

**IN RE ARBITRATION BETWEEN:**

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**INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 120**

**and**

**KNIFE RIVER, INC.**

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**DECISION AND AWARD OF ARBITRATOR**

**FMCS CASE # 080718-57947-3**

**JEFFREY W. JACOBS**

**ARBITRATOR**

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**January 18, 2009**

IN RE ARBITRATION BETWEEN:

IBT #120,  
and

DECISION AND AWARD OF ARBITRATOR  
FMCS CASE # 080718-57947-3  
Multiple suspensions grievance

Knife River, Inc.

**APPEARANCES:**

**FOR THE UNION:**

Dan Phillips, Solberg, Stewart, Miller & Tjon  
Dean Cypher, Business Agent Local 120  
Allen Bodin, grievant  
Gordon Baker, grievant  
Steve Rosenfeldt, grievant

**FOR THE EMPLOYER:**

Joel Abrahamson, Leonard, Street & Dienard  
Jeff Reinholz, former General Manager  
Jams Erbstoesser, Sales and Dispatch Employee  
Todd Nicholas, Plant Supervisor  
Jeff Eberhardt, General Manager

**PRELIMINARY STATEMENT**

The hearing in the matter was held on December 11, 2009 at 9:00 a.m. at the Wingate Inn in Fargo, ND. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on January 8, 2010 at which point the record was closed.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement dated January 1, 2008 through December 31, 2010. The grievance procedure is contained on pages 3 and 4 of the labor agreement. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service.

**ISSUES**

Was the grievance timely and procedurally arbitrable?

On the merits the issues are as follows: Did the Company have just cause to issue 3-day suspensions to the grievants in this matter? If not, what shall the remedy be?

**COMPANY'S POSITION:**

The Company took the position that the grievance is untimely and should be dismissed. The Company further took the position that there was just cause of the suspensions issued to each of the original six grievants, (now five since one grievant resigned.) In support of this the Company made the following contentions:

1. The Company asserted that Knife River Materials purchased Ames Sand Gravel and immediately made it clear that it had a far more stringent culture and a much greater emphasis on safety than did the predecessor employer. The Company promulgated a set of rules regarding safety, as well as other rules, but it was clear that this new Company placed considerably more value on safety rules and that it would enforce those rules strictly and mete out discipline to those employees found in violation of them.

2. The Company has a set of so-called “cardinal rules” for safety. These are found at page 9 of the Knife River & Knife River Materials Safe Work Practices Handbook, Company exhibit 3. These were given to all affected employees including all of the grievants, see e.g. Company 4 & 5, and they are presumed to have knowledge of them and of the consequences for failure to adhere to them.

3. Moreover, these rules were also posted in conspicuous places throughout the Company’s place of businesses and the grievants all acknowledged seeing them even though they claimed they did not read them thoroughly. The Company asserted that the employees knew of these rules and were given adequate notice of the need to comply with them.

4. The applicable rule in this matter reads as follows:

**KRC CARDINAL RULES OF SAFETY:**

Violation of the below listed Cardinal Rules of Safety will result in disciplinary action that, at a minimum, shall consist of a three (3) day suspension without pay, or, in management’s discretion, such other more stringent action, as may be appropriate under the circumstances up to and including termination of employment.

**Seat Belts** – Wearing seat belts while operating or while as a passenger in all Company vehicles and equipment, where required, is mandatory. Employees will also require non-employees to wear seat belts while in Company vehicles or applicable equipment.

5. The Handbook also contains Safety Best practices, found at page 8, which reads as follows:  
Seat belts shall be properly worn by the operator and all passengers in Company vehicles and equipment.

6. The Company argues that these clear pronouncements were more than enough notice to the employees that they were required to wear seat belts at all times while in a Company vehicle. Additionally, the Company noted that there was a meeting specifically called to discuss safety and that the seat belt rule was the subject of considerable specific discussion at that meeting.

