obligations under the TMA is considerable and it wishes to have the situation remedied.

4. As a remedy the Union seeks a direction to the Company that it provide a training plan for all locations across the system to deliver the necessary training. The Union also seeks compensation for employees in service on September 10, 1996 who were not granted an exemption from training and who have not received what the Union regards as the required training sufficient to satisfy red seal qualification, in the amount of $5 million.

5. The Company has not taken a position on the merits of the dispute, and has reserved its right to do so if and when necessary. The Union's explanation of

the Company's position on the merits of the dispute is that the TMA does not oblige the Company to provide red seal status training, and there was no agreed timetable within which the training was to be provided.

6. This decision does not address the merits of the TMA issue. It is concerned with preliminary matters. The Company asks that the grievance be dismissed on preliminary grounds. The Union objects to the Company's raising preliminary issues when it has omitted either to sign the Union's proposed joint statement of issue or to provide its own statement of issue.

7. I held over the question of whether, as a consequence of this omission, the Company is bound by the terms of the Union's proposed joint statement of issue, and I permitted the Company to continue with its preliminary issues, which were set out in writing to the Union prior to the hearing.

8. The Company contends the dispute is not arbitrable. Firstly, it says that the Union has not specifically filed a grievance with respect to its TMA claim, nor progressed it properly through the grievance procedure. Secondly, and alternatively, the Company says that all issues relating to training under the TMA were settled by Brian De Baets, the Union's President, on various occasions as

part of the collective bargaining process, and that the Union has therefore agreed to a variation of the TMA, or the Union is estopped from any attempt to resurrect its grievances concerning the manner in which the Company is applying the TMA.

Are the grievances arbitrable?

9. The Company accepts that many grievances concerning training under the TMA have been filed (the Union says that seven or eight grievances have been filed), but the Company contends that no grievance which specifically deals with the red seal issue has been properly progressed in accordance with the mandatory time limits contained in Rule 27 (Grievance Procedure) and Rule 28 (Final Disposition of Grievance) of Agreement 12.

10. The Union raised the issue it raises in this arbitration – the non-application of the TMA – with the Company. It did so in writing on January 9, 2002, on February 5, 2002, and on March 5, 2002. On April 30, 2002 the Union wrote to the Company advising that it would be proceeding to arbitration with respect to the following grievance, among others: "A Step 2 dated March 5, 2002 claiming a violation of Appendix X [the TMA] concerning the deliberate stalling and lack of

concrete measures to commence the implementation of Trades Modernization at the LRC". The Union proposed the dispute be referred to arbitration and suggested an arbitrator. The Company did not respond and the matter was not pursued then by the Union.

11. On February 17, 2003 the Union wrote to various offices of the Company and asked of progress in providing training under the TMA. The Company did not respond. On May 23, 2003 the Union wrote to the Company claiming a violation of the TMA, advising it was willing to expedite the case to arbitration. On July 25, 2003 the Union wrote to the Company advising that it was proceeding to arbitration concerning a violation of the TMA for the Company's failure to respond to the Union's requests for training plans to enhance the skills of existing employees and to achieve the portability of trades outside the rail industry. The letter records that the matter was submitted by the Union at a final step of the grievance procedure on May 23, 2003, and that the Company had not replied to Step 2.

12. Mr. De Baets had a discussion with Ross Bateman, a Seniority Labour Relations Manager of the Company, in about May 2004 regarding the referral of the TMA dispute to arbitration. They agreed I would arbitrate the matter.

13. I received an email from the Union dated June 21, 2004 stating that the parties had agreed to put an outstanding dispute concerning the TMA before me. This was the referral of the Union's grievances to arbitration.

14. The Company confirmed on June 23, 2004 that I was to consider the matter.

15. The Company says that the claim described in the Union's statement of issue appears to be a Union policy grievance, but no such grievance has been progressed through the grievance procedure by the Union, nor has there by an agreement by the Company to refer the dispute directly to arbitration. In support, the Company refers to the awards in *SHP 118, SHP 120, SHP 164* and *SHP 277*. Consequently, the Company says the Union cannot pursue a statement of issues at arbitration because the statement would have no reference to a specific grievance.

16. Furthermore, assuming the Union were entitled to proceed to arbitration, the Company says the Union requested arbitration on April 30, 2002, but did not pursue this request as contemplated under Rule 28.3. The Rule requires that, in the absence of agreement between the parties within 45 days of such a request, the

party making the request must, within 14 days, request the Minister of Labour to make the appointment. This was not done, although the Company does not suggest it was necessary for the Union to go to the Ministry in this case. Its objection is to the Union's tardiness in advancing the grievances to arbitration.

17. There is some dispute between the parties as to the impact of Rule 27.9. The relevant portion reads:

> A grievance not progressed within the time limits specified shall be dropped and shall not be subject to further appeal. ..

18. The Union argues there is no consequent invalidity of a late referral to arbitration under Rule 28, as there is under Rule 27.9. The Employer responds that Rule 27.9 applies to Rule 28 arbitration referrals. Otherwise the Union would never be precluded from progressing a grievance to arbitration despite the length of the delay. That is why the Company contends that the grievances are deemed to have been resolved.

19. The Company says that numerous meetings have been held between the parties to discuss settlement of the issue, but the Union has never progressed a grievance to arbitration.

