SPECIAL BOARD OF ADJUSTMENT

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

PARTIES
TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY

EMPLOYEE QUESTIONS AT ISSUE:

(1) Did Union Pacific violate and does it continue to violate its C&NW/UP Agreement effective November 1, 2001 when, pursuant to the Contract For Work Or Services it entered into with Loram Rail Services on February 1, 2005, it utilized or utilizes employes of Loram Rail Services to perform rail loading and unloading work in connection with the construction, maintenance, repair or dismantling of UP's tracks on the territory covered by the C&NW/UP Agreement?

(2) Did Union Pacific violate and does it continue to violate its SP-W/UP Agreement effective October 1, 1973 (last revised December 31, 2003) when, pursuant to the Contract For Work Or Services it entered into with Loram Rail Services on February 1, 2005, it utilized or utilizes employes of Loram Rail Services to perform rail loading and unloading work in connection with the construction, maintenance, repair or dismantling of UP's tracks on the territory covered by the SP-W/UP Agreement?

(3) Did Union Pacific violate and does it continue to violate its UP Agreement effective July 1, 2001 when, pursuant to the Contract For Work Or Services it entered into with Loram Rail Services on February 1, 2005, it utilized or utilizes employes of Loram Rail

Services to perform rail loading and unloading work in connection with the construction, maintenance, repair or dismantling of UP's tracks on the territory covered by the UP Agreement?

(4) If the answer to Questions 1, 2 and/or 3 above is "Yes," what shall the remedy be?

CARRIER QUESTION AT ISSUE:

Has BMWED met its burden of proof in demonstrating that all work associated with rail loading and unloading by the Loram owned rail change out machine is exclusively reserved to BMWED represented employees?

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

This dispute involves the performance of rail loading and unloading work on the north side of the Union Pacific (UP) territory, encompassing rail lines of the UP, the former Chicago & Northwestern (C&NW) and Southern Pacific Western Lines (SPW) which were merged into the UP territory. The work in issue is performed under three different collective bargaining agreements corresponding to these former railroad territories, herein referred to as the "UP Agreement," the "C&NW Agreement" and the "SPW Agreement." As a result of a Consolidated System Gang Agreement (CSGA) effective August 1, 1998, the parties agreed to the operation of

certain mobile heavy maintenance and construction gangs (some of which perform rail loading and unloading) throughout the entire UP system, and that on the north side of the UP territory those gangs would operate under the terms of the UP Agreement, except for issues specifically addressed in the CSGA.

As background, rail and other track material was originally handled through use of manual labor and lifting equipment. Historically, rail was manufactured in 39 or 78 foot lengths, shipped to job locations on flat cars, lifted out of and pushed on to rail cars using different types of cranes, and bolted together. Over the past few decades, railroads began using continuous welded rail (CWR), and the dominant technology at present for replacing worn track or constructing new track is quarter mile lengths of "ribbon" rail. With the change in this rail material, came the development of special rail trains to transport and unload ribbon rail and load second hand rail being removed from the site. These rail trains normally include a rail pickup car with a small boom and a threader box (crane car), a power car which uses winches and power wheels to aid in threading the rail into or out of the rail racks, a breaker car which is the point car for placing the rail in the racks, and the rail tie-down cars housing the racks. Rail was loaded or unloaded by the power of the rail train (whose locomotive was operated by an engineer represented by the Brotherhood of Locomotive Engineers and Trainmen, herein "BLET") backing under or pulling out from under the rail. UP currently owns 20 rail train sets and leases 5 others.

UP Rail Train Instructions and schematics show that the manpower requirements for a rail pickup (loading) gang is 16, including one Rail Train Supervisor (RTS) (represented by the American Railway and Airline

Supervisors Association, herein "ARASA") who operates the power car, and 15 BMWE-represented employees with the classifications of foreman (1), assistant foreman (1), operator (1), trackman (11) and driver (1), who perform various functions on the rail pick up car, breaker car, tie-down car and as point men. The force required in a rail unloading gang also includes the ARASA RTS operating the power car, and 9 BMWE-represented employees working on the tie-down and rail unloading cars.

On February 1, 2005 Carrier entered into a Contract For Work Or Services with Loram Rail Services, LLC (herein "Loram") for "rail pick-up and delivery services, including nine (9) 150-meter complete rail transport sets which can be consolidated into three (3) 450-meter trains, one gantry loading/unloading work unit with power cars (together hereinafter the "Equipment") and operators for use systemwide (hereinafter the "job site")." The contract was for a ten year period with services to commence within 12 months and included both the lease of this new equipment being developed by Loram and the use of Loram employees to operate it.

