PRIVATE ARBITRATION
BEFORE ARBITRATOR STEVEN M. BIERIG

IN THE MATTER OF ARBITRATION BETWEEN: UNION PACIFIC RAILROAD AND BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, DIVISION I.B.T.	GRIEVANT: CLASS ACTION ISSUE: USE OF PRE-PLATED RAILROAD TIES PREPARED BY NON-BARGAINING UNIT EMPLOYEES ARB. NO. 08-169

Before: Steven M. Bierig, Arbitrator

APPEARANCES:
For Union Pacific Railroad: Wayne Naro
General Director of Labor Relations

For BMWED: Steven Powers
Director of Arbitration

Location of Hearing: BMWED Office
150 S. Wacker #300
Chicago, Illinois

Date of Hearing: April 27, 2009

Date of Award: December 22, 2009

AWARD:

For the reasons stated in this Opinion and Award, the Arbitrator finds:

The Grievance is sustained. The Carrier violated the Agreement when it allowed tie-plating work to be performed by non-bargaining unit employees at North Little Rock and subsequently allowed the installation of said ties on the UP North Territory. I find that the February 7th Agreement provides that Bargaining Unit work that is transferred from one location to another remains within the same craft. In this case, the tie-plating work that was properly transferred from the UP North to the UP South Agreement was required to be performed by Organization-represented employees and not by an outside contractor.

Therefore, when the Carrier transferred the work of tie-plating to non-bargaining unit employees and said ties were subsequently installed on the UP North, it violated the Contract. To the extent that said violation is occurring, the Carrier is ordered to cease and desist from these actions immediately. In addition, the matter is remanded to the parties to fashion an appropriate remedy.

The Carrier's Statement of the Issue is answered in the Negative. The Organization's First Statement of Issue is answered in the Affirmative. The Organization's Second Statement of Issue is answered in the Negative.

I. INTRODUCTION

The Hearing in this matter was held on Monday, April 27, 2009 at the offices of the BMWED located at 150 S. Wacker Drive in Chicago, Illinois. The Hearing commenced at 9:00 a.m. before the undersigned Arbitrator who was duly appointed by the parties to render a final and binding decision in this matter. At the Hearing, the parties were afforded a full opportunity to present such evidence and arguments as desired. No transcript of the Hearing was prepared although the Arbitrator did record the parties' presentation. Both parties argued their positions on the date of the Hearing, whereupon the Hearing was declared closed. Both parties stipulated at the Hearing to this Arbitrator's jurisdiction and authority to hear this case and issue a final and binding decision in this matter.

The Arbitrator, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

II. ISSUES

A. Carrier's Statement of Issue

Does the transfer of tie plating from the jurisdiction of the UP/BMWED July 1, 2001 collective bargaining agreement to the jurisdiction of the UP/BMWED July 1, 2000 collective bargaining agreement pursuant to Article III, Section 1 of the February 7th Agreement remove such work from the jurisdiction of the July 1, 2001 agreement?

B. Organization's Statements of Issue

(1) Is it a violation of the July 1, 2001 Union Pacific Agreement if Union Pacific installs track ties that have been plated by persons other than Union Pacific

employees represented by BMWED in connection with track work performed on territory and in operations covered by the terms of the July 1, 2001 Agreement?

(2) Does the Carrier's transfer of tie plating work performed at its Laramie, Wyoming Plant that was covered by the BMWED-UP 2001 Agreement to a UP facility in North Little Rock to be performed by BMWED-represented forces covered by the BMWED-UP 2000 Agreement permit UP to install track ties that have been plated by persons other than BMWED–represented forces on territory and in operations covered by the 2001 Agreement when the 2001 Agreement expressly reserves such work to BMWED track sub-department forces?

III. RELEVANT CONTRACT/AGREEMENT PROVISIONS

Article III Section 1 of the February 7, 1965 Agreement

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 hereto 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.

Rule 9 of the July 1, 2001 UP Agreement (UP North)

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.

IV. STATEMENT OF FACTS

A. Introduction

The instant Grievance was filed by the Brotherhood of Maintenance of Way Employes, a Division of the International Brotherhood of Teamsters ("BMWED" or the "Organization"). The Organization and the Union Pacific Railroad Carrier ("UP" or the "Carrier") are parties to the instant dispute. The instant Grievance relates to the Carrier's use of pre-plated railroad ties that were prepared by non-Organization employees.

