

Award No. 12953

Docket No. MW-12627

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

NORTHERN PACIFIC RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when, during the period June 6 to July 8, 1960, both dates inclusive, the Carrier assigned or otherwise permitted employes outside the scope of the agreement (Roadmasters) to perform the work of operating one side of a weed sprayer.

(2) Mr. J. T. Huseby be allowed eight hours' pay at Weed Spray operator's rate for each work day within the period mentioned in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: During the period from June 6 through July 8, 1960, the Carrier assigned and used its Roadmasters, who are excepted from the scope of this Agreement, to operate one side of a chemical weed spraying machine in the performance of chemical weed spraying work on the Saint Paul Division.

The work was of the nature and character usually and traditionally performed by the Carrier's Chemical Weed Sprayer Operators. In fact, the carrier assigned and used one of its Track Department Chemical Weed Sprayer Operators to operate the other side of the weed spraying machine on the days in question.

The Claimant, who has established and holds seniority as a Chemical Weed Sprayer Operator in Group 26 of the Track Department on the Saint Paul Division, was available, fully qualified and could have expeditiously performed the Chemical Weed Sprayer Operator's work assigned to the Roadmasters.

The Agreement violation was protested and 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.

rier has not relinquished its inherent right to assign a Roadmaster to direct and operate chemical weed sprayers.

6. The Employes have not acquired by agreement or otherwise a monopoly over the operation of chemical weed sprayers.

This claim should be denied.

OPINION OF BOARD: This dispute involves Carrier's assignment of a Roadmaster, a Carrier Official not covered by the applicable Agreement, to operate one side of a chemical weed spraying machine.

The Organization relies on Rule 1, Scope and Rule 2, Seniority Groups and Ranks. These Rules are general in nature, and do not, in themselves, constitute a reservation of work to the Employes. This Board has frequently held that under such rules, the exclusive right of the Employes to such work must be determined by custom, practice and tradition, and that the Organization has the burden of proving that such custom, practice and tradition support its right to such work. The Organization submitted no evidence to support its burden. It merely asserted that "The work was of the nature and character usually and traditionally performed by the Carrier's Chemical Weed Spray Operators." Mere assertion, however, is not proof.

The Organization also relied on the Letter Agreement of January 31, 1952. We have ruled in a companion case, Award No. 12952, that the Letter Agreement did not grant to the Employes any new, exclusive rights they did not theretofore have.

This case is complicated somewhat by the fact that Carrier's Reply to the Organization's Original Submission was filed late and was, therefore, rejected by the Board. The Organization argues that Carrier must be deemed to have admitted all allegations in the Organization's Submission under the principle that the failure to deny constitutes an admission.

The Organization's position is sound, but does not apply where the Carrier had elsewhere already denied the allegation. Once an allegation has been denied, there is no need to repeat the denial because the allegation is repeated. As between an actual denial and an inferred denial, it would be to fly in the face of common sense to prefer the inference merely because it came later.

Under these principles, we must find the Carrier had denied all the essential aspects of the claim. The record indicates that Carrier asserted that the Roadmaster and others have from time to time been used to operate the Weed Sprayer. The Organization did not deny this. To prevail, the Employes were obliged not only to deny it, but to prove the opposite, that only Organization employes performed the work. This the Organization failed to do.

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 the 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.