

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 5144

Heard in Montreal, February 13, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The assessment of fifteen-demerits to Locomotive Engineer T. Burchart.

JOINT STATEMENT OF ISSUE:

Following an investigation, Engineer Burchart was issued 15 demerits described as: *“For your failure to oblige by the T&E Availability Standards Canada Bulletin BCI- INT0013/19 in the form of booking off unfit on call at 2312 on January 1st, 2023, for a call time of 0100 on January 2nd, 2023. A violation of the T&E Availability Standards.”*

Union’s Position:

The Union’s position has been thoroughly explained throughout the grievance procedure. For all the reasons and submissions set forth through the Union’s grievance procedure, along with those herein adopted, outlines our position.

The Union contends a violation of Article 35.01 as the article expressly states that an employee will not be disciplined for booking unfit. The Union must assert that this clause is an important safety precaution. If an employee deems themselves not fit for duty the safest course of action is to book off.

The Union asserts a violation of Duty and Rest Period Rules for Railway Operating Employees. As Engineer Burchart has an obligation under the Duty and Rest Period Regulations through the Company’s Fatigue Management Plan to report fatigue and yet the company has punished her for doing so. It should be noted that Section 5 of the Duty and Rest Period Regulations applies in this instance. The Company has elected to issue discipline to Engineer Burchart after she took thoughtful and insightful consideration towards her fatigue level and reported such to the appropriate Company Officer. This company action demonstrates a wilful violation of the Duty and Rest Period Regulations and further diminishes faith in the Fatigue Management Plan. By allocating punishment for employees booking unfit due to fatigue creates an environment where employees are reluctant to comply with Transport Canada’s fatigue guidelines for fear of reprisal. This creates the potential for an unsafe workplace.

The Union notes as it is referenced, an obligation remains on both that of the employee(s) and the employer to ensure that a work environment exists which cohabitates a truthful acknowledgment of fatigue in the industry and to take the appropriate and safe actions to mitigate harm to one another, to the company or to the public.

When the mitigating factors involved absolve an employee, the issuance of demerits is unfounded.

Ms. Burchart expressed she was unable to accept a call to work as she had not received the proper amount of rest to be fit for duty. The Company did not question the validity of Ms. Burchart booking unfit at the time she booked unfit. Ms. Burchart followed the Duty and Rest Period rules. It is unreasonable for the Company to expect their employees to be rested 24/7 without prior notice. It is even more unreasonable to expect an employee to book off in advance of a phone call that they did not know they were going to receive. The Union asserts the discipline assessed to Engineer Burchart is excessive, unwarranted, and undeserved considering all the factors entered within the investigation and raised through the grievance process.

The Union requests the Arbitrator order that the fifteen demerits be expunged from Engineer Burchart's work record. We further seek a declaration that the Company is responsible for Ms. Burchart's lost wages while withheld from service prior to and for attendance at the investigation. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

The Company disagrees and denies the Union's request.

The Company maintains the burden of proof has been met and that the Grievor's culpability as outlined in the discipline letter was established following a fair and impartial investigation and that the discipline was determined following a review of all pertinent factors, including those described by the Union.

Regarding the Union's allegations of a violation of Article 35.01, the Company disagrees. A plain read of the Article makes it clear that the Grievor did not follow the language of the Article as written. The Grievor waited until being called for duty before booking off unfit. The language clearly states, "an employee being physically unfit for duty will report same to the crew management center, so that the employee may not be called".

The Union further alleges a violation of DRPR. It is important to note, the Grievor did not book off red as outlined in the DRPR. The Grievor did not complete a self-assessment as outlined in item 5.1 of the DRPR.

Based on the foregoing, the Company can see no violation of the Collective Agreement, or any other provision and maintains the discipline assessed was appropriate, warranted and just in all the circumstance.

Accordingly, the Company cannot see a reason to disturb the discipline assessed and request the Arbitrator to be drawn to the same conclusion.

