

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

CASE NO. 5147

Heard in Montreal, February 13, 2025

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the 20 demerits assessed to Conductor D. Vicente (“the Grievor”) of Kamloops, BC.

JOINT STATEMENT OF ISSUE:

Following a formal investigation, Mr. Vicente was issued 20 demerits on May 19, 2023, for the following: *“For failing to ensure you were fully fit and properly rested when called for your tour of duty on May 4, 2023 at Kamloops, B.C.”*

Union Position

The Union contends the Company has failed to meet the burden of proof or establish culpability related to the allegations outlined above.

The Union further contends the discipline assessed is arbitrary, unjustified, unwarranted, and excessive in all of the circumstances, including mitigating factors evident in this matter and that the discipline assessed is contrary to the principles of progressive discipline.

Furthermore, the Union contends that the discipline is in violation of the Duty and Rest Period Rules, CP Rail’s Fatigue Management Plan and Policies HS 4552 & 5830.

The Union disputes the T&E Availability Standards and the Hybrid Discipline & Accountability policy and their application in the instant matter.

The Union seeks a finding that the Company has violated the Collective Agreement, the Duty and Rest Period Rules, and Company policy, as indicated above, and seeks an order that the Company cease and desist its ongoing breaches of the parameters as described.

Accordingly, the Union requests the discipline be removed in its entirety, and that Mr. Vicente is made whole for all associated loss with interest. 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 that the Grievor’s culpability as outlined in the discipline letter was established following a fair and impartial investigation.

The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

Regarding the Union's arguments that the discipline assessed was in contravention of DRPR, FMP, and Policy H&S 4552, the Company disagrees and maintains that there has not been a violation.

For the Union:
(SGD.) D. Fulton
General Chairperson CTY-W

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

There appeared on behalf of the Company:

S. Scott – Manager Labour Relations, Calgary
D. Zurbuchen – Manager Labour Relations, Calgary

And on behalf of the Union:

E. Carr – Counsel, Caley Wray, Toronto
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 Conductor with some 4.5 years of seniority with the Company. He has three previous examples of attendance issues prior to the present matter.

Issues

- A. By declaring himself unfit when called, is the Grievor subject to discipline?
- B. Is the discipline of 20 Demerits unreasonable in the circumstances and if so, what discipline is appropriate?

A. By declaring himself unfit when called, is the Grievor subject to discipline?

Position of Parties

2. The Company argues that it is a 24/7 operation with dynamic scheduling needs, which depends on the actual availability of employees who declare themselves to be available for work.

3. Here the Grievor declared himself available, but when called, booked unfit based on fatigue. The Grievor could have avoided all issues by declaring himself unfit prior to being called.
4. The Union argues that the Grievor was following a proper course of action of action by declaring himself unfit, when he was too tired to work safely. This is exactly what he is required to do by Transport Canada Regulations, the Company's Policy on Fatigue Management, the Collective Agreement (s. 35.01) and many arbitral decisions.
5. The Union submits that the Grievor believed he would not be called until the morning of May 4, 2023, and on that basis had not booked unfit at an earlier point. When called at 0110 he was asleep, in preparation for an anticipated call in the morning.

Analysis and Decision

6. The Company's T and E Availability Standard sets out the importance of attendance levels to productivity (see Tab 6, Company documents):

For Canadian Pacific to be successful and competitive in the North American Railway industry we not only have to provide great customer service, we have to continue our collective efforts at exceling on efficiency and productivity. Given that efficiency and productivity are directly impacted by employee attendance levels, an attendance policy that is understood and adhered to by all is essential.

[...]

T&E employees have negotiated opportunities provided for in their Collective Agreements to legitimately remove themselves from the working board. Examples of negotiated and also legal absence categories that will not result in discipline under this availability standard include: annual vacation; pre-authorized personal leave; bereavement; jury duty; company business; and time off mandated by the hours-of-service regulations.

7. More specifically, the Standard notes: "The following absence categories will be handled as more serious offenses...Booking sick or unfit on-call or after accepting a call...".

8. The Grievor was questioned as to why he had not booked off prior to being called:

Q14 According to Appendix B - Missed call document, it also shows you booking red on call when properly called for train 113-29, correct?

A14 Yes

Q15 When you got booked on May 2nd, did you look at the lineup after getting booked on to see when you might be going to work?

A15 Yes

Q16 Why did you not book off in advance of being called for train 113-29?

A16 The lineup said I wasn't going to work till the morning so I didn't think I would be getting called. I was sleeping at the time of the call to be rested for work the next morning.

Q17 Did you provide a reason for booking unfit(red) on call to a company officer? If so, what reason was given?

A17 I self-assessed myself using the CPKC self-assessment tool and determined I was unsafe to go to work.

[...]

Q24 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?

A24 Yes, but I was following the guidelines of the CPKC fatigue management and the DRPR.

Q25, Do you have anything you wish to add to the statement?