7. The Company noted that even though the language of the cited safety rules and cardinal rules was enough, the Company took the extra step of holding a safety meeting, which took place a few weeks before the discipline in this case was issued, and announced that the seat belt rule was absolute and that employees were expected to wear them “at all times.” The Company further noted that there was some pushback by employees at the meeting and that several of them raised very specific questions as to when and under what circumstances exceptions of that rule would be allowed. Some raised questions about moving a very small distance and were told that seat belts were required. Others asked about “curbing” and the need to see people to the side of the truck and the need to occasionally lean over to do so. They were told that seat belts were required at all times and that if they could not see they would need to stop the vehicle and advise whoever was outside of the truck to make sure they were visible in the mirrors so the operator could safely operate the vehicle. There were other requests for exceptions and all were met with the same response: seat belts would be required to be worn *at all times*. The Company asserted that even though there were no discussions about driving in the yard or using the weigh scale, that would become the subject of the instant discipline and grievance, it was made clear that seat belts were required at all times.

8. The Company elaborated on what “at all times” meant and pointed to the somewhat spirited meeting held in the spring of 2008 to discuss this very rule. Mr. Reinholz made it crystal clear that seat belts were to be worn at all times and that they should not be unbuckled while the driver was in the truck operating it. The Company asserted in the strongest possible terms that everyone clearly understood what their responsibilities were with regard to seat belts but that some drivers simply wanted to be scofflaws and chose not to comply

9. The Company further noted that the very purpose of the safety meeting in the spring of 2008 was to make it clear that the safety rules were going to be more stringent and more strictly enforced. If the drivers already understood that they were to wear their seat belts on the roads and on the job sites, why then hold such a meeting except to make clear that they were to wear them in the yard, since they were already required to wear them everywhere else. The Company asserted that the seat belt rule was well published and understood by all the drivers.

10. The Company characterized this situation as a clash of wills between management and a small group of drivers who simply did not want to comply with the seat belt rule. Most of the drivers did wear their seat belts after the safety meeting, even though many of them did not do so prior to that. Those that did not were appropriately disciplined pursuant to the Company's disciplinary rules.

11. The Company pointed to an incident in the Bismarck, ND location several days prior to June 24, 2008, in which two employees were issued 3-day suspensions for failure to wear their seat belts at a job site. This, the Company claimed, was a well known situation throughout the Company and that it served as notice too of the strict zero tolerance policy on seat belt usage.

12. On June 24, 2008 six employees were observed not wearing seat belts when they drove onto the weigh scale, which had been installed in the spring of 2008. After consultation with upper management, the supervisor at the Fargo location was instructed to issue 3-day suspensions to each of the 6 employees. One of them quit immediately leaving 5 grievants.

13. The Company asserted that the matter was not procedurally proper and pointed to the provisions of the grievance procedure as follows: "Step 1. The employee or the employee and the steward shall present the grievance orally to the employee's immediate supervisor within five (5) working days, the immediate supervisor will answer the grievance orally within three (3) working days excluding Sunday and holidays."

14. The Company further asserted that only one of the five grievants, Mr. Austinson, (who did not appear at the hearing) followed the proper procedure called for in the grievance procedure and orally presented the grievance to their direct supervisors. The Company asserted that this matter is therefore untimely and procedurally defective and should be denied on that basis.

15. On the merits, the Company asserted that the grievants did not dispute that they were not wearing their seat belts. Further, even though one of the grievants claimed that he needed to lean outside of the truck to see the rails on the side of the scale, at least 4 or 5 of the grievants were seen with their windows rolled up and air conditioning on. Further, since the discipline was meted out all of these employees have complied with the rule and wear their seat belts. They drive onto the scale hundred of times per year and have done so without apparent problem or mishaps. Thus, the argument that they needed to lean outside the truck to negotiate the ramp rings hollow since several of them did not at the time and none of them has ever since.

16. The Company further noted that when the grievants were on suspension they called in drivers from a sister company in St. Cloud. When they were observed not wearing their seat belts they were sent home. The Company cited this as a further example of its commitment to safety in general and to this seat belt rule in particular and that even though it was quite inconvenient to send these drivers home during a busy time of year, the Company's commitment to safety took precedence over even the need to get product out.

17. The Company pointed to its safety Rules as follows:

**Cardinal Rules of Safety.**

**KRC CARDINAL RULES OF SAFETY**

Violation of the below listed Cardinal Rules of Safety will result in disciplinary action that, at a minimum, shall consist of a three (3) day suspension without pay, or, in management's discretion, such other more stringent action as may be appropriate under the circumstances, up to and including termination of employment.

