

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 34975  
Docket No. MW-33413  
00-3-96-3-935

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

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

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) day suspension] imposed upon Mr. S. Brown, Jr. for alleged responsibility and failure to perform his duties safely and properly in connection with an on-duty injury he sustained on September 13, 1995 was arbitrary, capricious and on the basis of unproven charges [System File BROWN-A/12 (95-1269) SSY].
- (2) The Claimant shall be compensated for all wage loss suffered, including attendance at the investigation involved here, and his record shall be cleared of the charges leveled against him.”

**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.

The Claimant was assigned and working as a Bridgeman on Bridge Force 6F68 at Bridge SH 411.2. on the Andrews Subdivision of the Florence Division on September 13, 1995. He was working under the supervision of Relief Foreman F. E. Flowers when the incident giving rise to this dispute occurred.

On September 13, 1995 the Claimant was struck in the chest by a "clam bucket" when he was setting a timber support upright in a hole. The timber was picked up and set in the hole by a crane. The crane was equipped with a "clam bucket" which is used to remove soil in the area where the retaining wall was to be set.

The boom of the crane was extended past the timber over the Claimant. When the "clam bucket" released the timber, the bucket swung into the Claimant, knocking him backwards against a retaining wall.

As the Claimant explained, he and another Bridgeman were located about four feet below the track. One of the men "had the end of the timber" and he had the other part of the timber which was 14 feet in length. The bucket was hooked in the middle of the timber to prevent it from tipping.

The Claimant stated that "one guy" on top was holding the drag line to keep the bucket from knocking the dirt back into the hole that had "just [been] dug." The Claimant gave "the guy" standing above a signal to bring the machine ahead. About that time, the retainer wall caps hit the main wall. The Claimant then gave "the guy" on top a signal to let go and he [the "guy on top"] relayed that signal to the power driver who let the bucket loose. Upon doing so, the Claimant remembered the bucket coming toward him and he was unable to get out of the way of the bucket. After the bucket hit him, the Claimant said "the guy" above, hollered "back up."

The Claimant was immediately taken to a hospital. However, after he was examined, the Claimant was found not to be seriously injured.

An Investigation was held as scheduled on September 25, 1995 to determine the facts and place responsibility if any, in connection with the incident. As a result of the Investigation, the Claimant was found by the Carrier to be responsible for the on-duty injury. By its letter dated October 14, 1995, the Carrier also stated the following:

**"Facts developed in the investigation indicate that you are responsible and at fault with failure to perform your duties safely and properly. Your lack of personal judgement with the potential hazard of being in the way of moving loads and using improper equipment to perform the job at hand is judged as gross negligence. The resulting injury is a direct result of your lack of personal responsibility in being careless and injury prone.**

**This is the second incident of personal injury in 1995. I refer to your June 12, 1995 injury. In light of these facts, you are being suspended from services of CSX Transportation, Inc. for a period of ten (10) days without pay effective at beginning of business day, October 16, 1995."**

**The issue raised by this dispute is whether the Carrier sustained its burden of proving that the Claimant failed to perform his duties "safely and properly," had committed "gross negligence" and "was careless and injury prone." Based upon the record, the Board concludes that the Carrier failed to carry its burden.**

**In this connection, Supervisor of Bridges, H. T. Jeffers conducted the preliminary investigation at the scene of the accident on the afternoon of September 13. As he stated, he asked some of the men who were present when the incident occurred earlier that day how it happened. He testified that "... the team was setting the timber in the hole ... and they were using a clam bucket to set the timber which in the past lots of peoples always has."**

**Further in this testimony, Jeffers said that "some of the fellows now tell me they ... occasionally do use it that way. But over the several period of years we've been trying to get out things like that." The Claimant acknowledged in the past "supervisors [have] been around whenever the clam bucket was used in similar fashion." The Board concludes that the past and customary work practice was to use a clam bucket in setting timbers as it was performed by the Claimant and other employees on September 13, 1995.**

**Jeffers testified that on the day before the incident, he noticed one of the men hooking the bucket onto the machine. He further testified that he instructed "them to leave the bucket off, don't use the bucket bring the timber off and that's as far as I went, in telling them how to put the timber in the hole." However, Jeffers could not recall whom he instructed not to use the clam bucket. Jeffers repeated that he was unable to**

specifically recall giving Foreman F. Flowers or the Claimant, "specific instructions" as to whether to use a clam bucket or not."

The Claimant testified that the only time he heard that the bucket was not to be used was the day after he was injured. Until that time, the Claimant said "we was using the bucket." He added that the supervisors never "sent a statement out that the bucket wasn't a proper tool to move this piece of timber so we used it" on September 13.

The Board concludes that it was after the injury sustained by the Claimant that the Carrier issued instructions to its employees not to use the clam bucket to handle timber. The record establishes that the Carrier failed to properly instruct its employees, including the Claimant of a potentially hazardous work practice.

The record also warrants the conclusion that the Claimant was positioned during the incident to keep the timber from hitting himself and his co-workers. Accordingly, the Carrier failed to prove that the Claimant failed to perform his duties safely and properly and that he was grossly negligent of "being in the way of moving loads and using improper equipment."

In its letter to the Claimant dated October 14, 1995, the Carrier alluded to a June 12, 1995 injury, thus indicating that the personal injury he sustained on September 13, 1995 was "the second incident of personal injury in 1995." The Claimant's "personal record" which was part of the transcript of the Hearing, does not include any such injury on June 12, 1995. It is sufficient to state that the Carrier did not establish that the Claimant was injury prone.

The record establishes that the Carrier failed to prove that the Claimant was responsible for the on-duty injury he sustained on September 13, 1995. Accordingly, the disciplinary suspension issued to the Claimant was arbitrary and capricious. This decision is consistent with the Board's findings in Third Division Award 33344, which over turned the discipline assessed B & B Foremen F. E. Flowers in connection with this incident.

### **AWARD**

**Claim sustained.**

**Form 1**  
**Page 5**

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**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 20th day of September, 2000.**