The Organization first received telephonic notice of this contract on January 16, 2006, which was thereafter followed by a letter from UP General Director, Labor Relations, Wayne Naro to each of the four affected General Chairmen seeking agreement with the utilization of the equipment and corresponding labor changes contemplated. In pertinent part the letter states:

> Loram's rail pick up and delivery unit consists of a four to six car integrated work unit with two gantry cranes. I have attached a schematic drawing of this piece of equipment. It is designed to travel to and from the

work site and pick up or deliver rail at the work site using its two gantry cranes and integrated power cars.

As was indicated to you in our conversations, we contemplate utilizing these units commencing February 1, 2006. Due to the production rates and performance standards required with the leasing of the units, certain employees from Loram are required in connection with the supervision and operation of these units. It is understood that the following positions will be filled by Loram employees on Loram's payroll and will not, in any way, be subject to the provisions of the Collective Bargaining Agreement dated July 1, 2001 between the Union Pacific Railroad and the Brotherhood of Maintenance of Way Employes (BMWED):

(a) One (1) Supervisor who will be responsible for directing rail pick up operations.

(b) Two (2) gantry crane operators who will work in conjunction with the power car operator and be responsible for picking up from or delivering rail to the work site.

(c) One (1) Power Unit Operator who will be responsible for the power cars and any movement of the unit.

Employees represented by BMWED will be assigned to all other tasks associated with the operation of this unit that are generally recognized as being covered by the Collective Bargaining Agreement between UP and BMWE effective July 1, 2001. These positions will consist of two (2) laborers responsible for cutting rail, drilling holes and adding joint bars where necessary and two (2) laborers responsible for securing the rail for transit. These positions will be bulletined to Roster 9126.

This Agreement is without prejudice to either

> party's position concerning the leasing of equipment, and will not be considered as precedent, and will not be cited by either party.....

The Organization was not amenable to signing this agreement, and a meeting was held on February 28, 2006 in Omaha to further discuss this matter. The use of Loram employees to perform rail loading and unloading and operate the gantry cranes was the primary concern of the Organization. Carrier's position was that this was unique equipment which replaced the work of the power car which was performed by ARASA employees, not BMWE employees, so they had no claim to the work. The parties were unable to reach agreement on this matter and Carrier advised the Organization that it intended to proceed with its contract to use the Loram equipment and employees.

By letter dated March 10, 2006 the Organization gave Carrier a ten day strike notice based upon its alleged repudiation of Rule 9 of the collective bargaining agreement and failure to timely comply with the notice provisions of Rule 52. On March 13, 2006 Carrier filed suit in the United States District Court for the District of Nebraska seeking to enjoin the Organization from striking over the use of Loram employees to operate its rail pickup and delivery equipment. The parties subsequently agreed to have this matter resolved by means of expedited arbitration and they signed an Agreement on March 29, 2006 establishing this Special Board of Adjustment to resolve the specific questions set forth above. The Organization withdrew its strike notice and Carrier withdrew its complaint without prejudice. The matter was heard by the Board on August 4, 2006, after submission by the parties of Briefs, Reply Briefs and numerous exhibits, which constitute the record in this case. The parties waived the 30 day time limit for the issuance of the award contained in the

agreement establishing this Board.

In summary, the Organization's position is that Carrier violated Rules 9 and 52 of the UP Agreement, Rule 1 of the C&NW Agreement, Rules 26(d) and 59 of the SPW Agreement, and the December 11, 1981 Berge/Hopkins National Letter of Agreement when it subcontracted to Loram, without advance notice, the rail loading and unloading work in connection with the construction, maintenance, repair or dismantling of UP's railroad tracks specifically reserved to BMWE employees by clear contract language and past practice. The Organization is not claiming the work of the power unit operator, but rather, the work being performed by the Loram gantry crane operators in loading and unloading the rail. It seeks return of this work to BMWE-represented employees under the terms of the applicable agreements and compensation to appropriate employees from the CSG roster for an equal proportionate share of the man-hours expended by Loram employees in performing the disputed rail loading and unloading work.