20. The Union says that Rule 23.8 is never applied strictly by the parties and that they routinely refer grievances to arbitration long after the time prescribed in Rule 28.3. In the vast majority of cases the referral to arbitration is beyond the 59 days (45 days plus 14 days) prescribed in Rule 28.3. The Union contends this is the first case in which the Company has sought to strictly enforce the time periods in Rule 28.3.

21. The Company responds that in many instances it does not enforce the strict time limit prescribed in Rule 28.3, but sometimes it does. The applicability of the time limit depends on the nature and importance of the dispute. In this case the Company says that it advised the Union well in advance of the hearing that the Company would be claiming the grievance was, or the grievances were, untimely.

22. The Union points out that routinely the process adopted by the parties is for the Union to suggest the names of arbitrators to the Company, from which the Company makes a selection or proposes other names. That was done in this case. In a letter dated April 30, 2002 the Union proposed the matter be referred to a named arbitrator for determination. It appears the Company did not respond in writing to the proposal. Similarly, in a letter dated July 25, 2003 the Union

proposed the names of three arbitrators to hear this dispute, but there appears to have been no written response from the Company. The Union suggests the usual practice between the parties is for the Union to propose arbitrators to hear the dispute, the Company considers the matter and the parties either agree to an arbitrator, or the Union refers the matter to the Ministry to make an appointment.

23. The Company says it did not respond to the letters referring the grievances to arbitration because it hoped throughout, pursuant to what is described below, that Mr. De Baets would resolve the matter without the need for an arbitration hearing.

24. The Union contends that the Company is not entitled to challenge the timeliness of the Union's referral of the grievances to arbitration because of its failure to file a separate statement of issue prior to the hearing of the arbitration, as required by the parties' rules. The Union suggests that if I waive the procedural requirement that the Company file a statement of issue, I should equally waive the Union's breach of the procedural requirement to refer the grievances to arbitration within the time limits prescribed in Rule 28.3.

25. The Employer was able to cite one instance in which it had previously

challenged the arbitrability of a grievance on the basis it was referred in an untimely manner to arbitration. That case involved an individual grievance which had not be advanced for a period of 9 years.

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26. The Company has been aware for a long time of the Union's dissatisfaction with its approach to the TMA. The Company has received several grievances from the Union over the period since the TMA was concluded and, although the Union has not advanced to arbitration any except the two before me, all of the grievances involve the same issue: the alleged failure by the Company to fulfil its obligations under the TMA.

27. The evidence presented on the Company's estoppel argument, which follows, demonstrates the degree to which both parties are conscious of the differences between them regarding the implementation of the TMA. They are very aware of their differences; they have made several efforts to try to address their differences and to meet each other's concerns. Unfortunately these efforts have been unsuccessful, but that does not detract from how alert both sides have been to the importance of the TMA for both of them.

28. Consequently, the Union pursuing the grievances to arbitration was not a surprise to the Company. The Company might reasonably have expected that to happen. There is accordingly no prejudice to the Company by the Union taking the grievances beyond the level of discussion between them to arbitration.

29. The Union's position is that all of the grievances concerning the alleged non-implementation of the TMA by the Company have been referred to this arbitration. The Union specifically includes in its brief the grievance of January 9, 2002 (#02-01-006) filed by Ashok Venkatarangam, Vice-President of Lodge 110, and progressed to Step Two on March 5, 2002 by John Gouvela, Vice-President, Great Lakes Region; and the grievance of May 23, 2003, filed by Dennis Wray, Vice-President. These grievances form the subject matter of this arbitration.

30. I am not persuaded that the deemed resolution of a grievance under the grievance procedure, in Rule 27.9, applies to the time periods under Rule 28. The time limits "specified" are those contained in Rule 27, not those in Rule 28. The referral of a grievance to arbitration is dealt with under Rule 28, which has its own time limits. The impact of delay on the Union's entitlement to continue with the arbitration of a grievance under Rule 28 is a question of mixed fact and law:

the length of the delay, the reasons for the delay and the relative prejudice to the parties. There is no deemed resolution of a grievance under Rule 28.

31. The Union's complaint against the Company is that the Company is constantly violating the TMA; in the Union's submission, by the Company failing to perform its obligations under the TMA, it is engaged in an ongoing violation of the TMA. This means that the Union could at any time file a fresh grievance on the issue and pursue it to arbitration. A finding that the referral to arbitration by the Union was untimely will not determine the dispute between the parties. It would merely delay resolution of the issue at arbitration.

32. Upholding the Company's timeliness objection would introduce a measure of rigidity which has been absent in the parties' relationship. They are flexible with each other in dealing with grievances and disputes. They allow each other time to file grievances, they do not conventionally hold each other to the strict time limits of Rule 28.3. This approach has advantages for them in their dealings with each other.

33. In this case the Company advised the Union of its intention to challenge the timeliness of the Union's referral of the grievances to arbitration when the

Union was already in breach of the time limits in Rule 28.3. The Union's choice then was either to pursue the grievances, as it has done, or to withdraw them and file fresh grievances on the same matter.

34. In the particular case of the two grievances before me, the Company did not respond in writing to either. As explained, it hoped to resolve the grievances through further discussions of the need to modify the TMA. Thus, the Union was led to believe that these grievances would not require strict compliance with Rule 28.3 since the Company itself was not complying strictly with the Rule. In the circumstances it was reasonable for the Union to conclude that discussions would occur, over a period of time, to try to resolve a complex and important matter, and that the strict time limits of Rule 28.3 would not be enforced.

