

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

**CASE NO. 5177**

Heard in Montreal, May 14, 2025

Concerning

**CANADIAN PACIFIC KANSAS CITY RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

The assessment of 20-demerits to Locomotive Engineer Cabel Crombach ("the Grievor").

**JOINT STATEMENT OF ISSUE:**

Following a formal investigation conducted on November 30, 2023, Mr. Crombach was issued a Form 104 on December 8, 2023, which advised him that his discipline record had been assessed with 20-demerits for the following reason(s):

"For booking off sick on two or more available workdays in a calendar month while exhibiting excessive and patterned absenteeism on weekend and consecutive to other absence types such as, but not limited to: vacation, paid leave, earned days off, and rest days. A violation of the T&E Availability Standard Canada."

**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 asserts a violation of Article 39. The scope of the investigation is excessively broad, and the period of the absences being investigated are too long in the past for Mr. Crombach to accurately recall the events in significant detail. The Union relies on CROA 1588 where the arbitrator ruled that it is unfair to the employee to investigate an alleged incident after such time has passed.

The Union asserts a violation of Article 35.01 and the current Duty and Rest Period Regulations specifically 5.1(a), 5.2, 5.3, and 5.6. Employees have a duty to report their fatigue and not commence work when they are not properly fit and rested. Both the CCA and the DRPR agree that employees will not be disciplined for reporting unfit for duty. In this instance the company had punished Mr. Crombach for taking thoughtful and insightful consideration towards his respective fitness level and properly reporting such to the Company.

The Union submits that the Company has not met the burden of proof necessary to warrant any discipline in this instance. The investigation did not provide any evidence that Mr. Crombach's illness was not bona fide.

The Union asserts the Company is in violation of the provisions of Section 239(1) of the Canada Labour Code which allows for Mr. Crombach to book off sick and in this case the validity of the book off was not questioned. Also, the Company chose not to make a request for a

certificate issued by a health care practitioner certifying that Mr. Crombach was incapable of working for the time of absence. Further the Company is prohibited from dismissing, suspending, laying off, demoting, or disciplining Mr. Crombach for being off due to a bona fide illness. The Company has not provided any proof that would render the book off for any other reason than a bona fide one.

CROA case 349 in short states the onus is on the Company to establish that there was just cause for the imposition of discipline. Mr. Crombach provided an adequate explanation that each of the absences were bona fide. The Union asserts that the Company has provided no evidence to prove otherwise.

The Union requests the Arbitrator order that the 20-demerit marks be expunged from the work record of Engineer Crombach. We further seek a declaration that the Company compensate Mr. Crombach for wages lost for attending the investigation. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

**Company Position:**

The Company disagrees with the Union's request.

For all the reasons and submissions set forth through the Company's reply, along with those herein adopted, outlines our position.

The Company disagrees with the Union's allegation that the investigation was not fair and impartial due to the scope of the investigation being excessively broad and that the period of time was too far in the past. A review of the Notice to Appear and Statement demonstrate this allegation to be unsupported by the facts.

The Company carefully considers the appropriate disciplinary consequence, if any, to be assessed. Discipline was determined following a review of all pertinent factors, both mitigating and aggravating, and maintains the Grievor's culpability for this incident was established following the fair and impartial investigation into this matter. Moreover, the Company maintains the discipline was properly assessed in keeping with the *Hybrid Discipline and Accountability Guidelines*.

The Company's position continues to be that the discipline assessed was not excessive and was in fact just, appropriate, and warranted in the circumstances.

The Union alleges that the Company violated the Canada Labour Code, DRPR, and the Collective Agreement (Article 35). The Company does not see a violation of these or any cited authority, policy/procedure referenced by the Union.

The Company requests that the Arbitrator dismiss the grievance in its entirety.

