## SPECIAL BOARD OF ADJUSTMENT

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employes,
Organization,

and

Union Pacific Railroad Company,
Carrier.

OPINION AND AWARD

Track Panel Fabrication Dispute

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

As noted in the previous paragraph, this Board has been constituted by a March 3, 2000 agreement of the parties to establish an un-numbered Special Board of Adjustment to resolve a dispute over the fabrication of track panels. By this agreement, the parties have chose to have this Board proceed on a "parties pay" basis. In all other pertinent respects, however, the Board is to follow the customary analytical procedures that apply to the resolution of minor disputes under Section 3 First and Second of the Railway Labor Act.

By their agreement, the parties also agreed to the method by which the evidentiary record was to be developed to accommodate the unusual manner in which the dispute arose and was progressed to this Board. Each party provided an initial written submission containing all known argument and evidence upon which it relied. Rebuttal submissions were also provided that contained additional evidence in exhibit form. The submissions also contained a number of prior decisions of the National Railroad Adjustment Board as well as various adjustment boards constituted pursuant to the Railway Labor Act. A hearing was held at the Carrier's offices in Omaha, Nebraska on September 6, 2001. This closed the record, and the Board took the matter under advisement.

The portions of this Opinion and Award that describe the factual background and the positions of the parties have deliberately been condensed to the greatest extent possible. This has not been done to slight either party but, rather, to accommodate their joint request that we issue our decision expeditiously. Our brevity should not be construed as anything more than our best effort to honor that request by writing a concise award. However, our review and analysis of the evidence has not been abbreviated in any manner whatsoever. The Board reserves the right and confirms its willingness to elaborate further on the background and positions of the parties should they so request. The Board believes, however, that the additional details are so thoroughly covered in the parties' submissions that the interests of the parties are best served by merely incorporating them by reference.

The basic facts of this controversy are essentially undisputed. Although the Carrier's present size and operations are the result of past mergers, consolidations and combinations that have absorbed several other railroads, the instant controversy concerns only the original Union Pacific territory and arises out of the parties' January 1, 1973 Agreement, as amended, ("1973 Agreement") whose scope is limited to that original territory.

The Carrier has, for many years, used the "panel method" for construction and maintenance of its track. Although the record herein contains references to three basic types of track panels, the bulk of the evidence and argument focuses on just two types: Tangent track panels, which are straight sections of track, and turnout track panels, which also contain a switch and associated devices that allow rolling stock to move from one line of track to another. Curved track panels, the third type, which are not straight as their name denotes, are substantially similar in their fabrication to tangent track panels in most other respects.

This controversy deals with the work functions that constitute "fabrication of track panels" as this phrase is used in Rule 9 of the 1973 Agreement. Rule 9 reads, in pertinent part, as follows:

**RULE 9 - TRACK SUBDEPARTMENT**

> 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 shall be performed by forces in the Track Subdepartment.* (Italics supplied)

Immediately following the foregoing preamble paragraph is a listing of some twenty-four job titles and a brief description of the work associated with each job title.

Although the records shows the phrase "fabrication of track panels" to have included several related but different work functions, one of the more significant and time-consuming steps involves accurately positioning and affixing tie plates to wood cross ties. The tie plate performs several critical functions. For example, it distributes the weight transferred to the tie from the rail flange over a larger bearing surface to minimize crushing the wood fibers. The accurate location of the plate on the tie also serves to ensure the rails will be separated to the correct gauge when they are placed on the plate. Finally, the cant angle cast into the plate tilts the rail to achieve optimal contact between the rail and wheels.

The fabrication step of affixing the tie plate involves several work functions: Holes must be drilled in the tie at the proper location to accept the tie plate; the plate itself must then be placed and properly oriented over the holes; finally, the plate is attached by means of spikes or screws. Subsequent steps include laying out the plated ties and attaching rails by means of additional spikes or a clamping device.

Historically, tangent track panels were fabricated to a common length of 39 feet. Turnout track panels were considerably larger depending on the degree of turnout curve. Lengths well in excess of 100 feet were common.

Prior to 1968, the Carrier operated a tangent track panel fabrication plant in Cheyenne, Wyoming. The employees that staffed the plant were represented by the Organization and were part of Carrier's Track Department. All turnout track panels and some additional tangent track panels were fabricated in the field in areas adjacent to the track locations where they were to be installed. The employees who performed this field fabrication work were also represented by the Organization and were also assigned to the Track Department.

In 1968, the Cheyenne fabrication plant was closed and replaced by a plant in Laramie, Wyoming to fabricate tangent track panels. All turnout track panels and some tangent track panels continued to be fabricated in the field.

The parties concluded their 1973 Agreement effective January 1st. Among other things, that Agreement recodified predecessor language (Rule 4 of the May 1, 1958 agreement) to become Rule

9 and added the phrase "fabrication of track panels to the other types of work carried forward from Rule 4 of the 1958 agreement. There have been no significant modifications to Rule 9 since then despite several rounds of collective bargaining.