For the Union:
(SGD.) G. Lawrenson
General Chairperson LE-W

For the Company:
(SGD.) F. Billings
Director Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen	– Manager Labour Relations, Calgary
S. Scott	– Manager Labour Relations, Calgary
M. Picktall	– Disability Management Specialist, Calgary

And on behalf of the Union:

E. Carr	– Counsel, Caley Wray, Toronto
G. Lawrenson	– General Chairperson, LE-W, Calgary
B. Myre	– Vice General Chairperson, LE-W, Red Deer
J. Hnatiuk	– Vice General Chairperson, CTY-W, Mission
D. Fulton	– General Chairperson, CTY-W, Calgary

AWARD OF THE ARBITRATOR

Context

1. The Grievor has approximately 17 years of seniority with the Company. While she has had a number of instances of discipline, at the time of the present matter she had only 5 active demerits.

Issues

- A. Did the Grievor infringe the T and E Availability Standards?
- B. Was the discipline imposed of 15 demerits reasonable in the circumstances, and if not, what discipline is appropriate?

A. Did the Grievor infringe the T and E Availability Standards?

Position of Parties

2. The Company takes the position that the T and E Availability Standards have clearly been breached. She booked off unfit only at the time of a call at 2312 on January 1, 2023 for a call time of 0100 on January 2, 2023.

3. The Company underlines that this matter is not about the right to book off unfit, but when that right should be exercised. Here the Grievor failed to book unfit prior to her call in, thereby infringing the Standard.
4. The Union argues that when the Grievor checked the lineup, she estimated that she would be called at approximately 1400 on January 2, 2023. When she received a call at 2312 on January 1, this was some 16 hours earlier than anticipated. She had expected to be able to sleep prior to her call and therefore declared herself unfit, in conformity with the Transport Canada Regulations.
5. The Union argues that the Company has presented no evidence that the Grievor should have known that she was going to be called when she was, no culpability has been shown, and therefore no discipline should be imposed.

Analysis and Decision

6. CROR General Rule A requires that employees shall be fit when reporting to work:

CROR General Rule A(x) expressly requires that employees not report to duty in an unfit condition:

A Every employee in any service connected with movements, handling of main track switches and protection of track work and track units shall....

(x) when reporting for duty, be fit, rested and familiar with their duties and the territory over which they operate;

7. Transport Canada has added sleep requirements which employees must meet to be considered fit for work. Section 5 of the Duty and Rest Period Rules for Railway Operating Employees sets out the following:

According to Transport Canada's Duty and Rest Period Rules for Railway Operating Employees, which are mandatory, an employee is responsible for ensuring they do not commence a duty period if they are not fit to do so. Section 5 reads:

5. Fitness for Duty and Operating While Fatigued

5.1 An employee shall not commence a duty period unless the employee believes themselves to be fit for duty in accordance with the fatigue self-assessment method

found in the railway company's fatigue management plan and has:

- a. obtained at least 5 hours of sleep in the 24 hours prior to commencing the duty period;
- b. obtained at least 12h of sleep in the 48 hours prior to commencing the duty period; and
- c. assessed themselves as scoring a 7 or lower on the Karolinska Sleepiness Scale.

5.2 Where an employee cannot commence a duty period in accordance with section 5.1, the employee shall report to the railway company that they are not fit for duty before the beginning of the duty period in accordance with the railway company's fatigue management plan.

[...]

5.6 Every employee shall be permitted to report in accordance with sections 5.2, 5.4 and 5.5 without fear of reprisal.

8. The Collective Agreement deals directly with employees being required to report unfit with protection from discipline:

“35.01 An employee being physically unfit for duty will report same to the crew management center, so that the employee may not be called. The employee will not be disciplined for “booking unfit”.”

9. The Company rightfully points out that it runs a dynamic 24/7 operation which requires employees to be able to work subject to uncertain schedules (see paras 17-23, Company Brief).

10. The T and E Availability Standard requires employees to book off sick or unfit prior to receiving a call for work:

“The following absences will be handled as more serious offenses separate from this calendar month review:

-Booking sick or unfit after call time or after start time of assignment.”

