CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2717

Heard in Montreal, Tuesday, 9 April 1996

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [BROTHERHOOD OF LOCOMOTIVE ENGINEERS]

EX PARTE

DISPUTE:

Claim on behalf of Locomotive Engineer T.B. Corman, Hornepayne, for loss of earnings.

COUNCIL'S STATEMENT OF ISSUE:

On August 5, 1994, Mr. T.B. Corman was first regularly assigned locomotive engineer for the east pool. Due to an admitted crew calling error, Mr. Corman was not called for his regular assignment, as per article 54.

The Crew Management Centre attempted to call Mr. Corman for a spareboard assignment, which he refused, as it was not his work.

Thereafter, Mr. Corman submitted a claim for loss of earnings, which was adjusted by the Company for payment of 50 miles run-around and the balance of his claim for loss of earnings was declined.

In Hornepayne, the east pool assignments are set up as regular assigned service as per article 54.1, therefore, the Brotherhood contends that Mr. Corman should be "made whole" and therefore paid the balance of his claim(s).

The Company's position was that he was properly paid as per article 61.1(a). This was their position up to and including a meeting at joint conference. However, the Company not only violated the time limits as outlined in article 73.1(c)(1) by responding 3 months following the joint conference, but altered their position and informed the Brotherhood that they were in the process of "recouping" the 50 mile run-around paid to Mr. Corman in September 1994.

The Brotherhood's position is as follows: **(1)** The Company violated article 73.5(b), therefore the time claim should be paid in full. **(2)** The Company paid the claimant under the provisions of article 72.3, not through any clerical error. **(3)** As outlined in article 73, the Company does not have the right to alter their position, nor is it valid, as their time limits were expired. **(4)** In the alternative, the Brotherhood contends that the Company violated article 54 and the claimant should be compensated for the balance of his claim(s) – loss of earnings.

FOR THE COUNCIL:

(SGD.) C. HAMILTON
GENERAL CHAIRMAN

There appeared on behalf of the Company:

O. Lavoie	– Labour Relations Officer, Montreal
J. D. Pasteris	– Manager, Labour Relations, Montreal
J. P. Krawec	– System Transportation Officer, Montreal

C. J. Morgan – Labour Relations Officer, Toronto

And on behalf of the Council:

C. Hamilton – General Chairman, Toronto

AWARD OF THE ARBITRATOR

The first issue to be resolved is whether the Company violated the time limits provided in article 73.1(c)(1) of the collective agreement. If it did, it is not disputed that the Company would be compelled to pay a disputed time claim as provided in article 73.5(b). It is agreed that in this case the Company did not respond to the Brotherhood within thirty calendar days of the joint conference, as contemplated in article 73.1(c)(1). There is, however, evidence to establish, without substantial contradiction, that a pattern of dealing has developed between the parties, whereby the Brotherhood did not insist on the Company's adherence to the time limits, so much so that the parties adopted a practice whereby the time limits were not met, almost as a matter of course, in the great majority of cases, without any objection on the part of the Brotherhood. In the instant case, however, apparently prompted by its reaction to the Company's attempt to reverse its position on the issue of the grievor's minimum entitlement to run-around pay during the late stages of the grievance procedure, the Brotherhood advised the Company, after the expiry of the time limits, of its intention to seek their enforcement in this case. The Arbitrator is satisfied that in the circumstances the doctrine of estoppel does operate to prevent the Brotherhood from making such an assertion. It is, of course, now open to the Brotherhood to give the Company clear notice that it shall, contrary to the established practice, henceforth insist upon the timely delivery of the Company's responses, following joint conference, in all disputed time claims, failing which it shall claim the automatic payment provided for under the terms of article 73.5(b) of the collective agreement. It would, however, be inequitable in the instant case to allow the Brotherhood to assert such a claim, as the Company was clearly given to believe, based on the established practice, that no objection would be taken to a failure of the time limits in this circumstance. On that basis, therefore, the Arbitrator cannot allow the claim made by the Brotherhood based on the failure of the Company to honour the time limits contemplated under article 73 of the collective agreement.

The material before me discloses that the grievor was in fact denied his normally scheduled trip, a test train ordered for 0600 hours on August 5, 1994. In fact Engineer Corman was called for Train 302, ordered for 0645 hours. The grievor works out of the Hornepayne-Foleyet East Pool, a body of engineers who, by agreement, are treated as being in assigned service within a particular time pool for movements eastward out of Hornepayne. In the grievor's case, his time pool was from 0600 to 1100 hours. On the morning in question, the test train was assigned to a locomotive engineer from the spareboard.

As noted above, it is common ground that by error the Company did not call the grievor for the test train. When he discovered the error, he took the position that the subsequent call, for Train 302, was not properly his, and should be assigned to a locomotive engineer on the spareboard. On that basis he simply refused to take the second assignment, and filed the time claim which gives rise to the instant grievance, claiming payment for the full service for the trip performed by Engineer Crouch on the test train, a claim of $477.74. It is also common ground that the trip which the grievor refused to take, Train 302, would have earned him $520.45.

In this case the Brotherhood relies, in part, on the decision of this Office in **CROA 501**. It should be noted, however, that that case concerned the calling procedures for spare yardmen, and the report of the case does not disclose any consideration of issues of mitigation. In this case, even if it is accepted that the grievor was wrongfully deprived of access to work on the test train, there is no language in the collective agreement to which the Arbitrator is referred which would give him access, as of right, to penalty payments. While he could, I think, fairly claim compensation in the nature of a make whole order, such recovery must, in the circumstances, be conditioned on the normal application of the duty of mitigation. An employee in the circumstance of the grievor must take reasonable steps to reduce his economic losses, and the failure to take such steps can be taken into account in considering the remedy to which he may be entitled.

In this case it is not disputed that within forty-five minutes of its failure to call him properly, the Company did call the grievor for a trip which would, in fact, have brought him greater revenue than the trip which had been denied. Upon attending at work in response to the call for Train 302, Mr. Corman learned of the earlier assignment and refused to work the second trip, claiming that it was properly the work of the spareboard. Consequently, he performed no work on that tour of duty.

In the circumstances the Arbitrator is compelled to conclude that Mr. Corman did fail to mitigate his damages, to the point where any claim to a remedy must be entirely disallowed. There is no provision in the collective agreement of which the Arbitrator is aware which would have prevented the Company from offering the grievor the assignment of Train 302. In fact, had Mr. Corman carried out that assignment it would not have prejudiced the locomotive engineer next out on the spareboard. If the collective agreement had been properly applied, the grievor would have proceeded on the test train, spareboard engineer Crouch would have been called for Train 302 and the locomotive engineer next out on the spareboard would not have been adversely affected, quite apart from the Company's right to offer the assignment on Train 302 to the grievor, as he would, in either case, have been assigned to the next train. As the record discloses, the grievor was given every opportunity, within some forty-five minutes of the call which he claims he should have been given, to take another call which would have earned him still greater revenue. In failing to accept that assignment he refused to mitigate his losses in a way which, ultimately, must be viewed as fatal to this claim.

For the foregoing reasons the grievance is dismissed.

April 12, 1996

(signed) MICHEL G. PICHER
ARBITRATOR