CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3241

Heard in Montreal, Thursday, 10 January 2002

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

EX PARTE

DISPUTE:

Application of maintenance of earnings penalty for M.D. McGunigal of Humboldt, Saskatchewan.

COUNCIL'S STATEMENT OF ISSUE:

M.D. McGunigal became entitled to maintenance of earnings under the October 23, 1997 memorandum of agreement regarding the sale of subdivisions in and around Prince Albert, Saskatchewan.

Mr. McGunigal, now working in Humboldt, Saskatchewan, was assigned to a conductor's position on the North Pool in Humboldt.

The pool was not required to work on November 13, 1999. the Crew Management Centre (CMC) attempted to contact Mr. McGunigal to work outside his north pool assignment as a locomotive engineer on train 453, a West Pool assignment. Mr. McGunigal, whose assignment was not required that day, was not at home and CMC never contacted him.

Mr. McGunigal was penalized $737.30 as a result.

The Union contends that Mr. McGunigal protected the conditions of his assignment and is entitled to his full maintenance of earnings. The union further contends that as no contact was made with Mr. McGunigal, the collective agreement prohibits the Company from penalizing him.

The Company disagrees.

FOR THE COUNCIL:

(SGD.) R. HACKL
FOR: GENERAL CHAIRPERSON

There appeared on behalf of the Company:

D. VanCauwenburgh	– Human Resources Associate. Winnipeg
R. Reny	– Human Resources Associate. Vancouver
D. Erickson	– Assistant Manger, CMC, Edmonton

And on behalf of the Council:

R. Hackl	– Vice-General Chairperson, Edmonton
B. J. Henry	– General Chairperson, Edmonton
B. R. Boechler	– Vice-General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

The facts of the instant case are relatively straightforward. Exceptionally, on November 13, 1999 the Company required a locomotive engineer to protect service on train 453. Although the day in question was not a normal day of assignment for Conductor McGunigal, who is qualified as a locomotive engineer, it does not appear disputed that he was liable to be called in accordance with the provisions of article 137.16 of the collective agreement. It provides, in part, as follows:

> **137.16** Engine service employees will submit a 746 at the time they become qualified for promotion to locomotive engineer and at each change of timetable. Engine service employees who do not desire to accept calls for work as a locomotive engineer on a tour of duty basis will so notify their supervisor in writing at the time they become qualified for promotion to locomotive engineer, at each change of timetable. Engine service employees who do not advise their supervisor in accordance with the previous sentence will, when available for service, be called as required in seniority order to protect work as locomotive engineers. **If there are no such engine service employees available when service as a locomotive engineer is required, the junior available engine service employee's (sic) who have advised their supervisor in accordance with the first sentence of this paragraph will be called and must accept such service.** In the event that engine service employees fail to respond to a call on a tour of duty basis, they will not be considered as available for service in any capacity until such time as the employee accepting the call has returned and is released from duty at that terminal. The foregoing penalty provision will not apply when there are no other qualified employees available to protect a position on which the engine service employee can be used, nor will it apply when another employee accepts the call under the provisions of this article.
>
> (emphasis added)

It is common ground that the grievor did advise the Company that he did not wish to accept calls for work as a locomotive engineer. He nevertheless remained liable to be forced to do so, in keeping with the emphasized portion of the above article as the junior available engine service employee in the absence of any other employees.

In fact, when the Company called the grievor he was not at home, and was subsequently viewed as not available for the service in question. On that basis, in the pay period of October 29 to November 25, 1999 the Company reduced his maintenance of earnings by $737.20. The Company takes the position that the grievor failed to conform to the requirements of the maintenance of earnings provisions of clause 8(ii) of the October 23, 1997 memorandum relating to the sale of the terminal at Prince Albert, and surrounding lines. A condition for retaining maintenance of earnings under that clause reads, in part, as follows:

> **(ii)** they are available for service during the entire four-week period. If not available for service during the entire four-week period, their incumbency for that period will be reduced by the amount of the earnings they would otherwise have earned …

In the result, it does not appear disputed that the grievor was not under rest when called for train 4543, albeit it was on a different pool than his own. The Arbitrator is satisfied that he was liable to be called. Moreover, on the basis of **CROA 853**, an award between the same parties, failure to be available when called does justify a reduction in an individual's incumbency payment. That is entirely consistent with the bargain which underlies maintenance of earnings provisions, which is that the individual who has the benefit of that extraordinary wage protection must at all times maximize their earning potential. The grievor plainly failed to do so.

For the foregoing reasons the grievance must be dismissed.

January 16, 2002

(signed) MICHEL G. PICHER
ARBITRATOR