

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

CASE NO. 5146

Heard in Montreal, February 13, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Thirty-demerits and subsequent dismissal of Locomotive Engineer T. Burchart of Kamloops, BC.

JOINT STATEMENT OF ISSUE:

Following a formal investigation on January 29, 2024, Ms. Burchart was issued a Form 104 on February 14, 2024, notifying her of the discipline assessed and subsequent dismissal from Company service for the following reason(s): *"For failing to submit medical information as requested by Disability Management on October 18, 2023, December 20, 2023, December 28, 2023, and January 2024. A violation of the Fitness to Work Medical Policy HS 4000 and Fitness to Work Medical Procedures HS 5000.*

Please be advised that in light of your February 9, 2024, assessment of discipline, your deferred 30 demerits from June 14, 2023, are activated and you are hereby DISMISSED from Company service for an accumulation of 95 Demerits under the Hybrid Discipline & Accountability Guidelines."

Union's Position:

The following outlines our position the Union cannot agree with the thirty-demerits and subsequent dismissal of Ms. Burchart.

It is the Union's position that Form 104 dated June 13, 2023, that assessed 30 demerits deferred in lieu of dismissal, was improperly administered. Ms. Burchart signed this form without fully understanding the implications of the deferred discipline. The Company did not provide the proper letter that explains how deferred discipline functions, what Ms. Burchart's options were, and did not allow for the 3-day response window required in the CCA. The Union contends this discipline was unfairly administered, as Ms. Burchart was not provided with the details to make an informed decision that could affect her career. As stated in the grievance procedure, the Union intervened at the time and the Company's officer agreed to reissue the Form 104 along with the appropriate deferral information and 3-day determination period. For reasons unknown, the replacement Form 104 and deferral information was never issued to Ms. Burchart. As such, it is the Union's position the 30 deferred demerits for that issue are null and void.

Regarding the 30 demerits issued in this culminating incident, the Union asserts that the Company has failed to meet the burden of proof necessary to warrant any discipline in this instance. The information and evidence provided for the investigation did not include CPKC policy HS 4000. The investigating officer did not establish if Ms. Burchart was aware of, or if she had received a copy of the policy. The Union asserts that the Company has failed to provide any evidence during the investigation that Ms. Burchart was in violation of this policy. As such the Union submits there is no basis for the Company to assess discipline in this instance.

The Union submits that the policy cited on form 104 is for employees who are performing safety critical or safety sensitive duties, both of which Ms. Burchart was not as she was off duty injury status. The Union acknowledges that Ms. Burchart was not as timely as the Company would have liked in her response to the medical requests, but Ms. Burchart was in contact with the Company and advised them of her situation regarding the difficulty of finding a personal physician. The Union submits that the known doctor shortage in western Canada must be taken into consideration, and it is not unreasonable for timelines to be extended.

The Union submits the discipline imposed on Ms. Burchart is unjustified. Ms. Burchart has been a dedicated employee of over 15 years of service and to be unnecessarily dismissed from service for an accumulation of non-operational demerits while on medical leave is excessive, unjustified, and unwarranted under all circumstances.

The Union respectfully requests the Arbitrator remove the 30-demerits from Engineer Burchart's record and she be reinstated without loss of seniority and that she be compensated for lost wages with interest, and benefits for her time removed from service.

Company Position:

The Company has denied the Union's request.

The Company maintains its objection to the submission of this grievance as the grievance attempts to bundle multiple disputes into a single grievance. More specifically, the Union has attempted to consolidate the issues of the assessment of 30 demerits and subsequent dismissal dated February 14, 2024, as well as the assessment of 30 demerits deferred dated June 13, 2023. The collective agreement does not allow for the consolidation of multiple issues and therefore, this grievance ought to be invalid.

Notwithstanding the above, the Union's contention that the Grievor failed to understand the implications of the deferred discipline has no bearing on the discipline assessed. There is no such "deferral explanation letter" or language supporting such required within the Collective Agreement. The Grievor had every opportunity to review a form 104 with her Union prior to signing if she was unsure of the contents within. It was the Grievor's choice not to seek Union review and sign the letter, allegedly without understanding its contents.