B. The History of the Dispute

The history of the dispute was discussed in Award No. 34, issued January 15, 2008, of the Special Board of Adjustment 1087, the Neutral Member of which was John LaRocco. In the late 1990s, the Carrier maintained two facilities where employees represented by the Organization manufactured and assembled track panels. One facility was located in Laramie, Wyoming on the UP North Territory, and the other facility was located in North Little Rock, Arkansas on the UP South Territory. For many years, Organization employees attached tie plates to ties as part of fabricating track panels at Laramie. At North Little Rock, a third party vendor, Nevada Railroad Materials, supplied the Carrier with pre-plated ties. It is clear that Nevada Railroad Materials was a contractor and its employees were not members of the Organization. Once Nevada Railroad Materials prepared the pre-plated ties, Organization members assembled the track panels using the pre-plated ties.

On November 16, 1999, the Carrier notified the Organization of its intent to phase out track panel production and then close the Laramie and North Little Rock facilities. The Carrier indicated that it intended to purchase pre-plated ties and track panel components in the marketplace and ship them directly to work sites where Organization members would assemble and/or install the track panels. The Organization objected and threatened a work stoppage. After litigation, the parties submitted the matter to Arbitrator Gerald Wallin.

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 outside contractors. After a review of the evidence, the Wallin Board determined that the Carrier had adhered to a 20-year past practice of refraining from purchasing pre-fabricated track panels from outside vendors and that 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 Territory was reserved to Organization members. The Wallin Board determined that the 20-year period during which the Carrier had not purchased pre-fabricated track panels from outside vendors precluded the Carrier from the right to purchase track panels from outside vendors. The Wallin Board restricted itself to the interpretation of Rule 9 of the UP North Agreement.

Subsequent to the Wallin Board, another dispute arose concerning the Carrier's purchase of pre-plated rail ties from outside vendors for new track construction projects on the UP North Territory. Although the Carrier argued that it had often purchased pre-plated ties in the past, another Special Board of Adjustment, chaired by Arbitrator Herbert Fishgold, found that the Organization was unaware of the practice. Arbitrator Fishgold ruled in favor of the Organization and held that tie plating is reserved to Organization forces. The Fishgold Award was limited to the interpretation of Rule 9 and the Contracting Out Rule (52) of the UP North Agreement.

On December 2, 2003, the Carrier notified the General Chairman on the UP North that the work consisting of manufacturing pre-plated track ties and tangent track assembly would be transferred from Laramie to North Little Rock. Specifically, the second paragraph of the 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 [UP South Agreement].

The Notice also indicated that because the change of work location did not involve the transfer of any employees, no implementing agreement was necessary. There is no evidence that the Organization contested the transfer of the work from Laramie to North Little Rock.

The Organization later claimed that after the Carrier transferred the pre-plating tie work to North Little Rock, Nevada Railroad Materials, an outside contractor, produced pre-plated ties and partially assembled track panels at or near the North Little Rock facility. The Organization further charged that it had 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. The Organization claimed that this was a direct violation of the UP North Agreement. The Organization then threatened a work stoppage. It also initiated a lawsuit to enforce the decisions of the Wallin and Fishgold Boards. A cross-claim was filed by the Carrier. Subsequently, the parties

entered into a settlement agreement dated October 31, 2006, in which the parties dismissed all lawsuits and submitted their respective disputes to SBA 1087.

On August 1, 2005, the Organization filed a Notice with the National Railroad Adjustment Board (NRAB) 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 claimed straight time and overtime pay for Organization employees as determined by the amount of time that the outside vendor spent manufacturing the pre-plated ties. After a series of various litigation maneuvers, on October 31, 2006, the parties entered into a Settlement Agreement in which the parties agreed that they would submit the question to SBA 1087. This Arbitrator notes that SBA 1087's jurisdiction is charged with the interpretation and application of the February 7, 1965 Job Stabilization Agreement, as amended.

Before Arbitrator LaRocco, the Organization took the position that SBA 1087 lacks jurisdiction to address the dispute because the February 7, 1965 Job Stabilization Agreement does not apply to determining the propriety of the Carrier's alleged transfer of scope-covered work from employees represented by the Organization to an outside contractor. The Organization took the position that SBA 1087 does not have the authority to interpret the applicable scope rule and that the matter had already been resolved by Arbitrators Wallin and Fishgold. Conversely, the Carrier took the position that the February 7, 1965 Job Stabilization Agreement permits the Carrier to transfer work throughout its system. Once the work leaves the jurisdiction of the UP North Agreement, the jurisdiction of the tie-plating work becomes a question of interpretation of the UP South Agreement and no longer falls under the authority of SBA 1087. This is the crux of the instant dispute. The Organization claims that even if work is transferred to the UP South Agreement under the February 7th Agreement, it must still be performed by Organization Members. Conversely, the Carrier argues that once the work is transferred from the UP North to the UP South

Territory, it falls within the jurisdiction of the UP South Agreement and the rules of the UP North Agreement do not apply.

