CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2799

Heard in Montreal, Tuesday, 10 December 1996

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

DISPUTE:

Time claim submitted on behalf of T.M. Latoski of Hornepayne, Ontario claiming loss of earnings account not called for train 212 on February 22, 1993.

JOINT STATEMENT OF ISSUE:

On February 21, 1993, Hornepayne Locomotive Engineer T.M. Latoski was regularly assigned to the 1800 hours East Pool, Hornepayne to Foleyet. Mr. Latoski was entitled to be called for train 212 ordered for 0400 hours; on February 22, 1993. However, a spareboard engineer was incorrectly called in his stead.

Thereafter, Mr. Latoski was called for Train 204 ordered for 1358 hours, however he refused such call.

The Brotherhood contends that Mr. Latoski had valid reasons for refusing the above assignment. The Brotherhood further contends that Mr. Latoski is entitled to loss of earnings.

The Company denied the grievance.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) C. HAMILTON	(SGD.) D. W. COUGHLIN
GENERAL CHAIRMAN	FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

D. A. Watson	– Consultant, Montreal
O. Lavoie	– Transportation Officer, Champlain District, Montreal
C. Quinlan	– Operations Coordinator, Crew Management Centre, Moncton
P. Marquis	– Labour Relations Officer, Toronto

And on behalf of the Brotherhood:

C. Hamilton	– General Chairman, Toronto
R. G. Woehl	– Local Chairman, Hornepayne
A. Doyle	– Vice-Local Chairman (VIA), Hornepayne

AWARD OF THE ARBITRATOR

It is not disputed that the grievor was not called for train 212, as he was entitled to be in accordance with the bidding rights in the East Pool assignments following the October 1992 change of card for Hornepayne-Foleyet. At issue is whether the grievor is entitled to the time claim submitted for the trip missed. As previously reflected in the awards of this Office, it is well settled that an employee who claims to have been deprived of earnings, or of an opportunity to work, must take all reasonable steps to mitigate the damages which result from the alleged failure of the Employer (*see* **CROA 2717**). In the case at hand it is not disputed that, notwithstanding the Company's failure to properly call Mr. Latoski, he was given the opportunity to take train 204, but refused the call. It should be noted that the Council does not assert that the grievor declined the call for reasons of fatigue or inability to perform the work. Rather, it submits that he properly did so because he might have had some difficulty returning to his normal work cycle by accepting the call in question.

While the Arbitrator can appreciate the grievor's displeasure at having been improperly called, and the fact that there might be resulting inconvenience to him, the fact remains that as an individual claiming monetary compensation for the violation of an obligation owed to him, he was nevertheless himself under a general obligation to mitigate his losses. Significantly, in their collective agreement the parties have not provided for penalty payments for a circumstance such as the grievor's, comparable to the run-around provisions which apply to spareboard employees under article 61, or the penalties payable to locomotive engineers who are called and cancelled, as provided under article 62.

I am compelled to agree with the Company. Had Mr. Latoski accepted the call for train 204, he would not have suffered any loss of earnings and would, in fact, have earned some $79.00 more. In all of the circumstances the Arbitrator must conclude that the grievor did fail to mitigate his losses, and that the earnings which were available to him by accepting an alternate call exceed which those which he lost by the Company's failure to properly call him for train 212. For these reasons the grievance must be dismissed.

December 16, 1996

(signed) MICHEL G. PICHER
ARBITRATOR