SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Organization,

and

UNION PACIFIC RAILROAD COMPANY,

Carrier.

Case No. 34
Award No. 34

OPINION AND AWARD

Hearing Date: January 15, 2008
Hearing Location: Washington, D.C.

BOARD MEMBERS

Employe Members: R. B. Wehrli and Donald F. Griffin
Carrier Members: Kenneth Gradia and John Hennecke
Neutral Member: John B. LaRocco

EMPLOYEES' QUESTION AT ISSUE

Did UP's transfer of tie plating work formerly performed by BMWED represented employees under the 2001 (North) Agreement to a former Missouri Pacific facility in North Little Rock, Arkansas staffed by employees covered by the BMWED-UP 2000 (South) Agreement pursuant to Article III Section 1 of the February 7 Agreement permit UP to purchase and install on territory covered by the 2001 MBWED-UP (North) Agreement ties that had been plated in whole or in part by persons other than UP employees represented by BMWED (i.e., contractor forces)?

CARRIER'S QUESTIONS AT ISSUE

(1) Does UP's transfer of tie plating work from the jurisdiction of the UP/BMWED July 1, 2001, collective bargaining agreement (UP 2001) to the jurisdiction of the UP/BMWED collective bargaining agreement (MP 2000) pursuant to Article III Section 1 of the February 7th Agreement remove such work from the scope of the UP 2001 agreement, thereby permitting UP to have such work performed in compliance with the MP 2000 agreement?

(2) If the answer to 1 is yes, may these ties be utilized in territories covered by the UP 2001 agreement?

OPINION OF THE BOARD

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employe within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted according to the 1996 Mediation (National) Agreement and as specified in a National Mediation Board appointment letter dated August 18, 2004; and that all parties were given due notice of the hearing held on this matter.

I. BACKGROUND AND SUMMARY OF THE FACTS

To fully understand the issues presented herein, this Board must relate certain circumstances, events, and disputes that occurred during the last 10 years.

As of the late 1990's, the Carrier maintained two facilities where employees represented by the Organization manufactured and assembled track panels, albeit track panels often were assembled by maintenance of way forces in the field. One facility was located at Laramie, Wyoming, a point on the Union Pacific (UP)-North, while the other facility was located at North Little Rock, Arkansas, a point on the UP-South.[1] For many years even prior to the late 1990's, maintenance of way employees attached tie plates to ties as part of fabricating panels at the Laramie plant. The Carrier explained that at the North Little Rock panel plant, a third party vendor, Nevada Railroad Materials, supplied the Carrier with pre-plated ties. Employees represented by the Organization then assembled the track panels using these pre-plated ties.

On November 16, 1999, the Carrier notified the Organization of its intent to gradually phase out track panel production and then close the Laramie and North Little Rock facilities. The Carrier declared that it intended to purchase pre-plated ties and track panel components in the marketplace and ship them directly to right of way work sites where maintenance of way employees would assemble and/or install the track panels. The Organization vigorously

[1] The UP-North territory primarily consists of the original Union Pacific Railroad line as it existed before a series of mergers commencing in the early 1980's. The UP-South territory consists primarily of the former Missouri Pacific Railroad plus the former Missouri-Kansas-Texas Railroad.

protested the Carrier's decision to start buying pre-fabricated track panels from outside vendors. After a threatened work stoppage was enjoined by the U.S. District Court, the parties litigated whether the dispute was major or minor under the Railway Labor Act, 45 U.S.C. § 151, et. seq. On December 21, 2000, the U.S. Circuit Court of Appeals for the Tenth Circuit ruled that the dispute was minor. *Brotherhood of Maintenance of Way Employes v. Union Pacific Railroad Company*, No. 00-1105 (10th Cir.; Appeal from the District of Colorado). As a result, the parties submitted the dispute to a Special Board of Adjustment presided over by Arbitrator Gerald Wallin.

The Organization and the Carrier are parties to separate schedule agreements for the UP-North and the UP-South. The pertinent portion of Rule 9 (the scope rule) in the UP-North Agreement, provides:

> Construction and maintenance of roadway and track, such as rail laying, tie renewals, ballasting, surfacing and lining track, fabrication of track panels, maintaining and renewing frogs, switches, railroad crossing, etc., repairing existing right of way fences, construction of new fences up to one continuous mile, ordinary individual repair or replacement of signs, mowing and cleaning right of way, loading, unloading, and handling of track material and other work incidental thereto will be performed by forces in the Track Subdepartment.