On June 4, 2008, Arbitrator LaRocco issued Award No. 34 of SBA 1087 relating to the instant matter. Ultimately, it determined that it did not have jurisdiction over this matter. In reaching that conclusion, Arbitrator LaRocco opined:

> ... As both parties point out, this Board is confined to interpreting and applying the February 7, 1965 Job Stabilization Agreement ... This 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. ...
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> 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. ...
>
> 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 world thwart the Carrier's capacity to transfer work throughout its system per Article III of the Job Stabilization Agreement, as amended. ... 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. ...

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 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 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. ...

* * * *

(*Id.* at 11-14)

C. The Instant Dispute

Pursuant to Arbitrator LaRocco's determination that SBA 1087 did not have jurisdiction, the Organization notified the Carrier in a letter dated September 9, 2008 that the Organization would strike after 10 days if the Carrier did not cease its "abrogation and unilateral change of the [UP North] Agreement". Subsequent to this action, in a letter dated October 1, 2008, the parties reached the following agreement concerning this matter:

> The parties will enter into immediate party pay arbitration with respect to whether Union Pacific has the right to utilize pre-plated ties that were not assembled by Brotherhood of Maintenance of Way Employees Division/IBT represented employees on right of way and operations covered by the UP/BMWED 2001 agreement. Parties will promptly enter into an agreement establishing the Board, the questions to be placed before the Board, and the procedures for hearing this dispute. Failure to reach agreement will result in the parties returning to their original positions on this matter.

The above-mentioned agreement led to the instant Arbitration which took place on April 27, 2009.

V. POSITIONS OF THE PARTIES

A. The Organization

The Organization contends that the Carrier violated the Contract when, after the work was transferred from Laramie to North Little Rock, it allowed non-Organization employees to prepare pre-plated ties and subsequently to allow the installation of said ties on

the UP North Territory. According to the Organization, at all times relevant to this matter, the work of preparing pre-plated ties belonged exclusively to members of the Organization.

It is clear that the Organization does not dispute that, pursuant to Article III, Section 1 of the February 7th Agreement, the Carrier has the right to transfer tie plating work from its Laramie facility under the UP North Agreement to its North Little Rock facility under the UP South Agreement. In addition, the Organization does not dispute that ties plated at the North Little Rock facility by Organization employees working under the UP South 2000 Agreement could then be used in connection with track maintenance and construction work on territory and operations covered by the UP North 2001 Agreement.

However, the Organization differs from the Carrier in that the Carrier contends that it is permissible to contract out the work transferred from the UP North to the UP South Agreement pursuant to the UP South Agreement. The Organization contends that the language of the February 7th Agreement expressly provides that "...the carrier shall have the right to transfer work and/or transfer employees throughout this system which do not require the crossing of craft lines." The Organization vigorously maintains that the transferred work was required to be retained by members of the Organization.

The Organization asks that the Grievance be sustained in its entirety and that the Arbitrator issue a cease and desist order requiring that all tie-plating work be performed by Organization employees.

B. The Carrier

The Carrier takes the position that as this is a contract interpretation case, the burden of proof falls to the Organization and the Organization cannot meet that burden. The Carrier asks that the Grievance be denied in its entirety.

The Carrier contends that pursuant to the February 7th Agreement, it had the right to assign pre-plated tie work to non-bargaining unit employees after the work had been transferred from Laramie to North Little Rock. According to the Carrier, once the work was transferred from the UP North to the UP South Agreement, the language of the UP South Agreement is controlling and therefore, there was no obligation to continue using Organization employees to perform the tie-plating work.

According to the Carrier, Arbitrator LaRocco's Award held that the transfer of work pursuant to Article III of the February 7th Agreement removed the work from the scope of the original Agreement and placed it within the scope of the UP South Agreement. Award 34 held that the work was subject to the collective bargaining agreement to which it was transferred and that such work was no longer within the scope of the UP North Agreement. Therefore, the Carrier contends that it is not a violation of the UP North Agreement when work is performed pursuant to the provisions of the agreement to which the work is transferred, i.e., the UP South Agreement. Once the work was transferred, the original collective bargaining agreement, the UP North Agreement, has no applicability.

Finally, the Carrier contends that the logical implications of Award 34 provide that the UP North Agreement has no control over the finished product that is returned to the territory of the UP North Agreement. Once the work is divested of the UP North jurisdiction, the UP North Agreement has no jurisdiction over the finished product when it is returned to the UP North Territory. According to the Carrier, the imposition of such a requirement would thwart the very purpose for which the Carrier entered into the February 7th Agreement.

