

Award No. 686
Docket No. 647
2-D&RGW-MA-'42

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee I. L. Sharfman when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 10, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (MACHINISTS)**

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYEES: That Machinist Specialist Adolph Kochevar be reinstated with seniority rights unimpaired and compensated for all time lost subsequent to his improper suspension from service, August 19, 1940, under Rules 32 and 33 (d), Denver and Rio Grande Western Agreement, effective November 1, 1935.

EMPLOYEES' STATEMENT OF FACTS: On April 9, 1941, Adolph Kochevar will attain the age of 59; that he entered the service of the carrier, September 17, 1919, as a hostler helper, and subsequently served in several occupations, including that of a machinist helper, from which classification on October 16, 1929, he was transferred or promoted to the classification and work of a machinist, and has since remained in the service continuously as a machinist until August 19, 1940.

About August 12, 1940, Machinist Adolph Kochevar, during his regular tour of duty as a machinist in the roundhouse was contacted by master mechanic, Mr. McLean, in reference to submitting himself to a physical re-examination. On August 19, 1940, at about 10:00 A. M. Machinist Adolph Kochevar was again contacted by master mechanic, Mr. McLean, in regard to submitting himself to a physical reexamination. Again about 2:00 P. M. on this same date, master mechanic, Mr. McLean, contacted Mr. Kochevar while on duty and there and then verbally, but authoritively, suspended him from service at the close of this shift, of that day, for failure to then consent to a physical reexamination.

POSITION OF EMPLOYEES: Employees desire to preface their contentions by pointing out that under provisions of current wage agreement between the Denver & Rio Grande Western Railroad Company and its employees (mechanical section thereof), certain rules are incorporated, setting forth procedure to be followed in the handling of grievances; the manner in which disciplinary measures may be applied; also, the requirement of applicants for employment. These rules are known as Rules 32, and 33 and read in part as follows:

"Rule 33 (d) An employee who has been in the service more than sixty (60) days, or whose application for service has been formally approved, shall not be disciplined or dismissed without an investiga-

3. The application shall be approved or disapproved within sixty (60) days after the applicant began work, except in event of applicant giving false information approval may be revoked at any time.

and it will be observed there is nothing in this rule which prohibits the carrier from requiring employes to submit to physical reexaminations if necessary.

As to Rule 33 (d), the carrier asserts this rule is not applicable to the claim for the reason Mr. Kochevar has not been disciplined or dismissed. The question of whether Mr. Kochevar is physically able to work rests entirely with him, and in view of the fact that Machinist Specialist S. D. C. Green, 72 years of age, who with Mr. Kochevar was required to submit to a physical reexamination was qualified for service August 9, 1940, there appears to be no good reason for Mr. Kochevar refusing to be reexamined.

The carrier desires to direct the attention of the Board to that part of Rule 26 (g) which reads:

"In restoration of force, senior laid off men will be given preference in returning to service, provided that after ninety (90) days out of service they shall pass a **satisfactory physical reexamination** * * *." (Emphasis ours.)

and asserts it cannot be said that it does not have the right under any circumstances, as the organization indicated in conference, to require employes to undergo physical reexaminations.

The carrier has no desire to be and has never been arbitrary in the matter of requiring mechanical department employes to undergo physical reexaminations. In this case it was the conviction of our Grand Junction supervisory forces there has been a change in Mr. Kochevar's physical condition, and in the absence of any rule to the contrary we requested him to report for reexamination.

That the carrier is not arbitrary in this matter is substantiated by the fact an offer was made to the organization—on January 23, 1941—to the effect if Mr. Kochevar reported to our surgeon at Grand Junction and his condition was such in the opinion of our surgeon he should not be reemployed, we were willing to have him submit a report of his physical condition from his private physician, and if these two doctors disagreed as to his condition, to have an independent physician, chosen by the organization and the management, to make an examination of Mr. Kochevar, the expense of the independent physician to be divided equally.

The carrier reasserts and contends there is nothing in Rule 32 which prohibits it from requiring employes to take a physical reexamination, and holds that Rule 33 (d) has no bearing on the case, as Mr. Kochevar has not been disciplined or dismissed.

The carrier further contends if it has the right to require employes to submit to physical reexamination after being out of service in excess of 90 days as result of force reduction—as provided in Rule 26 (g)—there can be no good grounds to the organization's contention, when they have no rule to the contrary, that we have no right to require employes to take a physical reexamination, when there has been an indicated change in the employes' physical condition.

In conclusion, the carrier desires to state the question of Mr. Kochevar returning to service has rested entirely with him, and in its judgment nothing could be fairer than the offer made to his representative under date of January 23, 1941, above mentioned.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

The evidence of record discloses that Machinist Specialist Adolph Kochevar was suspended from service for insubordination without being accorded an investigation as provided for in the agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 15th day of January, 1942.