At issue before the *Wallin* Board was whether Rule 9 of the UP-North Agreement barred the Carrier from assigning the work of fabricating track panels to outsiders; that is, persons not within the scope of the UP-North Agreement.

The *Wallin* Board found that the Carrier had adhered to a 20-year past practice of refraining from purchasing pre-fabricated track panels from outside vendors and, correspondingly, employees represented by the Organization had historically and continuously performed track fabrication work. The *Wallin* Board concluded that the work of fabricating

track panels on the UP-North was reserved to maintenance of way employees at Laramie covered by Rule 9 of the UP-North Agreement. The *Wallin* Board wrote:

> We are compelled to find, therefore, that the Carrier has agreed, by its practice of more than 20 years, that it will not seek to obtain from outside vendors any of the track panel fabrication work its Track Subdepartment forces have historically performed that would be embodied in the finished products of an outside vendor. Stated differently, Carrier has agreed to prohibit itself from purchasing any finished products from outside vendors that incorporate, as part of the manufacturing process, any track panel fabrication work historically, customarily and traditionally performed by its Track Subdepartment employees. As is the case with all agreement terms that arise by binding practice, this prohibition is an implicit unwritten term of the parties' 1973 Agreement.
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> Accordingly, the Carrier's purchase of pre-plated wood ties beginning in 1996 violated the prohibition since those ties incorporated that attachment of the plate to the tie, which was fabrication work, on this record, that Track Subdepartment employees have historically, customarily and traditionally performed.

In essence, the *Wallin* Board adjudged that due to the elapse of a substantial amount of time, the Carrier waived any right that it might have possessed to purchase track panels "off the shelf" because it had not made such purchases, even though the National Railroad Adjustment Board had issued a series of decisions which seemed to permit carriers to make such purchases. Although the Carrier's November 16, 1999 notice referred to the North Little Rock facility, as well as the Laramie plant, the *Wallin* Board only addressed the track panel fabrication work performed at Laramie and confined its consideration to interpreting Rule 9 of the UP-North Agreement.[2] *Brotherhood of Maintenance of Way Employes v. Union Pacific Railroad Company* (Wallin; 2001).

Subsequently, an ancillary dispute developed between the Organization and the Carrier concerning the Carrier's purchase of pre-plated rail ties from outside vendors for new track construction projects on the UP-North. Although the Carrier argued that it had frequently

[2] The *Wallin* Board wrote, at page 2, that the "...instant controversy concerns only the original Union Pacific territory..." and the UP-North Agreement. In a footnote at page 4, the *Wallin* Board observed that any issue pertaining to pre-plated ties at North Little Rock is not part of the controversy presented to the *Wallin* Board.

purchased pre-plated ties for construction in the past, a Special Board of Adjustment, chaired by Arbitrator Herbert Fishgold, found that the Organization was wholly unaware of any such past practice. As a result, the *Fishgold* Board wrote:

> In conclusion, the Board finds that Rule 9, when considered in conjunction with Rule 52, reserves the work of track construction, of which tie plating is an integral step to BMWE forces, so long as it is performed at UP's initiative, for its benefit and at its expense. Indeed, under the circumstances presented herein, UP could not have contracted out tie plating work. As Fourth Division Award 1611 noted, "[i]t is a well established rule of law that one may not accomplish by indirection what he is forbidden to do in a direct manner..."

Like the *Wallin* decision, the *Fishgold* decision was limited to interpreting the scope rule (Rule 9) and the contracting out rule (Rule 52) in the UP-North Agreement.[3] *Brotherhood of Maintenance of Way Employes v. Union Pacific Railroad Company* (Fishgold: 2003).

On December 2, 2003, the Carrier notified the Organization's General Chairman on the UP-North that work consisting of the manufacturing of pre-plated ties and tangent track panel assembly would be transferred from Laramie to North Little Rock. More specifically, the second paragraph of the Carrier's December 2, 2003 notice stated:

> Please be advised that effective January 5, 2004, all pre-plating of ties that are utilized in new track construction, tangent track panel construction, road crossing renewals and in conjunction with the track renewal machine, which is presently performed under the jurisdiction of your collective bargaining agreement, will be transferred to North Little Rock, Arkansas. The work of assembling tangent track panels will be transferred also. Such work will be performed by employees coming under the jurisdiction of the collective bargaining agreement between Union Pacific and the Brotherhood of Maintenance of Way Employes dated July 1, 2001.