The Carrier asks that the Grievance be denied in its entirety.

VI. DISCUSSION AND FINDINGS

A. Introduction

After a complete and thorough review of all the evidence and arguments presented in this case, I find that I must sustain the Grievance. I find that the February 7th Agreement intended that transferred Bargaining Unit work would remain within the Bargaining Unit of that craft. In this case, it is uncontested that tie-plating work was properly transferred from the UP North to the UP South Agreement. I find that subsequent to the transfer, the work was required to be performed by Organization-represented employees and not by an outside contractor.

Therefore, when the Carrier used non-bargaining unit employees to perform this work, it violated the Contract. To the extent that said violation is occurring, the Carrier is ordered to cease and desist from these actions immediately. The matter is remanded to the parties to fashion an appropriate remedy.

B. Discussion

The instant Grievance relates to the Carrier's use of pre-plated railroad ties that were prepared by non-Organization employees. In the late 1990s, the Carrier maintained two facilities where employees represented by the Organization manufactured and assembled track panels. These facilities were in Laramie, Wyoming on the UP North Territory, and North Little Rock, Arkansas on the UP South Territory. For many years, Organization employees attached tie plates to ties as part of fabricating track panels at Laramie. At North

Little Rock, a third party vendor, Nevada Railroad Materials, supplied the Carrier with pre-plated ties.

On November 16, 1999, the Carrier notified the Organization of its intent to phase out track panel production and close the Laramie and North Little Rock facilities. The Organization objected and threatened a work stoppage. The parties submitted the matter to Arbitrator Gerald Wallin. 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 outside contractors. The Wallin Board determined that the Carrier had adhered to a 20-year past practice of refraining from purchasing pre-fabricated track panels from outside vendors and that 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 Territory was reserved to Organization members. The Wallin Board restricted itself to the interpretation of Rule 9 of the UP North Agreement.

Subsequently, another dispute arose concerning the Carrier's purchase of pre-plated rail ties from outside vendors for new track construction projects on the UP North Territory. Another Special Board of Adjustment, chaired by Arbitrator Herbert Fishgold, found that the Organization was unaware of the practice of utilizing outside vendors. Arbitrator Fishgold ruled in favor of the Organization and held that tie plating is reserved to Organization forces. The Fishgold Award was limited to the interpretation of Rule 9 and the Contracting Out Rule (52) of the UP North Agreement.

On December 2, 2003, the Carrier notified the General Chairman on the UP North that the work consisting of manufacturing pre-plated track ties and tangent track assembly would be transferred from Laramie to North Little Rock. There is no evidence that the Organization contested the transfer of the work from Laramie to North Little Rock.

The Organization later claimed that after the Carrier transferred the pre-plating tie work to North Little Rock, Nevada Railroad Materials produced pre-plated ties and partially

assembled track panels at the North Little Rock facility. The Organization further charged that 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. The Organization claimed that this was a direct violation of the UP North Agreement. The Organization then threatened a work stoppage. Subsequently, the parties entered into a settlement agreement dated October 31, 2006, in which the parties dismissed all lawsuits and submitted their respective disputes to SBA 1087.

On August 1, 2005, the Organization filed a Notice with the NRAB 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. On October 31, 2006, the parties entered into a Settlement Agreement in which the parties agreed that they would submit the question to SBA 1087. This Arbitrator notes that SBA 1087's jurisdiction is charged with the interpretation and application of the February 7, 1965 Job Stabilization Agreement, as amended. Before Arbitrator LaRocco, the Organization took the position that SBA 1087 lacks jurisdiction to address the dispute because the February 7, 1965 Job Stabilization Agreement does not apply to determining the propriety of the Carrier's alleged transfer of scope-covered work from employees represented by the Organization to an outside contractor. Conversely, the Carrier took the position that the February 7, 1965 Job Stabilization Agreement permits the Carrier to transfer work throughout its system. Once the work leaves the jurisdiction of the UP North Agreement, the jurisdiction of the tie-plating work becomes a question of interpretation of the UP South Agreement and no longer falls under the authority of SBA 1087. This is the crux of the instant dispute. The Organization claims that even if work is transferred to the UP South Agreement under the February 7th Agreement, it must still be performed by Organization Members. Conversely, the Carrier argues that once the work is transferred from the UP

North to the UP South Territory, it falls within the jurisdiction of the UP South Agreement and the rules of the UP North Agreement do not apply.