35. So, given the past practice between the parties, given also the particular conduct in this case, and the absence of an express consequence from a late referral to arbitration, the Company's timeliness objection to the Union's referral of the grievances to arbitration should fail. By acting as it did, allowing grievances generally to be referred to arbitration outside of the time limits in Rule 28.3, and specifically in this case allowing the grievances to proceed with a series of discussions over a very extended period of time to try to resolve the underlying

issues, with no early warning of an intention to challenge the timeliness of a referral of the grievances to arbitration, the Company waived its entitlement to rely on the strict language of Rule 28.3.

36. Having regard to the above circumstances, I find it would be inequitable to enforce the strict time limits of Rule 28.3. I therefore deny the Company's timeliness objection to the referral of the grievances to arbitration.

Agreement and estoppel

37. The Company says the Union, through Mr. De Baets, agreed to a variation of the TMA, alternatively the Union, through Mr. De Baets, made representations to the Company on which the Company replied to its detriment creating an estoppel. The Company contends the agreement was concluded and reaffirmed on the following occasions: in February 2002, on December 9, 2003, on December 10, 2003, and on January 18, 2004. Under the agreement alleged by the Company, it is largely freed of its obligations under the TMA. Instead it must provide training only to those who are permanently laid-off and to new apprentices.

38. The Company's estoppel argument is that Mr. De Baets represented that

he would ensure the Union agreed to the variations to the TMA which the Company wanted, the Company accepted his representation and relied on it to its detriment. As a consequence, the Company says, the Union cannot now seek to enforce the actual terms of the TMA.

39. A brief history of the TMA dispute is helpful. Trade modernization has been a contentious issue between the parties for almost a decade. The TMA was concluded in September 1996. At that time there was a real prospect of permanent layoffs. Workers needed the assurance of being able to get jobs outside of the rail industry. The TMA was intended to address this. Employees would be trained so that they had transferable skills they could use outside of the railway industry.

40. From the Company's perspective, circumstances changed significantly not long after the TMA was negotiated. The risk of layoffs considerably subsided. The rail industry became more buoyant. Far from having a surplus of skilled tradespersons, the Company needed to retain them. Training them for work outside of the rail industry no longer made economic sense, yet the TMA required that this be done. As a consequence the requirements of the TMA became contrary to the Company's economic interest. The Company was therefore less than enthusiastic at carrying out the training under the TMA and it identified the

need to change the TMA. It sought the Union's agreement to make the changes the Company thought necessary.

41. The Union's perspective was rather different. Its members were interested to obtain the transportable skills the TMA offered them. The training would increase their mobility. The Union was therefore concerned by what appeared to be indifferent or half-hearted implementation of the TMA. It complained to the Company about the way in which it was carrying out its obligations under the TMA. The issue was to become a source of significant disagreement between them for several years.

42. The Company was keen to discuss changing the TMA with the Union. In the 2000-2001 round of national negotiations for a renewal collective agreement there was discussion between Doug Fisher, the Company's Labour Relations Director, and John Moore-Gough, the Union's National Representative, regarding the implementation of the TMA. The Company's understanding of the arrangement reached between them was that there would be less focus on the red seal qualifications and more focus on the orphan trades – boilermakers, sheet metal workers, pipefitters – to enable them to learn the tasks of the regular occupations, as a means of becoming car mechanics. Their agreement was

recorded in writing and became an appendix to the collective agreement, Attachment #10 of the Memorandum of Agreement of March 6, 2001. However, the conclusion of Attachment #10 did not resolve the differences between the parties regarding the TMA.

43. As part of the 2000-2002 negotiations the parties agreed to keep a portion of their agreement confidential. The commitment to confidentiality included an additional feature: there was to be compensation of 2% for each craftsman payable on January 1, 2002, but this compensation did not form part of the parties' written Agreement. It would cost the Company about $2.5m per year. The Company prepared a confidentiality letter for signature by the Union. Its terms were that if the Union breached the confidentiality undertaking, the 2% skills trade adjustment would not be payable. The Union refused to sign the letter, but gave verbal assurances it would comply with the undertaking.

44. The 2000-2002 collective agreement was ratified in February or March 2001. Mr. Moore-Gough wrote of the 2% skills trades adjustment to one of the Union's regional chairs because of the need to have the Memorandum of Settlement ratified. The Company believed this breached the Union's assurances to keep the deal confidential. The Company took the position that the 2% was no

longer payable.

45. A meeting occurred on February 12 and 13, 2002 to discuss the situation. There are different recollections of how the payment of the 2% was resolved in relation to the TMA issue. Mr. Fisher recalls the clear conclusion of an agreement; Mr. De Baets remembers an agreement to begin a process to deal with the TMA issue. He does not recall any resolution of the TMA issue.

46. According to Mr. Fisher, the Company made clear it would consider paying the 2% as previously agreed, provided the TMA issue was resolved. The Company representatives suggested the following resolution: the Company would give a guarantee of red seal training only for new apprentices and for those who were involuntarily and permanently laid-off. They would be sent to trade school to achieve red seal status prior to ending their employment relationship with the Company.

47. Mr. Fisher recalls that Mr. Moore-Gough was against settling the matter on this basis, but Mr. Moore-Gough said it was Mr. De Baets' decision, as President. Then, according to Mr. Fisher, Mr. De Baets made the decision to undertake to try to resolve the TMA dispute on the basis suggested. He asked,

though, that he be given some time to do so because of the politically sensitive nature of the issue in the Union. The Company representatives accepted his undertaking, which they understood to be that he would in due course resolve the trade modernization issue along the lines discussed. In return the Company agreed it would pay the 2% compensation it had previously agreed to pay to the shopcraft tradespersons.

