Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33610
Docket No. MS-34217
99-3-97-3-762

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

(Aaron L. Williams
PARTIES TO DISPUTE: (
(Northeast Illinois Regional Commuter Railroad
(Corporation (NIRC/METRA)

STATEMENT OF CLAIM:

"As presented by Mr. Williams to the Third Division:

Dismissal from service for alleged insubordination and alleged failure to submit to drug screening in compliance with my July 24, 1996 leniency reinstatement. Dealing with the alleged insubordination first with Metra officer Barbara Akins my bulletined hours for ticket sales clerk number 9 in which I am the incumbent are 1:00 p.m. until 9:30 p.m. This alleged violation occurred at 10:45 a.m. when Ms. Kendall approached me stating she wanted to drug screen me. I refused stating I would be more than willing to take the screen at my bulletined start time which is 1:00 p.m. She then escorted me across the street to Ms. Akins office. I also told M. Akins I would take the test at my starting time as they have always done. Then Ms. Akins stated that Mr. Stone said my starting time was at 11:00 a.m. I never committed my self to a 11:00 a.m. start also in accordance with 1-scope which states that the responsibility of calling in employees and related duties falls under the crew management center contractually and even if requested by a supervisor for a early start must be reinforced by the crew management center to be a proper call. Also according to Rule 34B of TCIU current agreement starting times will not be changed unless without notice to employees affected, at least thirty-six hours in advance of the new starting time. The carrier failed to follow the collective bargaining agreement that was current at the time of this alleged violation. Therefore I submit I was not subject to duty at 10:45 a.m. in accordance with Rule 1-Scope also Rule 34b of TCIU agreement. These alleged violations occurred Jan 31, 1997 Chicago Union station.

This is the second part of my claim this is for Dismissal for alleged dishonest handling of my account in which the carrier states it was audited Jan 31, 1997 at about 5:00 p.m. in which they state it was 120.00 dollars short. Point in case I have cash shortages in the past just like other ticket sales agents had...And just like other ticket agents was given the opportunity to sign documentation that would allow the carrier to recoup those losses incurred by myself, by means of payroll deduction. It is well noted throughout this investigation that I mutually agreed with the carrier officers on Jan 28, 1997 to enter a retraining program, also agreed to sign the proper documentation for payroll deduction. The carrier stated that the re-training would be for thirty days at which time it would be determined if I showed sufficient fitness and ability to perform those duties related to the position. However after only two days into the re-training period and less than two hours of being actually trained I was served with investigation papers implying that I had been dishonest in handling of company funds because of yet another shortage in my cash drawer. The carrier acted in zeal to add false charges against me acted arbitrary and filled charges without merit. I am confident in my ability to perform those duties related to the position if properly trained as agreed. No where in the investigation the carrier had any witness to testify that I had been taking money or had been under suspicion of doing so. Therefore I submit that the carrier acted in prejudice in bringing these unwarranted charges against me, and not holding me to the same standards they do with the other ticket agents.

Third part of my claim, Dismissal of alleged failure to follow the course of treatment established by my EAP counselor. Carrier Memorial Hospital on Feb. 7. 1997. According to Mr. Terry Strickland, counselor Bensinger, Dupont and Associates for all intent and purposes once the carrier removed me from service for non-compliance of my alleged failure to follow the course of treatment on Jan. 31, 1997 I was then terminated from the EAP program the same day. Therefore I submit to this Board that I was not under any agreement on Feb. 7, 1997 since I was released from the program on Jan 31, 1997. The carrier never provided any tangible proof of the substance tested for or even a date for such said test.

So in view of what is stated above I request that, this board will accept this claim in its entirety reverse the decision of the carrier and also award me total compensation for loss of income, health and welfare benefits, prior seniority rights and my personal record is cleared of all charges concerning these matters."

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.

Petitioner Williams entered Carrier's service on September 10, 1992, and at the time of his removal from service, was assigned as a Ticket Sales Clerk at Chicago Union Station. The instant claim encompasses three separate incidents that were handled as individual claims on the property. Petitioner consolidated these three incidents into one claim before this Board.

The first incident occurred on January 31, 1997, when Petitioner was removed from service pending formal Investigation for an alleged violation of his leniency reinstatement agreement. The formal Investigation was convened on February 6, 1997 and, after two recesses, was concluded on February 12, 1997. Following its determination that Petitioner was insubordinate when he refused the directive of a Metra Officer to submit to testing in accordance with his July 24, 1996 Leniency Reinstatement Agreement, Carrier notified the Petitioner by letter dated February 24, 1997 that his employment was terminated.

