CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO.1703

Heard at Montreal, Thursday 15 October 1987

Concerning

CANADIAN PACIFIC LIMITED

AND

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Conductor A. B. Hutchinson, Moose Jaw, for conduct incompatible with his employment as evident by his involvement with the cultivation of marijuana at his residence in Moose Jaw.

JOINT STATEMENT OF ISSUE:

On July 19, 1986, Mr. A. B. Hutchinson was charged with cultivation of marijuana contrary to Section 6(1) and (2) of the Narcotic Control Act and was required to appear at Provincial Court on July 30, 1986 as a result of this charge by the Crown. Mr. Hutchinson appeared in court as required at which time the charge was read to him, he entered no plea and elected trial by judge without a jury. A preliminary inquiry on this charge, with Mr. Hutchinson present, occurred on October 8, 1986 and the presiding judge determined there was sufficient evidence to order Mr. Hutchinson to stand trial. The trial in the Court of Queen's Bench has not yet been conducted. This matter was investigated by the Company following which Mr. Hutchinson was assessed the discipline noted in the Dispute.

The Union contends that the Company has no right to prejudge the case and assume Mr. Hutchinson's guilt. The Union further contends that the Company has not demonstrated the validity of the charge and, therefore, not proven conduct incompatible with his employment. Accordingly, the Union's position is that Conductor A. B. Hutchinson should be returned to services with payment for all time lost.

The Company contends that the evidence adduced at its investigation warrants the discipline assessed in this case.

FOR THE COMPANY;

(SGD) E. S. CAVANAUGH
General Manager,
Operation and Maintenance
Prairie and Pacific Regions

FOR THE UNION:

(SGD) ROBERT NAULT
Acting General Chairman

There appeared on behalf of the Company:

- D. A. Lypka	- Supervisor, Labour Relations, Winnipeg
- B. P. Scott	- Labour Relations Officer, Montreal
- G. W. McBurney	- Assistant Supervisor, Labour Relations, Winnipeg

And on Behalf of the Union:

- W. M. Jessop	- General Chairman, Calgary
- Ian Robb	- Local Chairman, Thunder Bay
- Robert D. Nault	- Vice-General Chairman, Kenora
- P. P. Burke	- Vice-President,

AWARD OF THE ARBITRATOR

Conductor A. B. Hutchinson of Moose Jaw was discharged for his involvement with a prohibited narcotic. It is common ground that on or about July 19, 1986 officers of the Royal Canadian Mounted Police and the Moose Jaw City Police conducted a search of Conductor Hutchinson's residence following a tip. In the backyard of Mr. Hutchinson's property they found 104 marijuana plants growing, some 74 of which were estimated to be in excess of six feet tall. Some of the plants were growing in a greenhouse apparently constructed for that purpose. The police seized four pounds of marijuana found in the grievor's residence. He was charged with the cultivation of marijuana, contrary to the Narcotics Control Act.

On July 29, 1986 the Company attempted to conduct an investigation into the continued employability of Conductor Hutchinson. The grievor attended the investigation but refused to answer all questions relating to the charges against him, including the fact that he had been charged. He apparently did so on the advice of his criminal lawyer, stating, "I cannot answer any incriminating questions that could have a bearing on my pending case"

The Company decided to hold Conductor Hutchinson out of service. On July 30, 1986, the grievor appeared in Provincial Court, at which time a preliminary hearing was set for October 8, 1986. Being aware of what transpired in court on July 30, the Company sought to conduct a further investigation on August 1, 1986. As he had before, Conductor Hutchinson continued to refuse to answer any questions relating to the charges against him, citing his lawyer's advice. Given the position taken by the grievor, the Company's officer, in a letter dated August 15, 1986, informed the grievor that his investigation was indefinitely adjourned until such time as Mr. Hutchinson would be willing to answer the Company's questions. The Union then grieved the Company's action, objecting to the employer's decision to hold him out of service.

On October 8, 1986 Mr. Hutchinson's preliminary inquiry was held in

Provincial Court at Moose Jaw. Based on the evidence then placed before the Court, including the four pounds of marijuana, it was deemed that there was sufficient cause for the matter to be sent to trial. Shortly thereafter Conductor Hutchinson apparently changed lawyers. Having been held out of service for some six months, he agreed to the resumption of the Company's investigation on January 21, 1987.