In approximately 1984, Carrier began experimenting with the use of concrete cross ties. According to the record, the parties reached an agreement to facilitate the experiment. Concrete ties cannot be effectively drilled. Therefore, the manufacturing process must embed the equivalent of a tie plate into the concrete tie at the time of its casting. Track Subdepartment employees represented by the Organization continued to do the same plating work and other fabrication work on track panels using wood ties as well as the remaining fabrication work on track panels using concrete ties.

In 1992, the Laramie plant began fabricating turnout track panels in addition to tangent track panels. Some turnout track panels continued to be fabricated in the field as well.

In mid-1996, Carrier began purchasing pre-plated wood ties from an outside manufacturer. Since then, some 61 turnout track panels using such pre-plated ties have been installed at various locations on the original Union Pacific territory.

It is undisputed that the pre-plated ties Carrier purchased had no identification labels or other markings that would distinguish them from wood ties that had been plated at the Laramie plant and shipped to the field for further track panel fabrication by Track Subdepartment employees. Those employees had no way of knowing the ties had been purchased pre-plated from an outside vendor.

On November 16, 1999, Carrier sent a letter to the general chairmen of the Organization who represented Track Subdepartment employees. The letter informed the general chairmen of Carrier's plans to purchase pre-plated ties as well as completely assembled track panels from outside vendors. The purchase of pre-plated ties was described in the letter as a "new process." The letter went on to inform that the Laramie plant would be closed upon completion of the transition to the new procedures.[1]

The Organization immediately objected to what it saw as a major change to the 1973 Agreement. Ensuing discussions failed to produce a resolution. When it became apparent the Carrier

[1]The letter also referenced plans to close another track panel plant in North Little Rock, Arkansas. That territory, however, is not covered by the applicable 1973 Agreement. Any issues surrounding that plant closure are not part of the instant dispute.

was going to move ahead with implementing its plans, the Organization commenced a strike on February 24, 2000 at 6:00 a.m. The parties filed cross lawsuits for injunctive relief against one another in the federal courts of Colorado and Nebraska. The two suits were consolidated and heard in Colorado on March 2, 2000. The United States District Court there ruled in favor of the Organization. Carrier appealed to the 10th Circuit Court of Appeals. In an unpublished decision, the 10th Circuit reversed the District Court and found the controversy to be a minor dispute. Thus is the dispute before this Board.

There is one final background matter requiring note: Carrier has essentially maintained the status quo while the controversy awaits our award. As a result, the parties stipulated, at the Board's hearing, that any remedy issues, if applicable, should be remanded to the parties to provide them the first opportunity at resolution. They agreed the Board would retain jurisdiction to resolve such remedy issues if they are unable to do so.

The parties have proposed the following statements of the questions to be answered by us:

By the Organization:

1. Does the Union Pacific violate its January 1, 1973 Agreement with BMWE (as amended) when, as contemplated by its letters dated November 16, 1999 and December 13, 1999, it arranges for persons other than its own Track Subdepartment forces to fabricate tangent or turnout track panels in whole or in part or to perform other work incidental thereto for the purpose of constructing or maintaining track?

2. If the answer to Question No. 1 above is 'Yes', what shall the remedy be?

The Organization's position is that its Question No. 1 should be answered in the affirmative.

By the Carrier:

1. Does Union Pacific violate its January 1, 1973 Agreement with BMWE (as amended) when, as contemplated by its letters dated November 16, 1999 and December 13, 1999, it purchases tangent or turnout track panels in whole or in part from outside vendors for use in its track structure?

The Carrier's position is that its Question No. 1 should be answered in the negative.

The Organization advanced four lines of contention on the merits. First, it maintains that the language of Rule 9 clearly and unambiguously supports its position. Second, past practice supports its position. Third, the nature of the procedures contemplated by the Carrier do not constitute a genuine "off the shelf" purchase of a finished product due to the custom nature of the product and the extensive control Carrier holds over the manufacturing process. Finally, the Carrier's position is not supported by persuasive award precedent while the Organization's position is.

The Carrier's contentions in support of its position ran, not surprisingly, directly counter to those of the Organization. First, Rule 9 is essentially a classification of work rule that does not restrict it from implementing its plans. Second, past practice does not support the Organization's position. In this regard, the Carrier notes that it began purchasing pre-assembled insulated rail joints and pre-fabricated timber panel road crossings in approximately 1986. Both kinds of purchases should have triggered objections by the Organization under Rule 9 if it imposed the kind of restriction the Organization says it does. No such objections were raised. Third, the purchases contemplated by the Carrier do constitute "off the shelf" purchases as that terminology has evolved in railroad arbitration. Lastly, Carrier maintains its position is supported by award precedent while the Organization's is not.

After careful review of the record herein, we are persuaded that the resolution of the instant dispute does not lie solely within the context of Rule 9 as the Organization contends. In this regard, it must be remembered that the 10th Circuit Court determined the dispute to be minor. That determination was not further appealed and now, we believe, stands as a matter of record. Implicit in the Court's determination is the finding that the Carrier's interpretation of Rule 9 is "arguably justified," which is the standard established by the United States Supreme Court in *Consolidated Rail Corporation v. Railway Labor Executives Association,* 491 U.S. 299,302 (1989). In other words, Carrier's interpretation of Rule 9 is plausible. It is well settled that contract language that is susceptible of two or more plausible interpretations is not clear and unambiguous.

