

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

**CASE NO. 5145**

Heard in Montreal, February 13, 2025

Concerning

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

The Union advanced a grievance on behalf of Locomotive Engineer T. Burchart, of Revelstoke, BC, regarding being assessed 20 demerits.

**JOINT STATEMENT OF ISSUE:**

Following an investigation, Engineer Burchart was issued twenty demerits described as: *“For booking sick in excess of 36 hours on April 19th @ Kamloops, B.C. A violation of the T&E availability Standards.”*

**Union’s Position:**

The Union contends that this is not a case appropriate for an assessment of discipline, issuing twenty demerits to Engineer Burchart is in violation of the Canada Labour Code Section 239(1). The Code allows for an employee to be absent due to personal illness or injury, The Company elected to not request a doctors note at the time of the absence. The Code provides that an employee will not be disciplined for a bona fide illness. The company has not provided any proof that the absence in question was not bona fide. The investigating officer asked if Ms. Burchart sought medical attention long after the absence. Ms. Burchart determined that she was too ill to perform her duties as a Locomotive Engineer and remained off until she felt fit for duty. It is unreasonable for the Company to predetermine the amount a time a personal may be sick. The investigation failed to provide any evidence to warrant discipline.

The Union asserts the Company failed to discharge the burden of proof necessary to administer any discipline for booking off. Issuing twenty demerits for booking sick when unable to work due to illness is unreasonable. The Union asserts the circumstance is a case of innocent absenteeism and issuing discipline does nothing to mitigate or change the circumstance for future similar occurrences. As adjudicated in CROA 349 the burden is on the Company not the employee. The Company never questioned the validity of the booking off until the investigation.

The Company cites a violation of the attendance policy, yet their CP 7 policy clearly states that an employee that is sick must stay home. This policy evidence Appendix F states, “... Coming to work with symptoms of the Flu or COVID is taken as seriously as an employee violating a

critical rule.” Ms. Burchart followed this policy correctly and was punished for doing so. The Union submits that the Company is entrapping employees with these contradicting policies.

The Union asserts there does not appear to be any consistency when assessing the appropriate levels of discipline through this approach. It could be perceived as though the assessments are based on emotion rather than following a process or procedure. The Union continues to take the position that past jurisprudence supports the precept of discipline being administered with a degree of consistency and fairness, the Union is of the opinion that a third party will agree. It is because of this lack of consistency that the Union also contends that discipline applied in such an inconsistent manner is in violation of the KVP award.

The Union requests the Arbitrator order that the twenty demerit marks be expunged from Engineer Burchart’s work record. We further seek a declaration that the Company is responsible for Ms. Burchart’s lost wages 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 has denied the Union’s request.

The Company maintains the Grievor’s culpability as outlined in the discipline letter was established following the fair and impartial investigation.

Contrary to the Union’s argument, the T&E Availability Standard does make it clear that absences of 36 hours or more may be flagged for review. Also, cases of ongoing pattern absenteeism or consecutive to other absence types, such as but not limited to vacation, paid leave and rest days may be reviewed as well.

Discipline was determined following a review of all pertinent factors, including those described by the Union. Discipline was assessed in line with the Company’s Hybrid Discipline and Accountability Guidelines.

The Company’s position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. As such, the Company maintains that no violation of the collective agreement, policies, procedures nor the Canada Labour Code has occurred. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

**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 is a 15-year employee working as a Locomotive Engineer. She has been given 20 demerits as a result of booking sick at 9:04 April 19, 2023, and booking available at 04:02 April 21, 2023. She had contacted her manager saying she was sick. At the time of her booking off sick, she was not on call.

### **Position of Parties**

2. The Company takes the position that the Grievor has infringed the T and E Availability Standards for the second time in roughly two months and a 20-demerit penalty is reasonable in the circumstances.
3. The Union takes the position that the Grievor was sick, she is entitled to not attend work when she is sick, and that she is protected from discipline for exercising this right under the Code and the Collective Agreement.

### **Analysis and Decision**

4. Much of the background to the T and E Availability Standard, the Code and the Collective Agreement framework was set out in **CROA 5144**, involving the same Parties, the same Grievor and a similar, but not identical issue.
5. The pertinent portion of the Availability Standard to the instant matter reads as follows (see Tab 3, Company documents):

“T and E employees who book off sick on two or more available work days in the calendar month will be subject to attendance review. Disciplinary action may result.”
6. Thus, this portion of the Availability Standard deals with sick day absences on a monthly basis, and not issues of late notification of illness, as was the case in **CROA 5144**.

7. Here, the Grievor was booked off sick for some 43 hours. Her Form 104 refers to “booking sick in excess of 36 hours...A violation of the T and E Availability Standards” (see Tab 1, Company documents).
8. For the reasons that follow, I find that the Grievor was not in violation of the T and E Availability Standards, there was no culpability, and no discipline can be imposed.
9. Firstly, a plain reading of the Standard and a review of the facts does not disclose an “employee who book(s) sick two or more available work days in the calendar month”. The Grievor booked off 1.8 days sick or some 43 hours, which is less than the “two or more” work days addressed in the Standard.
10. Secondly, the Standard does not impose automatic discipline. It calls for an attendance review where disciplinary action may result. Here, the Grievor has given an explanation for her booking off, which was not contested by the Company:

Q9 Do you agree that being unfit or sick, is a random occurrence?

A. Yes.

[...]

Q27 Do you have anything you wish to add to this statement?

A. I don't book off unless I am too sick to come to work. I would never abuse the booking off system at CP. I am very good at contacting management when I am ill. If there something that we have all learned from the pandemic is that if you are sick, you don't come to work.

11. The Company did not seek a medical certificate from the Grievor.
12. Thirdly, many of the cases on which the Company relies refer to “a pattern of conduct” (see **UAW v Massey-Ferguson** 20 LAC 370, **Canada Post Corp and CUPW re Martin** 26 CLAS 480, and **CROA 4715-D**). I accept that if there was a pattern of the Grievor taking sick leave next to weekends or vacation days, the Company would be rightfully concerned. However, no such evidence is present here.
13. Fourthly, the Code, the Collective Agreement and the jurisprudence are completely consistent that there can be no discipline for legitimate illness (see Canada Labour Code, s. 239(1), Collective Agreement, art. 35.01, **CROA 3921**, **CROA 5054**), unless the absences due to illness are so extreme that the situation warrants

discipline for innocent absenteeism (see **CROA 3921, Canada Post Corp and CUPW re Martin**). There is no suggestion here that the Grievor's absences are extreme.

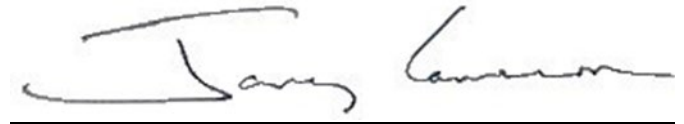
14. Fifthly, in the absence of culpability, there can be no discipline (see **CROA 5054**). There is no evidence of the Grievor taking illegitimate sick days here. Nor is there any "pattern of conduct", and the previous instance of discipline on which the Company relies, has now been reduced to a written warning (see **CROA 5144**).

### **Conclusion**

15. Accordingly, the grievance is allowed, the 20 demerits should be expunged from the Grievor's record and she should be made whole.

16. I retain jurisdiction for any questions of interpretation or application of this Award.

**March 19, 2025**

A handwritten signature in black ink, appearing to read "James Cameron", written over a horizontal line.

**JAMES CAMERON  
ARBITRATOR**