**Seat Belts:** Wearing seat belts while operating or while as passengers in all Company vehicles and equipment, where required, is mandatory. Employees will also require non-employees to wear seat belts while in Company vehicles or applicable equipment.

18. The Company also pointed to federal regulations governing these drivers as follows:

**C. Federal Motor Carrier Regulation.**

**Use of seat belts.**

A commercial motor vehicle which has a seatbelt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself/herself with the seatbelt assembly.

49 C.F.R. § 392.16.

19. The essence of the Company's case is that the rule was well published; it was a reasonable rule related to the operation of the business, that the grievants all acknowledged failure to comply with the rules, the rule has been consistently enforced and that the degree of discipline is clearly spelled out in the Cardinal Rules and is appropriate.

The Company seeks an award denying the grievance in its entirety.

**UNION'S POSITION**

The Union took the position that there was not just cause for the suspensions in this matter. In support of this position the Union made the following contentions:

1. The Union claimed that there was no procedural defect in the way this matter was handled and that it should proceed to the merits. The Union pointed to the same provisions of the grievance procedure and noted that the employees all presented the grievance to their immediate supervisor right away. The Union also pointed to the inherent irony here of the Company's argument since it was their immediate supervisor who gave them the discipline in the first place and none of the grievants agreed with it. One employee, the one who eventually quit over this, was quite animated about it and protested loudly and vehemently to the supervisor that very day, actually within seconds of getting the discipline, that the rules were nonsense and that the discipline unjustified.

2. Further, the employees immediately ran to the Union Hall and told their Business Agent about it. Mr. Cypher called Mr. Reinholz within hours of the discipline and also protested it. Under these circumstances the Union asserted, it can hardly be said that it failed to present the grievance within the meaning of the grievance procedure.

3. On the merits, The Union asserted that the terms of the Rule itself are not as absolute as the Company would have the arbitrator believe. The Union asserted that there was no notice to the employees that the failure to wear seat belts in the yard was even a violation of the seat belt rule. The Rule itself only requires seat belt usage “where required.”

4. The Union also asserted that the Company must show by “clear and convincing proof” that there was a disciplinable violation of the safety rules and that the Company failed to do so here. As discussed below, the Rule speaks in terms of mandatory seat belt usage “where required.” Here the Company failed to show that they were required on the scale.

5. The Union asserted that employees have never been required to wear seat belts in the yard and that this made sense; the yard was mostly level and the trucks moved slowly. The drivers knew that they were required to wear their seat belts once they left the yard since their commercial driver’s license required that. They also understood that they were required to wear seat belts on job sites because job sites have other vehicles, can be on uneven ground and are more dangerous.

6. Further, the Union pointed to the meeting that occurred a few weeks before the June 24, 2008 incidents and noted that the drivers were never made aware of the requirement to wear their seat belts in the yard or on the scale. There was considerable discussion about wearing seat belts on job sites but no discussion whatsoever about wearing them in the yard.

7. Moreover, the Company never said specifically that seat belts were required in the yard and that they should have in order to provide adequate notice to these employees since it was well known that the drivers never wore them in the yard.

8. The Union noted too that the supervisor was not new and had been with Ames prior to the purchase by Knife River. Thus, he knew the drivers did not wear their seat belts in the yard and should have been far more specific about that here, especially since there was no other prior warning to these drivers before getting a 3-day suspension. The Union cited Elkouri and argued that adequate notice is a precondition of discipline and that here notice was lacking.

9. The Union also noted what it terms the inherent irony and hypocrisy of the Company's position here. The Union noted that all the drivers were observed not wearing their seat belts while driving onto the weigh scale. That scale was only installed in the late spring of 2008 and the drivers were unfamiliar with it and were quite concerned about lining up the truck so their wheels would not slide off. The Union pointed out that there is a four to five foot drop-off on each side. It has a step ramp to get onto it and the drivers had a hard time seeing where their wheels are when they are on that ramp. The drivers are quite concerned about safety and want to be sure they do not drive off the edge of the ramp. There is perhaps 4 to 6 inches clearance between the edge of the ramp and the truck tires so there is little room for error.