The Carrier's notice went on to state that inasmuch as the shift of work did not involve the transfer of any employees, an implementing agreement was unnecessary.

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[3] The *Fishgold* Board wrote, at page 2, that the "...instant controversy concerns only the original Union Pacific territory..." and the UP-North Agreement.

The record does not reveal precisely when the Carrier transferred the pre-plating tie and tangent track panel work to North Little Rock, but the record reflects that the Organization did not contest the transfer.

The Organization later charged that after the Carrier transferred the pre-plating tie work to North Little Rock, an outside contractor called Nevada Railroad Materials produced pre-plated ties and partially assembled track panels at or near the Carrier's North Little Rock facility. The Organization further charged that it viewed waybills indicating that some of the pre-plated ties manufactured by Nevada Railroad Materials were shipped to trackage on the UP-North for installation by UP-North maintenance of way forces.[4] The Organization threatened a work stoppage over these charges. It also instituted suit to enforce the decisions of the *Wallin* Board and the *Fishgold* Board. The Carrier cross claimed. Subsequently, the parties entered into a settlement agreement dated October 31, 2006. Under the agreement, the parties dismissed the law suits and submitted their respective issues to this Board. Those issues appear verbatim on the title page of this Opinion and Award.

On August 1, 2005, the Organization filed a Notice with the National Railroad Adjustment Board of its intent to submit a claim to the Third Division concerning the Carrier's use of Nevada Railroad Materials to perform the work of pre-plating ties in the vicinity of North Little Rock. The Organization's claim seeks straight time and overtime pay for a number of maintenance of way employees measured by the time the outside vendor spent manufacturing the pre-plated ties. According to the parties, this claim is pending before the Third Division of the National Railroad Adjustment Board.

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[4] The Organization's allegation was not entirely clear regarding whether the outside vendor first supplied the pre-plated ties to the Carrier's inventory at North Little Rock or if pre-plated ties were transported directly from the outside vendor to points on the UP-North.

II. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Pursuant to the *Wallin* Board and the *Fishgold* Board decisions, the work of fabricating track panels and affixing plates on ties is exclusively reserved to maintenance of way employees on the UP-North pursuant to Rule 9. Special Board of Adjustment No. 1087 lacks jurisdiction to address this dispute because the February 7, 1965 Job Stabilization Agreement is inapplicable to determining the propriety of the Carrier's alleged transfer of scope-covered work from employees represented by the Organization to an outside contractor. This Board does not have the authority to interpret the applicable scope rule. The Organization stresses that the October 25, 1996 Letter Agreement creating a dispute resolution procedure for claims under the Job Stabilization Agreement specifically restricts this Board's jurisdiction to interpreting and applying that Agreement. *Brotherhood of Maintenance of Way Employes v. Union Pacific Railroad Company, Special Board of Adjustment No. 1087, Award No. 25 (LaRocco: 2006).* The Organization therefore urges this Board to dismiss this case for lack of jurisdiction. The Organization elaborates that a dismissal ruling would leave all outstanding issues to be later decided in accord with the provisions of the UP-North Agreement. The Organization alternatively argues that if the October 31, 2000 Settlement Agreement vests this Board with jurisdiction, this Board must follow the rulings issued by the *Wallin* Board and the *Fishgold* Board that held that the work of pre-plating ties is exclusively relegated to maintenance of way employees.

The Organization implores this Board to carefully examine how the Carrier framed its issues because the Carrier is improperly seeking the Board's approval for contracting out maintenance of way work to Nevada Railroad Materials when, not only does the Board lack

jurisdiction to either approve or disapprove of contracting out pre-plated tie work, but also the Carrier is surreptitiously circumventing the *Wallin* Board and the *Fishgold* Board decisions. If the Board responds to the Carrier's issues, it must carve out an exception stating that any pre-plated ties coming under the scope of the UP-North Agreement cannot be fabricated by an outside contractor or purchased by the Carrier from an outside vendor.

