

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 shoved 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 shovels, 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 on October 30, 1978. Six weeks later on December 11, 1978, Carrier notified claimant he was reinstated as of that date. 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 in 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 six 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 motor 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 over 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 Employees 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:

A.W. Paulos
Executive Secretary

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