

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 817

Heard at Montreal, Tuesday, March 10, 1981

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim for removal of discipline assessed Labourer D.C. Tremblay with compensation for lost wages, including overtime pay.

JOINT STATEMENT OF ISSUE:

On May 20, 1980, Mr. Tremblay, along with two other employees, was observed smoking what was believed to be marijuana. An investigation was held and it was established to the satisfaction of the Company that Mr. Tremblay did, in fact, smoke marijuana while on duty and in violation of Rule "G", Maintenance of' Way Rules and Instructions. Mr. Tremblay was subsequently dismissed for this offence.

The Union contends that the dismissal of Labourer Tremblay for violation of Rule "G" was without just and sufficient cause and on the basis of unproven charges.

The Union further contends that the claim should be paid under the provisions of Section 18.10 because the Company did not render a decision at Step 1 within twenty-eight (28) days as required by Section 18.8 of Wage Agreement No. 17.

The Company contends that the discipline was justified and that this was not "a claim for unpaid wages" as contemplated by Section 18.10 of Wage Agreement No. 17.

FOR THE EMPLOYEES:

FOR THE COMPANY:

(SGD.) H.J. THIESSEN
SYSTEM FEDERATION GENERAL CHAIRMAN

(SGD.) J.P. KELSALL
GENERAL MANAGER,
OPERATION &
MAINTENANCE

There appeared on behalf of the Company:

J.A. McGuire	-- Manager, Labour Relations, CP Rail, Montreal
S.J. Samosinski	-- Labour Relations Officer, CP Rail, Montreal
L.A. Clarke	-- Supervisor of Labour Relations, CP Rail, Toronto
F.E. Romeo	-- Assistant Supervisor of Labour Relations,

CP Rail, Toronto
M. Morin -- Section Foreman, CP Rail, North Bay

And on behalf of the Brotherhood:

H.J. Thiessen -- System Federation General Chairman, BMWE, Ottawa
A. Passaretti -- Vice-President, BMWE, Ottawa
R. Wyrostok -- Federation General Chairman, BMWE, Regina
E.J. Smith -- General Chairman, BMWE, London
L. DiMassimo -- General Chairman, BMWE, Montreal

AWARD OF THE ARBITRATOR

The first ground advanced by the Union in support of the claim is that since a decision was not rendered by the designated officer of the Company within the time provided for in the Collective Agreement, the claim should be paid. Generally speaking, failure to answer a grievance within the time provided at any step of the grievance procedure would simply give the other party the right to proceed to the next step. Article 18.10, however, provides that where, "in the case of a grievance based on a claim for unpaid wages", a decision is not rendered within the time provided, then the claim will be paid. That is to say that in such a case the Company has forfeited its right to answer the claim or to deal with it on its merits.

The instant case is not one "based on a claim for unpaid wages". If the grievance succeeds - or at least if it is found that there was not just cause for discharge - then the grievor may or may not be entitled to compensation for loss of wages. But this grievance involves only incidentally a claim for wages. It is not the sort of matter to which Article 18.10 was intended to apply. See, in this regard, Cases 461 and 507.

The substantial ground on which the case is presented has two aspects, first, whether or not the grievor did in fact smoke marijuana while on duty and second, if he did, whether or not the Company was justified in discharging him for that offence.

From all of the material before me I am satisfied that, on the balance of probabilities, the grievor did smoke marijuana while on duty. It is quite clear that other employees, (whose discharge as probationers is not in question) did smoke marijuana. It is also clear that the grievor was smoking something. There is direct evidence that the grievor (despite his statement to the contrary) was seen smoking a marijuana cigarette and not an ordinary one. In my view, one need not be an expert on narcotics to give evidence of that sort, especially in view of all of the material as to what occurred.

I conclude that the grievor did smoke marijuana while on duty. There is no doubt that that is a serious offence. In the case of an employee subject to the Uniform Code of Operating Rules such an offence might well justify discharge. In the case of an employee such as the grievor, however, it is my view that all of the circumstances should be considered. There is no doubt that any use

of alcohol, narcotics or some drugs by employees subject to duty or on duty is a serious matter, and that the safety of operations, of fellow workers and of the employee himself is at stake, even if not as immediately as in the case of those involved in the actual operation of trains.

In the instant case, the evidence establishes nothing more than that the grievor took a puff of a marijuana cigarette. There is no evidence of any impairment of his faculties (and while it is said that symptoms of the use of marijuana cannot be detected by casual observation, some of the cases have described such symptoms), and there is no evidence that the grievor was in other than momentary possession of anything more than a cigarette. While I was referred to a number of Public Law Board cases in which discharge for possession or use of marijuana was upheld, and while I do not, with respect, disagree with those decisions, I note that in such cases discharge has "generally" (but not always) been upheld.

In the instant case, having in mind the evidence as to extent of the grievor's involvement, and his short seniority but apparently clear record, it is my conclusion that the discharge of the grievor was too severe a penalty for this offence, serious as it is. It is my award that the grievor be reinstated in employment forthwith, without loss of seniority, but without other compensation.

J.F.W. Weatherill,
Arbitrator.