Although we believe the determination of the 10th Circuit has effectively rejected the Organization's clear language contention, we do not quarrel with that view. Contrary to the Organization's contention, Rule 9 simply does not say "... all fabrication of track panels, whether performed on or off Carrier's property, ... " or words to that effect. Conversely, and contrary to Carrier's position, nor does Rule 9 explicitly say its scope is " ... limited to fabrication work performed only on Carrier's property, ..." or words to that effect. In the final analysis, Rule 9 only says what it says. As it relates to track panel fabrication, it leaves unanswered the question, what

does it mean?

After careful review of the record, we find that the answer to the questions posed by the parties is readily provided when the bargaining history surrounding Rule 9 is taken together with the parties' historical practice regarding track panel fabrication.

As noted previously, Rule 9 and Rule 8, which pertains to the Bridge and Building Department, trace their roots, on this record, to the parties' May 1, 1958 agreement. Their predecessors appeared as Rule 4 and 3 in the 1958 agreement. Note 9 to Rule 3 and Rule 4(a) contained paragraphs using substantially similar language. Both paragraphs listed types of work of their respective departments. Note 9 ended with "... and other work generally so recognized shall be performed by employes in the Bridge and Building Department." Rule 4(a) ended "... and other work incidental thereto shall be performed by forces in the track department." Moreover, Note 9 was actually entitled "Classification of work - Bridge and Building Department:" Rule 4(a) carried no similar reference suggesting it was a classification of work rule.

In Award No. 14061 issued December 22, 1965, which involved these same parties, the Third Division of the National Railroad Adjustment Board rejected the Carrier's contention that Rule 3 Note 9 was only a classification of work rule and determined that it was a specific grant of work to the Bridge and Building Department employees.

After December 22, 1965, therefore, because of the parallel language involved in Rule 4(a), the Carrier is charged with knowing the high likelihood that the Third Division would also find Rule 4(a) to be a grant of work to Track Department employees should the question come before it. Nevertheless, in negotiating their 1973 Agreement, the parties recodified 1958 agreement Rule 3 and 4 to 1973 Agreement Rules 8 and 9 without significant change in the language to offset the precedent value of Award No. 14061. Moreover, the parties added "fabrication of track panels" to Rule 9. The addition of this reference strongly suggests the Carrier knew, or should have known, that the then existing practice of the parties would be looked to as a dispute resolution tool to determine the nature and extent of the grant should questions arise. In 1973, Track Subdepartment employees performed a considerable amount of track panel fabrication work. While Carrier did purchase pre-assembled frogs for turnout track panels, the record herein shows that Carrier's Track Subdepartment forces performed virtually all other fabrication work, including all tie plating.

According to the prior awards cited by the Carrier in its submissions, a new line of railroad

arbitration precedent began to emerge in 1978. It is the line of precedent dealing with "off the shelf" purchases of finished products. On February 15, 1978, Award No. 436 of Special Board of Adjustment No. 570 (Illinois Central v. Carmen) held that the purchase of 50 completed cabooses from an outside vendor was not violative of the applicable agreement. Nonetheless, the instant Carrier did not change its practice. It continued to use its Track Subdepartment forces as the sole source of track panel fabrication work. Significantly, it did not seek to obtain from outside vendors any of the track panel fabrication work its forces had historically performed that would be embodied in the finished products of the outside vendor.

Ten years later, when the Third Division issued its Award No. 27184 (Seaboard v. BMWE) on June 23, 1988, the situation had not changed. That award found that the fabrication of 20 track panels by outsiders to the applicable agreement did not constitute a violation. The award added to the growing body of precedent holding that the purchase of finished products from outside vendors did not violate contractual prohibitions on subcontracting scope-covered work. Still, the instant Carrier did not change its practice of now more than 15 years. It continued to use its Track Subdepartment forces as the sole source of track panel fabrication work. Significantly, it still did not seek to obtain from outside vendors any of the track panel fabrication work its forces had historically performed that would be embodied in the finished products of the outside vendor.

When the Third Division found no agreement violation in the purchase of pre-welded rail in Award No. 28561 (Southern Pacific v. BMWE) on September 27, 1990, the Carrier maintained its practice of now more than 17 years.

The same was true when the Third Division issued Award No. 29090 (Union Pacific{MP} v. BMWE) on January 23, 1992, which found no contract violation in the purchase of vehicles with Hy-rail equipment already installed. Still the instant Carrier maintained its practice of now more than 19 years. It did so despite the continually growing body of decisions that permitted purchases of all manner of finished products. Indeed, instead of attempting to contract out the fabrication of turnout track panel work in 1992, it instead began performing some of the fabrication at the Laramie plant.

It has been well settled for many years that a long-standing practice accepted by the parties can create unwritten agreement provisions that have the same force and effect as those written in the applicable collective bargaining agreement. The foregoing considerations described in the immediately preceding paragraphs lead to but one inescapable conclusion: The record herein establishes all of the elements of proof traditionally required to demonstrate the existence of a binding

agreement restriction arising from past practice. It is clear what the practice was. It was long-standing and repeated consistently. It was known at all the requisite organizational levels of both the Carrier and the Organization. No overt steps were taken by the Carrier to disavow the practice for more than 20 years.[2] Finally, there are no doubts about the underlying circumstances. They have not changed, nor has the 1973 Agreement language changed, despite intervening rounds of collective bargaining.