48. Mr. Fisher prepared a letter to the Union on February 13, 2002, confirming the terms of the parties' arrangement. The letter was sent to Gary Fane, the Union's Director of Transportation, for his confirmation. According to Mr. Fisher, Mr. Fane informed him that the content of the letter was accurate, but said, given the sensitivity of the issue and the need for Mr. De Baets to have time to implement the arrangement reached, he could not sign it. (Mr. Fane was not called to testify, so Mr. Fisher's evidence of their conversation was not contested). The letter was not presented in evidence.

49. Mr. De Baets' recollection of the February 2002 meetings is the following. He says Richard Dixon, then the Company's Vice-President: Labour Relations and Employment Legislation, said he would instruct payroll to pay the 2% increase retroactive to January 1, 2002, provided the Union was willing to meet

with Dennis E. Waller, then the Company's Vice-President: Engineering and Mechanical, to discuss modifications to the TMA. Mr. De Baets recalls that he was willing to agree to this, and on this basis the delay in payment of the 2% was resolved.

50. A dinner meeting took place between Mr. De Baets, Mr. Fane, Mr. Dixon and Mr. Waller. By this stage, according to Mr. De Baets, very little training had taken place under the TMA, except for apprentice training. At the dinner those present discussed how to deal with the TMA. Mr. De Baets undertook to try to craft a deal in the forthcoming period which would address the Company's concerns regarding implementation of the TMA. Mr. De Baets says that the tenor of the discussion was captured in the letter which Mr. Waller wrote to him shortly afterwards.

51. On February 15, 2002, Mr. Waller wrote to Mr. De Baets and to Mr. Fane. The Company sees this letter as a watered down version of what had been agreed; Mr. De Baets sees it as an accurate record of the discussion. In Mr. Waller's letter he refers to the TMA issue:

> I also understand that although Richard Dixon asked for a guaranteed result

> regarding "trade mod", that you could not provide us with such a guarantee. However, your promise to use your best efforts to have Local 100 craft a satisfactory deal, is sufficient for us to proceed with settling the skilled trades adjustment.

52. It was put to Mr. Fisher in cross-examination that Mr. De Baets had undertaken to use his best efforts to obtain the Union's agreement to the TMA deal. He denies this. He says Mr. De Baets' undertaking went beyond best efforts. He committed himself to resolving the issue on the basis proposed; he just needed time to do so.

53. The joint Union-Management Trades Modernization Committee met approximately a month later. The arrangement discussed the previous month between Mr. De Baets, Mr. Dixon and Mr. Waller was not put to the committee. Mr. Fisher says this was because it was apparent that the Union representatives on the committee would not accept it. Therefore the understanding between the Company and Mr. De Baets was not made public. Given the volatility of the matter, Mr. Fisher told the Company's director of training not to proceed with training for the orphan trades until the issue was properly clarified. Despite this, some training occurred, and the Company continued to train apprentices to red seal level during 2003.

54. The grievances referred to above were filed for the Company's failure to implement the TMA. The Company remained optimistic that an overall resolution of the issue could be achieved, perhaps on an industry-wide basis along the lines discussed with Mr. Fane, Mr. Moore-Gough and Mr. De Baets in February 2002.

55. The parties began negotiations for a renewal collective agreement in the fall of 2003. The then current agreement was expiring on December 31, 2003. The Union has a particular bargaining style. It bargains to a firm strike deadline. The Company thought to try to change the bargaining pattern. Mr. Fisher suggested three different approaches: door No.1, door No.2 and door No.3. Door No.1 was traditional bargaining, exchanging lists of demands and spending time negotiating over specific demands, as the parties were accustomed to do; door No.2 was in large measure to maintain the status quo, renewing the collective agreement with some wage and benefit adjustments and discussing what improvements were necessary; and door No.3 involved undertakings by the Company of job security in return for flexible job rules. The Company had in mind suspending the contracting out, work ownership and other restrictive clauses of the collective agreement in return for greater compensation improvements and a guarantee of employment security. The Union was willing to explore door No.3 if there were

significant wage increases. The Union saw the backroom TMA discussions, described below, as part of exploring door No.3, in advance of concluding the actual collective agreement, and not as a separate, concrete agreement on the issue. As a consequence, when the door No.3 style of bargaining failed to produce an agreement, and the parties resumed traditional bargaining (door No.1) prior to concluding a Memorandum of Settlement, the Union says the backroom TMA discussions fell away as well.

56. At the negotiating session on December 9, 2003 Mr. Fisher squarely raised the issue of the variation of the TMA. The Union negotiating committee rejected the proposal. Thereafter, in the corridor away from the bargaining room, a discussion took place between Mr. De Baets, Mr. Bateman, and Jim Danielwicz, the Company's Chief Mechanical Officer. There is a difference between what Mr. Bateman and Mr. Danielwicz recall and what Mr. De Baets recalls of their discussion. According to Mr. Danielwicz and Mr. Bateman, Mr. Danielwicz suggested the Company would train all current and future apprentices and any involuntary furloughed employees in the future if the Union's demands regarding the TMA would cease. Mr. De Baets said he thought he could make this work, provided it was not raised at the bargaining table. He asked Mr. Danielwicz and Mr. Bateman to ensure the issue was not raised again in the open bargaining

session, in return for which he would deal with the matter. The Company accepted this assurance and did not raise the matter at the bargaining table again.