Carrier, on the other hand, contends that the gantry crane on the Loram unit is only replacing the work of the rail train power car, which was operated by an ARASA employee, and cannot be claimed by the Organization as being encompassed within the Scope of its Agreement. It asserts that Rule 9 of the UP Agreement does not reserve this rail loading and unloading work to BMWE employees, who have not exclusively performed it and who have retained all of the work that they did previously perform. Carrier's argument is also based upon its belief that this is not a subcontracting issue requiring notice to the Organization, but a jurisdictional dispute between the BMWE and ARASA. It also asserts that, even if it were to be considered subcontracting, valid business reasons

have been shown to support the need for using this specialized equipment which could not be procured without operators, to permit it to subcontract this work.

The Organization first argues that the contract language contained in the scope and reservation of work rules of the three relevant agreements is clear and unambiguous and that it supports the position that the work of loading and unloading rail belongs to BMWE employees. It relies upon the following collective bargaining agreement language.

UP Agreement - Rule 9 - Track Subdepartment

> Construction and maintenance of roadway and track, such as rail ..... loading, unloading and handling of track material and other work incidental thereto will be performed by forces in the Track Subdepartment.

C&NW - Rule 1 - Scope

> B. Employees included within the scope of this Agreement in the Maintenance of Way Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, ...

SPW Agreement - Rule 1 - Scope

> These rules govern rates of pay, hours of service, and working conditions of employees in all sub-departments of the Maintenance of Way Structures Department (not including exempt employees above the rank of track supervisor) represented by the Brotherhood of Maintenance of Way Employes, such as:
>
> (b) .... hoisting engineers, ...
>
> (f) ... Foremen - .... and all employees coming under the supervision of such foremen.

Rule 2 - Sub-Departments

It is understood that the following sub-departments have been established within the Maintenance of Way Structures Department:

Track Sub-department

Rule 26 - Basis of Compensation

(d) Class and Wage Schedule,
Maintenance of Way Track Sub-department

1b Rail Pick-Up Train Foreman

September 13, 1989 Letter of Agreement between SP & BMWE ("LOA")

Rail Pick-up Train Foreman duties and responsibilities will be:

1. Operate Rail Pusher and Threader Cars on Rail Pick-up Train over the System.

2. Supervise and coordinate loading and unloading of released continuous welded rail.

3. Inspect and line up repairs to the equipment and rail train used in the loading and unloading operation.

4. Coordinate loading plans with Division Engineer or his assistants to best utilize the rail train and equipment.

With respect to the UP Agreement, the Organization asserts that the clear language of Rule 9 reserves the work of rail loading and unloading to Track Subdepartment employees, relying upon precedent interpreting both Rule 9 and its predecessor Rule 4 as a specific reservation of work rule. See, Third Division Awards 14061, 28817, 29916. It maintains that the Board should follow the plain meaning rule of contract interpretation and adopt such finding without reference to the practice of the parties,

citing Fourth Division Award 3442, Third Division Awards 18352 and 24306, *BNFS & BMWE (Seniority District Consolidation Issue)*, (Suntrup, 8/29/99) (herein "the Suntrup award"). This is especially true, the Organization asserts, where the operative language in successive agreements between 1958 and 2001 was not changed knowing that it had been interpreted in arbitration as a specific reservation of work rule. See, Third Division Award 11790.

The Organization distinguishes the three awards cited by Carrier in this area on the basis of their reliance on different Rules (52 vs. 9), their lack of reasoning, and in the case of Public Law Board 4219, Award No. 8, the contention that it is palpably erroneous, relying on the rationale set forth in the Labor Member's dissent thereto. The Organization states that the mandatory language of Rule 9 is sufficient alone to find that the answer to question 3 is Yes, relying on *Special Board of Adjustment (Pre-Plated Tie Dispute)*, (Fishgold, April 30, 2003) (herein "the Fishgold award").

The Organization also relies upon the mandatory language contained in Rule 1B of the C&NW Agreement which specifically reserves the work of "construction, maintenance, repair and dismantling of tracks" to the BMWE Structures Department, and has been interpreted as a strong reservation of work rule, Third Division Awards 37022, 37647, Public Law Board 1844, Award Nos. 16 & 17, in arguing that the plain language alone is sufficient to answer question 1 in the affirmative. It notes that rail loading and unloading is unquestionably an essential part of construction and maintenance of track.

The Organization acknowledges that the SPW Agreement contains a

general scope rule, not a detailed work reservation rule, but does define the positions needed to perform the work encompassed by the agreement. It relies upon the 9/13/89 Letter of Agreement (LOA) establishing the Rail Pick-up Train Foreman position and duties as revealing the intent of the parties that the rail train would be operated by BMWE employees. The Organization relies additionally on evidence of past practice (which will be discussed below) with respect to the SPW Agreement to support its position that question 2 should be answered in the affirmative.