On that occasion, apparently on the advice of a different lawyer, the grievor agreed to answer the questions put to him. He acknowledged that previously, in 1977, he had been convicted of possession of marijuana - a fact until then unknown to the Company. He also acknowledged that on July 24, 1986, when he was asked by Superintendent Hedden of the Company to undergo a drug test, he refused to do so. During the investigation, through a series of almost monosyllabic answers, Conductor Hutchinson denied any involvement whatever in the cultivation of the 104 marijuana plants found on his property. When asked who cultivated the plants found both in the greenhouse and in the yard, he responded that his wife did. When further asked for what purpose they were cultivated, Conductor Hutchinson answered that it was for his wife's consumption. The grievor denied any involvement whatever in the cultivation or use of the marijuana, asserted that he did not use marijuana any longer and could not recall the last time that he had. When asked how long he had been aware that such quantities of marijuana were being cultivated and stored on his property, he answered "Approximately a month, I can't be sure".

Based on the information available to it, the Company concluded that Conductor Hutchinson had a degree of involvement in the cultivation and possession of substantial amounts of marijuana that was incompatible with his continued employment. Notwithstanding that his disciplinary record was clear at the time, in light of what it viewed as the severity of the circumstances, the Company terminated the grievor's employment. The Union grieves both the suspension of Conductor Hutchinson pending his investigation as well as his discharge. It relies, in part, on the fact that some time following the grievor's termination, the criminal charges against him were struck down by the Court, apparently because the delay in bringing the matter to trial was deemed contrary to the protections of the accused under the Canadian Charter of Rights. The Union stresses that the conduct for which the grievor was discharged, if true, relates entirely to his actions while off duty and off Company premises. It maintains that there is no evidence upon which either the suspension or the discharge of Conductor Hutchinson can be justified.

This case raises, in vivid terms, the issue of the obligations of a railroad in respect of the involvement of its employees in the production, trafficking, possession or use of illegal drugs. There was a time, in the 1960's, when a substantial body of opinion held that "soft" drugs, and marijuana in particular, were relatively benign substances whose use posed no substantial threat. Those days are gone. Two decades of experience with accidents, both industrial and non-industrial, sometimes tragic in their proportions, caused by the use of prohibited drugs, have gradually affirmed the conclusion that involvement with illegal drugs, including marijuana, poses a

dangerous threat to health and safety. That was dramatically brought home to the railroading industry by the recent Conrail tragedy. On January 4, 1987, near Baltimore, a consist of locomotives of the Conrail Railroad ran through a number of signals, including a stop signal, into the path of an oncoming Amtrack passenger train, causing a collision that resulted in the loss of 16 lives and injuries to another 175 persons. The investigation disclosed that the engineer and brakeman in control of the locomotive consist had substantial amounts of marijuana in their blood at the time of the collision.

Much has been written in recent years about the problem of alcohol and drug abuse as it impacts on the workplace. It is a problem that relates to productivity as well as to health and safety. According to one estimate, a degree of substance abuse, whether of drugs or alcohol, is present in some ten percent of employees, a statistic which is said to obtain reliably in virtually all industries. (See, generally Denenberg, T.S., Masters, R.L., Cooper, K.B., "The Arbitration of Employee Drug Abuse Cases, Arbitration Promise and Performance", Proceedings of the Thirty-Sixth Annual Meeting, National Academy of Arbitrators, Quebec City, May 24-27, 1983 (Washington, D.C. Bureau of National Affairs, 1984) p90-127).

Most employers, including the Company in the instant case, have come to recognize that chronic drug abuse, like alcoholism, is a medical condition to be dealt with insofar as possible through an Employee Assistance Program (EAP). To be successful, such programs must be perceived by the employee as non-threatening, and they necessarily depend to a large extent on the voluntary participation of the employee in need. Given the high cost of training employees and the inefficiencies inherent in losing the services of qualified and experienced personnel, the high success rate of such programs is generally seen as a substantial aid to productivity. (See Denenberg and Denenberg "Alcohol and Drug Issues in the Workplace" (Bureau of National Affairs, Washington, D.C., 1983) and see Employee Assistance Programs: Benefits, Problems and Prospects, Bureau of National Affairs (Washington, D.C., 1987)).