**For the Union:**  
**(SGD.) G. Lawrenson**  
General Chairperson

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

There appeared on behalf of the Company:

A. Harrison	– Manager, Labour Relations, Calgary
S. Scott	– Manager, Labour Relations, Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
G. Lawrenson	– General Chairperson, LE-W, Calgary
C. Ruggles	– General Chairperson, LE-W, Lethbridge

## **AWARD OF THE ARBITRATOR**

### **Context**

1. The Grievor is a Locomotive Engineer with some eight years of seniority at the time of the investigation in November 2023. The investigation focused on attendance issues between January and November 2023.
2. The Grievor has a less than stellar discipline record, with two 30-day suspensions, and two previous attendance violations resulting in discipline of 10 Demerits and 15 Demerits (upheld in **CROA 5176**).

### **Issues**

- A. Did the Grievor receive a just and impartial investigation?
- B. Has the Company demonstrated the Grievor's culpable conduct worthy of discipline?
- C. Was the discipline imposed reasonable in the circumstances, or should some lesser penalty be imposed?

### **A. Did the Grievor receive a just and impartial investigation?**

#### **Position of Parties**

3. The Union takes the position that the Grievor was not given a fair and impartial investigation, as the period investigated went back 11 months prior to notice of the investigation being given. The Grievor was prejudiced by an inability to recall events in significant detail. The Union submits that the delay was contrary to the Collective Agreement and that the discipline must be held to be void ab initio. It relies on **CROA 3011, CROA 1588, CROA 4591** and **CROA 3322**.
4. In addition, the Union argues that the Company may not investigate attendance issues prior to the incident in September 28-29, 2023, which resulted in discipline of 15 Demerits. Finally, it argues that the Company had the right, under the Canada Labour Code, to seek a medical report concerning sick leave, but did not do. The sick leaves are therefore uncontested, and may not be challenged now.

5. The Company submits that the investigation was fair and impartial. It argues that the specific circumstances must be examined to determine whether the timeframe had become unfair or partial. Here sufficient time was necessary to demonstrate patterns of conduct by the Grievor concerning his absences due to sickness or declaring himself unfit.

### **Analysis and Decision**

6. Article 39.05 of the Collective Agreement reads as follows:

Employees will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the evidence produced...The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed...Failure to notify the employee within the prescribed, mandatory time limits or to secure agreement for an extension of the time limits will result in no discipline being assessed.

7. It is well established that a violation of the right to a fair and impartial investigation will result in the discipline being struck down as void ab initio (see **CROA 3322**).
8. Although the article prescribes a fixed 20-day period to render a decision and inform the employee, the article does not prescribe a fixed time for the start and completion of an investigation. The only requirement is that the investigation be "fair and impartial".
9. The ability of a grievor to recall a particular event will be a function of both how near or far the investigation is from the incident, as well as the significance of the incident. A collision is likely to remain far more memorable than how fast one was going on a particular section of rail some time in the past. An illness is likely more memorable, absent a chronic illness, than how tired one was on a particular day.
10. The investigation of a contemporary incident is ideal, when memories are fresh and evidence is readily available.

11. An investigation of an incident in the distant past would be “unfair”, as the grievor might have little to no recall of the incident, or the ability to obtain witness statements or other evidence.

12. The dividing line between investigations which are “fair” and “unfair” is clearly a question of fact, to be found based on the evidence.

13. In **CROA 3011**, Arbitrator Picher found that a delay of 7 months in presenting a sexual assault allegation was fatal to a fair and impartial investigation:

...it is inconsistent with the precepts of a fair and impartial investigation for an employer to withhold from an employee a complaint of serious allegations of misconduct for a substantial period of months, thereby depriving that individual from adverting as freshly as possible to the date and incident in question, so as to be able to fairly respond to the allegation made.

Apart from hampering a person’s own ability to recall, such a delay would also hamper, if not destroy, the employee’s ability to identify and confer with other persons or witnesses who might assist in his or her defence. These principles have been repeatedly sustained both in this Office and in Canadian arbitration jurisprudence generally...

