

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 2746

BURLINGTON NORTHERN RAILROAD COMPANY

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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* CASE NO. 22
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* AWARD NO. 22
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Public Law Board No. 2746 was established pursuant to the provisions of Section 3, Second (Public Law 89-456) of the Railway Labor Act and the applicable rules of the National Mediation Board.

The parties, the Burlington Northern Railroad Company (hereinafter the Carrier) and the Brotherhood of Maintenance of Way Employees (hereinafter the Organization), are duly constituted carrier and labor organization representatives as those terms are defined in Sections 1 and 3 of the Railway Labor Act.

After hearing and upon the record, this Board finds that it has jurisdiction to resolve the following claim:

- "(1) The Carrier violated the Agreement January 3, 4, 7 and 8, 1980, when contracting the rebricking of furnace at the tie plant in Brainerd, Minnesota.
- (2) Because of said contracting, B & B employes D. M. Wier and G. L. Ramsdell be allowed forty (40) hours each at their respective rates of pay."

Brainerd, Minnesota is a point on the former Northern Pacific Railroad, a component railroad of the now Burlington Northern. At

this point the Carrier maintains a Tie Treatment Plant where a Keeler boiler is used to supply steam to run the plant. Sometime in 1979 this boiler was in need of a general repairs including the rebricking of the boiler/furnace. The Carrier contracted out this rebricking work to Hilton Firebrick Service Company on January 3, 4, 7 and 8, 1980.

The Organization filed a claim on behalf of the above two named Claimants on the basis that the work involved was maintenance of way work and that the Carrier had violated applicable collective bargaining agreements. The claim was denied at the various steps in the grievance procedure and is before this Board for adjudication.

The Organization and the Carrier have cited several agreement provisions to this Board as well as numerous awards of various adjustment boards which they contend are properly considered and dispositive of the case from their respective viewpoints. This Board has read those citations some of which involve the issue of a general scope rule vis a vis custom and practice, and other cases which involve questions concerning previous determinations at the Tie Treatment Plant wherein work jurisdictional disputes have been addressed. However, we find that in the instant case a special agreement which was reached on September 7, 1954 and pertains exclusively to the repairing of boilers in stationary power plants, including the plant here under consideration, is the single agreement which must be reviewed in order to determine whether the Organization's claim has merit. It should be noted that both the

Organization and the Carrier have cited this agreement as being relevant to the disposition in the instant case.

This agreement provides in its entirety as follows:

"NORTHERN PACIFIC RAILWAY COMPANY

St. Paul 1, Minn.
September 7, 1954

Mr. J. T. Keyes, General Chairman
Brotherhood of Maintenance of Way Employees
511 Northwestern Federal Building
Minneapolis 3, Minnesota

Dear Sir:

Referring to our conference today about the assignment of A. F. Kuklok, employed as a second class carpenter on the St. Paul Division, to install and repair boiler settings in stationary power plants:

Mr. Kuklok has established a seniority date as a second class carpenter on the St. Paul Division as of July 8, 1952. Mr. Kuklok is now assigned as a second class carpenter on the St. Paul Division.

Effective September 9, 1954, a position will be established in the Engineering Department and the occupant of this position will be assigned to perform the work of installing and repairing boiler settings in stationary power plants at whatever point on the system such work is required. The occupant of this position will not establish seniority by virtue of occupying this position and neither will this employee be subject to displacement by other employees while filling such position in the Engineering Department.

Mr. Kuklok has made application for the position to be established in the Engineering Department provided the performance of this work in the Engineering Department will not prejudice his seniority or employment in the B&B Department on the St. Paul Division.

In order to permit Mr. Kuklok to take service in the Engineering Department without impairing his seniority and employment in the B&B Department on the St. Paul Division, the following is agreed to:

Mr. Kuklok, while employed by the Engineering Department in the position established for the purpose of installing and repairing boiler settings in the stationary power plants, will retain and accumulate seniority in the B&B Department on the St. Paul Division.

Mr. Kuklok, while assigned to the position to be established in the Engineering Department for the purpose of installing and repairing boiler settings in stationary power plants, will be permitted to perform work on the St. Paul Division on the basis of his seniority date as a second class carpenter when not engaged in performing the work of installing and repairing boiler settings.

When and if the position to be established in the Engineering Department and assigned to perform the work of installing and repairing boiler settings is abolished, Mr. Kuklok will be permitted to exercise his seniority in the B&B Department on the St. Paul Division in conformity with the rules of the Maintenance of Way Agreement.

