

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44861
Docket No. SG-46385
23-3-NRAB-00003-210014**

The Third Division consisted of the regular members and in addition Referee Michael D. Phillips when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Canadian Pacific Railway**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Canadian Pacific Railway (formerly Soo Line):

Claim on behalf of D. C. Smith, for 8 hours holiday, and, 96 hours at his respective straight time rate of pay plus the \$0.85 skill rate; account Carrier violated the current Signalmen’s Agreement, particularly Rule 17 – Forty-Hour Work Week, when on August 5, 2019, through September 5, 2019, Carrier would not allow the Claimant to work 12 days which he lost 1 holiday, resulting in a loss of work opportunity for the Claimant. Carrier’s File No. 2019-00010180. General Chairman’s File No. 2019-00010180. BRS File Case No. 16326-SOO. NMB Code No. 156.”

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.

On January 4, 2018, Claimant D. C. Smith signed a Drug and Alcohol (D&A) Waiver, which provided as follows:

- 1) I understand that I will be governed by the following terms and conditions:
 - a. Follow and abide by all return to duty/or return to work instructions as directed by the EAP and Manager Drug and Alcohol Programs/DER.
 - b. Take and pass any medical examinations required by the DOT and/or Company policy including a drug urine screen and/or alcohol screen.
 - c. Maintain periodic contact with the Substance Abuse Professional (SAP)/EAP at the intervals, and for the time period indicated by the SAP/EAP, and follow any continuing care plan that is prescribed.
- 2) I understand that upon my return to active service, I will be subject to unannounced drug and/or alcohol screening.
- 3) I understand that failure to comply with these requirements may be referred to your Department for administrative action which may result in disciplinary action up to and including termination of employment.
- 4) I understand that this instance could have resulted in my dismissal. However, solely as a matter of managerial leniency, and strictly on a 'last chance' basis, I may return to work pending the Company's review of your EAP assessment.
- 5) This is my last chance to demonstrate my understanding of all of the Company's Rules, Policies and Guidelines and that I am willing and able to comply with them. Any future proven violation of Company Rules, Policies or Guidelines will subject e to disciplinary action and may result in my dismissal.

On August 4, 2019, the Claimant notified his manager that he would not be able to report to duty that evening for his Signal Maintainer position due to an off-duty traffic violation. The manager told the Claimant not to come in to work that day, and the Claimant was withheld from service from August 5, 2019 through September 5, 2019.

The Organization initiated the instant claim on the Claimant's behalf, contending that the Carrier had improperly prevented the Claimant from working a forty-hour work week as provided for in Rule 17 of the applicable agreement. It stated that, while the Claimant did not possess a valid driver's license between August 12 and August 26, 2019, he had a driver's license during the period in question which would have permitted him to perform his duties, but that he had been prohibited from working by the Carrier's Designated Employee Representative. The claim sought pay for the time the Claimant had a valid driver's license but was not allowed to work.

The Carrier denied the claim, stating that the Claimant had been held out of service pending the outcome of an assessment through the Employee Assistance Program, and that after he completed that program, he was cleared to return to service September 6, 2019. The Carrier stated that the Claimant's own actions were the reason he was withheld from service pending the EAP assessment, and it asserted that he was due no additional compensation because he made himself unavailable and had to work through requirements of EAP.

The Organization submitted an appeal, stating that the Carrier erred in withholding the Claimant from service for a traffic violation which occurred off duty. It asserted that it was the Carrier which determined that an EAP assessment was necessary, despite the off-duty nature of the traffic incident, and that it was improper to tie that event to any prior issue.

The Carrier denied the appeal, quoting from the D&A Waiver set forth above. It stated that the traffic violation was connected to alcohol and the use of a vehicle, and that when the Drug and Alcohol Manager obtained that information, the Claimant was removed from service based on the earlier waiver. The Carrier asserted that the Claimant's actions put him in violation of the D&A Waiver, resulting in further review from the SAP/EAP as outlined in the waiver.

The parties handled the claim through the on-property appeal process, but they were unable to reach a resolution. The matter now comes to us for determination, with the parties' positions being essentially the same as those described in the on-property handling.

The Organization reiterates its position that the Carrier did not establish a violation of any aspect of the D&A Waiver which would justify its withholding the Claimant from service. It points to the specific provisions of the waiver which refer to potential discipline if a violation of Company Rules, Policies or Guidelines were to occur,

and it argues that no such showing was made here. The Organization states that the Carrier never produced any evidence to justify its position, but that it merely speculated that the traffic violation was associated with alcohol. It cites prior awards for the principle that an employer, if challenged, has the burden of proof on physical disqualification matters, and it avers that the Carrier did not meet that burden here.

The Carrier, on the other hand, maintains that when the Claimant made a decision which resulted in a traffic violation related to alcohol, he was in violation of the D&A Waiver, specifically paragraph (1), which required periodic contact with the SAP and following any continuing care plans. It also states that the waiver required the Claimant to take unannounced drug and alcohol tests to ensure he was compliant with his EAP/SAP treatment plan, and that it was incumbent on the Drug and Alcohol Manager to determine if the Claimant was in violation of the waiver. The Carrier avers that the Claimant was not arbitrarily withheld from service, but rather he was placed back into his treatment plan due to his actions and failure to come to work on August 4, 2019. It states that the Claimant had to go through evaluations to determine additional steps, and that he was allowed to return to service when those actions were completed. The Carrier urges that the claim be denied.

We first note that the parties concur that the issue before us is whether a violation of the D&A waiver was established to justify withholding the Claimant from service during the period in question. We have thoroughly reviewed the parties' arguments on that issue, and based on the specific language of the waiver agreement the Claimant signed, we are unable to discern a violation on these facts. The D&A Waiver contains three enumerated requirements, in addition to being subject to unannounced testing, but the record does not establish how the facts here implicate any of those requirements. There is no indication that he (1) failed to follow and abide by the return to work instructions as directed by EAP, and there is no evidence in the record to establish what such instructions were. There is no indication that he (2) failed to take and pass any medical examination. There is also no indication that he (3) failed to maintain periodic contact with the SAP/EAP as required.

We must emphasize that there may well be circumstances in which an employer is justified in withholding an employee from service pending EAP evaluation, including some circumstances in which the evaluation is indicated as necessary by an employee's commission of conduct which occurs off duty, and regardless of whether an employee had entered into a D&A Waiver. As noted above, however, the limited question posed by the parties and addressed in the claim handling is whether an alleged violation of the Claimant's D&A Waiver was established so as to justify withholding him from service

here. It may well be that the Claimant did not abide by the instructions given to him by EAP, but we have not been informed as to what those instructions were, and we will not speculate about them. In such circumstances, we concur with the Organization that the Carrier has not established the necessity of withholding the Claimant from service for the period in which he possessed the required driver's license. We therefore must sustain the claim.

AWARD

Claim sustained.

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 10th day of March 2023.