

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22976  
Docket Number **MW-23160**

A. Robert Lowry, Referee

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(The Denver and Rio Grande Western Railroad Company

**STATEMENT OF CLAIM:**, "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Track Patrolman D. J. Chess was without just and sufficient cause and on the basis of unproven charges [System File D-50-78/MW-26-78/.

(2) Claimant D. J. Chess shall be afforded the remedy prescribed in Rule 28(d)."

**OPINION OF BOARD:** Mr. D. J. Chess, the claimant, was a Track Patrolman working between Cannon City and Salida on July 26, 1978. Claimant in the performance of his duties operates a track motor car. The record shows he passed all the qualifying examinations required by the Carrier for a motor car operator. He also had the proper block authority to operate in the territory involved. At approximately 2:45 P.M. on July 26, 1978, near Mile Post 180.6 the claimant was operating his motor car on a one percent descending grade around a six degree curve on a heavily greased rail when he saw Section Foreman Espinoza's motor car approaching from the opposite direction ascending the grade about 80 feet away. Claimant chess testified that he was moving less than five miles per hour and his motor car was nearly stopped at the point of contact. Claimant dismounted from the motor car about 20 feet from contact. After contact claimant's motor car was shwed back approximately 25 feet, indicating the speed and force of the oncoming motor car.

Section Foreman Espinoza's motor car, carrying two other employees, was pulling a push car loaded with three railroad ties, a rail expander, rail fork, rail tongs, two big jacks, four shwels, three picks, two spike maulers, two lining bars, a claw bar and a water can. Section Foreman Espinoza's motor car was moving ten miles per hour or faster at time of contact. Espinoza testified he was moving 10 MPH, Section Laborer Rollison, one of the riders on Espinoza's car, estimated the speed to be 15 MPH and Section Laborer Hugley, the other rider on his car, estimated their speed to be 20 MPH.

**Immediately** prior to contact Espinoza and his **two riders** jumped from the motor car. Espinoza and **Hugley** were injured, Espinoza wrenched his knee and **Hugley** apparently had a more serious shoulder injury as he testified he would be off work 3 or 4 weeks. Claimant Chess was not injured. Extensive **damage** was done to both motor cars.

**Formal** investigation was held as scheduled on August 2, 1978. A copy of the transcript of the investigation was **made** a **part** of the record.

**Both** Section **Foreman** Espinoza and the claimant were dismissed from **service**, the claimant by letter of August 8, 1978. The record shows Espinoza **acknowledging** his part of the **responsibility** for the accident. Claimant Chess denied any responsibility for the accident. Espinoza requested and was granted **reinstatement** by the Carrier **without** back pay ou October 30, 1978. Six weeks later on December 11, 1978, Carrier notified **claimant he was** reinstated as of thatdate. The claimant rejected reinstatement.

Carrier's Safety **Rule** 405 of its Operating Department under Track Car Operations reads:

'Track cars **must** be operated with the expectation of finding the **main** track iu use **and** care exercised to avoid 'striking other track cars. It **must** be expected that on Two or More Tracks, locomotives **and** trains may be operated against the current of traffic without notice to track car operators."

Rule 415 of the **same Rules** reads:

"Special care **must** be used when operating track cars while rails are wet, icy or frosty and at all **times** **must** be operated at a safe speed for existing **conditions**."

These apparently are the two Operating **Rules** the Carrier **contends** claimant violated.

The record is clear that **claimant was** operating his motor car at a safe speed when he **was** engaging the sir degree curve with heavily greased rail, descending a one percent grade, at the **time** he first observed the oncoming motor car. The **record** further shows his wtor car-was moving **5 MPH** or less at the **time** of impact. The oncoming heavily loaded motor **car**, in accordance with the record, was moving between 10 and 20 **MPH**, it too operating wer the heavily greased rail. The **Board** is of the

opinion the only way the claimant could have avoided the accident would have been to have **removed** his motor car from the track as **it** would have been struck whether it was stopped or not. **Claimant** testified his car was "nearly" stopped at the time of impact and this testimony was not refuted. The record supports the position that **claimant** was exercising every effort to comply with the **rules**, but **conditions beyond** his control caused the accident.

The Board concludes, **and** so awards, that the claimant's service record be cleared and he be reinstated with seniority and all other rights unimpaired and with back pay from date held out of service until December 11; 1978, inclusive, when the Carrier offered reinstatement and claimant declined.

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

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute **are** respectively Carrier and **Employees** within the meaning of the Railway **Labor** Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the **Agreement** was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, this 12th day of September 1980.