

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20453
Docket Number CL-20343

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station Employees
(Norfolk and Western Railway Company
((Lake Region)

STATEMENT OF CLAIM: Claim of System Board of Adjustment No. 218 (GL-7342)
on the Lake Region, Norfolk and Western Railway
Company, that:

1. Carrier violated the Agreement between the parties when on June 12, 1972, they arbitrarily and capriciously assessed Clerk Dorothy Pekrul five (5) days actual suspension.
2. The carrier's action was unjust, unreasonable and an abuse of carrier's discretion.
3. Carrier shall now compensate Dorothy Pekrul for each day held out of service with seniority and all other rights unimpaired.

OPINION OF BOARD: This claim arises from the Claimant's refusal to work Saturday overtime, for which she was assessed five (5) days' suspension. The claim here is that her refusal was justified by health considerations and that she should be paid for time lost. Prior authorities enunciate the principle that an employee may refuse to work overtime for valid health reasons. Third Division Awards No. 7020 and recent Award No. 20265. Thus, a review of the instant record is in order to determine whether the Claimant brought herself within this principle.

The relevant facts, as reflected by the hearing record, show that the Claimant, Mrs. Dorothy Pekrul, was a Key punch Operator when this dispute arose. She had a five day assignment, Monday through Friday. The directive for Saturday overtime, which led to this dispute, was issued on May 25, 1972; however, the Claimant had registered objection to Saturday overtime for health reasons several months prior to this date. On February 3, 1972, the Claimant's objection in particular, along with objections to overtime by other Key punch Operators, had been discussed in a meeting attended by the Claimant, her Representative, and Carrier Supervision (Messrs. E. R. Foreman and H. Weekley, respectively, Manager and Assistant Manager, Data Processing). Without settling the Claimant's

objection, this discussion resulted in the Claimant being examined on March 6, 1972 by the Carrier's Regional Medical Director, Dr. H. H. Hopwood, who cleared her "...to continue with her duties in all respects ..." at "...any usual time needed." Subsequently, the Claimant was seen by her own physician Dr. Keith Smith who under date of March 28, 1972 wrote as follows:

"To Whom It May Concern:

Re: Dorothy Pekrul

Mrs. Pekrul's work load should be reduced due to a problem of emotional challenge. Too much strenuous work or physical activity has been of harm to her health."

The Claimant's Supervisor, Mr. Foreman, acknowledged receiving the above letter about two weeks after March 28. The situation remained uneventful until the Claimant (and other employees in her department) was notified on May 25, 1972 of a specific overtime requirement from 7:00 a.m. to 3:00 p.m. on Saturday, June 3, 1972, whereupon she informed Mr. Foreman that she could not work the overtime for the previously stated health reasons. Mr. Foreman responded by writing to the Claimant on the same day, May 25, advising that the overtime was necessary and that her refusal to work it would result in her being withheld from service pending investigation of such refusal. When the Claimant failed to report for the overtime duty on June 3, the Carrier issued written charges, including notice of hearing, in a letter by Mr. Foreman dated June 6, 1972. In the hearing the Claimant gave a history of having been on medication for three years for Meniere's disease, which she said her doctor said was incurable. She stated that her health was the reason for not reporting on June 3, and offered the March 28 letter of Dr. Smith in support of such statement. She also stated that she had worked overtime in the morning and a half-hour during the lunch hour of the workweek, but that she had never worked overtime on Saturday or Sunday. The Carrier's witness, Mr. Foreman, testified that the overtime was necessary, and that his belief about the Claimant's ability to work it was based on the opinion of Dr. Hopwood, Carrier's Regional Medical Director. Dr. Hopwood's June 7, 1972 letter to Mr. Foreman appears in the hearing record as follows:

"As I have expressed to you verbally, I am of the opinion that Dorothy Pekrul is in physical condition to continue with her duties in all respects.

I believe her health is sufficiently good to permit her working any usual time needed."

From review of the foregoing, and the whole record, we conclude that the Claimant justified her refusal to work overtime by evidence which validated the health reasons underlying such refusal. More than three months prior to the herein incident, the Claimant revealed to the Carrier her contention that Saturday overtime would adversely affect her health. Her objection in this regard was strongly supported by Dr. Keith Smith's March 28 letter which was in the Carrier's possession by mid-April of 1972. When the overtime directive was issued on May 25, the Claimant restated her health contentions and left no doubt that she was challenging the directive on the basis of the letter by Dr. Smith. At this juncture the Carrier was well aware that Dr. Smith's examination of the Claimant was later than Dr. Hopwood's examination by 22 days, March 28 as compared to March 6. Carrier also knew that the opinions of the two doctors differed sharply: Dr. Smith said that Claimant's "work load should be reduced due to a problem of emotional challenge"; Dr. Hopwood said her health permitted work "any usual time needed". The former opinion, calling for a reduction in work, is clearly antithetical to additional work such as overtime; the latter opinion did not seem to negative overtime by the Claimant. Yet, significantly, the Carrier did not have the Claimant examined by Dr. Hopwood upon receipt of Dr. Smith's letter in mid-April, or when the health issue was clearly joined on May 25. Consequently, as the record stands, Dr. Hopwood's June 7 letter merely restated his opinion as derived from the March 6 examination of the Claimant. The letter of Dr. Smith, based on the March 28 examination of the Claimant, thus stands unrefuted by probative medical evidence and it should have been accepted as validation of the Claimant's objection to Saturday overtime for health reasons. We have considered, but find not well taken, the Carrier's arguments that the letter from Dr. Smith was general in nature and that the Claimant's overtime during the week was some indication that she was capable of working overtime on Saturday. The Claimant's objection to Saturday overtime was the whole point of her being seen by the two doctors, and the letter from Dr. Smith, as previously indicated, spoke quite clearly of the relationship between the Claimant's work and her health. The fact that the Claimant worked overtime during the week would at best tend to cast doubt on the sincerity of her objections to Saturday overtime; however, in light of the medical evidence supporting her objection to Saturday overtime, this fact does not serve as evidence to refute her health contentions. Accordingly, we conclude that the Carrier's action is not supported by substantial evidence of record and we shall therefore sustain the claim.

Award Number 20453
Docket Number CL-20343

Page 4

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 Employees involved in this dispute are respectively Carrier and Employees 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

The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 25th day of October 1974.