57. According to Mr. De Baets, Mr. Danielwicz and Mr. Bateman wanted to settle the TMA issue at the bargaining table, but he was reluctant to do so. Bargaining was being done jointly with another union local, Local 5.1. Mr. De Baets felt that the TMA was a purely shopcraft issue, and he did not want it raised in joint discussions with the other local. He therefore asked the Company not to raise the issue in the joint bargaining forum. Mr. De Baets says no overall agreement of the TMA issue was reached.

58. The Company disputes this explanation for Mr. De Baets' request. It says that separate meetings occurred between the shopcraft unit bargaining team of the Union, and the bargaining team of Local 5.1. By way of example, at the time Mr. Danielwicz and Mr. Bateman were meeting in the hallway with Mr. De Baets, Mr. Fisher was in a separate caucus meeting with the Local 5.1 bargaining team.

59. On the next day, December 10, the Union bargaining team spokesperson, Mr. Moore-Gough, raised the TMA issue at the bargaining table. This contradicted what the Company understood had been arranged with Mr. De Baets,

that the matter would not be discussed in bargaining. The Company representatives took a break from the negotiations to speak to Mr. De Baets to find out what was going on. According to Mr. Danielwicz and Mr. Bateman, Mr. De Baets clarified he had not had a chance to speak to Mr. Moore-Gough prior to the meeting. He suggested the Company representatives should just listen and not discuss the issue.

60. The Company representatives then caucused among themselves and decided that a further discussion was necessary with Mr. De Baets and Mr. Moore-Gough to clarify the situation and re-affirm the agreement they thought they had been reached with Mr. De Baets. In the bargaining session the Company representatives listened to the Union's comments regarding the TMA, but did not respond.

61. A dinner meeting was arranged and held that evening at the Ruth's Chris restaurant in Mississauga, attended by Mr. De Baets, Mr. Moore-Gough, Mr. Fisher, Mr. Danielwicz and Brian Pullen, a Division Mechanical Officer. During the course of a convivial evening, two separate conversations occurred, one principally between Mr. Danielwicz and Mr. De Baets dealt with the TMA. Mr. De Baets has little recollection of it. Mr. Danielwicz remembers he inquired what

was going on: having the issue raised again at the bargaining table when he thought he had an agreement with Mr. De Baets. Mr. Moore-Gough said he disagreed with the basis of agreement discussed (dilution of the TMA to the training of all current and future apprentices and any involuntarily furloughed employees), but he said it was Mr. De Baets' decision, as President, to make. According to Mr. Danielwicz, Mr. De Baets said he could agree to the resolution of the TMA dispute on this basis. He asked that management not raise the issue in the bargaining because it was a sensitive one.

62. As I have said, Mr. De Baets has no recollection of this discussion. His recollection of the dinner meeting was a heated discussion between Mr. Moore-Gough and Mr. Pullen regarding the use of a US contractor by the Company to attend to derailments. Certainly, Mr. De Baets does not regard himself as having concluded any agreement to vary the TMA, because nothing was signed to that effect. He understood himself to be exploring ideas over a dinner meeting, not concluding a binding legal agreement.

63. The management representatives at the dinner meeting decided not to share the settlement widely which they believed they had achieved. They made this decision because of the sensitivity of the issue among the workers represented

by the Union. It was not raised again in the negotiations. The Company's view was that it had Mr. De Baets' assurance that the TMA issue was to be resolved, so it decided not pursue its demand at the negotiating table that the TMA be modified.

64. The Company prepared a letter on January 18, 2004 reflecting its understanding of the agreement reached with Mr. De Baets on December 10, 2003. The letter is written under the name of Kim Madigan, Vice-President, Labour Relations, North America for the Company, and addressed to Mr. De Baets. It has a space for Mr. De Baets to sign in his capacity as President of the Union. The letter reads:

> This has reference to the discussions held during the course of contract negotiations to renew Collective Agreement 12 and 12.90 regarding portability referred to in the Trade Modernization Agreement in Appendix X.
>
> In resolution of all issues associated with the Trade Modernization Agreement, the Company commits to sponsor the training of Apprentices or any employee who may be involuntarily laid-off permanently, during the life of this collective agreement.
>
> The training will satisfy the required curriculum that would permit an

> individual to challenge a provincial trade exam to obtain red seal status.
>
> If you concur with the above, please indicate your agreement in the space provided below.

At the bottom there is space for Mr. Madigan's and Mr. De Baets' signatures respectively on behalf of the Company and the Union.

65. From the Company's perspective this letter was to be an appendix to the Memorandum of Settlement, Attachment B.

66. According to Mr. Fisher, Mr. Moore-Gough objected strongly to it being attached and Mr. De Baets asked the Company to withdraw the letter from the overall Memorandum of Settlement of the negotiations because it would be too inflammatory for his negotiating committee at the time. Mr. Fisher says that Mr. De Baets repeated the assurance, though, that the understanding reached was that the TMA issue would be resolved along the lines of the January 18, 2004 letter.

67. Mr. De Baets has a different recollection. He says the January 18, 2004 letter was not accurate because there was no agreement, and therefore he did not sign it. He says there was no discussion of where and when training would take

place, what those being trained would get paid, and other aspects of what would be an agreement to change the terms of the TMA.

68. As result, the letter of January 18, 2004 was never signed on behalf of the Union and it did not form part of the Memorandum of Settlement.