Although the Organization asserts that it is not necessary to present external evidence with respect to the UP and C&NW Agreements, it argues that such evidence supports its position that Carrier violated the agreements when it subcontracted the rail loading and unloading work reserved to BMWE employees to Loram. The Organization relies upon an internal UP memorandum dated March 10, 1986 and three subsequent letters issued by different high ranking UP officers in response to claims dealing with the subcontracting of work encompassed within Rules 8 & 9, as evidencing UP's acknowledgment that work reserved to BMWE members is that specifically encompassed within these rules. See also, Third Division Award 29916.

The Organization contends that past practice also supports it position that the rail loading and unloading work in dispute being performed by Loram gantry crane operators has been customarily and historically performed by BMWE employees. Concerning UP property, it points to declarations from Vice President David Tanner, General Chairman Wayne Morrow and Vice Chairman David Scoville affirming at least a 32 year practice where the process of loading and unloading new or second hand rail from rail trains (including use of cranes) was

performed by BMWE employees, with ARASA employees generally, but not always, operating the power car on the rail trains, and not by contractors.

Tanner specifically sets forth all 17 instances where claims were initiated by the Organization because of an outside contracting force handling rail. Of these he asserts that five were settled on the property awarding claimants payment for work performed, the remainder were submitted to either the Third Division of the NRAB or Public Law Boards where two were sustained with a monetary remedy, and the other ten were denied based upon findings that the rail being picked up was sold to the outside party on an "as-is, where-is" basis. Tanner identifies the existence of only fourteen (14) contracting notices served by Carrier since 1982 concerning rail loading all relating to rail that had been sold "as-is, where-is"; no notices were found with respect to rail unloading. The Organization contends that this evidence shows a long, consistent and mutually recognized past practice of BMWE-represented forces performing rail loading and unloading work using cranes of all types and designs.

Under the C&NW Agreement, the Organization asserts that a past practice of over 30 years exists where BMWE members performed all of the loading and unloading of rail trains. It relies upon the written statements of General Chairman Kent Bushman and Vice Chairman Stanley Waldeier, as well as questionnaires completed by a cross section of 38 employees, to support the fact that contractors were never used on C&NW property to load and unload rail, and that such work was performed by employees under the terms of the C&NW Agreement.

Bushman notes that the only exception to employees performing all

of the work associated with loading and unloading rail cars was that the power (winch) car was sometimes operated by a Work Equipment Mechanic belonging to the International Association of Machinists (IAM) and at other times by a BMWE Foreman or Machine Operator, and that Federated Craft Welders performed torch cutting work of the rail when necessary. Bushman's review of the Organization's records did not reveal any instance where Carrier served a contracting notice to load or unload rail trains. Waldeier has specific experience with unloading CWR from 1973 and related all of the tasks performed by BMWE-represented employees (including operating the cable winch) in that operation. The questionnaires set forth specific employee experience with the functions involved with rail loading and unloading over the C&NW territory. The Organization concludes that the evidence establishes a clear past practice where employees, not contractors, customarily and historically performed the rail loading and unloading work on the C&NW territory.

The Organization also avers that past practice supports its position that the general scope language contained in the SPW Agreement, as clarified in the 9/13/89 LOA, has been interpreted to protect rail loading and unloading work as part of the work of the BMWE Structures Department. It relies upon the testimony of Pacific Federation General Chairman Louis Below, Vice Chairman Ricardo Canchola, Roadway Equipment Operator Henry Jajuga, Engineering Coordinator Frederick Hugg, and Boom Truck Operators Michael Graham and Randy Strosnider to establish that Structures Department employees have performed rail loading and unloading work (including operating all types of cranes) on a routine daily basis across the former SPW territory for more than three decades, manning every position on rail trains including winch cars, power cars and threader cars. The Organization concludes that past

practice exists on each of the three properties supporting the fact that all aspects of rail loading and unloading work has been performed by BMWE-represented employees, and not contractors.

The Organization next argues that, since the work which is the subject matter of the Loram contract is scope covered work specifically reserved to its employees, Carrier violated the various contracting provisions of the Agreements by failing to give advanced written notice of the contracting and failing to show that any of the exceptions permitting such contracting were present. In this respect the Organization relies upon the following language found in the different agreements.