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.

Accordingly, the Carrier's purchase of pre-plated wood ties beginning in 1996 violated the prohibition since those ties incorporated the attachment of the plate to the tie, which was fabrication work, on this record, that Track Subdepartment employees have historically, customarily and traditionally performed.

Certain other commentary is warranted in light of our overall finding. First, because of our finding, it is not necessary to address the other contentions raised by the parties. As a result, we make no findings thereon.

Second, our finding requires only that track panel fabrication work continue to be performed by Track Subdepartment employees. It does not require that the Laramie plant be kept open.

Third, our finding continues in force until the parties agree otherwise using the Section 6 procedures of the Railway Labor Act or other permissible interim agreement modification procedures.

Fourth, it is well settled that a practice may be applied no more broadly than the circumstances

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[2]It was not until 1996 that Carrier, without notice to the Organization, began purchasing limited quantities of pre-plated ties.

out of which it arose. Our finding, therefore, does not prohibit the Carrier from purchasing concrete ties with the integral equivalents of tie plates. On this record, the fabrication of such ties is work that Track Subdepartment employees have never done.

Finally, pursuant to the parties' stipulation, this Board retains jurisdiction over any remedy issues not resolved by the parties. Such issues are remanded to the parties for that purpose.

**AWARD**

The questions proffered by the parties are answered in the affirmative. All remedy issues are remanded to the parties for resolution. The Board retains jurisdiction to decide any unresolved remedy issues.

Dated: November 6, 2001

Gerald E. Wallin, Chairman
and Neutral Member

Steven V. Powers,
Organization Member

I dissent - See Attached
Wayne E. Naro,
Carrier Member

CARRIER MEMBER'S DISSENT
TO
PIVATE ARBITRATION
BETWEEN
UNION PACIFIC RAILROAD COMPANY
AND THE
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

The agreement establishing this board provided the following language:

> "Each party is charged with the duty and responsibility of including in its initial written submission all known argument and evidence upon which it intends to rely. Rebuttal submissions, including any rebuttal evidence in exhibit form, may be filed, by overnight delivery, up to ten (10) days before the hearing or on any other date directed by the Neutral in conference with the parties. The hearing on the matter will be based upon the parties' submissions and oral arguments. No arguments or evidence may be raised at the hearing unless previously raised in one of the parties' submission; except that the Neutral may request additional information necessary for the adjudication of the issues identified in Attachment 'A' "

In line with the above procedures the parties prepared their respective submissions. Rebuttals were prepared in response to each party's submission. With the exchange of these documents the record was closed, and oral argument was had.

The Carrier premised its right to purchase track panel and turnout kits under the well established principle that it may do so when purchasing finished products "off the shelf". BMWE predicated its objections to Carrier's purchase of these products on the clear language of Rule 9 of the collective bargaining agreement which reserved the work to their members; even if the rule was not clear past practice established the intent of the parties as to the proper interpretation of Rule 9; and this was simply subcontracting.

While recognizing that the language of Rule 9 is ambiguous with respect to BMWE's argument that such work is exclusively reserved to their members and further recognizing that there is a very clear line of precedent that permits the Carrier to purchase such products off the shelf, this Board sustained BMWE's position. It did so on the extraordinary theory that because Carrier did not exercise its right to purchase track panels off the shelf at some vague point in time, it was prohibited from exercising that right. In so doing, this Board has committed an egregious error and has clearly exceeded its jurisdiction.

The theory that the Carrier had waived its right to purchase track panels off the shelf was never raised by BMWE in its submission. Its rebuttal and oral argument was restricted to responding to Carrier's submission and presenting its case as set forth in its submission. This theory therefore was not in the record before this board. Consequently the Carrier did not have an opportunity to respond to such an argument. It simply did not have its day in court. By basing its decision on an argument that was not included in the record, this Board has clearly exceeded its jurisdiction, and this award is invalid.

Additionally, the agreement between the parties provided that "the Board shall not have the authority to add contractual terms or to change existing agreement...". By holding that the Carrier's failure to act has ripened into a new agreement not to purchase track panels, this Board has constructed new contractual terms that did not previously exist. It clearly has exceeded its jurisdiction.

