CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1324.
Heard at Montreal, Wednesday, January 9, 1985.

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Pacific Region)

and

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Conductor G. R. Mayert for "being under the influence of narcotics while on duty as Conductor, September 12, 1983; and for the use of narcotics while on duty at Illecillewaet, September 12, 1983, violation of Rule "G", Uniform Code of Operating Rules".

JOINT STATEMENT OF ISSUE:

A statement and "supplementary statement" were obtained from Conductor Mayert on September 14, 1983 and September 29, 1983 respectively as part of the investigation into his suspected violation of UCOR Rule "G". Following this investigation, Conductor Mayert was issued Form 104 dated September 23, 1983, stating as follows:

> "'DISMISSED' for violation of Rule "G",
> Revelstoke, B.C., September 11 and
> September 12, 1983."

The Union appealed this disxdssal and during the handling of the appeal, the Company agreed to expunge that portion of the discipline relating the use of narcotics while subject to duty September 11, 1983, however, Conductor Mayert remained dismissed for the remaining Rule "G" violations quoted in the Dispute.

The Union contends the evidence produced during the investigation was not conducive to a deduction that there had been a violation of General Rule "G", therefore dismissal was not justified.

The Union further contends that the discipline was handed down in an uneven and discriminatory manner in that the Crane Operator, who was also investigated as a result of this incident, was retained in service while the Conductor was dismissed.

The Company declined the appeal on the basis that the remaining discipline was proper and justified based on the evidence produced at the investigation.

FOR THE UNION: FOR THE COMPANY:

(SGD.) J. H. McLEOD (SGD.) L. A. HILL

General Chairman — General Manager, Operation and Maintenance.

There appeared on behalf of the Company:

D.N. McFarlane, Asst. Supervisor, Labour Relations, Vancouver
B.P. Scott, Labour Relations Officer, Montreal.
F.R. Shreenan, Supervisor, Labour Relations, Vancouver.
M.G. DeGirolamo, Asst. Superintendent, Revelstoke, B.C.

And on behalf of the Union:

J.H. McLeod, General Chairman, UTU, Calgary.
P.P. Burke, Vice President, UTU, Calgary.
I.L. Robb, Vice General Chairman, UTU, Thunder Bay.
L.0. Schillaci, Secretary, UTU, Vancouver.

AWARD OF THE ARBITRATOR

The grievor, Conductor G.R. Mayert, was discharged for being under the iniluence of a narcotic, namely marijuana, while subject to duty on Septe??er 12, 1983. In so doing it is charged that the grievor violated Rule "G" of the Uniform Code of Operating Rules.

At all times, the grievor denied consuming, as alleged, marijuana. The trade union has not argued mitigation of the discharge penalty if the company's allegations are sustained. The grievor's case stands or falls on the company satisfying the burden of establishing its allegations.

The company's case is based on circumstantial evidence. In other words no person directly observed the grievor consuming marijuana as alleged by the company. Nor, indeed, was any marijuana found on the grievor's person at any time relevant to his alle- gedly consuming the narcotic. The grievor is alleged however to have smoked marijuana on two occasions for periods of approximately ten minutes that were spent in a "warm-up" shack where he presumably was engaged in telephoning his dispatcher. At those material times the grievor was accompanied by a colleague, Crane Operator Barrett while he was in the warm-up shack.

As pointed out at the hearing the onus of proof on the company in making out its circumstantial case is to show, on the balance of probabilities, that not only do all the circumstances point to the grievor's consuming marijuana but those circums- tances must be inconsistent with any other reasonable conclusion than the grievor's culpability. (See; Re Air Canada and lAM)1978) 17 LA (2d) 337. The circumstantial evidence proferred by the company may be summarized as follows:-

(i) The grievor's admitted habit was to consume marijuana;
(ii) The grievor appeared inebriated and impaired and engaged in conduct, such as the errors he committed in receiving his dispatcher's instructions, that was indicative of his apathetic and confused state;

(iii) The "warm-up" shack was observed to have had at the material time in question the "stench" of marijuana. The grievor was observed opening a window of the "warm-up" shack presumably to remove and conceal the odeur of the marijuana.

(iv) The grievor's clothes smelled from the odeur of marijuana at a time shortly after he allegedly consumed the narcotic and in circumstances where his colleagues observed at the outset of the shift the existence of no such stench.

If it may be assumed (but without necessarily finding) that the employer, based on these circumstances, has satisfied the first leg of proving that the grievor's actions were consistent with smoking marijuana, as alleged, the issue then turns to whether the second leg has been met. That is to say, are the circums- tances such that they are inconsistent with any other reasonable conclusion than the grievor's coamittal of the alleged infraction?

In this regard, the uncontradicted evidence shows that at all material times the grievor was alleged to have consumed mari- juana he was in the presence of Crane Operator Barrett. The employee conceded that it had grave suspicions that Mr. Barrett also had consumed marijuana. Mr. Barrett denied this allegation in his interview. Nonetheless, the employer's major witness, Foreman Brehl confirmed, based on both their speech, appearance and manner, that each was impaired. Moreover Bridgeman Wood stated that he had observed Crane Operator Barrett to have been "glassy eyed" where the grievor exhibited no such symptom. Crane Operator Barrett was not disciplined for any allegation of having violated Rule "G".

It appears reasonable to draw two conclusions from the foregoing evidence when considered in the context of the employer's circumstantial case against the grievor. The first is that both Mr. Barrett and the grievor were smoking marijuana at the same time. Such an inference, irrespective of the resultant injustice complained of by the trade union, would still be consistent with the grievor's infraction in violating Rule "G" and thereby would warrant on the employer's part a disciplinary response.

The second (and more disturbing) inference that might reasonably been drawn is that at all material times the grievor was not smoking marijuana but Mr. Barrett was. In this regard the evidence shows the two employees were together at the very time the grievor is alleged to have consumed the narcotic. But, if, as suggested by Bridgeman Wood, only Crane Operator Barrett appeared "glassy-eyed" as result of his smoking marijuana presumably in the grievor's presence then an entirely different result might conceivably flow from the circumstances.

That is to say, the grievor may very well have opened up the window to the warm-up shack to remove the "stench" cre- ated by Mr. Barrett's consumption. Indeed, the stench on the grievor's clothing may also have resulted from the same cause. In other words, the circumstantial evidence when viewed, in an entirely different context, might very well support the hypo- thesis that Mr. Barrett,

and not the grievor, committed the infraction. And, it is for that reason I cannot conclude that the evidence, although liable to a number of different inter- pretations, is inconsistent with any other reasonable conclusion than the company's allegation of the grievor's consuming mari- juana. In short, it may very well be that the company disciplined the wrong employee.

As a result, the employer has failed to meet its burden of proof, as described, of establishing a circumstantial case of the allegations made against the grievor. Accordingly, the grievor's reinstatement is directed with compensation and all other benefits. I shall remain seized for the purpose of implementation.

DAVID H. KATES
ARBITRATOR.