Serial No. 269

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 19804

DOCKET NO. DC-19918

NAME OF ORGANIZATION: Joint Council of Dining Car Employees Local 385

NAME OF CARRIER: Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Upon application of the representatives of the Employes involved in the above Award, that this Division interpret the same in light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

The requested Interpretation arises from disagreement concerning Carrier's payment of compensation directed to be paid to Claimant by Award 19804. In that Award we considered the claim that Carrier had wrongfully terminated Claimant's service, in that it compulsorily retired him before he had attained the applicable compulsory retirement age. After noting in our Opinion that we found no merit in the Petitioner's contention that Carrier's action amounted to discipline under Rule 8 of the Agreement, we made a careful, detailed analysis of the information and evidence on which Carrier based its determination to compulsorily retire the Claimant. Based on this analysis we concluded that Carrier must restore Claimant to service because its action was rendered arbitrary when it continued to hold Claimant in compulsory retirement status, notwithstanding the proffer of new evidence by Petitioner and the Claimant's repudiation of a document which he had submitted to the Carrier prior to the termination of his service by the Carrier, and which supported Carrier's determination on his having reached retirement age, We also awarded compensation to the Claimant for time lost, but not for the entire period as stated in the claim, i.e., from August 31, 1970 until restored to service. We denied the monetary claim for the period August 31, 1970 through September 27, 1971, on the basis that the information available to the Carrier during such period rendered its initial action justified. We sustained the monetary claim from September 28, 1971 onward, on the basis that the information then available to the Carrier rendered its action a wrongful dismissal from such date onward.

After the Award was transmitted to the property for implementation, the parties disagreed over the Carrier's asserted right to deduct Claimant's outside earnings from the compensation directed to be paid to Claimant by the Award. The basis for such asserted right, as

stated in Carrier's Reply to a Employes' Request for Interpretation, is (1) that Rule 8(f) of the Agreement expressly authorizes the deduction of outside earnings in the instant case, and (2) that court decisions (federal and state) and Board Awards, as well as practice on this property, supports the Carrier's right to deduct outside earnings in appropriate cases. For its part, the Petitioner says that the Carrier's point (1) above is not sound because Rule 8, being a discipline rule, cannot apply here since Award 19804 noted that Carrier's action did not amount to discipline. The Petitioner also makes objection to the Carrier's entire Argument on the deduction of outside earnings (both points (1) and (2)) as being a new issue which is not properly before the Board. We believe the Petitioner is correct in labeling Carrier's point (2) a new issue, and, accordingly, we shall not consider this facet of Carrier's position. However, we do not agree that Carrier's point (1) involves a new issue and we shall therefore consider the text of Rule 8(f) which reads as follows:

> "RULE 8. DISCIPLINE AND GRIEVANCES
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> * * * * *
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> (f) If the final decision decrees the charges against the employee are not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employee shall be returned to the service and paid for all wages lost, less amount earned in any other service." (Underlining added)

The Carrier is entitled to make deductions from the compensation allowed in Award 19804 in accordance with the underlined portion of Rule 8(f). In processing the claim to this Board the Petitioner cited paragraph (a) of Rule 8, entitled "Discipline and Grievances". This rule, paragraph (a) through (g), sets out a body of procedures which become applicable when an employee is alleged to have been wrongfully disciplined or dismissed. Once the Petitioner took the position that the Claimant was wrongfully dismissed under paragraph (a) of Rule 8, the relief being sought automatically became subject to paragraph (f) of the same rule. And since the effect of Award 19804 was that the Carrier's action became a wrongful dismissal of Claimant on September 28, 1971, the Award is subject to paragraph (f) of Rule 8.

We note in conclusion that we have carefully studied the court decision, Board Awards, and Interpretations called to our attention by the Petitioner (Brotherhood of Railroad Signalmen v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, No. 67 C 1215; Third Division Board Award Nos. 11798, 14162, 15689; and Interpretation Nos. 223, 224, 226, 227, 228, 230, 242, 261, and 265), and find these authorities and Interpretations not inconsistent with the herein Interpretation.

Referee Frederick R. Blackwell, who sat with the Division as a neutral member when Award No. 19804 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of August 1974.

NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19804
THIRD DIVISION Docket Number DC-19918

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Joint Council of Dining Car Employee
(Local 385
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the Joint Council of Dining Car Employes, Local 385 on the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company for and on behalf of Mt. John H. Little, Jr., Cook, whose employment relationship was terminated by the Carrier effective August 31, 1970. Carrier shall now restore Mr. John H. Little, Jr. to service with all rights restored and compensated for all time lost.

OPINION OF BOARD: The issue here is whether claimant, John H. Little, Jr., was over 65 years of age when Carrier placed him on compulsory retirement on August 31, 1970. The record reflects disagreement on whether claimant took the initiative to prove to Carrier he had attained retirement age, or whether he was somehow induced to agree that he was of retirement age. However, we note here that, irrespective of how the Issue arose, the issue will be resolved solely on the basis of whether the evidence shows claimant to have been of retirement age when he was retired. We also note that we have considered but find no merit in: 1) Petitioner's contention that Carrier's action mounted to discipline and, hence, claimant was entitled to a hearing under the disciplinary rules of the Agreement; and 2) Carrier's contention that the claim is barred from consideration by the Board because, on the date the herein claim was filed, the claimant was not an employee of Carrier as he was retired from Carrier's set-vice.

Claimant was employed by Carrier in 1945. From then until this dispute arose he was carried in Carrier's files as having a birthdate of June 1, 1910, which would have made him 60 years old in 1970. Sometime prior to August 1970 the question was raised that claimant was born in 1900; this would have made him 70 instead of 60 years of age in 1970. On or about August 12, 1970, claimant gave Carrier a February 9, 1968 U. S. Census Report on the 1910 census.' Because this report indicated that claimant was 10 years old on April 10, 1910, Carrier accepted the report as proof that claimant was born in 1900. Consequently, on August 18, 1970, Carrier advised claimant that he was 71 years old and that, in accordance with the Compulsory Retirement of Dining Car Employees, his retirement date would be August 31, 1970. On August 31, 1970 the Organization wrote Carrier that it was in the process of establishing claimant's proper age and requested the claimant's retirement be deferred until it had completed its investigation. On September 4, 1970 the Organization filed formal claim demanding that claimant "be maintained on the seniority roster in this position, and paid his certification under the February 7, 1965 Mediation Agreement until such time as his age is officially established . . . to be different from that which was submitted on his application for employment."

The pro and con documentary evidence on claimant's age is as follows:

1) Claimant's employment application states claimant was born in Birmingham, Alabama, on June 1, 1910. This document shows claimant's age to be less than 65 when he was retired.

2) A February 9, 1968 U. S. Census Report on the 1910 census which report was given to Carrier by claimant. This report, covering a husband and wife, and six male and female children living in Taylor County, Georgia, shows one child, John H. Little, Jr., birthplace Georgia, to be 10 years of age in 1910. This document shows claimant's age to be more than 65 when he was retired.

3) A June 16, 1971 Census Report on the 1950 census, which shows a John H. Little, birthplace Louisiana, to be 39 years of age. This document, offered by the Organization, shows claimant to be less than 65 years of age when retired.

4) A January 16, 1958 auto driver's license showing a birthdate of June 1, 1910; and a certification of a life insurance policy showing a birthplace of Renold, Georgia, and a birthdate of June 1, 1910. These documents, offered by the Organization, show claimant to be less than 65 when retired.

5) Two affidavits offered by Carrier: a) a February 24, 1971 affidavit by one of Carrier's employees who stated that on August 1, 1970 the claimant had stated in her presence that he was 69 years old; and b) a February 24, 1971 affidavit by Supt. W. R. Jones who stated that claimant had told him he was "over 65 and planning to retire."

We note here that, on the property, the Organization offered two additional U. S. Census Reports, dated May 7, 1968 and March 16, 1971: however, because of their alteration, these documents were deemed by Carrier to have no probative value and we have therefore excluded them from consideration. Also, because claimant denied it was his, we have excluded Carrier's evidence of a certification for premium payment for Medicare in favor of Mr. John Little which was made in July 1968.