10. The Union asserted most vehemently that the drivers need to lean out the window in order to see where they are especially when going up the ramp and the nose of the truck obscures the view of the ramp itself. The Union introduced pictures that clearly show that trucks frequently hit the guardrails and that it would be quite easy for these large truck tires to climb over the rails. The drivers are simply trying to see where they are and the best way to do that is to lean out of the window. Their seat belts prevent this from happening thus actually making it less safe by wearing their seat belts.

11. The Union thus argued that the rule itself makes little or no sense and is thus not reasonably related to the operation of the business. Further, despite repeated attempts to get the Company to install flags or markers of some sort on the ramp, the Company has failed and refused to do so thus making the ramp less safe.

12. Finally, the Union asserted that the fact that six of the 10 employees who were observed on June 24, 2008 were not wearing their seat belts shows the level of lack of notice to the employees about wearing their seat belts in the yard. There was no conspiracy by these employees to challenge the rule or to engage in some sort of concerted behavior – they simply did not know that they were required to wear their seat belts in the yard since they had never been required to do it in the past. Notice must have been lacking since so many employees were seen without their seat belts on.

13. The Union asserted that a 3-day suspension is far too great a penalty for this infraction and that given the speed and extreme unlikelihood that anything untoward would happen or that any injury would occur from the failure to wear a seat belt in the yard, the arbitrator should reverse the discipline and expunge this discipline from these employees' records.

The Union seeks an award sustaining the grievances, making the grievants whole for all lost pay and accrued benefits as the result of the discipline herein.

### **MEMORANDUM AND DISCUSSION**

There was no dispute about any of the salient facts of this case. The grievants were all drivers many of whom had years of experience with the Company or its predecessor. They are licensed as commercial drivers and as such are required to wear seat belts any time they operate their vehicles on public roads. This requirement has been in place long before Knife River purchased Ames.

There is no dispute that on the day in question, June 24, 2008, the drivers in question were observed driving up the weigh scale in the yard without their seat belts on. The scale was installed in the spring of 2008. The evidence also showed that in order to get onto the scale the drivers are required to drive up a ramp and keep the truck centered on the scale itself. The pictures show that the scale is 9 feet 6 inches wide and that the trucks are approximately 12 inches narrower than the ramp itself leaving only 6 inches on each side of the truck. There is a small guardrail on each side of the scale that is approximately 8 inches high. This is designed to keep the truck tires from falling off the edge of the scale and that the tires do frequently brush up against these rails.

Finally, the drivers indicated that as they drive up the ramp to get on the ramp to the scale they briefly lose site of the ramp itself and cannot see where they are in order to keep the trucks lined up. There was some evidence to show that when the drivers are driving up the ramp they briefly lose sight of it due to the slope and the large nose of the truck going up in the air. This will be discussed more below.

Company witnesses testified that they observed the drivers without their seat belts on as they drove up the scale on June 24, 2008. There was no dispute: the drivers in question were not wearing their seat belts as they drove up the scale ramp that day.

Mr. Reinholz contacted upper management and was informed that the Company took this violation very seriously, per the cardinal rules, and that the drivers were all to be given the 3-day suspensions called for in the cardinal rules themselves. He called all the drivers in and informed them they would be given 3 day suspensions. One employee was apparently quite vocal in his objection to this and became very agitated. He eventually quit. All the employees in this matter went to the Union Hall immediately and informed their business agent what had happened. He then contacted the Company right away and made the Union's position known and commenced the grievance process.

#### TIMELINESS

The Company argued that the matter was untimely since the Union did not follow the procedure set forth in the grievance process. The grievance procedure requires the employee or the employee and the steward to present the grievance orally to the employee's immediate supervisor within five (5) working days. The evidence shows that this was clearly done.

First, the employees met with the immediate supervisor to receive the discipline. It was clear that at least one of the employees spoke for the entire group in voicing their displeasure with the discipline. The process requiring the employees to "present the grievance orally to the immediate supervisor" was thus clearly met in this case. Further, the business agent called the supervisor and orally presented the grievance within hours of the discipline.

While the procedure calls for the steward to make this call, it is by no means a perversion of that language to allow for the Union Business Agent to do so. The purpose of the procedure is to make sure that the Company has notice of the grievance and has an opportunity to adjust it prior to a more formal grievance being filed. Here all of these purposes were met and the Company suffered absolutely no harm. Accordingly, the matter is procedurally proper and can proceed on the merits.