14. In **CROA 1588**, Arbitrator Picher found that a 1-month delay with respect to an alleged speeding infraction was prejudicial.

15. In **CROA 4591**, Arbitrator Clarke found that an investigation of Efficiency Test failures after 7 months was one of the reasons to find the discipline imposed to be void ab initio. The Arbitrator noted: “What is considered “undue” in terms of delay will be a question of fact in each case.”

16. Here, the Company points to some 25 separate instances of the Grievor declaring himself sick or unfit between January 1 and November 26, 2023:

<u>Date</u>	<u>Day of Week</u>	<u>Type of Unavailability</u>	<u>Grievor’s Explanation</u>	<u>Q&amp;A</u>
Jan. 1-2, 2023	Sun. & Mon.	Unfit	Unfit	Q&A 14
Jan. 29-30, 2023	Sun. & Mon.	Sick	Sick	Q&A 15

Feb. 13-16, 2023	Mon.-Thurs.	Sick	Sick	Q&A 16
Mar. 19, 2023	Sun.	Unfit (leading into vacation March 20-26)	Unfit	Q&A 17-19
Apr. 23-24, 2024	Sun. & Mon.	Unfit	Unfit	Q&A 20
May 6, 2023	Sat.	Unfit	Unfit	Q&A 21
May 31 to June 2, 2023	Wed.-Fri.	Sick	Sick (including while on vacation)	Q&A 25
June 20-21, 2023	Tues. & Wed.	Unfit	Unfit	Q&A 26
July 8-9, 2023	Sat. & Sun.	Unfit	Unfit	Q&A 27
July 18-19, 2023	Tues. & Wed.	Unfit	Unfit	Q&A 28
July 21, 2023	Fri.	Missed Call	Investigation and was told to book back on for 20:00 but turned phone off.	Q&A 31
Sept. 2-3, 2023	Sat. & Sun.	Unfit	Unfit	Q&A 32
Sept. 14-15, 2023	Thurs. & Fri.	Unfit	Unfit	Q&A 33
September 24-25, 2023	Sun. & Mon.	Unfit	Unfit due to line-up unpredictability	Q&A 34
Sept. 28-29, 2023	Thurs. & Fri.	Unfit	See Appendix F resulted in 15 demerits	Q&A 35
Oct. 3-4, 2023	Tues. & Wed.	Sick	Sick – broken tooth sought medical attention; did not submit a CLC SL claim	Q&A 36- 38
Oct. 8-10, 2023	Sun.-Tues.	Sick	Sick	Q&A 39
Oct. 21-22, 2023	Sat. & Sun.	Unfit	Unfit due to line ups	Q&A 40
Oct. 31-Nov. 1, 2023	Tues. & Wed.	Unfit	Unfit due to line ups	Q&A 41
Nov. 3-4, 2023	Fri. & Sat.	Unfit	Unfit	Q&A 42
Nov. 4-5, 2023	Sat. & Sun.	Unfit	Unfit due to line ups	Q&A 43
Nov. 7-8, 2023	Tues. & Wed.	Unfit	Unfit due to line ups	Q&A 44
Nov. 9-12, 2023	Thurs.-Sun.	Sick	Sick, submitted Sick Leave claim	Q&A 45

Nov. 17-18, 2023	Fri. & Sat.	Unfit	Unfit due to line ups. Lined up for 0800 on Nov 16 <sup>th</sup> but it moved to 2359	Q&A 47
Nov. 23-26, 2023	Thurs.-Sun.	Unfit	Unfit due to line ups. Lined up on Nov 22 at 2300 and 0500 on 23 <sup>rd</sup> . Nov 23 line up for 1600	Q&A 48

17. The Grievor only notes that he has no recollection of events on a single occasion, that of May 29-May 31, 2023 (see Q and A 24, Company documents). However, it is noteworthy that the responses of the Grievor are generally quite sparse, especially with events further in the past:

014. Referencing Appendix A, why did you book off Unfit

Sunday, January 1<sup>st</sup> through Monday, January 2<sup>nd</sup>, 2023?