69. The Company was content to proceed on this basis, without a signed agreement with the Union, because it has many verbal understandings and agreements with the Union because of the sensitivity of the issue, which they mutually regard as binding, and it saw the agreement with Mr. De Baets as no different.

70. Following further discussions, the Memorandum of Settlement, absent the Company's letter of January 18, 2004, was signed on January 23, 2004. It was subject to ratification. The Union was unable to secure its ratification. In a vote on February 14, 2004 the bargaining unit rejected the Settlement. A strike followed, lasting approximately a month. Further discussion ensued, with some compromises and changes to the agreement, and a second Memorandum of Settlement was reached. The second Memorandum of Settlement was ratified.

71. Mr. Fisher recalls that the TMA was not discussed in the period between the signing of the first and second Memoranda of Settlement. Mr. De Baets recalls a confidential discussion between him and Mr. Fisher during this period. He says they spoke on the telephone, and he suggested to Mr. Fisher that they get together and try to resolve the trade modernization issue, which Mr. De Baets says he had been trying to do since making his commitment to Mr. Waller in February 2002. Mr. De Baets wanted the conversation to be confidential because he had yet to discuss the matter with Mr. Moore-Gough who had been involved in negotiating the TMA.

72. From Mr. De Baets' perspective, the conversation with Mr. Fisher was not kept confidential. In March 2004, shortly after the strike, Mr. Fane contacted the Company to advise that the Union intended to advance the TMA dispute to arbitration. This surprised the Company, which thought the matter had been resolved. The Company took the view that when the Union's President confirmed an arrangement, that was an agreement between the parties. Mr. Fane was told by Mr. Bateman that an agreement had been reached with Mr. De Baets on the TMA issue. Mr. Fane contacted Mr. De Baets and told him of this. Mr. De Baets informed Mr. Fane that all deals were off in light of the fact that the Memorandum of Settlement had not been ratified. Mr. De Baets says he then

phoned Mr. Bateman and told him this as well. Mr. Bateman has no recollection of receiving such a call.

73. Mr. De Baets says that as a result of the breach of the confidentiality of his conversation with Mr. Fisher, he told Mr. Bateman that his discussions concerning the TMA were over, and that he no longer felt bound by the commitment he had made to Mr. Waller.

74. From the Company's perspective the TMA issue had been resolved – the Union had agreed to not enforce the TMA's strict terms for training, instead the required training would be restricted to apprentices and those furloughed. From the Union's perspective, there was no agreement to vary the TMA. The Company was still in breach of its obligations under the TMA and all discussions to obtain compliance with the TMA had failed.

75. In light of the above, the Company says the Union is estopped from enforcing the TMA in its original form. It says the Union, through the assurance of its President, Mr. De Baets, lulled the Company into dropping its demand for the variation of the TMA, thereby creating the Company's detrimental reliance.

76. The Company relies on the award in *SHP-449* in which it was held that the conduct and exchange of positions at the bargaining table can form the basis of an estoppel. The failure of a party to table an amendment to the collective agreement at bargaining on the basis of representations from the other party may also found an estoppel.

77. The Union responds that the Company itself never acted as if it had a deal. Not once, in response to the Union's several letters to the Division Mechanical Officers ("DMOs") under the grievance procedure (Article 27.6) concerning the failure of the Company to implement the TMA, did any of them refer to an agreement between the Company and Mr. De Baets on behalf of the Union, despite the DMOs apparently being informed by Mr. Danielwicz that the agreement was made.

78. Furthermore, according to the Union, there were permanent layoffs of bargaining unit members in Symington, Melville and Sioux Lookout and they were not trained under the agreement the Company contends was concluded with Mr. De Baets. When this was considered it detail, it appears that there were no individuals fitting the category of those requiring training under the TMA after being permanently laid-off. The training of apprentices has been done by the

Company, as it undertook in its version of the agreement reached with Mr. De Baets.

79. The Company's replies that it acted as it did to protect the credibility of Mr. De Baets. It says he had given his word that he would resolve the issue on the basis described above, but he needed time to have this resolution accepted by the Union. The Company was aware of the substantial difficulties he faced in securing the Union's agreement to this resolution, and it did not want to undermine his efforts to achieve this result. For this reason, it says, the DMOs did not refer to the agreement in their responses to the grievances. The Company's hope was that the grievances could be resolved without arbitration, and without the agreement reached with Mr. De Baets having to be litigated.

80. The Union says that no enforceable agreement was reached between Mr. De Baets and the Company, and no representation was made by Mr. De Baets which the Company can rely on for the purposes of an estoppel.

81. The Employer responds, there need not be an agreement varying the TMA for the Employer to succeed with its estoppel objection to the grievances. It is sufficient that the Company was led by Mr. De Baets' representation to believe

that the Union's demand to enforce the TMA had been settled on the basis of the proposal presented by Mr. Danielwicz, and that, in future, the collective agreement would be construed in this manner. The Company says that as a consequence of this representation it had withdrawn its demand to vary the TMA. These circumstances give rise to an estoppel, which, in the Company's submission, it is entitled to use as a defense to these grievances.

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82. I deal firstly with the Employer's suggestion that an agreement was concluded with the Union, such as to vary the TMA. No written variation of the TMA was signed by the parties. Under s. 3(1) of the *Canada Labour Code* a collective agreement is defined as "an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters". For the TMA – a portion of the collective agreement between the parties – to be varied, that must be in writing. This has not occurred. I find therefore there has been no agreement to vary the TMA in the manner advanced by the Company.

