

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37681
Docket No. CL-37710
06-3-03-3-132**

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

**(Transportation Communications International Union
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

**"Claim of the System Committee of the Organization (GL-12971)
that:**

**The following claim is hereby presented to the Carrier on behalf of
Claimant D. E. Becker.**

- (a) The Carrier violated the TCU/CSX-North Clerical Rules Agreement effective June 1, 1999, as revised, particularly Rules 30, 24, 40, 42, 43 and other rules, when it arbitrarily removed Claimant Becker from service on December 19, 2001 and continues to withhold her from service, without compensating her as required by the Rules Agreement;**
- (b) Claimant Becker is qualified and available to perform her regular assigned duties, as well as any overtime duties, and would have done so had the Carrier not improperly removed/withheld her from service;**
- (c) Claimant Becker should now be allowed eight (8) hours pay, based on the pro rata rate of her regular assignment, or her full protected rate, whichever is greater, as well as any benefits, including overtime earnings lost, commencing December 19, 2001 and continuing for each and every day thereafter, on account of this violation;**

- (d) In order to terminate this claim, Claimant must be returned to active service.
- (e) This claim has been presented in accordance with Rule 45 and should be allowed.”

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 employee 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 were given due notice of hearing thereon.

The record reflects that Claimant D. E. Becker, a Clerk/Jitney Driver at Selkirk, New York, placed a phone call to District Superintendent J. D. Lewandowski around 3:15 P.M. on Wednesday, December 19, 2001, the second of her five consecutive days off. Although the substance of that discussion is not disclosed, it prompted Lewandowski to patch in the Carrier's Director Employee Assistance, D. C. Bowen on the call. After further discussion, Bowen then advised the Claimant around 3:50 P.M. "that she would not be able to work at this time." Upon being informed of Bowen's decision, the Carrier's Medical Department disqualified her approximately two hours later the same day. The Claimant apparently remained in that status until March 1, 2002.

On February 6, 2002, the Organization submitted a timely claim on the Claimant's behalf protesting her removal from service. The central argument it puts forward is that the Claimant's removal preceded her medical disqualification. Accordingly, it contends, she was in effect disciplined with no attendant proffer of charges pursuant to Rule 42.

The Carrier's declinations in claim handling assert that the claim is unsupported by any Agreement Rules. The Claimant's conversation on December 19, 2001 it argues, prompted her removal from service for medical reasons in accordance with the Carrier's well-established right to medically disqualify employees who represent a safety threat to themselves or their co-workers.

The principle that the Carrier endorses is, of course, well established in the industry. However, the right to remove unfit employees is not unqualified. Essential preconditions to its exercise are communication to the employee of the fact and at least some minimal showing that preemptory removal is based upon reasonable concerns.

In this instance, the Claimant's removal from service on December 19 was undertaken by the Carrier's Employee Assistance professional. The Claimant was not put on notice that she was medically unfit for duty. Furthermore, the Carrier made no effort to explain why it thought so until March 18, 2002 when the Claimant was informed that she had been removed from service for medical reasons because she may have been a threat to herself or to others. The reasonableness of the Carrier's action must be determined from the record before it. That record discloses no hostility on her part on December 19; no evidence of threatening behavior by the Claimant; no erratic actions; no showing of any physical or mental condition whatsoever that might support withholding her from service. Thus, to the extent it may be determined from this record, management's action must be deemed to have been an arbitrary abuse of discretion, offensive to Rule 42(a).

Based upon the foregoing, the claim is sustained to the extent that the Claimant shall be reimbursed for earnings lost from December 19, 2001 until March 18, 2002.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 30th day of January 2006.