Even if there was a basis in the record for such a decision (which there was not), the Board has ignored the well established line of awards that allows a Carrier to purchase a product off the shelf even though the work of constructing that product has been performed exclusively on the property by a particular craft. It has been recognized as an exception to any reservation of work. In Third Division Award 31160, Brotherhood of Maintenance of Way Employes v Kansas City Southern Railway Company, Referee Peter R. Meyers, it was held that:

> "This Board agrees that building track panels is scope covered work which has historically been performed by maintenance of way employees. However, this case involved the purchase of a finished product from a vendor, Lewis Rail, and that Lewis Rail was not on Carrier property, but was located adjacent thereto. (emphasis added)"

In Third Division Award 27184, Brotherhood of Maintenance of Way Employes v Seaboard System Railroad, Referee Eckehard Muessig, the Board held as follows:

> "The Organization contends that the work at issue traditionally and historically has been assigned to and performed by its employees. Accordingly, it argues that the Carrier was required to reach an understanding with the Organization before it took the action at issue. It relies upon Rule 1, Scope; Rule 2, Contracting; and Rule 3, Subdepartment; Rule 4, Seniority Districts; Rule 5, Seniority Groups and Ranks; and Rule 6, Establishment of Seniority.
>
> The Carrier, in its simplest terms, contends that it has the right to purchase prefabricated track panels from any other source

available. It contends that the Scope Rule applicable here does not obligate the Carrier to purchase separate component parts to be assembled by its forces. It maintains that it may purchase separate component parts to be assembled by its forces. It maintains that it may purchase what it considers to be new equipment. Therefore, this purchase was not a sub-contracting matter, and, accordingly, it was not required to serve the Organization with a notice of intent.

Clearly, had the construction of the twenty panels occurred on the Carrier's property, the basic Scope Rule contentions of the Organization would have considerable merit. Numerous awards have held that seniority rights to work activity is not legitmatized until the material or equipment upon which the work is to be performed is once delivered to the Carrier.'

The issue here is whether the panels may properly be considered to be new material or component parts. If they are new materials, then their purchase is not prohibited by the subcontracting provision of the Agreement.

After careful consideration, the Board finds that the panels are new materials and that the Carrier may avail itself of new methods and products in order to operate in an efficient and economical manner. In this case, it obtained a finished part that would become a part of its track system. We find no rule prohibiting this action, in light of all the particular facts presented on the property. (emphasis added"

In both of these cases as well as the several other awards that were provided this Board, the issue of exclusive reservation was rejected. The right to purchase off the shelf is an exception to any reservation of work. If an item may be purchased off the shelf, it is irrelevant whether the work to construct that item is exclusively reserved to the Organization. In its rush to find a reason to sustain this claim, this Board has clearly ignored that very basic principle.

The principle relied upon by the Board in sustaining this claim requires the act to be unequivocal, have existed over a long period of time, and must have been accepted by both parties before that act ripens into a contractual right. This Board has somehow interpreted this principle to also apply to inaction on the part of the Carrier. The issue here is the Carrier's right to purchase an item off the shelf. What unequivocal act can the Board point to that possibly could be interpreted as a decision by the Carrier "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 Track Subdepartment employees" (Award at page

9)? One can be held accountable for failing to act only when there is an affirmative duty to act. There was no such affirmative duty in the instant case.

BMWE would argue that the continued fabrication of track panels was the unequivocal act. The fabrication of track panels on the property however was done pursuant to Rule 9. Both the Brotherhood and the Carrier agreed that such work performed on the property belonged to the employees represented by BMWE. Certainly the Carrier's compliance with the provisions of Rule 9 is not a conscious unequivocal act of waiving its right to purchase track panels off the shelf. Indeed, there was no such act on the part of the Carrier.

The Board also has tried to fabricate an extended period of time in which this unequivocal act allegedly occurred to somehow shoehorn its decision into the parameters of this principle. This rationale is flawed as well. The Board refers to the time when the new line of railroad arbitration concerning purchasing items off the shelf began to emerge as the beginning of this time period. It cites Award No. 436 of Special Board of Adjustment No. 570 as the case that began this time period. According to the Board's flawed reasoning, the Carrier was somehow put on notice at that time to either begin buying its track panels off the shelf or forfeit its right to do so. This simply defies understanding.

Is the Board really expecting anyone to accept the theory that an award on another property dealing with the purchase of 50 completed cabooses would put the Carrier on notice that it had to begin purchasing track panels off the shelf or lose its right to do so? Even if an award on another property could put you on notice, the first award dealing with purchasing track panels off the shelf was issued in 1988 (Third Division Award 27184) a period of only 8 years prior to the Carrier's decision to begin purchasing track panels off the shelf. This is a period of time that is far shorter than the period the Board is trying to say allowed this practice to ripen into a rule.

It also should be remembered that each of these awards held that exclusive reservation was not a prohibition to purchasing items off the shelf. How then can the Board say that the Carrier was put on notice that it might lose its right to purchase an item off the shelf even if the practice of constructing track panels on the property has ripened into a rule?

The record is very clear that the development of the bracket and spring clip made the purchase of track panels feasible. This was not fully developed and implemented with wood ties until 1996. By the Board's logic, the Carrier would be required to exercise its right to purchase track panels off the shelf even though it was not efficient and did not make economical sense to do so.

Even if the principle of acquired rights through past practice were a viable argument in this case, which it is not, there clearly has been no unequivocal act

that has continued over an extensive period of time that was understood by both parties to be a waiver of Carrier's right to purchase track panels off the shelf.

In conclusion, I dissent from the decision. It is so egregiously wrong that I cannot sign it. While I do not understand what prompted the neutral member to go to such extraordinary lengths to find a basis for sustaining this claim, it clearly is not grounded in the factual record, the arguments of the parties, or any precedent. It clearly is an anomaly and should be considered as such.