83. I turn to the Company's estoppel argument. As stated in Brown & Beatty,

Canadian Labour Arbitration, at 2:2211, "the essentials of an estoppel are a clear and unequivocal representation, particularly where the representation occurs in the context of bargaining; which may be made by words or conduct; or in some circumstances it may result from silence or acquiescence; intended to be relied on by the parties to whom it was directed; although that intention may be inferred from what reasonably should have been understood; some reliance in the form of some action or inaction; and detriment resulting therefrom". Estoppel was described in *Canadian Broadcasting Corporation v. Canadian Media Guild, Unit II*, 2005 CanLII 48310 (ON L.A.) (P. Chapman) as follows:

> The doctrine of equitable estoppel [applies] where: there is a pre-existing contractual relationship; there exists some conduct or promise which induces the other party to believe that the strict legal rights under the contract will not be enforced; and, having regard to the dealings which have taken place between the parties, it would be inequitable to allow that party to enforce their strict legal rights.

84. Throughout the period of the discussions between Mr. De Baets and Company officials (assuming, without finding, the Company's version that Mr. De Baets made clear assurances regarding the TMA), the Company representatives knew that Mr. De Baets was not representing the views of the Union bargaining committee. They knew that any effort by him to compromise

the employees' entitlements under the TMA would be very unpopular and that he would meet considerable resistance in trying to get the Union's acceptance of the compromise. This was so much the case that the discussions were deliberately kept from the attention of the Union's bargaining committee and from its representatives across the system.

85. The law requires collective agreements to be in writing so that the parties know what obligations they may expect of each other. The written record of their contract gives them certainty as to what they have agreed to, and what they have not agreed to. It enables them to have discussions of issues without the arrangements reached being binding on them unless they commit those arrangements to writing. The doctrine of estoppel is an exception to the requirement that all of the parties' agreements be in writing. In labour relations it serves as an acknowledgement that, at times, the parties have intended to change their legal relationship, or have done so, but the written description of their mutual agreement has not yet caught up. Estoppel is an exception to the statutory requirement that collective agreements be in writing to be enforceable. As a consequence, there must be a clear and unequivocal representation by words or deeds and an intention that the representation be relied on by the party to whom it is directed for the party to whom the representation was made to be able to rely

upon it.

86. The Company's estoppel objection is not about whether Mr. De Baets made a representation on which the Company relied to its detriment. It is about whether the Union, represented by its President, Mr. De Baets, made a representation on which the Company relied to its detriment.

87. Estoppel is an equitable doctrine. It is intended to assist a party which has been unfairly misled by the conduct, words or silence during bargaining of the other into believing that a particular set of circumstances exists, when that is not in fact the case. See *Electro Sonic Inc. v. United Steelworkers of America, Local 3*, 2005 CanLII 49646 (ON L.A.) (Shime); and *Canadian Broadcasting Corporation v. Canadian Media Guild, Unit II*, above, and the cases cited therein.

88. A telling feature of the Company's version of all of the discussions between Mr. De Baets and the Company representatives is that the Company knew throughout that Mr. De Baets either could not, or would have great difficulty, obtaining the Union's approval of any compromise of the TMA. The Company's sensitivity to Mr. De Baets' plight, their concern that his credibility not be damaged, their desire to trust him to bring about what the Company wanted

as a variation of the TMA, all reflected an underlying awareness that the Union, or a significant and influential part of it, was strongly opposed to anything less than full implementation of the TMA. This is the reason that the suggested compromise of the TMA was not put to the joint Union-Management Trades Modernization Committee in 2002, and why the issue was never raised with the Union's bargaining committee during bargaining in December 2003.

89. In my view, this reality considerably undermines the Company's estoppel argument. It means that the Company was alert to the fact that, despite the assurances it says Mr. De Baets gave (which I consider below), the Union itself was not in agreement with the manner in which the Company wanted to carry out its obligations under the TMA. In other words, the Company was cognizant of the fact that the Union itself had no intention of compromising its entitlements under the TMA, despite what (according to the Company) Mr. De Baets was saying. In fact, the issue was deliberately not raised in bargaining because of the known adverse reaction which was anticipated from the Union's bargaining committee.

90. Those arbitration awards which have said that representations made during the course of bargaining can justify an estoppel in respect to the ensuing collective agreement (described in *SHP-449*) all deal with situations in which the

representation relied upon is unequivocal and clearly articulated in the bargaining between the representative bargaining parties. They are not side deals assiduously kept from the attention of those with authority to conclude a Memorandum of Settlement, as was the case here.

91. It is not necessary for me to make a determination on the relative credibility of the Company's witnesses compared to Mr. De Baets. On his version, there clearly was no agreement, no understanding reached that he was compromising the Union's rights under the TMA. But even on the Company's version of what was said, there was significant equivocation by Mr. De Baets. Assuming (without finding) the Company's version of events, the undertakings he made were not made in bargaining, but were separate from the bargaining table; they were not shared with the bargaining committee; they were vague as to when he would deliver on his promise to have the Union compromise the employees' rights under the TMA; and, most significantly, he refused to sign the document which purported to record what he had undertaken. This refusal made clear how uncertain and equivocal was his assurance.

92. Given this context, I find it was unreasonable for the Company to have relied on Mr. De Baets' representation (assuming it was made) as being

something more than an expression of his own intentions. The absence of any engagement by the Union bargaining committee in Mr. De Baets' representation meant that no clear representation was made by the Union in the course of bargaining.