11. It is clear that the Company bears the burden of proof to establish culpability. Without culpability, there can be no just cause for discipline (see **CROA 5054**).
12. The Company has established that the Grievor, while being available for work, received a call and declared herself unfit only at that time.
13. There remains a dispute, however, whether the Grievor could or should have known that she was likely to get a call when she did. The Grievor was questioned on this during her investigation:

Q14 On January 1st, 2023 as seen in Appendix A, at 2312 you were observed booking unfit on call for DHON840FF after being properly called, is this correct?

A14 No, I was called at 2305 for train 801, which I missed the first call. When they called back, they changed the call, to 8401 for an on-duty time of 0100, at which point I booked unfit on call.

Q15 Approximately How many hours were you available prior to being called for duty on January 1st, 2023?

A15 approximately 3 hours

Q16 According to Appendix B – Kamloops Manpower Report, 1555 January 1st, 2023, At what time were you lined up to go to work when the report was issued?

A16 That is what the report indicates.

Union Note: Manpower Reports are something the company has access to, and uses to plan operations, and union employees do not have access to this report.

Company Officer Note: Manpower reports are created using CMA train lineups that are verified by the OC director and applicable employee pools and spare boards. Union employees have access to all this information directly via CP Station, crew information, and CMA mainframe access.

Q17 How many hours of advance notice would this information have given you to be rested for your duty period?

A17 Approximately 8 hours and 5 minutes

Q18 How much did your actual on duty time vary from the one you were lined up for in Appendix B?

A18 1 hour

Q19 Did you provide a reason for booking unfit on call to a company officer or crew dispatcher? If so, what reason was given?

A19 When I looked at the lineup around 1700, it looked like I was going to work at 1400 the following day. I told the crew dispatcher that I was not expecting the call, and was not fit for duty.

Q20 How much advance notice did you have to book unfit before being properly called?

A20 Given the information that I had available to me, none.

[...]

Q27 Do you understand that Canadian Pacific Railway is a 24-7 operation and we are in the business of customer service and transportation of goods, and we require that when our employees are properly called to be mentally prepared, properly rested and physically fit in order to perform their duties in a safe, efficient and effective manner?

A27 Yes

Q28 Do you have anything you wish to add to the statement?

A28 As previously mentioned, based on the information I was working with, I was not expecting a call to work at this time and given the options of either going to work excessively fatigued or booking unfit, I chose the safest option and booked unfit as outlined in your fatigue management plan and as mentioned in item 5.6 of the new work rest rules, I am able to do so at any point "without fear of reprisal".

14. The Grievor's testimony that she checked the lineup at approximately 1700 and estimated that she would be called at for 1400 January 2, 2023 has not been directly challenged. The Company points to a Manpower Report (Tab 6 B, Company documents) which indicates that the Grievor would be called for a train at 0200 January 2. The Union contests that an employee would have access to this Report, instead having to rely on Train Lineups, available online for Crew Information. There is no actual Lineup available from January 1, 2023, as the online version is subject to constant change and a screen shot would have been required at the time.

15. I find no reason to disbelieve the testimony of the Grievor that she relied on the information she had available at 1700 January 2, 2023. However, this information was subject to change, to the Grievor's knowledge. She knew that there could be crew changes due to illness or otherwise, weather conditions are hugely changeable in the Canadian Rockies, customer needs expand or contract and mechanical issues affect the availability of trains. In light of these known variables, a prudent employee would have checked the lineup during the evening of January 2, to verify that her expected call out time had not changed. Had she done so, she

would have seen that her call out time would likely change, she would have known that she would be unfit due to lack of rest, and she could have declared herself unfit and never received a call. This entire situation would have been avoided.

