

Award No. 4124

Docket No. 4019

2-N&W-FO-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O. (Firemen & Oilers)**

NORFOLK & WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the controlling agreement, the position of Chief Weighman at the Norfolk Grain Elevators should be advertised to the employees as named in Rule No. 1.

2. That accordingly the Carrier be ordered to advertise the position of Chief Weighman under the provisions of Rule 14(a) of the controlling agreement.

EMPLOYEES' STATEMENT OF FACTS: On the effective date, November 25, 1958, of the controlling agreement, Mr. Walter Finn, Seniority date 1-30-1930, held the position of chief weighman.

Mr. Finn was an employe of the Norfolk and Western Railroad working at the Norfolk Grain Elevators which were leased to the Continental Grain Company. Mr. W. Finn had full supervision of the scale room and kept all records of work connected with the scale room. Mr. Finn was paid a salary as chief weighman.

Sometime in January, 1959, Mr. Finn was assigned the duties of pulling levers which resulted in the moving of grain from the garner to the scales and from the scales to the shipping bin. These were duties that had always been assigned to weighmen in the past. Since Mr. Finn had a heart condition, he was unable to handle the new duties and he was assigned to the position of truck dump weighman, a position not covered by the firemen and oilers' agreement but by the agreement of the operating engineers who hold the contract for the Continental Grain employes. At this time, Mr. Russell Hunt, an hourly rated employe of the Continental Grain Company was assigned to the temporary vacancy of Mr. Finn as chief weighman.

When this change was made a protest was made to Mr. E. A. Manetta, Norfolk & Western Personnel Officer. Mr. Manetta investigated the dispute

Even if W. M. Finn was considered holding the position of chief weighman subsequent to October 31, 1955, as the firemen and oilers contend, it was required under Rule No. 21—Grievances or Claims—of the November 25, 1958, agreement, that the claim be filed within sixty (60) days of April 20, 1959, which was the date Finn was transferred to the position of truck dump weighman at a lesser rate. The carrier points out that this is not the case, assuming this dispute is based on an initial claim dated March 22, 1960, approximately eleven months after Finn's pay was reduced.

There was a prior protest of Finn's demotion of April 20, 1959, dated December 12, 1959, by Shop Committee Chairman Cooper for the firemen and oilers, which was declined by the carrier and was allowed by the firemen and oilers to die in progression.

(2) The carrier contends that the firemen and oilers are requesting a position be advertised to them that is covered by agreement of another Union, and that this dispute is not properly before the Board and should be dismissed. In this ex parte submission the carrier has shown that the position of chief weighman at the grain company was filled in the only manner possible on October 31, 1955, by appointment of W. R. Hunt.

The carrier has also shown that during the time between October 31, 1955, and April 20, 1959, a period of three and one-half years, W. R. Hunt was in fact and responsibility chief weighman, although during that time W. M. Finn's wages as chief weighman were continued through the generosity of the grain company. The carrier has further shown that a position was arranged for Finn on April 20, 1959, within his physical capabilities, through an agreement between the grain company and the operating engineers, in order to provide employment for him.

Under the circumstances, the contention by the firemen and oilers that the position of chief weighman should be advertised now to employes named in Rule No. 1 is not supported by the applicable rules of the current agreement.

This claim is without merit and the carrier respectfully requests that it be denied.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

In 1952 the Carrier leased to the Continental Grain Company the grain elevators at Norfolk, Virginia, formerly operated by it, with the stipulation that the Carrier would continue to employ, pay and furnish to the Grain Company its twelve miscellaneous employes there, who were not covered

by any union agreement, the Grain Company to replace them as their service was terminated.

On November 19, 1953, the International Union of Operating Engineers was certified to represent as of January 14, 1954, all employes at the grain elevators except the above employes still on the Carrier's payroll.

On June 8, 1954, the Firemen & Oilers Organization was certified to represent the remaining seven of the twelve miscellaneous grain elevator employes mentioned in the fifth paragraph, supra, who were still on the Carrier's payroll, including Walter M. Finn. The coverage was not of named positions as such, but of the seven employes in their respective places.