W. E. Naro
Carrier Member

LABOR MEMBER'S RESPONSE
TO CARRIER MEMBER'S DISSENT
TO
PANEL FABRICATION AWARD
(Referee Wallin)

The Carrier Member's dissent should be read for precisely what it is - - a contrived and transparent effort to set the stage for challenging this well-reasoned Award in court. However, since neither the Opinion and Award itself or the record of this dispute provide even the most remote grounds for setting this Award aside, the Carrier Member has had to resort to misrepresenting principles and precedent as well as the facts of record. Indeed, it is quite clear that the Carrier Member was schooled in the statutory grounds for setting aside an award and after selecting one of those grounds (exceeding jurisdiction), he repeats it like a mantra in his dissent and then sets about contriving facts to fit the mantra. The problem for the Carrier Member is that a fair reading of the Opinion and Award in the context of the objective record shows that he is wrong when he asserts that the Board decided the case based on argument that was not in the record; wrong when he asserts that the Board has constructed new contract terms; wrong when he asserts that the Board ignored a well-established line of awards; and wrong when he asserts that the development of the bracket and spring clip in 1996 changed the circumstances under which panel fabrication practices had developed on UP. In short, the Carrier Member is wrong when he asserts that the Board exceeded its jurisdiction. Rather, this was a straightforward contract interpretation case and there was nothing unique about the principles employed in deciding the case that would undermine the precedential value or legally binding nature of this carefully reasoned award.

## I. All Arguments Considered By The Board Were Raised In The Parties' Submissions.

The Carrier Member is simply wrong when he asserts that the Board based its decision on argument that was not included in the record. The written record in the form of the parties' submissions shows that BMWE based its case on three key arguments: (1) the clear language of Rule 9 (Employes' Sub. at PP.26-29); (2) past practice (Employes' Sub. at PP.29-33); and (3) bargaining history (Employes' Sub. at PP.46-50 and Rebuttal Sub. at PP.3-9). On the other hand, UP relied heavily on a series of awards concerning so-called off the shelf purchases (UP Sub at PP.7-9). While the Board was not convinced that the language of Rule 9 was clear on its face in the context of this dispute, it went on to find that the meaning of Rule 9 could be determined if the bargaining history of Rule 9 was considered together with the parties' historical practice regarding track panel fabrication (Award at P.7). Relying solely on the facts of record, the Board then traced the bargaining history of Rule 9 together with the historical practice concerning track panel fabrication and the history of various off the shelf purchase awards upon which UP was relying (Award at PP.7-8). The Board ultimately found that the bargaining history and panel

fabrication practice were compelling for BMWE's position precisely because they continued during and after the time off the shelf purchase awards cited by UP were unfolding. Hence, contrary to the Carrier Member's assertion, the Board did not base its decision on new argument or evidence, but instead reached its decision by carefully considering and integrating the argument and evidence respectively presented by BMWE and UP in their written submissions.

## II. The Board Did Not Construct New Contractual Terms.

Contrary to the Carrier Member's assertion, the Board did not construct new contractual terms. Rather, the Board engaged in an interpretation of existing contractual terms (Rule 9) using the hornbook standards of bargaining history and past practice to determine the intent of the parties. Once again, this is clear from any fair reading of the award itself. The Board began by framing the dispute around Rule 9. Indeed, it began its analysis by stating:

> **"This controversy deals with the work functions that constitute 'fabrication of track panels' as this phrase is used in Rule 9 of the 1973 Agreement."** (Emphasis added) (Award at P.2)

After quoting the pertinent text of Rule 9, the Board recounted the historical background of the case, including the bargaining history of Rule 9 (Award at PP.3-4), and then summarized the positions of the parties, including their primary positions which concerned the meaning of Rule 9 (Award at P.6). As was pointed out above, the Board next determined that, in the context of this case, Rule 9 was not clear on its face (Award at P.6)[1] and then continued on to state that the answer as to what Rule 9 means:

> **"... is readily provided when the bargaining history surrounding Rule 9 is taken together with the parties' historical practice regarding track panel fabrication."** (Emphasis added) (Award at P.7)

In tracing the bargaining history of Rule 9, the Board examined the language of the 1958 Agreement from which Rule 9 evolved and noted the interpretation of that language in Third Division Award 14061 which had been favorable to BMWE. The Board then noted:

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[1] With all due respect, I continue to believe, as did the District Court, that Rule 9 is clear and unambiguous on its face with respect to the grant of track panel fabrication work to Track Subdepartment forces. Moreover, as a matter of law, the fact that the 10th Circuit ruled that the dispute was "minor" only meant that it was arguable that an arbitrator could find Rule 9 to be ambiguous, not that the arbitrator was precluded from finding that the rule was clear and unambiguous. Of course, given the arbitrator's independent finding that Rule 9 was ambiguous in the context of this case, my beliefs are now irrelevant for this case and are only noted for the record.