On June 4, 2008, Arbitrator LaRocco issued Award No. 34 of SBA 1087 relating to the instant matter. Ultimately, it determined that it did not have jurisdiction over this matter. Pursuant to Arbitrator LaRocco's determination that SBA 1087 did not have jurisdiction, the Organization notified the Carrier in a letter dated September 9, 2008 that the Organization would strike after 10 days if the Carrier did not cease its "abrogation and unilateral change of the [UP North] Agreement". Subsequent to this action, in a letter dated October 1, 2008, the parties agreed that it would submit the instant dispute to this Arbitrator, the Arbitration of which took place on April 27, 2009.

The Organization asserts that the Carrier violated the Contract when it transferred work from the jurisdiction of the UP North Agreement to that of the UP South Agreement, allowed the work of tie plating to be performed by non-Organization members and subsequently returned the ties for installation within the jurisdiction of the UP North Agreement. The Organization contends that work transferred from the UP North to the UP South Agreement is required to be performed by Bargaining Unit employees pursuant to the February 7th Agreement. Conversely, the Carrier contends that both the February 7th Agreement and the LaRocco Award mandate that once the work is properly transferred from the UP North Agreement to the UP South Agreement, the work falls within the jurisdiction of the UP South Agreement and therefore, the terms and conditions of the UP South Agreement take effect. Therefore, the Carrier had the right to assign the transferred work of tie-plating to non-Organization employees. The Carrier asks that the Grievance be denied in its entirety.

I have paid particular attention to the language of Rule 9 of the UP North Agreement and that of the February 7th Agreement. The relevant language of each is as follows:

Article III Section 1 of the February 7, 1965 Agreement

> 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 hereto 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.

Rule 9 of the July 1, 2001 UP Agreement (UP North)

> 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.

It is clear to this Arbitrator that the Carrier, pursuant to the February 7th Agreement, has the right to transfer work from the jurisdiction of one Agreement to another. That is in fact what occurred in the instant case when the tie plating work was transferred from the UP North to the UP South Agreement. It is clear to this Arbitrator that the parties agreed that such work could be transferred to take advantage of efficiencies of scale and other technological advances.

However, the transfer of work from one jurisdiction to another raises the question of whether such work must continue to be performed by Bargaining Unit employees or whether such work is wholly transferred to rules and regulations of the subsequent jurisdiction. In this case, the resulting product of the transferred work was returned to the original

jurisdiction, raising the question of whether the work of tie-plating, once transferred from the UP North to the UP South Agreement, the product of which was ultimately installed within UP North jurisdiction, could be considered completely within the jurisdiction of the UP South Agreement and thus manufactured by non-bargaining unit employees.

After a review of all the facts and circumstances in this case, I find that I must agree with the Organization. The language of the February 7th Agreement states in clear and unequivocal language that, "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. ...*" (emphasis added). It is clear to this Arbitrator that the work of tie-plating, once transferred from the UP North to the UP South Agreement, could be performed by employees covered under the UP South Agreement, only as long as the work stayed within the Bargaining Unit. Thus, any work performed by Organization employees on the UP North Agreement, due to its transfer and ultimate return to the UP North jurisdiction, could be performed only by UP South employees that were within the BMWED craft.

When the words of an agreement are clear and unambiguous, there is no need to resort to technical rules of interpretation. "...[I]f the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used." Elkouri, *How Arbitration Works*. (BNA Books) 6th Ed. at p. 434. I believe that pursuant to the February 7th Agreement, the parties' intention is clear and unambiguous that while work could be transferred from the UP North to the UP South, it could not cross craft lines. Those craft lines were clearly violated in the instant case.

The Carrier has attempted to use the LaRocco Award to obtain a benefit, the use of non-bargaining unit employees, that I cannot find that the parties intended based on the plain language of their Agreement. After a complete and thorough review of all the evidence and arguments presented in this case, I find that I must sustain the Grievance. I find that the February 7th Agreement mandates that transferred Bargaining Unit work must remain within the craft. In this case, the tie-plating work was properly transferred from the UP North to the UP South Agreement. However, because the resulting product was ultimately installed on the UP North Territory, the work was required to be performed by Organization-represented employees and not by an outside contractor.

Therefore, when the Carrier used non-bargaining unit employees to perform this work, it violated the Contract. To the extent that said violation is occurring, the Carrier is ordered to cease and desist from these actions immediately. In addition, I am remanding the matter to the parties to fashion an appropriate remedy.