While there are many parallels between drug and alcohol abuse, there are also some important differences. Firstly, employers are generally more familiar with the problems, symptoms and treatment of alcoholism. As a general rule, although not exclusively, the use of illegal drugs is found among younger and more junior employees, and the realities of drug use are less familiar to both senior management and senior union officers. Lastly, drug use carries the taint of illegality that is not a factor in the use of alcohol. This may account in some measure for the reluctance of some employers to deal with the issue and of many employees to come forward and seek assistance.

Another major point of distinction between alcohol and drugs is the problem of detectability, a factor which has given rise to the controversial topic of drug testing in the workplace. While inebriation through alcohol may be relatively obvious, and even reduced impairment can be detected by non-expert observation, the same is not true for the presence of some drugs in an employee. Given the safety hazards inherent in drug abuse in the workplace, drug testing has become the subject of much discussion and increasing

application in a variety of employment settings. The reliability of drug tests has been closely scrutinized and, at times, questioned. (See e.g. Palca "U.S. Drug Tests: Hit-and-Miss", Nature, vol, 323, Sept. 1986, p285). While both urine tests and blood tests employed to detect the presence of drugs cannot claim complete infallibility, it appears that when such tests are administered in keeping with exacting technical and professional standards, they can produce a generally acceptable degree of reliability and have, therefore, become more and more established as a means of fact-finding by certain public authorities.

The policing of drug use among the employees of public carriers is one area in which drug testing has gained increasing acceptance. The incompatibility of habitual drug use or dependence by employees in the transportation industry, whose activities impact readily on the lives and safety of many, is scarcely debatable. The possession of an illegal drug by a railway employee while on duty or subject to duty is plainly prohibited by Rule G of the Uniform Code of Operating Rules. Such conduct has been clearly confirmed by this office as a dismissable offence. (See CROA Case No. 1536). The United States Federal Aviation Administration revokes the medical certification of any pilot for "mental and neurologic" standards if it is established that he or she has an active drug dependence. Because of their concern with the debilitating after effects of drug use, a number of airlines have adopted rules prohibiting any use whatever of drugs for a period of 24 hours prior to active duty. A physician retained by the US Airlines Pilots Association and that union's attorney have jointly stated that in their opinion the use of marijuana is not compatible with flight safety if it is within 24 hours of flight time. (See Denenberg, Masters and Cooper, Proceedings of the Thirty-Sixth Annual Meeting of the National Academy of Arbitrators, cited above).

Concern for the threat which drug use poses for the safety of rail transportation has prompted the Federal Railroad Administration of the United States to enact regulations to govern the drug testing of railway employees. (See 50 Fed. Reg. 31, 508 (1985)). While the returns are still preliminary, at least one authority has expressed the view that the regulation has dramatically reduced the incidence of drug-related accidents within the railway industry in that country. (See "Accuracy of Drug Tests Examined During Drug and Alcohol Abuse Conference", Daily Labour Report No. 226, Nov. 24, 1986, pp. A-8, A-12).

The American regulation seeks, insofar as possible, to balance the interest of the railway to ensure safe operations with the interest of the employee not to be unduly deprived of rights of personal dignity and privacy. It does not permit random testing or testing for unsubstantiated reasons. Testing is permitted only following an accident or where, in the opinion of at least two trained members of management, it is established that there are grounds for reasonable suspicion that an employee is involved in the use of a prohibited drug. A fuller elaboration of the railroad regulations is found in Hartsfield, "Medical Examinations as a Method of Investigating Employee Wrongdoing", (1986) Labour Law Journal, Oct, p. 692 at pp. 693-694. The regulation provides for stringent conditions which must exist prior to requiring an employee to submit to a urine test,

including procedural safeguards for the maintenance, calibration and administration of testing devices by qualified technicians. Since urine tests may not pin-point with sufficient exactness the time at which an individual was exposed to a drug, in the event of a positive test, the employee is given the option of a blood test which can yield more precise evidence to rule out current impairment. An employee can therefore avoid the presumption of impairment by demanding to provide a blood sample at the time a urine test is taken.