When the Organization received the Carrier's December 2, 2003 notice, the Organization rightly assumed, as specified in the notice, that the Carrier was transferring the Laramie work to employees represented by the Organization at North Little Rock. Undoubtedly, the Organization would have challenged the Carrier's notice had it known that the Carrier was actually transferring work performed by maintenance of way employees at Laramie to an outside contractor. Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, does not allow the Carrier to transfer work exclusively reserved to maintenance of way employees, to outside contractors or vendors. Article III expressly limits the movement of work to intra-craft transfers. Thus, the Carrier must transfer maintenance of way work to maintenance of way employees. *Special Board of Adjustment, No. 605, Award No. 12 (Dolnick).* Furthermore, Article III of the Job Stabilization Agreement permits the Carrier to transfer work "throughout the system" which implicitly restricts the Carrier from transferring work beyond its system. While the Carrier disingenuously asserts that the pre-plated tie work is no longer subject to the UP-North Agreement, the Job Stabilization Agreement does not negate schedule scope rules. Rule 9 still applies to the manufacture and the utilization of pre-plated ties. On the other hand, no violation of Rule 9 of the UP-North Agreement occurs so long as the pre-plated tie work is performed by employees represented by the Organization at North Little Rock.

On three occasions, the Carrier was stymied in its improper attempts to contract out the work of pre-plated ties and manufacturing track panels. In this case, the Carrier is trying for a fourth time to gain the right to buy pre-plated ties off the shelf. As the *Fishgold* Board observed, the Carrier cannot do indirectly that which it cannot accomplish directly. Consequently, the Carrier cannot install pre-plated ties produced by an outside contractor on territory covered by the UP-North Agreement.

B. The Carrier's Position

Pursuant to proper notice, the Carrier transferred some, but not all, pre-plated tie and track panel assembly work from Laramie to North Little Rock under the auspices of Article III of the February 7, 1965 Job Stabilization Agreement, as amended. The Job Stabilization Agreement permits the Carrier to transfer work throughout its system and, in exchange, maintenance of way employees receive lucrative protective benefits. Subsequent to the transfer, the work came within the scope of the UP-South Agreement. Since the transferred work must be performed in accord with the UP-South Agreement, the UP-North Agreement is irrelevant. Once the work left Laramie, the UP-North Agreement does not govern either the pre-plated tie manufacturing work or the finished product (the pre-plated ties themselves). Put differently, the UP-North Agreement cannot possibly follow the work to North Little Rock because, upon consummation of the transfer of work, the pre-plating tie work is under the UP-South Agreement. Therefore, Rule 9 of the UP-North Agreement does not attach to work performed under the UP-South Agreement and commensurately, Rule 9 does not apply to work product accomplished under the UP-South Agreement, even if the product eventually comes onto territory covered by the UP-North Agreement. Indeed, this Board lacks jurisdiction to decide

whether or not the UP-North Agreement applies to any work product that the Carrier uses on the UP-North territory.

The transportation and distribution of ties after completion of the manufacturing process at North Little Rock is analogous to centralized payroll functions at the Carrier's Omaha headquarters. Clerical employees in the Carrier's payroll department at Omaha prepare checks that are sent all over the system. When a check is transported to a point on the UP-South, the check does not become subject to the rules in any clerical agreement on the UP-South. Rather, the check is produced according to the work rules contained in the clerical agreement applicable to Omaha employees. Similarly, when pre-plated ties leave North Little Rock, the ties do not thereafter come under the work rules of any other agreement. Nothing in the Job Stabilization Agreement authorizes this Board to place the finished tie plates within the scope of the UP-North Agreement.

The Organization misplaces its reliance on the holdings issued by the *Wallin* Board and the *Fishgold* Board. The Carrier is not attempting to abrogate those decisions. Indeed, the Carrier has fully complied with the two rulings. The Carrier assigned work on the UP-North in accord with the interpretation of Rule 9 laid down by the *Wallin* Board and the *Fishgold* Board. With regard to this dispute, the two decisions are irrelevant. Both decisions concerned the performance of pre-plated tie work prior to the Article III transfer of work. To reiterate, once the work is transferred, Rule 9 of the UP-North Agreement cannot possibly operate to give the work to maintenance of way employees working on the UP-North since the work is now performed at North Little Rock, a point subject to the UP-South Agreement.

Finally, if the contractor at North Little Rock is engaging in tasks which constitute a violation of the UP-South Agreement, the dispute must be adjudicated by the National Railroad

Adjustment Board, Third Division, where the Organization initiated a claim. If, as the Organization alleges, the contractor is wrongly performing pre-plated tie work or the Carrier is mishandling the finished product, the Organization must prove those allegations and rule violations in a forum other than this Board.