The present Firemen & Oilers Agreement, signed and effective November 25, 1958, is of the same type. It expressly relates (Rule No. 1) only to Finn and the four other grain elevator employes named therein still on Carrier's payroll; it provided that the Carrier was not obligated to replace any of them, and that upon the elimination of all five the Agreement would terminate. It also provided (Rule 14(a)) as follows:

"Vacancies formerly held by employes named in Rule No. 1 carrying a higher rate will be bulletined to other employes named in Rule No. 1."

A similar provision relates to temporary vacancies known to be for over thirty days.

On or about October 31, 1955, Finn, then Chief Weighman, suffered a heart attack and on returning to work only about two months later was not considered able to perform some physical work of the position. During his absence W. R. Hunt, an employe under the Operating Engineers' Agreement, had been performing the duties of the position, and on Finn's return they worked together, both being paid at the Chief Weighman's rate. That was the situation when the present 1958 Agreement, with the above Rule No. 1, was adopted, and it continued until April, 1959, when, after a new medical examination, Finn was reduced to Truck Dump Weighman, a lower rated position, which he held until his death on March 10, 1960. A protest of his demotion was made, denied and allowed to lapse.

Hunt held what amounted to a second Chief Weighman's position, and did not supplant Finn, until the latter's demotion in April, 1959, when Hunt became the only Chief Weighman. This claim was not filed until nearly a year later, and after Finn's death. The Carrier contends, therefore, that it came too late under Rule 21.

But Rule 21(d) provides that "a claim may be filed at any time for an alleged continuing violation." All that is here claimed is that "the position of Chief Weighman * * * should be advertised to the employes as named in Rule No. 1," and "that accordingly the Carrier be ordered to advertise the position of Chief Weighman under the provisions of Rule 14(a)."

Until the Carrier does so there is a continuing violation of the rule, and this claim comes in time. Third party notice was given to the Operating Engineers who represent Hunt.

The delay in asserting this claim under Rule 14(a) of the Firemen's and Oilers' Agreement did not adversely affect either Hunt or the Carrier, and

did not waive or forfeit claimant's right to complain of the continuing violation thereafter subject to the limitations of Rule 21(d).

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of February, 1963.

DISSENT OF CARRIER MEMBERS TO AWARD 4124

This award sustaining the claim as set forth in the findings is in error.

On page 2, paragraph 5, of the award there is a statement that "Hunt held what amounted to a second Chief Weighman's position, and did not supplant Finn, until the latter's demotion in April 1959, when Hunt became the only Chief Weighman. This claim was not filed until nearly a year later, and after Finn's death. The Carrier contends, therefore, that it came too late under Rule 21."

The above quoted paragraph makes two specific points:

1. That Hunt held what amounted to a second Chief Weighman's position and did not supplant Finn until the latter's demotion in April, 1959. Regarding this conclusion, it is true that the Grain Company through its generosity and its desire to assist Mr. Finn in a time of extreme difficulty, paid him his full wages which he had received when he was serving as Chief Weighman. It is not correct that merely because the Grain Company paid Mr. Finn his full wages during his period of illness and also during the period of his physical incapability, that this should be a basis for ruling that he held or performed the duties of Chief Weighman.

Due to the responsibilities of the Chief Weighman's position and its proper performance insofar as the Grain Company was concerned, extreme and careful consideration had to be given as to who was qualified to perform the Chief Weighman's duties. Mr. Hunt, in the opinion of the Grain Company, was the only one assigned to this position and held full responsibility for same.

2. Regarding the point that the Carrier contends the claim was filed too late under Rule 21, the fact that the Firemen and Oilers waited until nearly a year would indicate that this was an afterthought and would not constitute a continuing violation.

In the Carrier's rebuttal is stated if Finn was considered to have held the Chief Weighman's position at the time of his transfer to the Truck Dump Weighman's position, then, in accordance with Rule 14(a), claim should have been initiated within sixty days after date of April 20, 1959, the date Finn's pay was reduced.

Even though the Firemen and Oilers were certified on June 8, 1954, an

agreement was not signed until November 25, 1958. During this period there was no agreement in effect, nor any Firemen and Oilers' rules controlling since the employes involved were classed as "miscellaneous employes" at the Grain Company.

For the reasons stated above, we dissent.

P. R. Humphreys

H. K. Hagerman

C. H. Manoogian

F. P. Butler

W. B. Jones