Award No. 12952
Docket No. MW-12674

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when it assigned the work of operating a chemical weed spraying machine on its Fargo Division to outside forces during the period from June 3 to July 2, 1960.

(2) Track Department employes Jacob Eck and Jacob Enzminger each be allowed pay at the chemical weed sprayer operator's rate for an equal proportionate share of the total number of man-hours consumed by outside forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: During the period from June 3 to July 2, 1960, the Carrier assigned the work of operating a weed spraying machine, used in chemical weed spraying operations on the Fargo Division, to the Nalco Company, whose employes hold no seniority rights under the provisions of this Agreement.

The work was of the nature and character that has been customarily performed by the Carrier's Maintenance of Way Department employes, using Carrier-owned chemical weed spraying machines.

The Claimants, who have established and hold seniority in the Track Sub-department on the Fargo Division, were available, fully qualified and could have expeditiously performed the work assigned to contract.

The claim as set forth herein was presented and progressed in the usual and customary manner on the property, but was declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated April 1, 1952, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

The record in this docket shows that privately owned chemical weed sprayers manned by employes of chemical companies have been operated on this Carrier for a number of years; that the operation of privately owned chemical weed sprayers has never been considered as being included within the scope of the April 1, 1952 Agreement; and that the practice of manning privately owned chemical weed sprayers by employes of chemical companies has not been abrogated by the April 1, 1952 Agreement. Consequently, the operation of privately owned chemical weed sprayers is not work considered as coming within the scope of the April 1, 1952 Agreement. On this basis, the claim covered by this docket should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier contracted with the Nalco Company to do the work of operating a weed spraying machine used in chemical weed spraying on the Fargo Division instead of using its own employes. The Organization claims this to be a violation of its Agreement with the Carrier.

Claimant relies on Rule 1 — Scope, Rule 2 — Seniority Groups and Ranks and on a Letter Agreement between the parties dated January 31, 1952. The Rules are general in nature and this Board has held that under such Rules the burden is upon the Organization to prove by custom and tradition that such work is exclusively reserved to the Employes. Awards 12502, 10715 and others.

The Organization asserts that the Letter Agreement of January 31, 1952 reserved this work to the Organization and that it could not be contracted without first negotiating with the Organization's General Chairman. The full text of the said Letter Agreement appears in the Organization's initial submission and need not be repeated here. In effect the letter set forth the circumstances under which Carrier might contract "construction, maintenance or repair work, or dismantling work customarily performed by employes in the Maintenance of Way Department." (Emphasis ours.)

The Letter Agreement requires consultation with and agreement by the General Chairman before a contract of particular work may be let and it sets the guide lines which would govern: the need for special skills, special equipment or special materials, or the fact that the Carrier is not adequately equipped to handle the work or that emergency time requirements exist which are beyond the capacity of Carrier's forces. It provides that, should the General Chairman not agree, the Carrier may let such work and the dispute may be processed as a grievance.

It should be noted that the Letter Agreement involves only such work as is customarily performed by the Employes. It does not enlarge their domain of exclusivity and treats only with that work which the Organization could claim by operation of the Rules and history and tradition. There is no evidence that the parties intended to alter their respective positions with regard to exclusive jurisdiction over work. In fact on February 11, 1952, the parties entered into another letter agreement emphasizing that previous practice concerning work by the Employes were not changed by the Agreement of April 1, 1952.

It is clear, therefore, that before the Organization may claim a violation of the Letter Agreement of January 31, 1952, it must prove that it was entitled to the work of operating the chemical weed spraying machine

by custom and tradition. The record is silent as to any history of custom and tradition regarding the right of the Employes to perform this work. On the other hand, the Carrier asserted without denial by the Organization that it had contracted out this work in the 1930's and each year since 1955.

The Organization raised one other point which merits some comment. It argued that the Carrier has acknowledged the Organization's right to this work by agreeing in 1958 to a rate of pay for a spray machine operator and the inclusion of this classification in Rule 2. The fact that a classification is established after the work had been performed for years does not vest it with greater significance than other, older classifications have. Exclusivity must still be determined by custom and practice.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of October 1964.