NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20265
THIRD DIVISION Docket Number CL-20252

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Long Island Rail Road Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7336) that:

1. The Carrier violated the established practice, understanding and provisions of the Clerks' Agreement, particularly, Rules 6, 7, 7-A-2, 9-A-1 and 9-A-2 among others when it unfairly, unjustly and without a legal or proper reason removed Clerk Benoit from service on June 15, 1972 and again on July 10, 1972, when she advised her Supervisor she was unable to continually work mandatory overtime.

2. The Carrier further violated the Clerks' Agreement by conducting an unlawful, unfair, unjust and illegal Trial by having Mr. Pisano, Claimant Benoit's Supervisor, act as Trial Officer, Accusor, Judge and Jury on June 26, 1972 and August 8, 1972.

3. That Clerk E. Benoit be paid for all loss of pay for each day from June 15, 1972 to September 21, 1972 when this Trial and discipline was Appealed to the highest officer of the Carrier Mr. W. L. Schlager, Jr., President, who allowed Miss Benoit to return to duty and mandatory overtime was not required.

OPINION OF BOARD: On June 15, 1972, Claimant was advised that she would be required to work four (4) hours of overtime. She was charged with insubordination for her refusal to do so, and after investigation, was found guilty and was suspended for thirty (30) days.

On the first day Claimant returned to duty (July 10, 1972), she was again advised that it would be necessary to work overtime, and she was cautioned that a refusal would result in another charge of insubordination. Claimant refused to work and was again charged. After an investigation, she was removed from the service of the Carrier.

During the appellate process on the property, Claimant was allowed to return to service on September 21, 1972.

The investigations concerning the two charges of insubordination present varying considerations. Accordingly, we will consider them separately.

Regarding the initial suspension, the transcript demonstrates the following sequence of events. On June 12, 1972, Claimant submitted to Carrier a June 8, 1972 statement from her physician which stated:

> "To Whom It May Concern:
>
> /Claimant/ is still under my care. She is capable of working eight hrs. a day but is not able to do any overtime because of her medical condition."

At about 11:00 a.m. on June 15, 1972, Claimant, and others, were advised that it would be necessary to work four (4) hours of overtime that evening. While there is conflict as to the exact time, and the precise purpose of the visit, Claimant did report to the Medical Department during the morning, and returned to work at noon with a "resume work" slip. At 2:00 p.m., she stated that she would not work overtime which she confirmed at 4:50 p.m.

Claimant cited her June 8, 1972 doctor's note as the basis for her refusal.

Claimant testified that she was sent to the Medical Department on the morning of June 15, 1972. At that time, she presented the June 8, 1972 note to a company doctor, who stated that she was not capable of fulfilling her job duties. She insists that at no time was she examined.

After so testifying, Claimant requested a recess in order to secure a witness. When that request was denied, Claimant's Representative asked the Hearing Officer if he would provide a copy of the Medical Report of June 15, "...as she was not examined." To that request, the Hearing Officer replied:

> "I am assuming that she was examined. That is her testimony. I do not know if she knows what an examination is... I am not a medical authority. I have before me this return-to-duty slip... and rely on the facts so stated...."

Claimant's Representative reminded the Hearing Officer that the return-to-duty slip had been introduced by Carrier, and suggested that the Medical Report from the company doctor should accompany it so that the record would not contain "half-a-loaf."

There were additional requests made for recess and for production of documents, as well as arguments as to which party had the duty to supply information.

We feel that it is established that an employee may refuse to perform overtime work for valid medical reasons. See, for example, Award 7020 (Wyckoff). Carrier apparently accepts that view, inasmuch as one of its Supervisors stated, at the second investigation:

> "...other than for medical reasons all of the girls had complied with mandatory overtime." (underscoring supplied)

The Organization cites, among others, Fourth Division Awards 2158 and 2166 (Seidenberg) for the general proposition that a Hearing Officer cannot have an adversary role as he is obligated to seek out all of the facts surrounding the incident in question. Moreover, Claimant relies upon Award 19807 (Blackwell) as it pertains to medical evidence.

In that Award, the Board held:

> "...evidence, which is not contradicted by positive evidence or testimony, must be inherently improbable, incredible, or unreasonable in order for a Hearing Officer properly to reject it on grounds of disbelief."

There was some hearsay testimony concerning discussions between a Supervisor and the Medical Department prior to June 15, 1972 regarding Claimant's capabilities of performing all related duties of her job. There is no indication however that Claimant was a party to, or had knowledge of, those discussions. We find absolutely nothing in the record to contradict Claimant's testimony that she was not examined on the day in question. Accordingly, we feel that the Hearing Officer departed his role of trier of fact when he stated, with no apparent basis other than a personal opinion, "I am assuming that she was examined." The return-to-work slip, which he had before him, made no reference to examination.

Thus, crediting the testimony of Claimant, as we must, we find that she had a reasonable right to refuse the overtime request on June 15, 1972. She relied upon a medical statement from her doctor, which she had presented to the Company prior to the incident. The record fails to show that she was examined on the 15th of June or that she was reasonably placed on notice that the Carrier disputed the contents of her medical statement. Accordingly, we will sustain the claim concerning the suspension for the June 15, 1972 alleged insubordination. However, we note that on June 30, 1972, Claimant was advised to report for duty on July 5, 1972. Claimant did not report until July 10, 1972. Thus, we will only sustain the claim for the period up to, but not including, July 5, 1972.

The Board does not conclude that the considerations stated above control the claim regarding the second alleged insubordination, because we view the record as being in a different posture concerning that charge.

July 10, 1972 was Claimant's first day of duty after her previously discussed suspension.

Because she was returning to an active employment status, she was required to undergo examination in the Company's medical facility. The record demonstrates that on this occasion, Claimant was given a medical examination concerning blood pressure, heart, urinalysis, etc. At the conclusion of the examination, the Company Medical Facility determined that Claimant was fully qualified to resume active employment.

On a number of occasions on July 10, 1972, Claimant was advised that it would be necessary to perform overtime work, along with other employees in the department, commencing at 5:00 p.m. Moreover, Claimant was specifically advised that a refusal to do so would result in disciplinary action.

As indicated above, we do not consider the July 10, 1972 refusal in the same context as the June 15 episode. Claimant had been examined by the Company Medical Department and, if for no other reason than the previously referred to suspension, she was on notice that the Company did not agree with Claimant's personal physician's statement that she was not medically capable of performing overtime work. Thus, she was aware, or should have been, that a refusal to work overtime was at her own peril.

The Board notes that in addition to a reference to the June 8, 1972 medical statement, Claimant's refusal to perform overtime work on July 10 was also predicated upon distances that she was required to travel, plus her mother's ill health. At the investigation, Claimant introduced an August 8, 1972 letter from her doctor which traced some of her medical history but obviously, that information was not submitted to Carrier on July 10, 1972.

A review of the record demonstrates that the Carrier was not unreasonable or discriminatory in its request for overtime work. The request was not limited solely to Claimant, but was directed to all employees in a similar capacity. The work was necessary so that payrolls could be issued in a timely manner.

The Board is of the view that Claimant did not have good and sufficient reason to refuse mandatory overtime on July 10, 1972 and that the Company's disciplinary action was warranted. Moreover, we do not feel that the length of the suspension was arbitrary or capricious under the circumstances.

Accordingly, we will deny the claim concerning the refusal to work overtime on July 10, 1972.

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.

A W A R D

Claim sustained to the extent stated in the Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of May 1974.