Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 41864
Docket No. MW-41666
14-3-NRAB-00003-110185

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

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(BNSF Railway Company (former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The discipline [Level S thirty (30) day record suspension and a three (3) year probation period] imposed upon Mr. J. Glascock by letter dated March 22, 2010 for alleged violation of EI 1.4 Fall Protection, EI 1.4.9 Working on Railroad Bridges and MOWOR 1.6 Conduct for alleged failure to wear fall protection in an area where it was required, while working alongside a crane at Mile Post 165.3 on the Brookfield Sub on July 1, 2009 in connection with falling off a bridge and sustaining a personal injury while assigned as a machine operator was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-18/10-10-0226 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Glascock shall now receive the remedy prescribed by the parties in Rule 40(G)."

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 actions that gave rise to the discipline addressed in this matter took place on July 1, 2009. At that time, the Claimant had amassed 34 years of railroad service, most (approximately 20) were as a Crane Operator.

We find several concerns addressed by the Organization to be of little or no merit. Among them are the following:

(1) The Notice of Investigation erred by citing the milepost of the bridge as 163.5, whereas the correct MP was 165.3. The record is clear that neither the Claimant nor the Organization was misled by the transposed numbers.

(2) The Organization argues that the Safety Incident Analysis Process (SIAP) was more appropriate than discipline as a way to handle the matter, but it is clear that the decision to utilize SIAP is a matter for managerial discretion.

(3) The Organization notes that there were many instances where what had been said in the Investigation were reflected in the transcript as being inaudible. However, there is no indication in the record that the Organization was harmed by this common problem in transcribing an audio recording. Moreover, we note

that the Organization had its own recording of the proceedings against which it could have checked the omissions in the transcript.

(4) The fact that the Claimant's Supervisor concluded after his preliminary investigation that the Claimant broke the Rule does not mean that the Carrier prejudged the matter.

(5) Although the Organization was not informed in advance of a witness called by the Carrier, the cure for such "surprise" is not rejection of the disciplinary action, but, upon request by the surprised party, a recess and time to prepare. No such request was made."

On the day addressed, the Claimant was part of a work crew of ten involved in laying two panels on a bridge. He was operating a crane between two segments of co-workers. One group of workers was positioned in front of the crane readying the surface in preparation for placement of the panels by the crane while the remainder of the crew was some distance behind completing the installation. As the Claimant was working, the air hose that was necessary for all crane activities failed and the crane ceased functioning. The air hose ran from the crane over a flat car containing the panels and a ballast car that required the air supply for it to function.

The Claimant did not know where the trouble spot was. He was the only worker involved in the operation of the crane. His assessment was that the portion of the work crew that was behind him was so distant that it would take considerable time for one of them to come to his aid, while the portion in front, while near, had no radio and could not hear him if he were to shout. The disabled air hose had also disabled the whistle and the horn on the crane.

The Claimant made the decision to locate the problem himself. In the process of dismounting from the cab of the crane, he fell from the bridge. Although he did not know of the details at the time, he reported later that he had suffered breaks in his back and hyperextension injuries to his left ankle and right elbow.

Two questions raised in the Investigation are central to the Board's decision. (1) Was the Claimant in a situation where fall protection was required? (2) Was the charge against the Claimant without basis given the data developed in the Investigation?

The record evidence establishes that fall protection was required. The Claimant attempted to dismount from the cab of a crane that was located on a bridge. Although he was not aware at the time of the precise height of the bridge, it was some 15 feet off the ground. An operator sitting in the cab of a crane on that bridge would be an estimated nine to 11 feet higher off the ground. The Carrier (and OSHA) regulations require fall protection when a worker is functioning at 12 feet or more above ground level. William R. Sims, the Carrier's Manager of Structures, Chicago Division, responded to the following question from the Investigating Officer:

> **"MICHAEL HEILLE: So basically if you, what you stated is true, between nine and 11 feet is the correct, is the operator's seat in that crane, all he has to do is be above or be over a bridge one or two feet or three feet we'll say. Even your dimensions and he would be outside the rules?**
>
> **WILLIAM R SIMS: Yes, of federal regulations, correct."**

The Claimant acknowledged that he was required to have fall protection when out on a bridge above 15 feet. He asserted that his fall protection on that day was using his handrail:

> **"I have a handrail down the length of the derrick [crane] . . . . It's a dirty place to hang onto but as I reached for it, I, I didn't get a hold of it. *** The ballast line was all the way up to the top of the rail *** the ballast line was probably 18 inches below the tie . . . . With getting out of the crane with the ballast line being to the top of the rail . . . [t]he ballast kicked out and the handrail wasn't where it should have been. . . . [T]he ballast was so high on the bridge that it ran up to me probably at least eight inches higher than I expected it."**

A short time later the following exchange took place:

> **"MICHAEL HEILLE: When you were reaching for the handrail, did you maintain three-point contact? I guess your feet would have been on the ground. Where was your other hand?**
>
> **JAMES M GLASCOCK: Other hand was been on the handrail just getting out of the crane. Best I remember, as I'm reaching. I had a hold of it and I was reaching for the other handrail and the ballast kicked out and away I went. I wasn't expecting the ballast to give way on me or.**
>
> **MICHAEL HEILLE: So were you maintaining three-point contact then?**
>
> **JAMES M GLASCOCK: Until I fell.**
>
> **MICHAEL HEILLE: And you fell because the ballast kicked out?**
>
> **JAMES M GLASCOCK: Yes, sir."**

The Organization argues:

> **"It is evident from the testimony provided by the Claimant that the Carrier mistakenly contends in its notice of investigation and disciplinary letter that the Claimant was not wearing fall protection when required to do so 'while walking alongside a crane.' This assertion by the Carrier . . . was clearly refuted by the Claimant because when asked by the hearing officer if he was walking alongside a crane, Claimant responded 'No, I didn't make it a step.' Hence, it is quite clear Carrier is blatantly and mistakenly placing allegations upon the Claimant that are not based on the pertinent facts developed in this investigation."**

In the Board's view, this argument has little merit. While it is true that the Claimant fell before he was able to complete what he set out to do, his clear

intention in dismounting from the cab of the crane was to walk back tracing the air hose to locate the source of its malfunction. As he stated, he intended to rely upon the handrail that ran the length of the crane for fall protection, but his mission was, if necessary, to trace the air hose back over the two cars that were attached to the crane. For this, fall protection beyond the handrail could well have been necessary. The record establishes that the Claimant undertook this task without the required protection for his personal safety.

The record also indicates that there was no fall protection equipment available in the crane. The Claimant argues that supervision was to blame for this deficit, but the reason the fall protection equipment was not available is not relevant to our decision. What is relevant is that instead of waiting for assistance, the Claimant undertook activity that required fall protection equipment without the equipment that was required.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of June 2014.