

**CANADIAN RAILWAY OFFICE OF ARBITRATION**  
**& DISPUTE RESOLUTION**  
**CASE NO. 4224**

Heard in Montreal, July 10, 2013

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the dismissal of Rail Traffic Controller David Dunsmore for conduct unbecoming.

**JOINT STATEMENT OF ISSUE:**

On October 24, 2012, Rail Traffic Controller David Dunsmore attended an investigation for his failure to properly notify the Company of his medical condition and for continuing to report for work as an RTC on two occasions. Following this investigation, the company dismissed RTC Dunsmore on November 13, 2012 for conduct unbecoming.

Union's Position

The Union contends that the dismissal of RTC Dunsmore was excessive and not progressive and that there are mitigating circumstances that need to be considered. The Union requests that RTC Dunsmore be reinstated without loss of seniority and be made whole for all lost wages and benefits.

Company's Position

The Company disagrees and denies the Union's request.

**FOR THE UNION:**  
**(SGD.) S. Brownlee**  
**General Chairperson**

**FOR THE COMPANY:**  
**(SGD.) A. Becker**  
**Labour Relations Officer**

There appeared on behalf of the Company:

A. Becker	– Labor Relations Officer, Calgary
D. Freeborn	– Director Labor Relations, Calgary
M. Chernenkoff	– Labor Relations Officer, Calgary

There appeared on behalf of the Union:

S. Brownlee	– General Chair, Edmonton
K. Essery	– CP Vice General Chairperson, Calgary
C. Clark	– CP Local Chairperson, Montreal
G. Lapointe	– CN Local Chairperson, Montreal
P. Boucher	– Arbitration Coordination, Belleville

D. Psychogios  
D. Dunsmore

– Local Chair CP CTY East, Montreal  
– Grievor, Calgary

### **AWARD OF THE ARBITRATOR**

The record confirms that in September of 2012 the grievor had experienced difficulty sleeping and a degree of stress. It appears that he attended a walk-in clinic where he was seen by Dr. D. Beeharry. The physician prescribed sleeping pills and provided him with a note stating : “This is to certify that David Ross Dunsmore is unfit to work for two weeks from today due to medical reasons.”

The record confirms that in fact the grievor did not present the medical note to his employer and commence a two week leave of absence immediately. As he explains it, Mr. Dunsmore got the impression from his verbal exchange with his doctor that he had a certain discretion as to whether he should choose to use the sleeping pills which were prescribed and put into effect the prescribed two week leave of absence.

In the result, Mr. Dunsmore reported for work on September 27, 2012 doing a full eight-hour shift notwithstanding his doctor’s note. It appears that he did the same on his next scheduled working day, October 2, 2012. It is only late on that day that the grievor presented the doctor’s note to the Company by leaving it on his manager’s desk. Receipt of the note prompted the grievor’s supervisor, RTC Manager Alain Daunais to make an investigation into the grievor’s condition.

Based on the information obtained, the Company ultimately concluded that in fact the grievor had reported for duty in a safety critical position when he had been declared unfit for duty by a physician. The Company submits that for the grievor to have worked in the duties and responsibilities of a Rail Traffic Controller on September 27, 2012 and on October 2, following receipt of the medical note which he had was clearly improper, forming the opinion that in fact he was attempting to apply the note at his discretion, in such a way as to enhance his time off by linking the two week medical leave of absence to an upcoming period in which he already had four days off scheduled.

The Arbitrator can readily understand the Company's perspective. It would appear that the grievor was effectively attempting to place himself within the duties and responsibilities of a safety critical position, having been medically deemed unfit to work. The grievor's perception, however, was different. He was of the view that it was a matter of his own discretion as to when he would commence taking the sleeping pills prescribed for him by his doctor, and the related two week leave of absence. While I am satisfied that the grievor's perception constituted a serious error of judgement, and that at minimum it was incumbent upon him to communicate immediately and clearly to his employer his medical condition and any limitations attached to it, there are nevertheless elements in mitigation to take into account. Firstly, as he did not immediately undertake the course of medication prescribed, it is less than clear that the grievor was in fact unfit to work at the time he returned to work for two separate days following his visit to the doctor, albeit he may well have continued to suffer a degree of fatigue. In mitigation it must also be recognized that the grievor has a positive work record, having had no prior

discipline since he was hired in August of 2007. While I am satisfied that the grievor's error in judgement was a serious one, I am not persuaded that it was such as to necessarily justify putting an end to his career with the Company.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages or benefits lost.

July 12, 2013

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MICHEL G. PICHER  
ARBITRATOR