## MERITS

There was no dispute as to what happened on June 24, 2008. There is no dispute that the drivers did not wear their seat belts on that day on their way up the scale. The Union's claim is about the notice given to the grievants and whether there was adequate warning to them of the consequences of the failure to wear seat belts in the yard.

The evidence showed that Knife River has a more stringent policy regarding safety as compared to Ames. The evidence showed that the drivers did not use their seat belts in the yard when they were employed by Ames. When Knife River took over it promulgated a set of safety rules found in the Knife River Materials Safe Work Practices Handbook, Company Exhibit 3. As noted above, there is also a set of what are known as Cardinal Rules of Safety. It was clear that the employees in question received copies of these rules in the handbook. It was also clear that the rules were posted in conspicuous locations and that the grievants saw them at various places as well. The Union did not assail the Company's right to promulgate these rules but it did assail the language of the rules and asserted that it did not provide adequate notice to the employees.

Indeed, the Cardinal Rules do use the term "where required" and therein lies the essence this dispute. The Company asserted that the language of the Rules is clear and means just what it says – that seat belt usage is required everywhere.

The difficulty is that it does not say that directly thus calling into question what "where required" means in this context. Since the drivers testified that they did not use seat belts under the previous management the Rule itself by its terms would not carry the day. If the cardinal rules were the sole basis of the notice the result herein would likely be different. The employees' understanding of "where required" without more could well be reasonably limited to the roads and job sites.

Here however, the evidence showed that there was a specific safety meeting held only weeks before the incident in question at which the topic turned to seat belts. It was this meeting that carries the day for the employer.

There was little question that the management representatives made it clear that the new Company had a much more stringent policy and attitude toward safety. Even the employer witnesses described this as somewhat Draconian but this only serves to support the Company's case here.

There was some merit to the Company's assertion that the Company was making it clear that it would have much more stringent rules and that the only reasonable place to expand the rules already in place was in the yard. Indeed, if the rules were going to stay the same, there would have been little reason to have the meeting. Moreover, there would have been little reason to relay the message about how safety conscious the new Company was and to warn the employees about the cardinal rules and the consequences of violating them.

The Company witness testified credibly that he informed the employees that the seat belts were to be worn at all times. There was little more he could have done to have made that message clearer to them. Indeed, the grievants all indicated that they heard that and acknowledged that the terms "at all times" was mentioned at this meeting. The Company asserted that "where required" was thus literally every time the drivers were in or operating the vehicle. This was why they kept saying that seat belts had to be worn "at all times."

The Union argued though that despite considerable discussion, the employees reasonably assumed that they did not have to wear their seat belts in the yard. This was based largely on the fact that several employees brought up different scenarios all of which pertained to operating the vehicles on job sites. There was discussion about curbing and even moving a few inches to position a vehicle but in all cases the message was clear – wear their seat belts at all times.

There was no discussion about use of the vehicles in the yard or specifically about driving up the ramp to the scale. The Union argued that the fact that there was no specific discussion about the yard or the scale created an exception to the general rule to wear seat belts at all times. The failure to bring up an exception does not create an exception. The employer indicated that seat belts were to be worn at all times.

The fact that the Company did not provide a list of every imaginable scenario does not mean that there was such a list nor does it mean that there was an exception created based on the older rules in place with the prior employer. The whole purpose of the meeting was to make it clear that those older rules were not necessarily in place.

On this record the evidence showed that there was notice to the employees that they were to wear their seat belts. If they had wanted to ask about that scenario there was adequate opportunity to do so. On this record though, it was clear that the answer would have been the same as for the other scenarios – wear their seat belts at all times.

The Union further argued that the employees were acting reasonably and that the rule as applied here was unreasonable since it was safer not to wear their seat belts while driving up the ramp to the scale. One of the other elements of just cause analysis is that the rule in question be reasonably related to the operation of the business. Further, the application of the rule must be reasonable, although there is little guidance in the literature as to what that means. Presumably, it is left to arbitrators applying the just case provisions of the labor agreement to determine if the rule and the application of it under the facts and circumstances of each individual case is reasonable.