III. DISCUSSION

Both parties have reminded this Board about the extent of its jurisdiction. Consequently, we must be ever mindful of the degree of our authority to adjudicate any issue presented to us. As both parties point out, this Board is confined to interpreting and applying the February 7, 1965 Job Stabilization Agreement, as amended. *Special Board of Adjustment No. 1087, Award No. 25 (LaRocco).* The Board acknowledges that circumstances and disputes can arise where the Board must determine if rules in a schedule agreement conflict with or are inconsistent with provisions of the February 7, 1965 Job Stabilization Agreement, as amended, in order to properly interpret and apply the latter agreement. However, this Board may not presumptively exceed its jurisdiction by, for example, interpreting and applying the scope rules of either the UP-North Agreement or the UP-South Agreement when the rules do not concern an application of the Job Stabilization Agreement. Therefore, when this Board answers the issues herein, we will not tread beyond our jurisdiction.

The starting point for analyzing this dispute is Article III of the February 7, 1965 Job Stabilization Agreement, as amended. Article III, Section 1 provides:

> The organizations recognize the right of the carriers to make technological, operational and organizational changes, and in consideration of the protective benefits provided by this Agreement the carrier shall have the right to transfer work and/or transfer employees throughout the system which do not require the crossing of craft lines. The organizations signatory here to shall enter into such implementing agreements with the carrier as may be necessary to provide for the transfer and use of employees and the allocation or rearrangement of forces made necessary by the contemplated change. One of the purposes of such

> implementing agreements shall be to provide a force adequate to meet the carrier's requirements. [Emphasis added]

Article III, Section 1 specifically grants the Carrier the "...right to transfer work...throughout the system..." so long as the transfer does "...not require the crossing of craft lines."

In December 2003, the Carrier gave the Organization notice of its intent to transfer pre-plated tie work and some track panel assembly work from the Laramie plant on the UP-North to the North Little Rock facility on the UP-South. The two territories are subject to separate maintenance of way schedule agreements. While Article III bars the Carrier from crossing craft lines, it does not contain any prohibition against transferring work from one collective bargaining agreement to another. The Carrier may move work among agreement territories so long as the work does not cross craft lines. *Special Board of Adjustment No. 605, Award No. 12 (Dolnick).*

When maintenance of way employees performed tie-plating and track panel assembly at Laramie on the UP-North, the work was covered by the UP-North Agreement. The *Wallin* Board and the *Fishgold* Board issued comprehensive decisions concerning the interpretation of the scope and contracting out rules in the UP-North Agreement. Those two decisions adjudicated who may perform the work. More importantly, the two decisions found that the Carrier lacked the prerogative to purchase pre-plated ties off the shelf for either track rehabilitation or new construction projects. So long as the work was parked on the UP-North, the UP-North Agreement, as interpreted by the *Wallin* Board and the *Fishgold* Board, applied to the performance of the work. However, as stated above, the Job Stabilization Agreement permitted the Carrier to transfer the tie plate work and track panel assembly work "throughout the system," which includes a right to transfer the work outside the boundaries of the UP-North Agreement. After the Carrier transferred the work to North Little Rock, the work fell within the province of the rules set forth in the UP-South Agreement. The UP-North Agreement does not

piggyback on the work after it leaves the UP-North. Otherwise, untenable consequences would thwart the Carrier's capacity to transfer work throughout its system per Article III of the Job Stabilization Agreement, as amended. Examples of circumstances of how the UP-North Agreement would effectively frustrate the operation of Article III if it continued to apply to work transferred to the UP-South include, but are not limited to, the following. If Rule 9 of the UP-North Agreement covered the work at North Little Rock, an arbitral tribunal interpreting Rule 9 could decide that the work must be performed by maintenance of way employees under the UP-North Agreement which would require the Carrier to return the work to the UP-North or require the transfer of UP-North employees to North Little Rock. The question then would become do the employees transferring to North Little Rock continue to work under the UP-North Agreement inasmuch as they are performing work covered by that agreement. Similarly, if the UP-North Agreement followed the work to North Little Rock, the Maintenance of Way General Committee on the UP-South could not negotiate rules governing particular work at a point covered by the UP-South Agreement.