Furthermore, the Union has not disputed that the Grievor would not have signed the 104 had this accompanying letter been included. The only argument the Union has made is that the letter was not included. There is no dispute that she would have signed the 104 regardless. Had the Grievor and Union had issue with the deferred assessment of discipline, the General Chairman had every opportunity to request a meeting with the General Manager to review, pursuant to Article 39.13. The Union opted not to pursue this matter at the time.

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

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in the circumstances. Discipline assessed was consistent with the Company's Hybrid Discipline and Accountability Guidelines.

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. At the time of her dismissal on February 14, 2024, the Grievor was a Locomotive Engineer with 16 years of seniority.
2. She had previously been the subject of discipline in **CROA 5144**, in which discipline of 15 Demerits was reduced to a written warning and in **CROA 5145**, in which discipline of 20 Demerits was removed.
3. In this matter, she was assessed 30 Demerits for failing to submit requested medical information.

4. She was dismissed for having accumulated 95 Demerits, which includes 30 Demerits of deferred discipline and the 35 Demerits, later reduced to a written warning, addressed in **CROA 5144-5145**.

Issues

- A. Is the Company entitled to count the 30 Demerits of deferred discipline towards a dismissal, or is the discipline void?
- B. Is the Grievor subject to discipline concerning a failure to supply requested medical information?
- C. If so, are the 30 Demerits imposed reasonable in the circumstances, or should a different penalty be imposed?

A. Is the Company entitled to count the 30 Demerits of deferred discipline towards a dismissal, or is the discipline void?

Position of Parties

5. The Company objects to submissions by the Union on the 30 deferred Demerits, as this would constitute the bundling of multiple issues into a single grievance, which cannot be done under the Collective Agreement and CROA Rules, absent agreement of the Parties, which has not been given.
6. The Company argues that in any event, the Grievor signed the Form 104 concerning the deferred Demerits, had the opportunity to consult with the Union should she have so desired, and would have signed the Form, with or without the explanatory letter.
7. The Company submits that the Grievor has agreed to the deferred Demerits, and pursuant to the agreement they became applicable as additional discipline was imposed within the following 12 months.

8. The Union submits that the Company failed to provide an accompanying letter with the original Form 104, this was brought to the attention of management who agreed to provide a new Form 104 with the appropriate letter. For reasons unknown, management never did this, such that the discipline which is the subject of the deferral is now void.
9. The Union notes that the first time the Union or the Grievor had any notice of the intention of the Company to invoke the deferred discipline was in the final Form 104 leading to the dismissal of the Grievor.

Analysis and Decision

10. The deferred discipline Form 104 dated June 13, 2023 advises that 30 Demerits Deferred has been imposed following the Grievor booking off sick on two occasions in May 2023 (see Tab 8, Company documents).
11. The deferred discipline process is set out at article 39.13 (see Tab 9, Company documents). Article 39.13 (3)-(9) note the following:

39.13 DEFERRED DISCIPLINE

- (1) This Clause is intended to address an individual who has been found responsible for an incident in circumstances that by themselves are not dismissible, but which, due to the existence of demerit marks on the individual's record, would result in dismissal.
- (2) Where it is felt that the service record of the individual warrants their retention in employment, the employee may be assessed "deferred discipline".
- (3) Deferred discipline is a procedure whereby the discipline assessed will be annotated on the employee's file, but not added to their demerit mark total provided, for a period of one year following the issuance of the deferred discipline, the employee is discipline-free. Following one year of discipline-free service, the employee's discipline record will revert to its standing prior to the assessment of the deferred discipline.
- (4) If additional discipline is issued to the employee during the one-year period, then the discipline that had been deferred will be added to the employee's discipline record.

(5) Where it is determined that the situation warrants the assessment of deferred discipline, the employee will be so advised and will have three (3) days in which to advise the Company that they wish to accept the deferred discipline. By so accepting, the employee will be waiving the right to grieve the discipline as provided for in the Collective Agreement.