A25 I just want to once again add that I was just following the guidelines that have been put into place by transport Canada and CPKC and that I wasn't expecting to go to work at this time based on the lineups.

9. The Union properly notes that the Grievor self-assessed as being fatigued and unfit to work. This assessment has not been questioned by the Company as being untrue, or part of any illegitimate booking off pattern.

10. However, it must be noted that the Grievor did hold himself out to the Company as available to work. It was only when he was called did, he self-assesses and declare himself unfit.

11. There is no doubt that the Grievor was available for a lengthy period, from 1319 on May 2 until 0110 on May 4. During this time, he would necessarily have to sleep, in order to be fit for work. According to his testimony, he believed, based on the

Lineup which he consulted on May 2 when booking on, that he would not be called until the morning of May 4. In fact, he was called some 6-7 hours earlier than anticipated.

12. In **CROA 5144**, this arbitrator dealt with a similar situation, where the Grievor anticipated being called after approximately 18-19 hours and she in fact was called some 13-14 hours earlier.

13. I found that in **CROA 5144** the Grievor was subject to discipline, as she should have checked the Lineup again to verify if changes had occurred in the interim. That finding would be still more applicable here, where there is no proof that the Grievor checked the Lineup after May 2. Had he done so on May 3 before sleeping, he could have booked unfit and avoided the current situation. Given the dynamic nature of operations and the changeability of the Lineup, he should have done so.

14. As Arbitrator Hodges noted in **AH 750**:

“Booking Unfit on Call can have a significant operational impact on the Company. It also impacts the Grievor’s fellow crew members who were expecting him to report for work. It delays departures and impacts the on-duty times of the fellow employees”.

15. Arbitrator Picher in **CROA 3981** also noted the impact on booking sick while on call:

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.

The Arbitrator cannot accept the submission of the Union to the effect that the discipline assessed against the grievor was contrary to the provisions of section 239(1) of the Canada Labour Code. That provision prohibits any reprisal against an employee for an absence due to illness or injury. The discipline in the instant case was not issued by reason of the grievor’s absence, nor did the Company question the legitimacy of his illness. Rather, the discipline assessed is for the fact that the grievor did, contrary to long standing policy, await the moment

of an actual call to work before advising the Company that he would not attend at work because of illness. That rule, which is of long standing, is plainly intended to ensure that employees exercise a degree of vigilance and responsibility in giving their employer reasonable advance notice of their inability to attend at work by reason of illness. I am satisfied that that is not an unreasonable requirement in the railway industry which must operate on a 24 hour a day, 7 day a week basis, with many trains being required to operate at unscheduled and sometimes unpredictable times.

16. Accordingly, I find that the Grievor was properly subject to discipline for having infringed the T and E Availability Standard by declaring himself unfit at the time of call.

B. Is the discipline of 20 Demerits unreasonable in the circumstances and if so, what discipline is appropriate?

Position of Parties

17. The company submits that under its Hybrid Discipline and Accountability Guideline, booking unfit when called is considered a non-Major offence. However, this is the third infraction by this Grievor, the last discipline was for 10 Demerits and the Guidelines call for 20 Demerits.

18. The Company has cited multiple cases where the discipline ranges from 15-20 Demerits (see **CROA 3605** 15 Demerits; **CROA 4524** 15 Demerits; **CROA 4630** 3-day suspension; **CROA 4569** 20 Demerits and **AH 751** 20 Demerits).

19. The Union cites a number of cases in which arbitrators have found that there can be no discipline imposed for booking sick in light of the protections provided by the Code and the Collective Agreement (see **CROA 3921**; **CROA 3639**; **CROA 4340**; **CROA 4757**).

Analysis and Decision

20. The basic principle is that when employees hold themselves out as available to work, they should be available to work. There will obviously be exceptions to the principle, such as when employees fall suddenly ill or there is a completely unexpected change to the Lineup which no reasonable person could foresee. Absent these exceptions, however, employees should be able to signify their unavailability prior to being called if they are fatigued or unwell.

21. Here, I have found that the Grievor was liable to discipline for his booking unfit at time of call. In terms of penalty, the single most aggravating factor is that this is the third instance of attendance related issues. The length of service at 4.5 years is not a mitigating factor and may be an aggravating one. The fact that the Grievor did the right thing by declaring himself unfit is perhaps a mitigating factor. However, there is no good explanation for why he did not do so prior to being called.

22. The jurisprudence indicates that 20 Demerits is not unusual (see **CROA 4569** and **AH 751**). Discipline at 15 Demerits has been found in other cases (see **CROA 3605** and **CROA 4524**).


23. Given the Grievor's record and previous discipline at 10 Demerits, I cannot find that the discipline imposed by the Company is unreasonable.

Conclusion

24. The grievance is therefore dismissed.

25. I remain seized for any questions of interpretation or application of this Award.

March 19, 2025



JAMES CAMERON
ARBITRATOR