These unacceptable and absurd consequences amply demonstrate why Article III, Section 1 permits the Carrier to transfer work throughout its system and, upon consummation of the transfer, the work becomes subject to the collective bargaining agreement at the point to which the work is transferred. Therefore, the pre-plated tie and track assembly work which the Carrier moved to North Little Rock henceforth fell within the scope of the UP-South Agreement.[5] *Special Board of Adjustment No. 605, Award No. 442 (Lieberman).*

Our holding that the work fell within the agreement covering the location to which the work is transferred upon consummation of the transfer would be equally applicable if the Carrier

[5] The *Wallin* Board and *Fishgold* Board decisions interpreted only the UP-North Agreement, and so those decisions did not piggyback on the work transferred to North Little Rock.

had engaged in an Article III, Section 1 work transfer from North Little Rock to Laramie. Regardless of how the work was being performed at North Little Rock, once the work reached Laramie, the Carrier would be compelled to conform work assignments to the rules contained in the UP-North Agreement, including complying with arbitration decisions interpreting those rules.

Once this Board concludes that the pre-plated tie work and track panel assembly work falls within the scope of the UP-South Agreement when the work arrived at North Little Rock, this Board's jurisdiction ceases. We do not have the authority to determine whether or not the Carrier properly assigned the work after the transfer was completed. Similarly, the propriety of any contracting out of work that might have occurred subsequent to the transfer is not within the jurisdiction of this Board. *Special Board of Adjustment No. 605, Award No. 230 (Friedman).* The Organization charges that the Carrier impermissibly engaged in a transfer of work across craft lines by directly transferring the Laramie tie plating work to an outside contractor at North Little Rock. This Board has carefully perused the evidence in this record and finds insufficient evidence to prove the Organization's allegation. The Carrier transferred the work to a location on the UP-South where not only did the Carrier have a track department facility, but also maintenance of way forces were employed. Therefore, the transfer of work did not go beyond the maintenance of way craft. If, as the Organization charges, the Carrier assigned tie plating work to outsiders after the work arrived at North Little Rock, this Board, as discussed above, lacks jurisdiction to pass judgment on the propriety of any such work assignment.

Both parties framed their issues with the objective of endorsing their respective positions. Most significantly, both parties injected one subject into their statement of the issues which goes well beyond the purview of Article III, Section 1 of the February 7, 1965 Job Stabilization

Agreement, as amended. Both parties' issues allude to pre-plated ties manufactured at North Little Rock which are shipped to and utilized at locations across the Carrier's system, including trackage on the UP-North. The Organization's issue is structured to suggest that when the finished product reaches any location on the UP-North territory, the finished product must have been manufactured by maintenance of way employees to avoid running afoul of the UP-North Agreement. The Carrier's second issue suggests that it can use the finished product without reservation throughout its system. This issue is beyond our jurisdiction for two reasons. The first reason is a pragmatic extension of our holding that we lack jurisdiction to determine if the Carrier's assignment of the tie plating work at North Little Rock violated the UP-South Agreement. Whether or not the Carrier is violating the UP-South Agreement may or may not taint the Carrier's utilization of the finished product on the UP-South, or on the UP-North, or on both territories. Second, the Organization argues that Rule 9, as interpreted by the *Wallin* Board and the *Fishgold* Board, forbids the Carrier from using pre-plated ties anywhere on the UP-North territory if those pre-plated ties have been handled or manufactured by persons other than those represented by the Organization. This factual allegation cuts directly to an interpretation of Rule 9 of the UP-North Agreement as well as any scope rule in the UP-South Agreement. This Board lacks the jurisdiction to decide if the scope rule in the UP-South Agreement continues to be applicable to the finished product wherever it may travel after leaving North Little Rock or whether (and when) Rule 9 of the UP-North may be applicable to any finished product used on UP-North right of way.

Because of the constraints on our jurisdiction and authority, this Board can only narrowly and partially answer the issues the parties have submitted.

AWARD AND ORDER

Employes' Question At Issue:

Did UP's transfer of tie plating work formerly performed by BMWED represented employees under the 2001 (North) Agreement to a former Missouri Pacific facility in North Little Rock, Arkansas staffed by employees covered by the BMWED-UP 2000 (South) Agreement pursuant to Article III Section 1 of the February 7 Agreement permit UP to purchase and install on territory covered by the 2001 MBWED-UP (North) Agreement ties that had been plated in whole or in part by persons other than UP employees represented by BMWED (i.e., contractor forces)?