It is understood that for the purposes of rendering a decision, the date upon which the individual is advised that their discipline may be deferred will be regarded as the date upon which the Company has rendered its decision. If the individual indicates that they do not wish to accept the deferred discipline, or they have not replied within the three (3) day delay, the discipline assessed will be immediately added to their discipline record.

(6) Within 30 days of the assessment of discipline, i.e., the date the Form 104 is issued to the employee which results in the use of deferred discipline under the provisions of the collective agreement(s), the Union may request that a review of the case be done by the General Chairman of the Union and the General Manager.

(7) The General Chairman and the General Manager will meet as soon as possible to review the culminating incident, but in any case, within 30 days of the request.

(8) The parties will review the entire case file on the matter to determine the merits of the case.

(9) There shall be no ability to progress a grievance or to proceed to arbitration with respect to deferred discipline.

12. The Form 104 which resulted in the dismissal of the Grievor activated the 30 Demerits Deferred (see Tab 1, Company documents):

"Please be advised that in light of your February 9, 2024, assessment of discipline, your deferred 30 demerits from June 14, 2023, are activated and you are hereby DISMISSED from Company service for an accumulation of 95 Demerits under the Hybrid Discipline & Accountability Guidelines."

13. The Union notes that deferred discipline is accompanied by a letter providing information to the Grievor and a three-day window in which to respond. An example of such a letter is found at Tab 3, Union documents:

Dear Sir,

Please be advised you have been assessed Thirty (30) Demerits Deferred in Lieu of Dismissal for the following reason(s):

For *FTO* usage under 90% from January 2, 2023 to May 9, 2023 while working as a Locomotive Engineer out of Kamloops, B.C. A violation of GOI Section 1, Item 45.3

Due to the existence of demerit marks on your record, the assessment of these 30 demerits would result in dismissal; however, pursuant to Collective Agreement Article 39.13, the Company is offering you the opportunity to defer these 30 demerits. As outlined in Article 39.13, you will have three (3) days in which to advise the Company that you wish to accept the deferred discipline. If you indicate you do not wish to accept the deferred discipline, or do not respond within the three (3) days, the discipline assessed will be immediately added to your discipline record. If additional discipline is issued within the one-year period under Article 39.13(3) then the discipline that has been deferred (30 demerit marks) will be added to the employee's discipline record. Please advise of your decision by June 2, 2023. (underlining added)

14. The Union learned of the signed Form 104 deferred discipline letter on the following day and wrote to the Company, seeking a retraction of the Form and offering an extension of time for a new Form 104 and letter to be issued:

Hello Francine,

Last night the local chairman in Kamloops contacted me. He let me know of a circumstance where Locomotive Engineer Talitha Burchart was awarded the attached deferred discipline. Talitha signed this 104, I'm assuming unaware of the fact that this meant she would be on the deferral plan as the usual letter and three-day period that accompanies the 104 was not present. I have not spoken with her directly but this 104 was left in the local chairman's box in the bullpen for him to pursue as a grievance. I had the local chairman check with the local manager who confirmed this 104 meant she was on the deferral plan. She was not given the option, or the three days and the local manager said that the fact that it's in the collective agreement is what the company's position will be. What I'm asking you today is to retract that 104 and send her a new 104 with the option to sign or not sign within the three days. The letter that generally accompanies the 104 is provided for you because Scott Swift who is also out of Kamloops, just had the exact same circumstance a couple of weeks back. I haven't even talked to Talitha, I'm not sure whether she would sign or not knowing the circumstances, but I think the opportunity needs to be presented to her appropriately and not with just saying, well it's in the collective agreement you should know better. She was asked to come in and sign for discipline and did as she was instructed and was not given the option appropriately.

She'll probably sign anyway is my guess, but just thought we should maybe clean this up now. Thank you, let me know, if a time limit extension is required to make this happen, I'll gladly give one. I don't know where we were in the 20-day process when she signed this yesterday.

Thank you.

Greg

(underling added)

15. The Company agreed that there had been an administrative error and would reissue the Form 104 (see Tab 4, union documents):

Hi Greg,

Spoke with Allan and it sounds like there was an administrative error and they are reissuing the 104.