The second incident, dealing with the alleged misappropriation of funds, also took place on January 31, 1997. On that date, Petitioner's account was subject to an audit

and it was confirmed that he was $120 short. Petitioner was subsequently notified to attend an Investigation in connection with his alleged failure to have adequate funds on hand to balance his account on that date. At the request of Petitioner's representative, the Investigation was postponed and ultimately convened on February 10, 1997. Petitioner was unable to attend on that date due to his incarceration and the Investigation was recessed. On February 12, 1997, the Investigation was reconvened and concluded on that date. Carrier's conclusion that Petitioner was guilty of the charges formed the second basis for his February 24, 1997 dismissal.

The third incident relied upon by the Carrier in discharging Petitioner was the subject of Investigation on February 12 and 20, 1997 following notice to the Petitioner of his alleged failure to follow the course of treatment established by his EAP counselor in connection with his July 24, 1996 leniency reinstatement agreement. The Investigation was triggered by a letter from the EAP counselor to Carrier indicating that Petitioner was in noncompliance with the recommendations of the Employee Assistance Program pursuant to the leniency reinstatement agreement.

The Board has reviewed this voluminous record in its entirety. There is no claim that Petitioner was denied Agreement due process or that he was afforded less than a fair hearing. In fact, Petitioner was given full opportunity to present witnesses and evidence on his behalf and to cross-examine Carrier's witnesses at each of the three Hearings that took place prior to his dismissal from service.

The Board further finds that there is sufficient evidence on this record to support the conclusion that Petitioner was guilty of insubordination. The record reveals that Petitioner was on Carrier premises shortly before 11:00 A.M. on January 31, 1997. He was advised that he was to submit to a drug test. Petitioner had submitted to random drug tests previously as a condition of his leniency reinstatement agreement of July 24, 1996. On this particular day, however, Petitioner refused to take the test, claiming that he was not on duty and that he had an appointment with his lawyer. Petitioner also argues that he offered to submit to testing later on that same date and should have been given the opportunity to do so.

The Board agrees with Carrier that Petitioner's contentions do not provide a proper basis for refusing to be tested. As a factual matter, the record shows that both the Petitioner and his Supervisor, Mr. Stone, agreed that Petitioner was asked to work overtime on January 31, 1997, by reporting to work two hours prior to the Petitioner's

usual 1:00 P.M. starting time. Ticket sales are high at the end of the month, and the evidence reveals that it is common for Ticket Agents to work overtime on that day. Indeed, Petitioner had done so in the past. Although Petitioner claimed that there was no firm acceptance of the January 31, 1997, overtime on his part, Supervisor Stone testified that Petitioner accepted the overtime assignment and his acceptance was documented on the schedule. Any credibility conflict on that particular point was properly resolved on the property. We find no basis to conclude otherwise, particularly since no other credible reason for Petitioner to be at the Metra station at 11:00 A.M. on the date in question was advanced. Thus, Petitioner's contention that he was not on duty at 11:00 A.M. on January 31, 1997, and therefore not subject to drug testing is without merit.

Similarly, Petitioner was unpersuasive in his contention that he should have been permitted to take the test later in the day because he had to go to a previously scheduled appointment with his lawyer. It was not the Petitioner's province to direct the testing schedule. He was obligated to take the test when properly directed to do so. To find otherwise would defeat the purpose for random testing and would put at risk the validity of the testing process.

Petitioner's contention that his overtime assignment violated a provision of Rule 34(B) regarding changes in starting times is not properly before this Board for consideration. Review of the record fails to show that the claimed contractual violation was raised during the handling of this case on the property. No citation is necessary for the firm proposition that the Board is precluded from reviewing issues or arguments raised *de novo* but is instead confined to the record as it was developed during the on-the-property handling of the case.

The final argument raised by the Petitioner was that the calling of overtime is a function "contractually" reserved to employees in the crew management center. However, no probative evidence was offered in support of that proposition nor was specific contract language identified to establish the merits of the Petitioner's claim. In any event, self-help was not the proper course of action. Even if Petitioner believed that Carrier was violating his rights under the Agreement, he should have followed the testing directive and then filed a claim.

Concluding as we do that the defenses advanced by Petitioner are without basis, it is apparent that Petitioner's refusal to submit to testing pursuant to the terms of the

Petitioner's July 24, 1996 leniency reinstatement warranted his dismissal. Petitioner was on notice that his refusal to submit to testing would put his employment at peril. Prior Awards in similar situations have established that termination is not an unreasonable or unexpected outcome under the circumstances. See Second Division Award 11947; Third Division Award 29228 and Special Board of Adjustment No. 910, Award 519.

Additional arguments were advanced in this case in connection with the two other incidents which provided alternative bases for the Petitioner's dismissal from service. However, they need not be addressed since our findings above are dispositive of the matter herein.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of November 1999.