ANSWER TO EMPLOYES' QUESTION AT ISSUE:

For the reasons fully explained in this Opinion, Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, permitted the Carrier to transfer pre-plated tie work and track panel assembly work from Laramie to North Little Rock and, once such work arrived at North Little Rock, the work fell within the scope of the UP-South Agreement provided, however, this Board lacks jurisdiction to interpret or apply either the UP-North Agreement or the UP-South Agreement to: (1) whether or not the Carrier properly assigned the work at North Little Rock after the transfer was completed; and (2) whether or not the Carrier may use any finished product produced at North Little Rock on the UP-North territory, the UP-South territory, or both.

Carrier's Questions At Issue No. 1:

(1) Does UP's transfer of tie plating work from the jurisdiction of the UP/BMWED July 1, 2001, collective bargaining agreement (UP 2001) to the jurisdiction of the UP/BMWED collective bargaining agreement (MP 2000) pursuant to Article III Section 1 of the February 7th Agreement remove such work from the scope of the UP 2001 agreement, thereby permitting UP to have such work performed in compliance with the MP 2000 agreement?

ANSWER TO CARRIER'S FIRST QUESTION AT ISSUE:

For the reasons fully explained in this Opinion, Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, permitted the Carrier to transfer pre-plated tie work and track panel assembly work from Laramie to North Little Rock and, once such work arrived at North Little Rock, the work fell within the scope of the UP-South Agreement provided, this Board lacks jurisdiction to determine if the Carrier is in "compliance" with the UP-South Agreement.

Carrier's Questions At Issue No. 2:

(2) If the answer to 1 is yes, may these ties be utilized in territories covered by the UP 2001 agreement?

ANSWER TO CARRIER'S SECOND QUESTION AT ISSUE:

For the reasons fully explained in this Opinion, this Board lacks jurisdiction to decide whether or not the Carrier may use finished product produced at North Little Rock on the UP-North territory. Nothing in this Answer shall be construed to mean that the Board has unequivocally answered "Yes" to the Carrier's first question at issue.

Dated: June 4, 2008

Rick Wehrli
Union Member

Ken Gradia
Carrier Member

Donald E. Griffin
Union Member

John Hennecke
Carrier Member

John B. LaRocco
Neutral Member

CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION
SPECIAL BOARD OF ADJUSTMENT NO. 1087, AWARD NO. 34

The Carrier Members concur with the findings of the Board upholding the well-established principle that Article III of the February 7, 1965 Job Stabilization Agreement [JSA] permits a carrier to transfer work throughout its system and, upon consummation of the transfer, the work transferred becomes subject to the collective bargaining agreement at the point to which the work is transferred (see page 12).

The Board further correctly identified what it termed to be the "unacceptable and absurd consequences" that would result if the collective bargaining agreement at the former location followed the work to the new location. As the Board explained, those "consequences" would impermissibly "thwart the Carrier's capacity to transfer work throughout its system" in derogation of Article III and "effectively frustrate the operation of Article III."

We cannot concur, however, with the Board's reluctance to apply those tenets to the dispute presented to the Board by the parties for resolution.

The Organization argues, in effect, that even if the carrier properly transferred work from Laramie (UP-North) to North Little Rock (UP-South) and, even if the work product (pre-plated ties) was produced at North Little Rock in accordance with the UP-South collective bargaining agreement, such work product nonetheless could not be used at locations covered by the UP-North collective bargaining agreement. This contention, if accepted, would unquestionably produce the same absurd results identified above. The Carrier's practical ability to effectively utilize its rights under Article III to transfer work would be unduly and impermissibly thwarted. The Organization's position is no different than saying a carrier may transfer crew calling from one location to another, but the crew callers, once transferred, cannot call crews at the location from which they were transferred. That outcome cannot be reconciled with the broad rights to transfer work granted to a carrier under Article III: *"The organizations recognize the right of the carriers to make technological, operational and organizational changes, and in consideration of the protective benefits provided by this Agreement the carrier shall have the right to transfer work and/or transfer employees throughout the system which do not require the crossing of craft lines."* [1].

SBA 1087 plainly has the jurisdiction to not only interpret and apply the JSA, but to resolve disputes turning on the application of schedule rules that would "frustrate" or "thwart" effectuation of JSA rights. The Board itself states, concerning its jurisdiction at page 10 of the award: *"The Board acknowledges that circumstances and disputes can arise where the Board must determine if rules in a schedule agreement conflict with or are inconsistent with provisions of the February 7, 1965 Job Stabilization Agreement, as amended, in order to properly interpret and apply the latter agreement."*

[1] Article III, Section 1, February 7, 1965 Job Stabilization Agreement, as amended.