Union Objection: Leading question

A14. I was unfit

015. Referencing Appendix A, why did you book off Sick

Sunday, January 29<sup>th</sup> through Monday, January 30<sup>th</sup>, 2023?

A15. Because I was sick

18. His responses often get more detailed, the closer in time to the actual investigation:

Q47. Referencing Appendix A, why did you book off unfit Friday, November 17th through Saturday, November 18th 2023?

A47. I was unfit due to the line ups. I was lined up for 0800 on the 15th the last time I had looked. Then it shifted to 2359 on the 15th.

19. It is reasonable for the Company to take a certain time to establish patterns of behaviour, such as booking sick or declaring unfit adjacent to other scheduled time off. This must be balanced with the right of the Grievor to be able to fully defend himself. I am particularly concerned with the issue of fatigue, as an exploration of the reasonableness of a declaration of unfit necessarily requires facts concerning when the grievor last slept, what the lineup showed and when, if there were changes to the lineup, etc.

20. The Form 104 imposing the discipline is quite general and not limited to a particular time period (see the JSI).

21. While the Company examined incidents going back to January 2023, I find that this period is too lengthy to ensure that the Grievor can fully respond to the allegations. It is unnecessary in the present matter to precisely delimit the period which could have been examined. For present purposes, it is enough to examine a period which is contemporaneous to the investigation and during which the Grievor had notice of Company concerns about attendance. The Grievor was disciplined with 15 Demerits for a problematic declaration of unfit for the period of September 28-29, 2023. The period after this until the investigation on November 30, 2023 provides a 2-month period which balances Company and Grievor concerns.

22. I find therefore that the attendance issues raised by the Company in the present matter can be limited to this period, which affords the Grievor a fair and impartial investigation.

**B. Has the Company demonstrated the Grievor's culpable conduct worthy of discipline?**

**Position of Parties**

23. The Company notes that the Grievor had one of the worst attendance records in both the bargaining unit and within his terminal.

24. The Grievor had clear patterns of attendance abuse, in taking 2 days off with every sick claim or declaration of unfit, almost 100% of the time. The Grievor also took these periods off adjacent to other periods when he would not have been working. The Company submits that there are clear patterns of abuse worthy of discipline.

25. The Union submits that there are no grounds for discipline, as the jurisprudence is clear that employees may not be disciplined for being sick or unfit (see, for example,

**CROA 3921, CROA 3639, CROA 4340**). It notes that there must be evidence, and not mere suspicion of wrongdoing (see **CROA 4630**). It submits that the Company has failed to establish clear and cogent evidence of any wrongdoing.

## **Analysis and Decision**

26. The Grievor was disciplined 20 Demerits for:

For booking Off sick on two or more available workdays in a calendar month while exhibiting excessive and patterned absenteeism on weekends and consecutive to other absence types such as but not limited to: vacation, paid leave, earned days off, and rest days. A violation of the T&E Availability Standard Canada.

27. The Parties acknowledge that the Grievor was off work sick or unfit on some 23 days between October 1 and November 30, 2023, when the investigation was conducted.

28. During the 2 months prior to the investigation, he missed 8 days due to sickness. However, the Company did not seek a medical certificate for any of the 3 absences. The grievor also provides a concrete reason for one of the absences, October 3-4, due to a broken tooth.

29. During the preceding 2 months, he also booked off unfit 7 times, for a total of 15 days. On 2 occasions, November 17-18 and November 23-26, the Grievor provided information concerning a changed lineup which resulted in his being fatigued and declaring himself unfit. On all other occasions, his explanation is limited to "I was unfit due to lineups" (see Q and A 40,41,42,43, Tab 6, Company documents).

30. The Company contends that there is a pattern of taking sick leave and declaring unfit adjacent to other time off, which calls into question the validity of the leave. It also notes that the leaves are all for periods of two days or more.