It is understood and agreed that no claims by other qualified employees on other divisions will be presented or prosecuted by or in behalf of Mr. Kuklok or by or in behalf of any other employees who have established seniority under the Maintenance of Way Agreement because of the performance of work by Mr. Kuklok as herein provided for.

Yours truly,

Agreed to:

/s/ G. M. Hare
Chief of Personnel

/s/ J. T. Keyes
General Chairman

Brotherhood of Maintenance of Way Employees"

It is interesting to note in viewing this agreement that the Carrier (the Northern Pacific) found it necessary to reach agreement with the Organization before it established the position for

Mr. Kuklok and before it assigned Mr. Kuklok to perform the work which is now in dispute.

It is also to be noted that when the Carrier investigated the instant claim of the Organization that it solicited the opinion of Mr. Kuklok, who is now a supervisor in the B&B Department, and that Mr. Kuklok in response to the Carrier's inquiry regarding entitlement to work of rebricking of boilers at the Tie Plant at Brainerd stated that "There never has been any B&B help used when performing brick repair by me at the Tie Plant. Most brick work that was done on boilers was so minor that B&B forces were not needed." Mr. Kuklok then attached to his response the agreement which has been reproduced above.

The Organization contends that the September 7, 1954 agreement with the Northern Pacific, as well as the provisions of its scope rule, reserve the work of rebricking the furnace at the Brainerd Tie Plant to its forces who are qualified to perform that work.

The Carrier contends that the Organization's claims that its employees have performed this work in the past and are qualified to perform such work is substantially refuted by the statement furnished by Mr. Kuklok (reproduced above), who was an exempt employee in the Engineering Department and who was used to perform rebricking work not only at Brainerd, but throughout the entire former Northern Pacific system, in accordance with the September 7, 1954 agreement.

When the Northern Pacific decided on September 7, 1954 to use Mr. Kuklok to perform rebricking work at certain furnaces on its system, including the furnace at the Brainerd Tie Plant, it sought agreement with the Organization. Additionally, the Northern Pacific structured a very detailed agreement under which the services of Mr. Kuklok would be utilized. In this Board's view the last three paragraphs of the agreement are very significant. The third paragraph from the end provides that while Mr. Kuklok is assigned to the position in the Engineering Department, which would involve the repairing of boilers, that he will be permitted to perform work on the St. Paul Division on the basis of his seniority date as a second class carpenter "when not engaged in performing the work of installing and repairing boiler settings." Clearly, the parties contemplated that the repairing of the boilers would not be a full time position and that Mr. Kuklok would flow back and forth between his regular carpentry work on the St. Paul Division, a position clearly within the terms of the collective bargaining agreement and the scope, and the furnace repair work.

The penultimate paragraph in the agreement states that when and if the position in the Engineering Department which was to be assigned to Mr. Kuklok is abolished, that Mr. Kuklok would then be permitted to exercise his seniority in the B&B Department on the St. Paul Division in conformity with his agreement rights under the Maintenance of Way agreement. In this Board's view the fact that

Mr. Kuklok was being "assigned" to a position that could then be "abolished" is indicative that the parties intended that the work of repairing boilers, and particularly the boiler at the Brainerd Tie Plant, was an extension of the agreement rights of the Organization, and because of his unique qualifications, Mr. Kuklok was selected to perform the work.

Finally, the last paragraph of the agreement states that the parties understand and agree that "no claims by other qualified employees on other divisions" will be presented or prosecuted by or on behalf of Mr. Kuklok or by or in behalf of other employees who have established seniority under the Maintenance of Way agreement because of the performance of work by Mr. Kuklok. In this Board's view that waiver by the Organization to filing claims establishes that absence such agreement, the Organization could file claims if Mr. Kuklok performed the work of repairing boilers on the system.

In our opinion the essence of the Agreement was to create a "partially excepted" position, as that term is understood in the industry, in the Engineering Department. Mr Kuklok would perform the occasional work of the position, and senior, qualified employees would waive claim to the work when it was performed by Mr. Kuklok, a fellow member of their craft or class; but this waiver did not extend to outside contractors.

In view of the foregoing, this Board concludes that the Organization had the right to perform the work as a result of the September 7, 1954 agreement, and that special provisions made to allow performance of said work by a single employee, does not remove the Organization's right to now claim such work. In the circumstances, this Board finds that the claim should be sustained.

AWARD: Claim sustained.

F. H. Funk
F. H. Funk, Organization Member

W. Hodynsky
W. Hodynsky, Carrier Member

Dissent attached

Richard R. Kasher
Richard R. Kasher, Chairman
and Neutral Member