As the national disputes committee established pursuant to the JSA, as amended, SBA 1087 has exclusive jurisdiction to interpret and apply the provisions of the JSA. This squarely precludes other tribunals established under Section 3 of the Railway Labor Act from interpreting or resolving disputes over the application of the JSA. Accordingly, any time this Board disclaims jurisdiction to resolve an issue and dispute properly before it involving the JSA, it deprives the parties' of the dispute resolution process which they have mutually established. That outcome is especially vexing when the matter at issue has been submitted to the Board by mutual consent of the parties.

By its decision, the Board has created a Catch 22 for the carriers. This dispute turns on the interplay between schedule rules and JSA provisions. A Section 3 tribunal does not have the jurisdiction to interpret or apply the JSA. But that is the only other forum to which the dispute can be taken.

In short, it is the duty and the responsibility of SBA 1087 to properly address and resolve this dispute precisely because it is the only arbitral tribunal that has the requisite authority and jurisdiction. The Board's inexplicable refusal to resolve this dispute cannot in any way diminish its authority or its jurisdiction to do so, now or in the future.

For all of these reasons, the Carrier Members must register their dissent to that portion of the decision in Case 34.

Respectfully submitted,

A. Kenneth Gradia, Carrier Member

John F. Hennecke, Carrier Member

April 21, 2008

EMPLOYE MEMBERS' CONCURRING OPINION AND RESPONSE TO THE CARRIER MEMBERS' DISSENT, IN PART, TO THE BOARD'S DECISION IN CASE NO. 34

In connection with the facts of this case, this Carrier gave its written commitment on December 2, 2003, that the work transferred and referenced in this dispute would "***...be performed by employees coming under the jurisdiction of the collective bargaining agreement between the Union Pacific and the Brotherhood of Maintenance of Way Employes dated July 1, 2000,***" i.e., the work would be performed by UP-South employees under the UP-South collective bargaining agreement. Based on that fact, BMWED never disputed the principle that Article III, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended September 26, 1996, permitted this Carrier to transfer such work throughout its system and, upon consummation of the transfer, the work transferred became subject to the collective bargaining agreement at the point to which the work was transferred. Hence, the Employe Members do not take exception to the Board upholding that principle or the Carrier Members' concurrence therewith. Indeed, that unremarkable and limited holding was consistent with this Board's jurisdiction.

However, contrary to the Carrier Members' implication in paragraph four of its dissent, after such work was properly transferred pursuant to Article III, BMWED did not contend that ties plated by the UP-South employees under the UP-South collective bargaining agreement could not be used at locations covered by the UP-North collective bargaining agreement. Hence, the Carrier's position regarding possible "*absurd results*" is associated with a situation not in dispute and is, therefore, irrelevant.

Notwithstanding, the Employe Members are a bit confused by the Carrier Members' dissent with the Board findings that once such a transfer was completed, the Board's jurisdiction ceased. That is, the Board determined it did not have authority to determine whether or not the Carrier properly assigned the work under the UP-South Agreement after the transfer was completed including the possible assignment of such work to outside contractors. Nor does this Board have jurisdiction to interpret or apply any terms of the UP-North Agreement regarding the Carrier's use of pre-plated ties from any source. The Employe Members' confusion regarding the Carrier's dissent is based in large part on the fact that *both parties* to the dispute argued that this Board did not have jurisdiction to address such matters. In connection with the Carrier's position on this specific issue, the Carrier indicated the following on page 8 of its submission presented in this dispute:

> "*While BMWED objects to the fact that someone other than BMWED represented employees performed some portion of the work involved in the creation of pre-plated ties, <u>their solution is not before this board</u>. They have exercised one option by filing grievances and progressing them to the Third Division. The other option is to seek a change to the MP agreement through the bargaining process. In either event, <u>resolution of this matter is not to [be] found before this board</u>.*" (Underscoring added for emphasis)

Based on the Carrier's written position concerning the Board's jurisdiction, it makes absolutely no sense for the Carrier to *now* dispute the Board's determination that essentially agreed with that position.

This dispute arrived at the Board at the insistence of the Carrier in arguments made in another forum. This Board issued a sound decision within the scope of its jurisdiction. If the Board's decision did not satisfy the Carrier or resolve the dispute to its satisfaction, it must look to other *fora* for answers to questions this Board does not possess the jurisdiction to answer.

Respectfully,

D. F. Griffin - Employe Member

R. B. Wehrli - Employe Member

April 23, 2008