Francine

16. The Union argues that the discipline is void as the promised reissuance of the Form never took place. The Company at paragraphs 32-42 of its Brief argues that this constitutes a bundling of issues without consent and relies on **CROA 4557**.

17. I agree with the Company as a general proposal that the CROA Rules require consent before a bundling of grievances may take place. The situation in **CROA 4557** dealt with three separate grievances being bundled without consent and the arbitrator, rightly in my view, refused to permit such bundling.

18. Here, however, the situation is factually quite different. No grievance was filed concerning the deferred discipline as neither the Union or Grievor received the promised reissued Form 104 and the old Form 104 had been revoked by the decision of the Company (see Tab 4, Union documents).

19. The Company is relying, at least in part, for the dismissal of the Grievor on the deferred discipline (see Tab 9, Company documents). The Union must be permitted to argue that they are not entitled to do so. This is not a case of bundling separate grievances together, but rather directly responding to the Company reason for dismissal in the present matter.

20. In addition, the Company cannot be prejudiced by the Union being able to make such arguments. The issue was raised throughout the grievance process and again in the JSI and the Company has responded to these arguments.
21. Based on the facts presented, I find that the Company is not permitted to rely on the deferred discipline to which it refers in the dismissal Form 104. The whole purpose of deferred discipline is to impress on the employee of the need to change behaviour. By revoking and then not reissuing the Form 104, this Grievor was given no opportunity do that, or indeed, to accept or to contest the discipline.
22. While I find that the Company may not rely on the deferred discipline in these circumstances, I need not make any decision whether the discipline is itself void. The revised Form 104 has not been sent, and no grievance has been filed with respect to the merits of the discipline. The Parties are entitled to argue about whether the discipline is now void due to the passage of time, but that issue is not properly before me and I make no decision concerning it.

B. Is the Grievor subject to discipline concerning a failure to supply requested medical information?

Position of Parties

23. The Company argues that the Grievor has repeatedly failed to provide requested medical information, contrary to her obligations. It submits further that the Grievor failed to communicate with the Company or to seek extensions of time.
24. The Union argues that the Grievor has supplied a great deal of medical information, but has been delayed in doing so by the absence of family doctors in her area. It notes that the Grievor was disciplined after she found a doctor but before the medical information could be provided.

Analysis and Decision

25. The Company has clearly made repeated attempts to obtain medical information from the Grievor, both before and after the mid-October Return to Work Plan. The Table set out at paragraph 25 of the Company Brief is a helpful summary:

For ease of reference, the following table is a summary of the attempts made by the Company to receive medical updates from the Grievor:

<u>Date:</u>	<u>Company's Attempt:</u>	<u>Grievor's Response:</u>
June 30, 2023	DM Mandy Pickthall requested medical information and an updated FAF with a due date of July 17, 2023.	No response.
July 19, 2023	Ms. Pickthall sent a follow up email to the Grievor inquiring an update.	July 25 – Responded that she had a doctor's appointment on July 26.
August 4, 2023	DM received some medical information but no FAF. Ms. Pickthall emailed the Grievor requesting the FAF again and provided a due date of August 11, 2023.	August 9 - Grievor emailed stating she will need more time to have the FAF filled out.
August 11, 2023		Did not sent in the FAF by deadline.
August 14, 2023	Ms. Pickthall sent a registered mail letter summarizing DM's requests to the Grievor to provide medical information. A new due date of August 28 was provided.	
August 29, 2023		Grievor emailed the FAF – fit for modified duties but very restricting.

October 2, 2023		Grievor provided medical – fit for modified return to work.
October 18, 2023	DM created return to work plan with a request for a medical update to be provided by December 18.	No response.
December 20, 2023	Ms. Pickthall emailed the Grievor inquiring about the medical update that was never received.	No response.
December 28, 2023	DM. Kearah Darr called and left the Grievor a voicemail, inquiring about the outstanding medical update.	No response.
January 5, 2024	Ms. Pickthall called the Grievor and left a voicemail follow up on the overdue medical.	No response.
January 9, 2024		The Grievor emailed and advised she was looking for a doctor to complete the medical forms.
January 16, 2024		No medical received.
January 26, 2024	The Company sent the Grievor a Notice to Appear for an investigation scheduled on January 29.	