93. The first source of the Company's claim of a representation by Mr. De Baets was the series of discussions around the payment of the 2%, culminating in Mr. Waller's letter on February 15, 2002. In my view, what endured from these exchanges was the content of Mr. Waller's letter. Mr. Dixon had asked for a guaranteed result regarding the TMA, much as Mr. Danielwicz was to do later, and Mr. De Baets said he could not provide the Company with such a guarantee. However, Mr. De Baets had promised to use his best efforts to have the Union craft a satisfactory deal. This undertaking by Mr. De Baets – that he would do his best to persuade the Union to move off its desire for strict enforcement of the TMA – was sufficient for the Company to pay the 2% it was withholding.

94. That was the state of affairs until the next round of bargaining. According to the Company, Mr. De Baets gave similar, though probably stronger, assurances to those he gave in 2002. He said that the Company could look forward to the Union not enforcing the strict terms of the TMA, although he needed time to give

effect to the undertaking. Assuming this to be the case, this promise of a state of affairs which Mr. De Baets wished to bring about was not sufficient, in my view, to affect the legal relationship between the parties. Mr. De Baets' assurance was clearly not accepted by the Union. It was not even discussed by the Union's bargaining team because Mr. De Baets and the Company representatives knew how strongly opposed the team was to the suggested compromise of employee rights under the TMA. The assurance itself was vague: there was no time limit by which Mr. De Baets was to secure the Union's agreement. In effect, on the Company's version, it obtained a promise of a future state of affairs without any assurance that it could be accomplished. The uncertainty of the promise was part of its content.

95. The Company sensibly sought to put Mr. De Baets' undertakings regarding the TMA into a draft Letter of Understanding to be signed by both Company and Union representatives in their representative capacities. The Union declined to sign the document. This was a clear indication to the Company that, despite the verbal assurances from Mr. De Baets, the Union would not amend its legal entitlements in the manner sought by the Company. If the assurances were given by Mr. De Baets, then the refusal to sign the draft Letter of Understanding was a repudiation of them. Or, if Mr. De Baets is to be believed, the refusal was

consistent with his intention to address the problem of the TMA, without giving any guarantee as what would be the outcome. The refusal to sign the draft Letter of Understanding meant that Mr. De Baets and the Union leadership were willing to treat his undertakings as no firmer than that which he had given in the previous round of bargaining, viz. he would do his best to persuade the Union to alter its position on the TMA, but that was all. What was clear by the repudiation of the draft Letter of Understanding was that the Union had no intention of altering the legal relationships between the parties.

96. The Company had an opportunity to insist up the Letter of Understanding being made part of the renewal collective agreement. It chose not to. It says it did not wish to embarrass Mr. De Baets, it did not wish to undermine him in the eyes of the Union. But the cost of this election was that the opportunity to consolidate his verbal assurance (assuming it was given), to convert it into a legal obligation with binding effect under the collective agreement, was lost.

97. In February 2002 the Company gave Mr. De Baets the benefit of any doubt it might have had regarding his assurances on the TMA. He was to have a period of time to persuade the Union to modify its position on the TMA implementation. He failed in that endeavour. The arrangement reached in the next

round of bargaining was much the same. Mr. De Baets was to get the Union's agreement to Mr. Danielwicz's proposed variation of the TMA at a time and in the way Mr. De Baets thought best. Again the Company was giving Mr. De Baets the benefit of any doubt regarding his assurances. In this regard, the comment by arbitrator M. Picher in *SHP-404* is apposite:

> Bearing in mind that the parties to this process are sophisticated and experienced in the ways of collective bargaining, it is significant that there was no jointly signed letter of understanding or other memorandum in written form confirming the process to be followed [with respect to the issue in dispute]. In these circumstances, the arbitrator can not accept the suggestion that the matter can be said to have been resolved in a mutually binding manner by agreement between the parties.

98. My conclusion that no estoppel arose from Mr. De Baets' assurances in December 2003 (assuming they were made) because of their vagueness and equivocation, is strengthened by the context in which the assurances were allegedly given. The assurances were made preparatory to the conclusion of a Memorandum of Settlement which was itself rejected by the Union's membership in the ratification vote of February 14, 2004. To the extent there was any estoppel from Mr. De Baets' representation in December 2003, it was extinguished by the members' rejection of the Memorandum of Settlement. The Company had an

opportunity to re-introduce the proposed Letter of Understanding as part of the second Memorandum of Settlement, although, understandably, it chose not to.

99. As a consequence of all of the above, I find there was no clear, shared understanding between the parties of a common intention to apply the TMA in the manner desired by the Company. The Union's refusal to include the written record of the understanding was effectively a repudiation. What resulted was a gentlemen's agreement that Mr. De Baets would do his best to bring the Union around to the Company's view of how the TMA should be resolved, without that representation amounting to a compromise of the Union's legal rights under the TMA.

100. In the circumstances I have described it would not be equitable, nor accurate, in my view, to determine that the Union itself had clearly accepted the assurances allegedly given by Mr. De Baets to the Company. I find no clear and unequivocal representation was made by the Union to the Company which had the effect of conveying to the Company an intention that employee entitlements under the TMA would not be enforced.

101. I therefore conclude that the Company has not established an estoppel. Its

preliminary objection on this ground is therefore denied.

102. Given that the Company fails on both preliminary objections, the matter must now proceed to hearing. I will liaise with the parties to schedule the further hearing dates.

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Christopher J. Albertyn

Arbitrator

May 16, 2006.