

The Third Division consisted of ~~the~~ regular members and ~~in~~
~~addition~~ Referee Ronald L. Miller when award was rendered.

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: (
(**Soo** Line Railroad Company (formerly Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)

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

(1) The Agreement was violated when the Carrier improperly closed the service record of Extra Gang Laborer L. D. **Hardimon** (System File C #14-85/D-2655).

(2) The claimant's seniority as Extra Gang Laborer shall be restored unimpaired, he shall be reinstated and **compensated** for all wage loss suffered."

FINDINGS:

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

The ~~carrier~~ or carriers and the **employee** or employees involved in this dispute are respectively carrier and employees 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.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant held seniority as an extra gang laborer on the date of this dispute. On June 22, 1984, the Carrier notified the Claimant that he had voluntarily forfeited his seniority. The Carrier contends that the Claimant **knowingly** refused to protect his assignment, because he took a leave of absence other than as prescribed by Schedule Rules when he absented himself from his assignment without authority on June 19, 20, 21, and 22, 1984.

In May, 1982, the Claimant sustained an on-duty personal injury. Effective August 22, 1983, the Claimant was released by his physician to perform limited or light **duty** only. Subsequently, on March 18, 1984, following a physical examination ordered by the Carrier, the Claimant was notified that no medical restrictions had been placed on his ability to work. There is no evidence that the Claimant raised any objection to this determination of his medical fitness to work prior to being recalled.

Upon being recalled to work on June 19, 1984, the Claimant stated that he could only work on a restricted basis and presented a medical note, dated August 17, 1983, in support of his contention. Although the March, 1984, unrestricted work certification was reconfirmed for the Claimant on June 19, 1984, the Claimant nevertheless did not report for his scheduled work on June 19, 1984, or on any of the subsequent days.

The Claimant has produced no evidence that would diminish the controlling **nature** of the March 18, 1984, medical certification. That certification, acknowledged by the Claimant, supersedes the physician note of August 17, 1983. The physician notes of June 28, 1984 and July 19, 1984, submitted by the Claimant are vague and of little or no **evidentiary** value. There is substantial evidence from which to conclude that the Claimant failed to protect his assignment upon being recalled to service, and thereby subjected himself to dismissal.

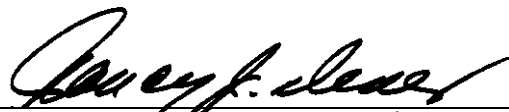
It is appropriate for this Board to consider the Claimant's past record in determining whether dismissal is fair and reasonable, **given** the circumstances of this case. A return to service with seniority unimpaired **bu** without **backpay** would achieve the intended purpose of discipline in this matter.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



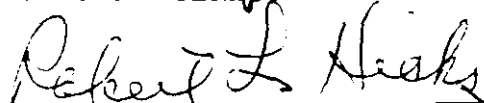
Nancy J. Dever - Executive Secretary


Dated at Chicago, Illinois, this 28th day of January 1988.

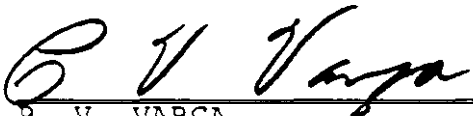
CARRIER MEMBERS' DISSENT
TO
AWARD 26781, DOCKET MW-27169
(Referee Miller)

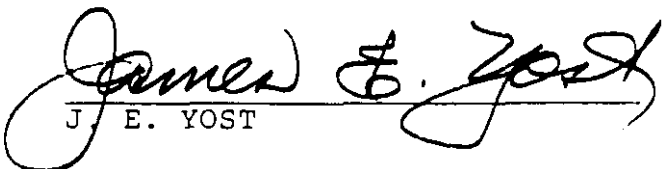
The Majority directs the reinstatement of Claimant on the erroneous premise that the Carrier's action constituted discipline and that dismissal was excessive discipline. The record on the property, however, shows that Claimant forfeited his seniority when he failed to respond to a recall following his recovery from a medical disability. The Board has consistently held that such forfeiture is automatic and does not constitute discipline. See, for example, Third Division Awards: 26240, 25841, 25837.


M. W. FINGERHUT


K. L. HICKS


M. C. LESNIK


P. V. VARGA


J. E. YOST