

**Award No. 13453**  
**Docket No. MS-14719**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Kieran P. O'Gallagher, Referee**

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**PARTIES TO DISPUTE:**

**H. R. GRIMMER**

**ILLINOIS CENTRAL RAILROAD COMPANY**

**STATEMENT OF CLAIM: That:**

(a) Carrier violated the Agreement between the parties when on January 23, 1963, it dismissed H. R. Grimmer, formerly employed as an Efficiency Clerk, Johnston Roundhouse, Memphis, Tennessee, from the service following investigation on January 23, 1963.

(b) Clerk H. R. Grimmer shall be reinstated to the service of the Illinois Central Railroad with all seniority rights unimpaired and compensated for all time lost.

**OPINION OF BOARD:** This is a discipline case in which Claimant was dismissed from the service for failing to protect his assignment on January 19, 1963, and failure to report his absence to anyone in authority. The Claimant maintained that his absence and the reason he could not notify anyone in authority were both due, in his words, to reasons completely out of his control. At the hearing it developed the Claimant was in custody of the police at Memphis, charged with heinous violation of the law, and it further developed that Claimant failed to answer the charges and forfeited his bond.

A careful review of the transcript leads us to the conclusion that the hearing officer emphasized that part of the charges against the Claimant having reference to the "reasons for his absence." We cannot take issue with him for this, but we do feel that this resulted in an attitude toward the Claimant which caused the hearing officer to act in an arbitrary manner, and while we are fully aware of the fact that Claimant did, in effect, admit he did not protect his assignment, the evidence shows it was impossible for him to do so, or to notify his superiors.

We are also aware that the assessment of discipline is within the sole discretion of the Carrier, and that reinstatement on a leniency basis is not a proper function of this Board, absent a showing of bias; nevertheless, in this difficult matter, we find the hearing officer acted in such an arbitrary manner as to justify the reinstatement of the Claimant with all seniority rights unimpaired, but that his claim for compensation for time lost and for accrued vacation rights be denied.

**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 Employes involved in this dispute are respectively Carrier and Employes 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.

#### AWARD

Claim sustained in part and denied in part.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 5th day of April 1965.

#### DISSENT TO AWARD NO. 13453, DOCKET NO. MS-14719

This Award is in error for a variety of reasons. The Board should never have reached the merits because of obvious and fundamental deficiencies.

The claim on the property was for reinstatement without pay which is basically a request for leniency. Award 10789 (Ray) and Second Division Award 4042 (Daugherty). Since the claim of pay for time lost was not handled on the property, the claim should have been dismissed. First Division Award 19498 (Royse), 19430 (without referee), 18971 (Begley), and 16804 (without referee). The Board has consistently held it is without power to grant leniency since such matters are within Management's discretion. Awards 6085 (Whiting), 9973 (Webster), 10566 (Levinson), 10789 (Ray), 11651 (Webster), 11914 (Coburn), 12104 (Dorsey), 12001 (Dolnick), 13116 (Hamilton), 8478 (Coburn) and 9775 (Larkin). Also, the Organization by Claimant's admission "withdrew from the case", and did not appeal it, thus concurring in Carrier's application of the contract. Where the contracting parties are in accord, the Board has not rendered an Award contravening their conclusions. Awards 8846 (without referee), 9270 (without referee), 11257 (without referee), 12399 (Wolf), 12854 (Coburn) and First Division Awards 20348, 18798, 17971.

Having erroneously proceeded to the merits, the claim should have been denied in its entirety. The Claimant admitted his absence and failure to notify anyone in authority. The fact that he was incarcerated is no excuse since he was confined as a natural and probable consequence of his own conduct, which constitutes a reason within his control. Awards 12993 (Hall), 11114 (Sheridan), 6572 (Wyckoff), and First Division Awards 12021 (Johnson), 14692 (Coffey), 15763 (Carter) and 18244 (Johnson).

A Claimant is entitled to get into the record that a charged absence was due to illness, accident, car trouble, etc. Likewise, a Carrier should be privileged to point out matter in aggravation. The Board has long held these considerations appropriate in fixing and evaluating a discipline.

Since the reasons for the absence are obviously material and relevant it is difficult to determine why the Carrier should be penalized because they are in the record. The function of a hearing officer is to develop all material facts. Since Claimant's whereabouts was a material fact, how could the hearing officer be arbitrary because the question was raised and it became of record?

The Board found that the investigating officer emphasized the reasons for Claimant's absence and this was arbitrary. The record reveals no undue focus on this aspect of the case. There can be no question that the reasons for an absence are a legitimate and proper area of inquiry, particularly where the Claimant refused to shed any light whatever on the question. Those making a decision on the record are entitled to know of any aggravating, extenuating or mitigating circumstances.

Finally, Claimant's past record left much to be desired.

**T. F. Strunck**  
**D. S. Dugan**  
**R. E. Black**  
**P. C. Carter**  
**G. C. White**