PUBLIC LAW BOARD NO. 1844

AWARD NO. 23

CASE NO. 27

PARTIES TO THE DISPUTE

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The thirty (30) day suspension of Machine Operator F. D. Clapp was without just and sufficient cause and wholly disproportionate to the alleged offense. (Carrier's File D-11-1-338)

(2) Machine Operator Clapp be allowed compensation for all time lost and his personal record be cleared of the discipline assessed."

OPINION OF BOARD:

Claimant F. D. Clapp is a regularly assigned Machine Operator. On September 14, 1976, he was operating a backhoe machine near Dixon, Illinois, when Assistant Division Manager--Engineering P. L. Boger arrived at the job site. Claimant had descended from the cab of his machine and the ADME noticed that he was wearing neither a hard hat nor safety glasses. Mr. Boger immediately advised Claimant that he would be issued a safety reminder for not following Safety Rules. The next day, September 15, 1976, Claimant was served with a notice to attend an investigation into "your failure to wear safety glasses during working hours on September 14, 1976, at approximately 10:00 a.m., while working in the vicinity of River Street, in Dixon, Illinois." At the investigation it was established that Claimant was not wearing safety glasses when he was observed by the ADME. In fact, Claimant testified that notwithstanding various safety regulations he never

had worn safety glasses or a hard hat while operating any machinery during his 3-1/2 years of employment. We do not find persuasive the Organization's contention that the record establishes a mutually accepted practice whereby employees were not required to wear safety equipment while operating machinery. To the contrary, the record shows that Carrier did not acquiesce in this so-called practice and a general safety reminder was communicated to all employees on the Division, including Claimant, on June 13, 1975, emphasizing the wearing of safety glasses, hard hats and safety shoes in the performance of duties. So far as the record shows, the safety regulations are a reasonable exercise of management discretion to attempt to protect employees from injury and the Carrier from liability. In every sense of the word employees disregard the safety regulations at their peril.

The only question remaining is whether the imposition of a thirty-day suspension is unreasonably harsh for failure to wear safety glasses. At the investigative hearing Carrier witness Boger read into the record alleged excerpts from Claimant's personnel record which purported to record the issuance of two prior "safety reminders" for not wearing safety glasses. A number of awards have commented critically and in some cases overturned the assessment of discipline where Carrier has so intermingled past transgressions with present charges that a reasonable review cannot determine whether an employee was found culpable on the basis of solid evidence of the instant misconduct or merely upon an impermissible inference based upon earlier misconduct. See, e.g., Third Division Awards 11130 and 11308. It should be understood that review of the employee's personnel record is appropriate to determine the amount of discipline to be assessed once Carrier has demonstrated by substantial competent evidence that the employee is culpable

of the misconduct with which he is charged. But the personnel record is relevant only to the question of the amount of discipline to be imposed and must not be permitted to enter into the determination of whether Claimant was culpable. A careful review of the transcript persuades us that competent evidence including Claimant's own admission established that he did not wear the safety glasses and accordingly we cannot conclude from this particular record that Carrier improperly deduced his guilt from alleged prior transgressions. On the other hand, we find that the Organization has raised a valid objection to the apparent use by Carrier of the two prior alleged "safety reminders" as bases for increasing the severity of the discipline assessed for the September 14, 1976, failure to wear safety glasses. We are not prepared to hold on this record that letters of reprimand may never constitute discipline, with all the implications such a holding might have on related questions of applicability of Rule 19 and subsequent consideration when reviewing personnel records to determine the amount of discipline to impose for proven later offenses. Cf. Third Division Awards 18244, 19713 and 21335. But it does appear to us that neither Carrier nor the Organization can have it both ways. So far as we can tell from the record before us, the "safety reminders" did not constitute discipline and accordingly Carrier's assertions are not well founded that Claimant was twice "reprimanded" before the more severe discipline of the thirty-day suspension was imposed. Viewing the case in terms of progressive discipline, the incident of September 14, 1976, is the first proven instance of safety rule violation by the Claimant. In our judgment a thirty-day suspension without pay is excessively severe for a first offense of this kind. Since the record indicates that Carrier erroneously concluded that this was a third offense rather than a first offense for discipline purposes, we shall reduce the penalty imposed by two-thirds. The uncontradicted record indicates that Claimant lost

168 hours at his straight time rate as a result of the penalty imposed by Carrier. Carrier shall compensate Claimant at his straight time rate for two-thirds of the time lost (112 hours).

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;

2. that the Board has jurisdiction over the dispute involved herein; and

3. that the Agreement was violated.

AWARD

Claim sustained to the extent indicated in the Opinion. Carrier is directed to comply with this Award within thirty (30) days of issuance.

Dana E. Eischen, Chairman

C. M. Berge, Employee Member

R. W. Schmiege, Carrier Member

Dated April 11, 1978