The constitutional legitimacy of the regulation depends substantially on the decision of the Supreme Court of the United States in Schmerber v California, (1966) 384, US757, which held that the use of a blood test to establish a criminal driving offence does not violate the Fifth Amendment right against self-incrimination or the Fourth Amendment's prohibition of unreasonable searches and seizures. American judicial authority would appear to support the view that an employee refusing, without reasonable justification, to submit to a drug test required for the legitimate business purposes of an employer is subject to discharge. (See Hartsfield, article cited above and part 2 of the same article appearing in (1986) Labour Law Journal, November 767).

There are, as yet, no regulations in Canada comparable to those governing drug testing in the American railway industry. However, boards of arbitration in Canada have, on a number of occasions, found drug use and involvement with drugs to be grounds for discipline, and in some cases for discharge, particularly in the field of transportation. As noted above, in CROA 1536, this office found that the possession of marijuana while on duty justified the discharge of an employee. Similar conclusions have been drawn in other parts of the transportation industry. For example, it was found by the arbitrator in Re Air Canada and International Association of Machinists, Lodge 148, (1973) 5 L.A.C. (2d), 7 (Andrews), that trafficking in marijuana was incompatible with the grievor's continued employment as an aircraft maintenance mechanic. However, in another case, the mere possession of a small quantity of marijuana while off duty was not seen as sufficient to justify discharge (Re Air Canada and International Association of Machinists (1975) 10 L.A.C. (2d) 346 (Morin). Understandably, the cases treat off-duty trafficking more seriously than possession. Apart from the more serious criminal ramifications impacting on an employee's reputation, that approach reflects a natural concern about a person whose involvement with drugs extends to producing or selling it for profit.

It is not unnatural to harbour concerns that the profit motive may cause the individual's trafficking activities to spread into the workplace.

There are no reported decisions on the issue of drug testing for employees in Canada of which the arbitrator is aware. There are, however, some general principles which are instructive. It is well established that an employer does have the right to require an employee to submit to a medical examination where the purpose of such an examination is to confirm that he or she is physically fit to perform assigned work in a safe manner. That conclusion is confirmed in a number of arbitral awards. (See, e.g. Monarch Fine Foods Co.

Ltd. (1978), 20 L.A.C. (2d) 419 (M.G. Picher); B.P. Oil Ltd. (1972) 24 L.A.C. 122 (Palmer); Lake Ontario Steel Co. Ltd. (1970) 22 L.A.C. 206 (Hanrahan)).

Does an employer's right to require an employee to undergo a fitness examination extend to requiring a drug test? I am satisfied that in certain circumstances it must. Where, as in the instant case, the employer is a public carrier, and the employee's duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a drug test. Given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, absent any express provision to the contrary.

Canadian public policy reflects a clear concern for the dangers of drug use within the transportation industry. As noted above, Rule G of the Uniform Code of Operating Rules articulates the direct prohibition of drug possession for railroad employees on duty or subject to duty. In the aviation industry, Regulation 409 of the Air Regulations under the Aeronautics Act (C.R.C. 1978 c.2) specifically prohibits a person from acting as a crew member of an aircraft while using a drug that may cause impairment that would endanger flight safety. An extraordinary provision was recently introduced into section 5.5 of the Aeronautics Act, (S.C. 1985 c.28), whereby a physician who is aware of a medical condition or impairment in his or her patient that would constitute a hazard to aviation safety is placed under a statutory obligation, with the protection of privilege, to report that condition to a medical adviser designated by the Minister of Transport. That duty would appear to extend to conditions of drug impairment and drug dependence. In the transportation industry, where the risk of drug use is concerned, of necessity vigilance and caution have become the rule.

What guidance do the foregoing considerations provide in the instant case? It appears to the Arbitrator that a number of useful principles emerge. The first is that as an employer charged with the safe operation of a railroad, the Company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end the Company must exert vigilance and may, where reasonable justification is demonstrated, require an employee to submit to a drug test. Any such test must, however, meet rigorous standards from the stand-point of the equipment, the procedure and the qualifications and care of the technician responsible for it. The result of a drug test is nothing more than a form of evidence. Like any evidence, its reliability is subject to challenge, and an employer seeking to rely on its results will, in any subsequent dispute, bear the burden of establishing, on the balance of probabilities, that the result is correct. The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and a risk of impairment, may leave the employee liable to removal from service. It is simply incompatible with the obligations of a public carrier to its customers, employees and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either

drug-dependent or drug-impaired. In addition to attracting discipline, the refusal of an employee to undergo a drug test in appropriate circumstances may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of the refusal. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril.