"*** Nevertheless, in negotiating their 1973 Agreement, the parties recodified 1958 agreement Rule 3 and 4 to 1973 Agreement Rules 8 and 9 without significant change in the language to offset the precedent value of Award No. 14061. **Moreover, the parties added 'fabrication of track panels' to Rule 9. The addition of this reference strongly suggests the Carrier knew, or should have known, that the then existing practice of the parties would be looked to as a dispute resolution tool to determine the nature and extent of the grant should questions arise.** ***" (Emphasis in bold added) (Award at P.7)

In order to determine the "nature and extent of the grant" that the parties intended when they added "fabrication of track panels" to Rule 9, the Board carefully examined the practices of the parties and found that all track panels had been fabricated by BMWE forces for more than 20 years (Award at PP.7-9). The Board found this to be compelling evidence of the parties' intent since neither the underlying circumstances or the language of Rule 9 in the 1973 Agreement had been changed during this period of more than 20 years. More precisely, the Board stated its findings as follows:

"*** It is clear what the practice was. It was long-standing and repeated consistently. It was known at all the requisite organizational levels of both the Carrier and the Organization. No overt steps were taken by the Carrier to disallow the practice for more than 20 years. Finally, there are no doubts about the underlying circumstances. They have not changed, **nor has the 1973 Agreement language changed,** despite intervening rounds of collective bargaining." (Emphasis in bold added) (Footnote omitted) (Award at P.9)

It is simply beyond question that the Board understood this case as a dispute over the meaning of the language in Rule 9 of the 1973 Agreement and used hornbook standards of contract interpretation (bargaining history and past practice) to determine the intent of the parties. The Board clearly did not construct new contract terms, it simply determined the extend of the grant in Rule 9. Moreover, even if the Board had done more, that is, if the Board had gone beyond interpreting the express terms of the Agreement (which it did not), such a finding would not have exceeded the Board's jurisdiction. Indeed, since the Steelworkers trilogy, it has been axiomatic that, "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law - - the practices of the industry and the shop - - is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers v. Warrior and Gulf Navigation Co.*, 80 S. Ct. 1347, 1351-52, 46 LRRM 2416, 2419 (1960). Of course, as everyone involved in this case knows, the Supreme Court applied the principles from *Steelworkers* in a much more recent case that arose under the RLA, i.e., *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299 (1989), where it held:

"*** **Neither party relies on any express provision of the agreement; indeed, the agreement is not part of the record before us. As the parties**

**"acknowledge, however, collective-bargaining agreements may include implied as well as express terms. See, *e. g., Northwest Airlines, Inc. v. Air Line Pilots Assn.*, 442 F. 2d 251, 253-254 (CA8), cert. denied, 404 U. S. 871 (1971). Furthermore, it is well established that the parties' 'practice, usage and custom' is of significance in interpreting their agreement. See *Transportation Union v. Union Pacific R. Co.*, 385 U. S. 157, 161 (1966). This Court has observed: 'A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. ". . . [I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law – the common law of a particular industry or of a particular plant."' *Id.*, at 160-161 (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S., at 578-579.**

**In this case, Conrail's contractual claim rests solely upon implied contractual terms, as interpreted in light of past practice. Because we agree with Conrail that its contractual claim is neither frivolous nor obviously insubstantial, we conclude that this controversy is properly deemed a minor dispute within the exclusive jurisdiction of the Board."** (Emphasis in bold added)

The Carrier Member knew, or certainly should have known, that relying on past practice to interpret implied as well as express terms was within the Board's jurisdiction because UP not only relied heavily on the *Conrail* decision in its brief to the 10th Circuit in this very case, but also specifically argued as follows:

**"In determining whether a railroad's assertion that its actions are arguably justified by the collective bargaining agreement, the courts are not limited to the express terms of the agreement. Rather, 'minor' disputes involve the interpretation and application of rights under the collective bargaining agreement, which include implied as well as express terms of the agreement. It is 'well established that the parties' 'practice, usage, and custom' is of significance in interpreting their agreement.' *Id* at 311 (quoting *Transportation-Communication Employees' Union v. Union Pacific R. Co.*, 385 U.S. 157 (1966).[6] *****

[6] *See also, Air Line Pilots Ass'n Int'l v. Eastern Air Lines, Inc.*, 863 F.2d 891, 896 (D. C. Cir. 1988) *cert. dismissed*, 501 U.S. 1283 (1991) (court must consider express contractual terms in light of past practices); *Ry. Labor Executives' Ass'n*, 833 F.2d at 705-06 **(parties' collective bargaining agreement 'includes both the**

"**specific terms set forth in the written agreement and any well established practices that constitute a "course of dealing" between the carrier and employees').**" (Emphasis in bold added) (UP's May 15, 2000 10th Circuit brief at P.16)

Given UP's arguments in the 10th Circuit, it is simply unconscionable for the Carrier Member to now argue that the Board exceeded its jurisdiction by supposedly relying on past practice to interpret implied agreement terms. In short, while it is clear that the Board did nothing more than interpret the express terms of Rule 9 of the 1973 Agreement, the Board would not have exceeded its jurisdiction even if it had gone further by interpreting implied terms and we need look no further than UP's own 10th Circuit brief for definitive authority on this point.