VII. AWARD

For the reasons stated in this Opinion and Award, the Arbitrator finds:

The Grievance is sustained. The Carrier violated the Agreement when it allowed tie-plating work to be performed by non-bargaining unit employees at North Little Rock and subsequently allowed the installation of said ties on the UP North Territory. I find that the February 7th Agreement provides that Bargaining Unit work that is transferred from one location to another remains within the same craft. In this case, the tie-plating work that was properly transferred from the UP North to the UP South Agreement was required to be performed by Organization-represented employees and not by an outside contractor.

Therefore, when the Carrier transferred the work of tie-plating to non-bargaining unit employees and said ties were subsequently installed on the UP North, it violated the Contract. To the extent that said violation is occurring, the Carrier is ordered to cease and desist from these actions immediately. In addition, the matter is remanded to the parties to fashion an appropriate remedy.

The Carrier's Statement of the Issue is answered in the Negative. The Organization's First Statement of Issue is answered in the Affirmative. The Organization's Second Statement of Issue is answered in the Negative.

Steven Bierig

Steven M. Bierig
Neutral Chairperson

Steven V. Powers

Steven Powers
Organization Member

I dissent See Attached

Wayne Naro
Carrier Member

CARRIER MEMBER DISSENT TO PRIVATE ARBITRATION
DATED DECEMBER 22, 2009 BEFORE REFEREE STEVEN BIEREG

The issues presented to this Board are inextricably connected to and should be governed by the holdings of Referee John LaRocco in Special Board of Adjustment No. 1087 Award 34. This Board however has ignored those holdings and consequently has not resolved the issues put before it.

The questions put before SBA 1087 are as follows:

"EMPLOYEE'S 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 I of the February 7 Agreement. permit UP to purchase and install on territory covered by the 2001 (North) Agreement ties that had been plated in whole or in part by persons other than UP employees represented by BMWED (i.e. contract forces)?"

CARRIER'S QUESTION 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?"

In rendering its decision, the Board accepted BMWED's argument that it did not have jurisdiction to interpret the respective scope rules of the collective bargaining agreement recognizing that it had exclusive jurisdiction to interpret the February 7th Agreement. It therefore restricted its decision to the application of the February 7th Agreement. In so doing the board held that the work was properly transferred from the scope of the UP North Agreement to the UP South Agreement (page 12). It further held that it was transferred to members of the BMWED craft (page 14). If finally held that once the work was transferred from the jurisdiction of the UP North agreement to the jurisdiction of the UP South agreement, the application of the February 7th Agreement ceased to apply and all other issues had to be resolved through an interpretation of the respective collective bargaining agreements (page 14). It declined to answer those

questions even though the parties had agreed to place them before this Board with the authority to answer the questions.

Because SBA 1087 failed to answer the final questions involved, the matter was not resolved. The dispute again arose and was presented to this Board to answer the remaining questions. The questions presented to this Board are as follows:

CARRIER'S STATEMENT OF ISSUE

"Does the transfer of tie plating from the jurisdiction of the UP/BMWED July 1, 2001 collective bargaining agreement to the jurisdiction of the UP/BMWED July 1, 2000 collective bargaining agreement pursuant to Article III, Section 1 of the February 7th Agreement remove such work from the jurisdiction of the July 1, 2001 Agreement?"

ORGANIZATION'S STATEMENT OF ISSUE

"(1) Is it a violation of the July 1, 2001 Union Pacific Agreement if Union Pacific installs track ties that have been plated by persons other than Union Pacific employees represented by BMWED in connection with track work performed on territory and in operations covered by the terms of the July 1, 2001 Agreement?
(2) Does the Carrier's transfer of tie plating work performed at its Laramie Wyoming Plant that was covered by the BMWED-UP 2001 Agreement to a UP facility in North Little Rock to be performed by BMWED represented forces covered by the BMWED-UP 2000 Agreement permit UP to install track ties that have been plated by persons other than BMWED-represented forces on territory and in operations covered by the 2001 Agreement when the 2001 Agreement expressly reserves such work to BMWED track sub-department forces?"

In rendering its decision, this Board held: "I find that the February 7th Agreement mandates that transferred Bargaining Unit work must remain within the craft." Such a conclusion is in clear contradiction to the LaRocco award, which held that once the work was transferred, it fell within the jurisdiction of that agreement and any further interpretations must be governed by the scope rules of the respective collective bargaining agreements. This Board rendered its decision notwithstanding the fact that it recognized that "[T]his Arbitrator notes that SBA 1087's jurisdiction is charged with the interpretation and application of the February 7, 1965 Job Stabilization Agreement, as amended."