The Union asserted that this rule may not be reasonable since it is dangerous to drive up the ramp without being able to lean out of the window to see where the tires of the truck are. One of the recognized tenets of just cause is a discussion of whether the rule in question is reasonably related to the efficient and safe operation of the business.

The Union assailed the rule as it applies to this particular operation due largely to the fact that the operator does briefly lose sight of the ramp due to the steep angle of approach as they line up on the scale ramp and due to the narrowness of the ramp itself. The Union argued essentially that the drivers were actually being *more* safety conscious by not wearing their seat belts because they then had an easier time leaning out the window to see where their tires were and thus avoid driving off the ramp.

Several things are problematic with this argument. First, even though it was shown that the drivers do lose sight of the ramp momentarily as they drive up, the evidence showed that they have been able to perform the task successfully for almost a year and a half. Clearly, the employees are legitimately concerned about being able to see when on the scale and this is understandable but it was not shown to be so inherently unsafe as to warrant violating the rule. There was no evidence that drivers are having difficulty operating their trucks on the ramp after the enforcement of this rule nor was there any evidence of trucks falling off the ramp. There was evidence that the tires do occasionally scrape the sides but presumably that is why the guardrail is there – to direct drivers back onto the ramp. There was evidence to show that the drivers must be, and are, cautious when driving on the scale ramp but that they do so slowly and carefully and that so far mishaps have been avoided.<sup>1</sup>

Second, while it was shown that the nose of the truck rises up as it goes up the ramp, it was also apparent from the pictures that there are visual reference points on the ramp itself that provide guidance as to where the truck is. Fortunately, there was no evidence that trucks have gone over the side of the scale or the ramp and this too adds some credibility to the Company's argument here.

Further, and significantly, the evidence showed that several of the employees were not leaning out of the window on the day in question. Only one of the employees raised this issue on June 24, 2008. The rest were shown to have had their windows rolled up and were not leaning out of the window. This fact undercut the claim that the drivers needed to lean out the window to get up the ramp. On this record, there was insufficient evidence to show that driving up the ramp with a seat belt on was so unreasonably dangerous that it justified an exception to the rule.

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<sup>1</sup> The Union noted that there have been some discussions about placing flags on the ramp to guide the drivers better. While the arbitrator does not have the power to order this, it seems more than reasonable to place such flags or markers on the sides of the ramp to assist the drivers in avoidance of accidents or mishaps. For a company that claims it is so safety conscious it was curious that these have not been installed yet. On this record the lack of these flags did not operate to change the result however.

The final argument raised by the Union is that the penalty is too severe. This gave the arbitrator some pause here. Certainly, a unilaterally implemented rule is subject to an analysis of whether the penalty fits the crime as a part of any just cause inquiry. On one hand, a 3-day suspension for a first offense seems harsh. On the other, there is no provision in the labor agreement calling for progressive discipline or any language that calls for a warning of some kind prior to a suspension.

Moreover, the clear terms of the policy call for a 3-day suspension even on a first offense. The evidence also showed that it was made quite clear that the seat belt rule is a so –called cardinal offense – i.e., punishable more harshly or leading to a greater penalty sooner than other less serious offenses. Arbitrators frequently are called upon to determine penalties but should be cautious about substituting their own judgment for what the Company feels is a serious problem. Obviously this Company feels that seat belt usage is very important and has educated and warned its employees about that. It is not for an arbitrator to “dispense his own brand of industrial justice” by imposing a different penalty.

Here, while a 3-day penalty may not have been what the arbitrator would have done without a specific rule calling for that penalty, and it likely would not have been, the penalty under these circumstances is not so severe that it should be reduced or tinkered with.

The Company also noted that the discipline had the desired effect – people are now wearing their seat belts. None of these grievants have had a similar issue since June 2008 and have presumably “gotten the message” and are complying with the rule. For that reason as well, there is support for imposition of this level of discipline for this proven offense. Accordingly, it is determined that there was adequate notice to the employees and that there was just cause for the discipline in this case.

## **AWARD**

The Grievances are DENIED.

Dated: January 18, 2010  
IBT 120 and Knife River award.doc

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Jeffrey W. Jacobs, arbitrator