## III. The Board Did Not Ignore A Well-Established Line Of Awards.

The Carrier Member's assertion that the Board ignored a well-established line of awards concerning off the shelf purchases suffers from multiple infirmities. First, the Carrier Member is factually wrong when he asserts that the Board ignored the off the shelf purchase awards cited by UP. In fact, just the opposite is true. Even a cursory review of the Award shows that the Board very carefully considered the off the shelf awards cited by UP not only as to their subject matter and the parties involved, but their precise dates in relation to the evolving track panel fabrication practices on UP (Award at PP.7-8). In short, the off the shelf awards cited by UP were not ignored, but instead carefully integrated in the Board's analysis and findings.

Second, the Carrier Member's real complaint is not that the awards it cited were ignored, but that they were not followed by the Board. But the Board had no obligation to follow those awards because, as Hill and Sinicropi so aptly explained in their hornbook text, prior awards between different parties have no binding precedential value:

> "*** The institutional conditions that require that precedent be followed by the courts are absent in the arbitral forum. By its nature the arbitration process, subject only to the terms of the parties' labor agreement, allows much more latitude for equitable considerations than does the judicial process.[1] As such, arbitration awards involving difference parties but similar issues are not considered to have precedential force. This view was well expressed in 1962 by Arbitrator Burton Turkus in *Brewers Board of Trade, Inc.*:
>
> > It is a fundamental concept of industrial relations that decisions of other arbitrators, unlike judicial precedent in the Courts, are neither necessarily controlling nor decisive—but rather that each award in arbitration represents the judgment of the arbitrator of what the agreement of the parties means and where the equities lie. Thus the doctrine of 'stare

> "decisis, et non quieta movere'—adhere to precedents do not unsettle things—does not apply in arbitration, as it does in Courts of law (where judicial precedent of a higher Court must be followed)." (Footnotes omitted)[2]

Consequently, the best that can be said for prior awards is that they can be persuasive where their reasoning is sound and the rules, facts and circumstances are similar to an instant dispute. In this case, UP did not and can not show that the off the shelf awards upon which it relied involved rules, facts or circumstances that were similar to the instant track panel fabrication dispute between BMWE and UP.

Finally, the so-called "well-established line of awards" upon which UP relied is anything but definitive. Rather, for as long as the off the shelf issue has been in controversy, there have been divergent views. As we pointed out in our Rebuttal Submission, the off the shelf argument raised by various carriers has been rejected as early as 1950 in Third Division Award 4713 (Rebuttal Sub. at P.23) and as recently as 1999 in Third Division Award 33044 (Rebuttal Sub. at PP.25-27). Hence, there was no well-established line of awards for the Board to ignore, but only divergent awards involving different parties, rules and circumstances. Indeed, in the ultimate irony, the Carrier Member now complains that one of the off the shelf awards on which UP relied in this case (Award 436 of Special Board of Adjustment No. 570) is so distinguishable on the facts that UP could not reasonably have been expected to recognize it as similar in principle to buying track panels off the shelf. The Carrier can not have it both ways.

## IV. There Was No Change In Circumstances Related To Track Panel Fabrication In 1996.

In an attempt to show that UP should not have been bound by its consistent and long-standing panel fabrication practices under Rule 9, the Carrier Member asserts that it was not feasible to purchase track panels until the "bracket and spring clip" were developed for wood ties in 1996. That assertion is demonstrably false and demonstrates once again the lack of credibility of the Carrier Member's dissent. As the evidence of record clearly establishes, the modern bracket and spring clip used for fastening rail to wood ties were invented in Europe in the 1950's and their use was spreading across commuter and freight railroads in the United States by the 1980's. These facts are reported in the 1985 edition of The Track Cyclopedia (Employes' Exhibit 6 at PP.246 and 398). Moreover, irrespective of when the bracket and spring clip became available, there is not a shred of evidence or logic which even remotely suggests that the type of rail fastening employed (cut spikes, screw spikes, drive spikes, spring clips, etc.) makes it more or less "feasible" to have track panels constructed off-site by contractors in their panel plants rather than

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[2] Marvin F. Hill, Jr. and Anthony V. Sinicropi, Evidence In Arbitration, 2nd ed. (Washington, DC: The Bureau of National Affairs, Inc., 1980, 1987) P.386.

by BMWE represented employes in UP's own panel plants. Irrespective of which technology is chosen, the work functions remained the same. That is, tie plates or brackets must be attached to the wood ties with spikes or screws and then the rail must be fastened with spikes or clips. Hence, even if brackets and spring clips had not been invented until 1996 (which is untrue), there is nothing about that technology that would have suddenly made it "feasible" to contract out for panel fabrication. In short, there was no change in circumstances that would have any effect on the long-standing practice of the parties under Rule 9.

In conclusion, the only thing that is egregiously wrong with this case is the Carrier Member's cavalier disregard for the principles and facts in his transparent effort to set the stage for judicial review of the Board's decision. However, a fair reading of the record shows that the Award is grounded in the facts and arguments presented by the parties and that the Board relied upon hornbook principles of contract construction to interpret the parties' Agreement. Hence, there is no basis for setting this well-reasoned Award aside and it will carry powerful persuasive value in future cases involving analogous circumstances.

Respectfully submitted,

Steven V. Powers

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Labor Member