26. The Union argues that the medical was only roughly one month late, the holidays had just passed and that there is an uncontested doctor shortage.

27. While I accept the Union arguments, they do not address the lengthy wait from mid-October. The Grievor knew that a medical was required, yet failed to obtain it by mid-December, nor did she seek an extension prior to the deadline, or even to

communicate with the Company. Her explanations for her failure to do so are unimpressive:

Q18. In reference to Appendix A, is it correct that your medical information was due on December 18, 2023?

A. Yes

Q19. Did you receive all the communications noted in Appendix A?

A. Yes

Q20. What was the delay in getting the required medical information submitted?

A. The lack of doctors. I do not have a family doctor and the online doctors won't fill out CPKC forms.

Q21. Why did you not reach out till January 9, 2024 when you were first contacted on December 20th, 2023?

A. I had forgotten about it and replied as soon as I realized my mistake.

28. Moreover, the Grievor admits that her address was correct and that she checks her email daily. Her failure to communicate with the Company cannot here be justified (see Q and A 12-14, Tab 5, Company documents).

29. There can be no doubt that employees are obliged to stay in communication with their employer, particularly when needed medical information is sought. This would be true even in the absence of the Disability Management Policy HS 4000, which notes: "Effective communication, including early intervention, is recognized as a benchmark of disability management programs and is a joint responsibility of employees, Managers...and DM specialists".

30. By failing to stay in communication with the Company and neither providing the requested information, or explaining why she was unable to do so and obtaining an extension of time, the Grievor is liable to discipline.

C. If so, are the 30 Demerits imposed reasonable in the circumstances, or should a different penalty be imposed?

Position of Parties

31. The Company argues its Hybrid Discipline and Accountability Guidelines clearly set out as a Non-Major Offense, a "Failure to comply with qualification or

certification requirements". It notes that the Grievor has received twice received discipline in the past, in 2015 and 2021 (see Tab 2, Company documents), for failures to comply with Company medical requirements.

32. The Union argues that any infraction committed by the Grievor was unintentional. She clearly was unable to obtain an earlier medical report, although she could have communicated more promptly.

33. The discipline imposed of 30 Demerits is one half of the 60 Demerits under the Brown system, which is clearly disproportionate to any transgression here.

Analysis and Decision

34. In weighing the aggravating and mitigating circumstances of discipline here, it is clear that the Grievor had previously been disciplined for similar offences. Progressive discipline calls for subsequent infractions to be penalized more severely. Her previous discipline in 2021 was for 10 Demerits.

35. However, while it is clear that she should have communicated much more promptly with the Company, there is no evidence to indicate that she could have obtained the medical report earlier. The current doctor shortage is obvious.

36. In the circumstances, I find that a penalty at half the maximum Brown points to be too severe in the circumstances, particularly in light of the decisions in **CROA 5144-5145**, which have substantially reduced the existing discipline. Exercising my discretion, I find that a penalty of 15 Demerits is appropriate in the circumstances.

Conclusion

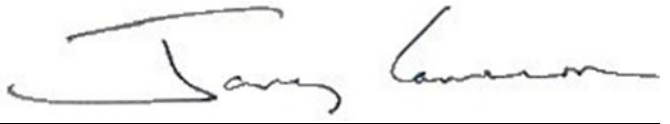
37. Accordingly, the discipline of 30 Demerits is reduced to 15 Demerits.

38. In light of this decision, together with the decisions in **CROA 5144-5145**, the Grievor is no longer over 60 Demerits. Consequently, she cannot be dismissed for accumulation of demerits and is therefore reinstated without loss of seniority.

39. The Grievor is to be made whole, less mitigation.

40. I remain seized concerning any issues of interpretation or application of this Award.

March 19, 2025

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

**JAMES CAMERON
ARBITRATOR**