16. Arbitrator Picher came to a similar conclusion in **CROA 3330**:

As in any case of discipline, it is clear from the above cited awards that each case must be determined on its own facts. In the case at hand, it is significant, in the Arbitrator's view, that Mr. Cerilli was a spare board employee. In that capacity he knew, or reasonably should have known, that a certain degree of unpredictability and volatility can operate in the movement of a spare board, particularly on a Friday as occurred in the case at hand. In deciding whether or not to book rest, thereby protecting his ability to avoid being called for as much as twenty-three hours from the time he booked off, Mr. Cerilli made a judgement for which he must bear the responsibility. In essence, by not booking rest he held out to the Company that he was available for a call at any time after 08:30 on Friday, October 19, 2001. While he could obviously expect to be called considerably later, by the normal progression of the spare board, he also knew that unpredictable factors, such as employees booking sick or extra assignments being required, could accelerate his movement up the board. On the whole, the Arbitrator can find no circumstances which could fairly be characterized as mitigating in the circumstances of the case at hand. It is clear that the Company did provide accurate line-up information through the CATS system at all material times. In the circumstances I am satisfied that there are no compelling mitigating factors, and that the grievor did make himself liable to discipline for failing to accept the call to work at 00:21 on October 20, 2001.

17. I therefore find that the Company has met its burden of proof in establishing culpability and grounds to discipline.

B. Was the discipline imposed of 15 demerits reasonable in the circumstances, and if not, what discipline is appropriate?

Position of Parties

18. The Company argues that as an experienced employee, the Grievor knew that discipline could ensue for not booking off prior to a call. She had been previously disciplined in 2017-2018 for similar events.

19. The Company relies on **AH 751** and **CROA 2845**, where 20 demerits were upheld for attendance issues. It further relies on **CROA 398**, in which Arbitrator Picher noted:

“The discipline assessed against the Grievor was not for having booked sick, but rather for having booked sick only when he received his call to work. The expectation of the Company is that an employee who is not fit to work should advise the employer without delay, and in particular should not await the moment of an actual call to work, as that may cause substantial disruption to the efficiency of operations.”

20. The Union argues that there should be no discipline for booking off unfit, as this is protected by the Code and the Collective Agreement. The Grievor here was unfit and chose the safest response when she was unexpectedly called in. The Union argues that discipline of 15 demerits is far too severe in the circumstances and points to **CROA 3330**, **CROA 3902**, **CROA 3981** and **CROA 4524**, where discipline was reduced to a written reprimand.

Analysis and Decision

21. I have found above that the Grievor did breach the T and E Availability Standard. However, for the reasons that follow, I find that the discipline of 15 demerits should be replaced by a written reprimand.
22. Pursuant to the **William Scott** matter, arbitrators are advised to consider mitigating and aggravating factors when considering the appropriateness of levels of discipline.
23. Firstly, the Grievor was not oblivious to the need to check the Lineup. She did so.
24. Secondly, the Grievor had reason to believe that she would not be called for some time. Both these factors are mitigating.

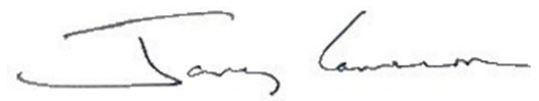
25. Thirdly, the Grievor could and should have checked the Lineup more frequently. She was declaring herself available to the Company and it was entitled to rely on this representation. This factor is clearly aggravating.
26. Fourthly, the attendance issues raised by the Company occurred 4-5 years previously. She had no current discipline in relation to booking unfit. This factor is somewhat mitigating.
27. The weight of the jurisprudence cited is in favor of a reprimand rather than significant demerits, absent a pattern of attendance abuse, as was found in **CROA 4524**, **CROA 2845** and **AH 781**. No such pattern is present here. As Arbitrator Clarke noted in **CROA 4524**:

The TCRC accepted that booking unfit at the time of a call, as opposed to before receipt of a call, may result in discipline: CROA&DR 3981. Based on all the allegations made, and the evidence presented, the arbitrator has decided to uphold this grievance, in part. The arbitrator orders CP to remove the 15 demerit points from Mr. Playfair's record. A written warning shall be substituted, but solely to address Mr. Playfair's booking unfit at the time he received a call.

Conclusion

28. Accordingly, I find that the discipline of 15 demerits should be reduced to a written reprimand.
29. I remain seized for any issues of interpretation or application of this Award.

March 19, 2025



**JAMES CAMERON
ARBITRATOR**