

**Award No. 1290**  
**Docket No. 1209**  
**2-D&RGW-MA-'49**

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Harold M. Gilden when award was rendered.

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**PARTIES TO DISPUTE:**

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

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

**DISPUTE: CLAIM OF EMPLOYES:** That under the current agreement the carrier has unjustly terminated the service rights of Machinist C. H. McCullough on and since June 6, 1947, and that accordingly the carrier be ordered to reinstate this employe to all service rights with pay for all time lost retroactive to the aforesaid date.

**EMPLOYES' STATEMENT OF FACTS:** Machinist C. H. McCullough, hereinafter referred to as the claimant, was regularly employed by the carrier at Salt Lake City, Utah, in the air brake room with a service record beginning effective August 19, 1922, and a copy of his service record is submitted, identified as Exhibit A.

This claimant and Machinist A. J. Hein were dismissed from the service on April 9, 1947, for having engaged in an altercation in the air brake room about 8:00 A. M. on April 4, 1947, and on appeal by the local chairman on April 11, 1947, both the claimant and Machinist Hein were advised on May 23, 1947 by the master mechanic of having been reinstated without pay for time lost, without vacation privileges in 1947, and upon reporting for and passing a satisfactory physical examination.

Machinist Hein reported for physical examination and was restored to service in the air brake room about June 1, 1947, whereas the claimant, upon reporting as instructed on June 3, 1947, was informed that he would have to be physically examined by Dr. R. S. Allison and this is affirmed by the submitted affidavit sworn to by the claimant on January 5, 1948, identified as Exhibit B. This occurred on June 4, 1947, and thereupon Dr. Allison took exception to the claimant's right hand, and on the following day, June 5, 1947, the doctor refused to approve the claimant for service, which is affirmed by submitted affidavit sworn to by the claimant on January 5, 1948, identified as Exhibit B-1.

This claimant was approved at the office of Dr. Allison and Dr. Spencer, both company doctors, for his initial employment with the carrier in 1922. The examining physician, Dr. Spencer, at that time was aware that the claimant had two fingers and part of the thumb missing on his right hand.

time lost notwithstanding C. H. McCullough's subnormal vision. The offer of reinstatement of November 13 1947, read:

"November 13, 1947  
MW-G-145

Mr. Alex Bauer,  
General Chairman, IAofM,  
Salt Lake City, Utah.

Dear Sir:

Your letter November 3rd, referring to oral conference held in my office with Machinist C. H. McCullough and yourself on October 4, 1947.

So that there will be no misunderstanding in this matter, Management is agreeable to reinstate Machinist McCullough with seniority unimpaired, but without pay for time lost.

This offer if not accepted, expires thirty (30) days from this date. Advise.

Yours truly,

(Signed) J. E. Kemp  
J. E. KEMP  
Manager of Labor Relations"

November 26, 1947, organization requested that claimant be paid from June 6, 1947, to date of reinstatement. On November 28, 1947, carrier again offered to reinstate claimant without pay for time out of service. This letter read:

"November 28, 1947  
MA-10-47

Mr. Alex Bauer,  
General Chairman, IAofM,  
Salt Lake City, Utah.

Dear Sir:

Your letter of November 26, 1947, with reference to case of Machinist C. H. McCullough, my file MW-G-145.

I feel that the offer contained in my letter of November 13, 1947, File MW-G-145, is a fair offer and should be accepted. Your proposal of November 26th is not acceptable.

Yours truly,

(Signed) J. E. Kemp  
Manager of Labor Relations"

Claimant prior to dismissal was a machinist in the "air brake room". The work of repairing air brakes demands good vision, as it is fine work and requires a machinist to use and read calipers, micrometer and other measuring devices in addition to seeing that the various parts of the brake are properly functioning. The lives of employes and the traveling public are dependent upon the proper operation of the brakes on a train.

Carrier submits that its offer to overrule the doctor's report, that claimant was not physically qualified to perform the duties of a machinist and return claimant to service, was a fair and impartial offer in the present case and should have been accepted by organization.

**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 details of the fight between McCullough and Hein are not a part of the record in this case, and the Second Division cannot properly evaluate either the degree of blame, or the propriety of the disciplinary action. For our purpose, this case begins with the carrier's offer to reinstate both men on a leniency basis upon the condition of their passing a physical examination.

The evidence is contradictory on the question of whether a practice to require physical examinations in reinstatement cases applied to shop employes who were out of service less than ninety days. Without attempting to resolve the conflict, it is sufficient to point out that both McCullough and Hein responded to the carrier's proposal, and did submit to such an examination.

The refusal to reinstate McCullough must be justified, if at all, on the medical report (carrier's Exhibit A). There is merit in the instant claim only if the physician's conclusion is not supported by the findings.

Dr. Allison noted two disqualifying defects; namely partial loss of right hand and defective vision. McCullough's right hand was in the same condition as when he entered the carrier's service some 25 years previously, and he was approved for employment with full knowledge of such defect. There is no showing that this impairment hindered McCullough in the satisfactory performance of his duties during his long years of service. It would be manifestly unfair to now use it as a bar to his reinstatement.

On the subject of McCullough's vision, Dr. Raley found McCullough to be below qualifying requirements. However, there is no evidence of any prior complaint with McCullough's vision. This same doctor, a year later, certified that the claimant's corrected vision was well within the prescribed limits for re-examination of employes in the service.

Under the facts and circumstances of this case, it is concluded that Machinist C. H. McCullough was unjustly deprived of reinstatement on and since June 6, 1947, and he shall be reinstated with seniority rights unimpaired, and remunerated for all time lost since June 6, 1947, with deductions for wages, if any, earned in other employment during the period for which he is awarded back pay.

#### AWARD

Claim sustained in accordance with the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

ATTEST: J. L. Mindling  
Secretary

Dated at Chicago, Illinois, this 19th day of January, 1949.