A first issue in the instant case is whether the Company was justified in holding the grievor out of service pending its investigation. The conduct for which he was criminally charged appeared, on its face, to involve activities away from the workplace and on the grievor's own time. It is well-established that the laying of a criminal charge does not, of itself, justify the suspension of an employee, particularly where the conduct giving rise to the charge does not appear to be work-related. In some cases, however, off-duty conduct that is the subject of a criminal charge may seriously affect the legitimate interests of the employer. The operative principle was well summarized by the majority of the board of arbitration in Re Ontario Jockey Club and Mutuel Employees Association (1977) 17 L.A.C. (2d) 176 (Kennedy) at p. 178:

> ... The better opinion would appear to be that the employer's right to suspend where an employee has been charged with a criminal offence must be assessed in the light of a balancing of interests between employer and employee. The employee, of course, has a legitimate interest in being considered innocent until he has been proven guilty. If, however, the alleged offence is so related to the employment relationship that the continued employment of the employee would present a serious and immediate risk to the legitimate concerns of the employer as to its financial integrity, security and safety of its property and other employees as well as its public reputation, then indefinite suspension until the charges have been disposed of would appear to be justified. In determining the nature of the legitimate interests of the employer, it is necessary to look at the nature of the offence, the work being performed by the employee, and the nature of the employer's business.

(See also Re Oshawa General Hospital and Ontario Nurses Association, (1981), 30 L.A.C. (2d) 5 (Adams) where a board of arbitration sustained the suspension by a hospital of a nurse found in possession of a substantial quantity of marijuana and marijuana plants, and charged with the possession of narcotics for the purposes of trafficking and see, generally, Re Hydro Electric Commission of the City of Hamilton and International Brotherhood of Electrical Workers, Local 138, 1984, 13 L.A.C. (3d) 204 (Devlin)).

Mr. Hutchinson is a conductor, and as such is the person primarily responsible for the movement of the train to which he is assigned. Based on a newspaper report and the observations of its own officers during the grievor's court appearances, the Company had reason to

believe that Conductor Hutchinson was involved in the possession of marijuana and the cultivation of more than 100 plants in his greenhouse and backyard. The outward circumstances were such as to give the Company reasonable apprehension to believe that Conductor Hutchinson was heavily involved in what may be described as the "drug culture", relating to the production and use of marijuana. In the arbitrator's view, in those circumstances it was not unreasonable for the Company to have substantial concerns about whether Conductor Hutchinson was a habitual user of marijuana, whose consumption of that drug might seriously impair his work performance. Indeed, given the quantity of marijuana he was charged with cultivating and possessing, there were grounds for the Company to be concerned that he was, in fact, drug-dependent.

Nothing in the grievor's conduct at the time he was charged and when the Company attempted to conduct its initial investigation provided any reassurance in respect of these serious questions. Upon inquiries by the Company, Conductor Hutchinson refused to answer any questions whatever relating to the charges against him. Indeed he refused to acknowledge that he had been charged. He declined to answer any questions respecting his involvement in the use of drugs and, when asked to do so, refused to submit to a drug test. In these circumstances the arbitrator is satisfied that the Company had ample justification to hold Conductor Hutchinson out of service pending a full and satisfactory investigation of his involvement with the cultivation, possession and use of marijuana. In the circumstances which then obtained, given the prima facie evidence of the grievor's involvement with marijuana, as long as these critical questions remained unanswered, the Company could not responsibly continue his assignment to a substantially unsupervised position in charge of the movement of trains. The Company was justified in having a reasonable apprehension for the safety of its operations and had grounds for reasonable concern about its public reputation should Conductor Hutchinson be maintained in service. In this regard it is of little consequence that the newspapers did not identify Mr. Hutchinson as a railway employee. The Company is not obliged to await a tragic accident or a scathing editorial before acting to protect its reputation.

I turn to consider whether the evidence discloses just cause for the discharge of Conductor Hutchinson. While the off-duty possession of a prohibited drug is a serious matter, such conduct will not necessarily justify discharge, or indeed any measure of discipline, if the objective circumstances disclose no adverse impact on the legitimate interests of the employer. If, for example, during a period of extended vacation, an employee is charged with the possession of a small quantity of marijuana in circumstances that do not suggest habitual use or drug dependence, or any involvement with the drug in a work-related context, it is difficult to see what interest the Company could assert to impose a disciplinary penalty for such an event. Needless to say, each case must turn on its own particular facts.

