Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33344
Docket No. MW-33707
99-3-97-3-155

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Seaboard
(System Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline [ten (10) overhead suspension for six (6) months] assessed B&B Foreman F. Flowers for his alleged responsibility in connection with the injury sustained by Bridgeman S. Brown Jr., on September 13, 1995 was without just and sufficient cause and based on an unproven charge [System File 5(5)(95)/12 (95-1130) SSY].

(2) B&B Foreman F. Flowers shall now have the charges dropped and have his record cleared of any mention of this incident."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant, with 14 years of service, held and established seniority as an Assistant Foreman. On September 13, 1995, he was working as such on Bridge Force 6F68 that was to build a retaining wall. After conducting a safety briefing the Bridge Force commenced the task, using a locomotive crane equipped with a clam bucket to lower 14 foot long timbers. The clam bucket grasped the middle of one such timber, attached to a drag line. When the drag line was released, the bucket slid or became twisted and struck Bridgeman S. Brown, Jr., who suffered injuries. The record reflects that for some period prior to the accident, it was a common practice, known to management as well as employees, to use the clam bucket in that fashion. The record also reflects that on the day before the accident, management informed some employees that the practice was to cease.

After a preliminary investigation, the Claimant was charged with gross negligence and using improper equipment, for which he was assessed a ten-day overhead suspension.

Upon review of the parties' contentions it is clear that the matter turns on whether the Carrier clearly ended the prior practice of using the clam bucket in the fashion that it was used on the day in question. If the Carrier did in fact do so, and if the Claimant was aware of that fact, the Claimant's conduct was in clear violation of a reasonable rule. On the other hand, if the Claimant was not aware, he would have no reason to believe that the prior practice was no longer acceptable.

On this critical point, a close examination of the record reveals that the Carrier did indeed announce that the prior practice was to end. However, the testimony concerning whether that communication was made known to the Claimant is less than clear. On the one hand, the Claimant clearly and unequivocally denied that he was told of any such change to the practice of using the clam bucket to move timbers. On the other hand, the Bridge Supervisor testified that he told someone of this directive and that when he did so, several employees were present. However, he was only able to testify that he <u>believed</u> the Claimant was ". . . standing around . . . then" and admitted that he did not go directly to the Claimant and inform him that the prior practice should end. At best, the Bridge Supervisor could only say that he advised the Claimant to use the "right tool for the right job."

It is axiomatic that the Carrier bears the burden of proof in a discipline matter and, as noted above, it meets its burden of proof in this claim only if it can show that the

Claimant was put on notice that the prior practice with regard to using the clam bucket was to end. We do not believe that the Carrier met its burden of proof in this regard. The testimony of the Bridge Supervisor is less than emphatic and pales in comparison to the Claimant's clear and unequivocal denial that the directive was made. Thus, we conclude that the Claimant had no reason to believe that using the clam bucket to lower timbers was no longer acceptable and when he did, and an accident occurred as a result, he was not guilty of gross negligence for using improper equipment. Therefore, the discipline must be overturned. We so order.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of June 1999.