This Board clearly has exceeded its jurisdiction and in so doing has failed to resolve the very issue the parties had placed before it. The issue before this Board was not whether the February 7th Agreement restricted the Carrier's rights under the 2000

South Agreement. SBA 1087 already had interpreted the February 7th Agreement pursuant to its express and exclusive jurisdiction, and it aptly pointed out that the remaining issue required interpretation of the CBA provisions and not the February 7th Agreement. Unfortunately, the decision here is based entirely on the majority's interpretation of the February 7th Agreement, a matter reserved to SBA 1087, and the decision fails to interpret the CBA provisions as was the Board's charge.

As a result, we now have an award from SBA 1087 holding that the February 7th Agreement has no further application once the work is properly transferred and this contrary award which purports to extend the February 7th Agreement beyond the bounds set by SBA 1087. Since SBA 1087 has sole jurisdiction to interpret the February 7th Agreement, and because this Board has usurped the jurisdiction of SBA 1087 and contradicted the holdings of that Board, this award exceeds the Board's jurisdiction and is of no force and effect.

W. E. Naro
General Director Labor Relations

LABOR MEMBER'S RESPONSE
TO CARRIER MEMBER'S DISSENT
TO
TIE PLATING AWARD
(Referee Bierig)

INTRODUCTION

After ten years, four awards and three trips to the federal courts, nothing the Carrier Member says or does in connection with this dispute should come as a surprise. Indeed, a dissent from the Carrier Member came as no surprise because the Carrier Member dissented to each and every one of the trio of carefully reasoned awards that were previously rendered in connection with this long running dispute (i.e., the Wallin, Fishgold and LaRocco Awards). However, I admit to being dumfounded by the substance of the dissent in this case. The Carrier Member's assertion that the Board exceeded its jurisdiction in this case by interpreting the Feb 7th Agreement is obviously wrong as demonstrated by a simple reading of the arbitration agreement that established this Board and defined its jurisdiction.

Likewise, the Carrier Member is just as obviously wrong when he asserts that: (1) this Board supposedly failed to answer each of the questions put before it; and (2) this Board's award is somehow in conflict with Award No. 34 of SBA 1087. Contrary thereto, a simple reading of this Board's award and Award No. 34 of SBA 1087 establishes that this Board definitively answered each of the questions put before it and provided cogent reasoning to support each of those answers and that there is no conflict between these awards.

JURISDICTION

The Carrier Member's assertion that this Board exceeded its jurisdiction by interpreting the Feb 7th Agreement is patently frivolous. The first paragraph of the agreement that established this Board and defined its jurisdiction plainly states:

> **"This Board shall have jurisdiction provided for under Section 3 First and Second of the Railway Labor Act to decide the Questions identified in Attachment 'A'."** (Emphasis in bold added) (Em. Ex. No. 15 at Page 1)

The Questions identified in Attachment "A" clearly reference the Feb 7th Agreement. The Carrier's statement of the Question at Issue specifically references, "Article III Section 1 of the February 7th Agreement" and the Union's statement of the Questions at Issue refer to, "... the Carrier's transfer of tie plating work....", a transfer that was done pursuant to the Feb 7th Agreement. Hence, the plain language of the arbitration agreement that established this Board clearly granted the Board the jurisdiction to interpret the Feb 7th Agreement.

In addition to the plain language of the arbitration agreement, it should be noted that the Carrier opened its submission with the heading "PERTINENT CONTRACT LANGUAGE" and under that heading it not only cited, but quoted, the text of Article III Section 1 of the Feb 7th Agreement. The Carrier continued on to cite the Feb 7th Agreement no less than nine times in its 10 page submission. And then, at Page 7 of its submission, the Carrier told the Board that the issue to be decided was as follows:

> **"This Board must decide what the impact is on collective bargaining agreements when the finished product of work that properly has been transferred from one collective bargaining agreement to another pursuant to Article III Section 1 of the Feb 7th agreement is returned to the territory of the original agreement."** (Emphasis in bold added - Carrier Sub. At P.7)

The Carrier plainly told the Board that it "must decide" the impact that the Feb 7th Agreement had on its collective bargaining agreements. Consequently, for the Carrier to now complain that the Board exceeded its jurisdiction when it interpreted the Feb 7th Agreement is not only contrary to the plain language of the arbitration agreement, but also contrary to the position the Carrier asserted in its submission.