In a drug-related discipline case the burden of proof, as in any case of discipline, is upon the Company. Where, however, certain objective facts - however circumstantial - are established that would point to the heavy involvement of a railroad employee in the

production and use of drugs, the onus may shift to the employee to provide a full and satisfactory account of his or her actions and circumstances to justify continued employment. The absence of a full and credible explanation, in the face of overwhelmingly incriminating evidence, leaves an employer with the public safety obligations of a railroad with little choice but to suspend or terminate the employment of a person whose habits or activities appear so dramatically incompatible with the safe operation of its business. On the other hand, the admission by an employee that he or she is involved in drug use or is drug dependent should not necessarily be seen as justifying automatic termination. In many circumstances, where drug dependence is, like alcoholism, tantamount to an illness, a non-disciplinary response, involving the offer of help through a company sponsored employee assistance program might be the more appropriate reaction. Where, however, the employee is uncooperative and evidence of his or her involvement with drug use goes unexplained, termination of the employment relationship may be the only responsible alternative.

In the instant case, has Mr. Hutchinson been sufficiently candid and forthcoming? I must regrettably conclude that he has not. His actions and statements in explanation of his obviously incriminating circumstances tax all credulity. Faced with the inescapable fact that substantial amounts of a prohibited drug were found both growing and stored on his property, Conductor Hutchinson initially refused to answer any questions put to him by his employer. Critical to the assessment of his credibility is the further fact that he refused to submit to a drug test when asked to do so. While he may be free to make that choice, he cannot claim freedom from the compelling inferences that may be drawn from it. This is not a case, moreover, where the reliability of a drug test can be, or indeed was, asserted as a reason for his refusal. Had the test which the Company proposed to administer been in some way deficient or unreliable, its results would have been a matter for full examination through the grievance and arbitration procedure. Because of Mr. Hutchinson's summary refusal to undergo any test, however, that issue never matured.

Conductor Hutchinson's purported explanation for the presence of substantial quantities of marijuana on his property give further reason for pause. While he admits to a prior conviction for the possession of marijuana, a fact previously undisclosed to the Company, he denies any use of it at the time he was charged, and any involvement whatever in the fact that remarkable amounts of that drug were found stored and growing at his home. In short, almost monosyllabic answers, he asserts that all of the marijuana found in his home, being some four pounds in quantity, as well as the 104 plants growing there, both inside a greenhouse and in the yard, were entirely the doing of his wife. As he would have it, she planted, tended, harvested and processed all of that marijuana for her own consumption. The dubiousness of that unflattering account is compounded by the entirely incredible statement of Conductor Hutchinson that he was entirely unaware of this state of affairs save for perhaps a month prior to the charges brought against him.

It is generally accepted that an employer making a grave charge against an employee should be expected to provide proof whose reliability is commensurate with the seriousness of the allegation

(See Indusmin Ltd. (1978), 20 L.A.C. (2d) 87 (M.G. Picher). By the same token, when such evidence is established which, absent some good and credible explanation, would, on the balance of probabilities, lead to an inference of wrongdoing, it is incumbent on the employee affected to provide a full and compelling explanation. In this case Conductor Hutchinson has fallen short of discharging that obligation. No corroborating witnesses were brought forward to substantiate his plea of total innocence at the Company's investigation, nor did he appear at the arbitration hearing where his explanation might be made the subject of testimony under oath and the probe of cross-examination. On the whole of the evidence, having regard to the grievor's prior criminal record, to his refusal to submit to a drug test, and to all of the objective circumstances disclosed, I find it impossible to conclude, on the balance of probabilities, that the grievor has been candid with the Company and this office, or that he is innocent of involvement in the production and possession of large quantities of marijuana at his place of residence. In these circumstances, and in the absence of any persuasive mitigating factors, the arbitrator cannot conclude that the discharge of Conductor Hutchinson was other than a responsible and appropriate response by the Company.

For these reasons the grievance must be dismissed.

MICHEL G. PICHER
ARBITRATOR