The 1968 census report (item 2 above), as previously indicated, was delivered to Carrier by claimant himself and, based thereon, Carrier made a determination that claimant had reached the compulsory retirement age. Subsequently, however, the claimant repudiated the census report and, although the record does not show precisely when this repudiation occurred, it is clear that the Carrier had knowledge of the repudiation on September 28, 1971. In a December 16, 1971 Carrier letter to the Organization, the repudiation was describ as follows:

> "During discussion of the instant case, in conference on September 28, 1971...it was Mr. Little's contention . . . that the information contained in the Bureau of Census Report dated February 9, 1968, which he presented to Mr. Jones, was false stating that the report contained several names of persons identified as brothers and sisters when he claimed to have none that he did not live in Taylor County, Georgia and that he received information regarding another Little family."

In describing the repudiation in an October 7, 1971 letter to the U. S. Census Bureau, the Carrier referred to claimant as having said:

> "..that his birthplace was not in the State of Georgia, but instead, Birmingham, Alabama, and that his birth date is June 1, 1910."

A review of these facts and the record as a whole makes it clear that the 1968 census report came from claimant himself and that it was the basis for Carrier's determination that claimant was ten years older than the age reflected in his employment application submitted 25 years earlier. The two affidavits referred to in 5 above did not enter into this determination and, in addition, their nature is such that they would have probative value only to corroborate other evidence having a material and direct bearing on the age of claimant. In appraising this evidence, it also becomes clear that the justification for Carrier's action revolves around the 1968 census report, which, though submitted by claimant, was subsequently repudiated by him. Because of the manner in which the report came into Carrier's possession, and because of the credibility given a census report on issues of age, there is no doubt that the report afforded a reasonable basis for Carrier's determination that claimant was over 65 when it retired him on August 31, 1970. Thus, Carrier's initial action to retire claimant was justified. However, on or shortly after the claimant's effective retirement date, the Carrier received written notice that the Organization questioned whether claimant had reached retirement age, that an investigation was underway to establish his correct age, and that Carrier was requested to hold the matter in abeyance. Subsequently, and more important, the claimant himself repudiated the 1968 census report on which Carrier's initial action had been based, saying that the information therein 'was not about his family and that he was born at the time and place set forth in his application for employment. While this repudiation may have afforded a basis for charges against claimant under the Agreement, on the ground of giving false information to Carrier by his prior representations about the report, this matter does not concern us here. The pertinent matter here is that the record does not show that claimant's representations about the report influenced or induced Carrier to part with anything of value or to give claimant a benefit of such a nature as to bar his repudiation from being given effect. Consequently, the issue here is whether, after claimant's repudiation of the 1968 census report, the remaining evidence supported Carrier's determination regarding his age.

Petitioner's evidence in 3 and 4 above shows birthplaces different than the one shown in claimant's employment application, but this discrepency did not per se discredit portions of the evidence bearing on the age issue. Apparently, though, Carrier theorized that claimant had been misrepresenting his age for approximately 25 years and, therefore, Carrier refused to accept this evidence as dispositive of the age issue. As to Carrier's own evidence, after claimant's repudiation of the 1968 census report, the Carrier's remaining evidence consisted of claimant's employment application and the two affidavits referred to in 5 above. The employment application did not necessarily establish that claimant was under 65, especially since claimant himself had raised doubts about the accuracy of the age shown in the application. But it is equally true that the affidavits, which came into existence after the age issue was raised, did not overcome the application so as to establish the claimant's age as being over 65; because the affidavits merely asserted that claimant had said his age was over 65, which, of course, is the very fact repudiated by his repudiation of the 1968 census report. Thus, even though Carrier did not have to accept the Petitioner's evidence as dispositive of the age issue, the submission of that evidence, coupled with claimant's repudiation of Carrier's principal evidence, the census report, gave Carrier abundant knowledge that its own evidence was under serious challenge. Carrier's response to this challenge was to ignore claimant's repudiation, whereas, as we have indicated, the repudiation should have been given effect. We must therefore conclude on the whole record that Carrier's evidence does not establish that claimant was over 65 years of age on August 31, 1970, which is the burden that Carrier must meet in order to justify its action. However, as we have indicated, Carrier's initial action was justified and its arbitrary action did not occur until it refused to give effect to claimant's repudiation of the census repot t . Precisely when claimant repudiated the report is not clear from the record; however, it is established by Carrier's December 16, 1971 letter that the repudiation occurred at least as early as September 28, 1971. Accordingly, we shall deny the claim from date of claim through September 27, 1971, and sustain the claim from September 26, 1971 onward.

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 in part as indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: & c & ! & g & -
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June 1973.