Finally, it should be noted that nothing in this Board's award does anything to undermine the ongoing jurisdiction of SBA 1087 to interpret and apply the Feb 7th Agreement in the future. In the dissent to Award No. 34 of SBA 1087, the Carrier Members complained that the tie plating dispute was a hybrid dispute that required an interpretation of both schedule rules (Rule 9 of the UP Agreement) and the JSA (Feb 7th Agreement). Specifically, the Carrier Members stated it thusly:

> **"By its decision, the Board has created a Catch 22 for the carriers. This dispute turns on the interplay between schedule rules and JSA [Feb 7th] 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."** (Emphasis in bold added) (Carrier's Member's Dissent to Award 34 of SBA 1087 at P.2)

The Carrier Members clearly recognized that the tie plating dispute was a hybrid dispute that involved the interplay of Rule 9 of the UP Agreement and the Feb 7th Agreement and that this interplay created a jurisdictional "Catch 22". The only way to overcome that jurisdictional Catch 22 was to establish a Board with jurisdiction to interpret and apply all of the relevant contract terms, including Rule 9 and the Feb 7th Agreement. That is precisely what the parties did when they established the Bierig Board. Moreover, it is clear that the parties knew they were establishing a hybrid Board with broad jurisdiction because they expressly provided in Paragraph 9 of the arbitration agreement that, "[t]he resolution of this dispute is without prejudice or precedent to the parties' respective position as to the appropriate forum to resolve similar disputes." Thus, nothing

in this Board's award does anything to undermine the jurisdiction of SBA 1087 to interpret and apply the Feb 7th Agreement in future disputes over the application of that agreement.

The Board Has Resolved All Questions Placed Before It

I am particularly baffled by the Carrier Member's repeated assertions that the Board failed to resolve the issues put before it (Dissent at Pages 1, 2 and 3). The Carrier submitted one question to the Board and the Union submitted two questions. The Board not only answered each of those questions with a definitive "Negative" or "Affirmative" answer, but also provided cogent reasoning to support each of those answers. It is clear that the Board resolved all issues within its jurisdiction and the Carrier Member's assertions to the contrary are definitively refuted by simply reading the award.

There Is No Conflict Between The Bierig And LaRocco Awards

Just as he did with respect to the Wallin and Fishgold Awards, the Carrier Member asserts that the Bierig Award is in conflict with prior precedent. More specifically, at Page 2 of his dissent, the Carrier Member asserts:

> "In rendering its decision, this Board held: 'I find that the February 7th Agreement mandated that transferred Bargaining Unit work must remain within the craft.' Such a conclusion is in clear contradiction to the LaRocco award, which held that once the work was transferred, it fell within the jurisdiction of that agreement and any further interpretations must be governed by the scope rules of the respective collective bargaining agreements."

There are at least three problems with the Carrier Member's assertion. First, it is founded on a false premise. Indeed, the Carrier's entire case is built upon an intellectual sleight of hand that just does not stand up to the light of reason. Both the black letter and spirit of the Feb 7th Agreement prohibit the transfer of work beyond craft lines. Consequently, any tie plating work performed by an outside contractor could not possibly have been "transferred" pursuant to the Feb 7th Agreement.

Second, the LaRocco Board was not only assailed with jurisdictional protests from both parties, but had before it limited facts with respect to the nature of the outside contracting transaction (LaRocco Award at PP.13-15). In light of those limitations, the LaRocco Board issued an award that, "... only narrowly and partially answer[ed] the issues the parties submitted." (LaRocco Award at P.14). In contrast, the Bierig Board had no such jurisdictional limitations and was fully informed as to the facts. With its broad jurisdiction, the Bierig Board fully resolved the dispute and finally brought an end to the jurisdictional shell game that the Carrier had been playing with the courts and arbitrators for nearly a decade.

Finally, it is clear that the Bierig Board carefully considered the LaRocco Award and took it into account in fashioning its award. This is clear from Page 20 of the Bierig Award where Arbitrator Bierig expressly states, "[t]he Carrier has attempted to use the LaRocco Award to obtain a benefit, the use of non-bargaining unit employees, that I cannot find that the parties intended based on the plain language of their Agreement." The fact that Arbitrator Bierig interpreted the LaRocco Award differently than the Carrier does not mean that the LaRocco Award is in conflict with the Bierig Award. Rather, with its broad jurisdiction and full knowledge of the facts, the Bierig Board was able to finally and completely resolve the dispute which the LaRocco Board could only address "narrowly and partially".

In summary, the Bierig Board properly exercised the broad jurisdiction the parties granted to it to render a well-reasoned and fully informed opinion based on clear contract language and hornbook principles of contract construction. Pursuant to Paragraph 9 of the parties' arbitration agreement, the Bierig Award is "final and binding on the parties" and should bring a definitive end to this long running dispute. Moreover, since the precedential value of an award is proportionate to the clarity of reasoning in the award, the Bierig Award will carry powerful precedential value in future cases involving analogous circumstances on other carriers.

Respectfully submitted,

Steven V. Powers

Steven V. Powers
Labor Member