31. I agree that such a pattern is indeed questionable, unless a good explanation is offered.

32. The Company has the burden of proof to show culpable behaviour, to which the grievor can respond with an exculpatory explanation. For instance, a declaration of unfit, when buttressed by a good explanation, would not be problematic, even if it was taken next to a holiday. Conversely, a declaration of unfit, without a good explanation, adjacent to a holiday could form the basis of a problematic pattern of abuse. As noted by Arbitrator Burkett in **Canada Post Corp and CUPW (Martin)** 26 CLAS 480:

The attendance record, depending on what it reveals, may support an inference that would shift the evidentiary onus to the grievor to provide a credible explanation...was adopted by Arbitrators Picher in **Larmon** and Jolliffe in **Knox**. They drew inferences from the record that, absent a credible explanation to the contrary, they relied on, in part at least, to make a finding against the grievor. (underlining added)

33. I am less troubled by the sick leave taken, as there were three sick leaves taken, for which a good reason is given for one instance. However, I am greatly troubled by both the number of times on which the Grievor has declared himself unfit and the fact that he provided essentially no explanation on 5 of 7 occasions, other than a bald statement of being unfit. In my view, the Grievor has not met his burden of proof to provide a proper explanation for a problematic pattern.

34. The jurisprudence is quite clear that a pattern of sick days or declarations of unfit next to holidays can be grounds for discipline (see **AH 750, CROA 5054, CROA 5145**).

35. Here I find that the Company has established culpable behaviour worthy of discipline on the part of the Grievor.

**C. Was the discipline imposed reasonable in the circumstances, or should some lesser penalty be imposed?**

#### **Position of the Parties**

36. The Company takes the position that the discipline is reasonable in the circumstances, as the Grievor has significant discipline on his record, including 15 Demerits for a

recent attendance issue. It notes that the Grievor is not a long service employee, with less than 8 years of seniority. It submits that there is a clear pattern of abuse of absences, which has warranted significant discipline in the jurisprudence (see **CROA 5106**, 15 Demerits, **CROA 2656**, discharge upheld for innocent absenteeism, **CROA 4715-D**, 2-year suspension).

37. The Union takes the position that no discipline is appropriate in the circumstances, as employees may not be disciplined for being sick or unfit. It submits that the Grievor's record is not as bad as it appears, as there are multiple instances of an absence of a short period of hours extending over 2 calendar days being recorded by the Company as absent for 2 days. In the alternative, it submits that the discipline is excessive.

### **Analysis and Decision**

38. The **William Scott** decision set out an array of factors to consider in determining whether the discipline imposed was reasonable in the circumstances, or needed to be revisited in light of mitigating and aggravating facts.
39. Here, the Grievor was not an employee with lengthy seniority. His discipline record is not stellar, and of particular note, he has previous discipline of 15 Demerits for attendance related matters. The issues here would constitute additional attendance problems and attract progressive discipline.
40. Perhaps the most aggravating factor is the sheer number of attendance issues, particularly when sick leave or unfit time off is being taken adjacent to holidays or other time off. Even where justified absences due to sickness or being unfit are extracted from the overall number of absences, the Grievor was absent on a shockingly high number of occasions. This is true, even taking into account the Union argument about possible over-counting due to the overlap of the absence between two days. There is no doubt that employees may not be penalised for legitimate absences due to sickness or being unfit, but there may not be abuse of these rights. Here, the evidence demonstrates that there was such abuse.

41. In all the circumstances, I cannot find that the Company decision to impose 20 Demerits is unreasonable. The jurisprudence provides examples of lesser discipline (see **AH 678**) or greater (see **CROA 4715-D**), but on the basis of the facts of this matter, the discipline must be upheld.

### **Conclusion**

42. Accordingly, the grievance is dismissed.

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

**July 18, 2025**

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

**JAMES CAMERON  
ARBITRATOR**