UP Agreement - Rule 52 - Contracting

> (a) By agreement between the Company and the General Chairman, work customarily performed by employees covered under this Agreement may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it will notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in "emergency time requirements" cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company will promptly meet with him for that purpose. Such Company and organization representatives will make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the Company may nevertheless proceed with said contracting,

and the Organization may file and progress claims in connection therewith.

(b) Nothing contained in this rule will affect prior and existing rights and practices of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

(d) Nothing contained in this rule will impair the Company's right to assign work not customarily performed by employees covered by this Agreement to outside contractors.

C&NW Agreement - Rule 1 - Scope

B. * * * * *

By agreement between the Company and the General Chairman, work as described in the preceding paragraph, which is customarily performed by employees described herein, may be let to contractors and be performed by contractor forces. However, such work may only be contracted provided that special skills not possessed by Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or time requirements must be met which are beyond the capabilities of Company forces to meet.

In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in "emergency time requirements" cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company will promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file

and progress claims in connection therewith.

SPW Agreement - Rule 56 - Subcontracting

(a) NOTICE - In the event Carrier plans to contract out work coming with the scope of this collective bargaining agreement, the Carrier will notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable but in any event not less than fifteen (15) days prior thereto. (Article IV of the May 17, 1968 National Agreement)

(b) CONFERENCE - If the General Chairman or his representative requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier will promptly meet with him for that purpose. A good faith effort will be made to reach an understanding concerning said contracting, but if no understanding is reached the Carrier may nevertheless proceed with said contracting, and the organization may file and process claims in connection therewith. (Article IV of the May 17, 1968 National Agreement)

(c) PRESERVATION OF RIGHTS - Nothing in this rule will affect the existing rights of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith. (Article IV of the May 17, 1968 National Agreement)

December 11, 1981 Berge/Hopkins Letter

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The Organization points out that Carrier entered into the contract with Loram on February 5, 2005, almost a year before it notified the Organization of its intent to contract out loading and unloading of rail on UP property to Loram employees. Since performance of such work is within the scope of all three agreements, the Organization argues that

Carrier violated the above cited provisions by entering into the Loram contract for a period of ten years without satisfying the advance notice requirements, or giving the Organization the opportunity to conference issues including the feasibility of leasing the equipment without Loram gantry crane operators. It also asserts a violation of the Berge/Hopkins letter by Carrier's failure to exercise good faith in reducing the incidence of contracting and increasing the use of its own forces to the extent practicable, pointing to the the lack of effort on Carrier's part to insist that its own employees operate the gantry cranes on the Loram rail train, relying on Third Division Award 29121.

The Organization rejects Carrier's attempt to rely upon the exclusivity doctrine in this case, noting that exclusive performance of the work in issue is not required in contracting out cases, but only in class or craft disputes, and that it is sufficient to show that employees customarily and generally perform the work in order for the notice requirements to be applicable, citing Third Division Awards 13237, 23217, 25934, 31388, 31777, 32858. The Organization maintains that there is no overlapping work jurisdiction in this case, as asserted by Carrier, and that although not required to, it has established exclusive performance of rail loading and unloading work with respect to the use of outside contractors. The Organization avers that even where there is overlapping work jurisdiction, its inability to prove exclusivity between itself and another craft does not give Carrier the right to assign the work to an outside contractor. See, Third Division Awards 11733, 16372, 27012; SBA 1016, Award Nos. 43 & 66; PLB 6671, Award No. 1.

The Organization maintains that the determinative factor is always the nature of the work involved, not the method of performing it, citing

Third Division Award 20703. It notes that each Agreement reserves the character of the work - loading and unloading rail - and lists various types of cranes used by employees to handle rail and other material. See, UP Agreement Appendix Y; C&NW Agreement Appendix 9; SPW Agreement Rule 26(d). The Organization points to its evidence establishing that employees have customarily and historically operated all types of cranes (rail mounted, car top and gantry) to load and unload rail out of rail trains, gondola cars and special cradle cars.

The Organization makes clear that the work in dispute is the operation of the gantry crane to handle rail by pulling it on and off the rail train, not the work of operating the locomotive (BLET) or rail train power car (sometimes ARASA). It disputes Carrier's contention that this is a jurisdictional dispute, pointing out that the work was not assigned by Carrier to another craft, and noting that the letters solicited by Carrier from these other crafts are irrelevant to the issue of whether it improperly contracted the work under the terms of its three Agreements. The Organization states that once the work returns to Carrier's forces, if another craft asserts a claim to it, a jurisdictional dispute may arise, and can be handled through the proper mechanism under the Agreements.

The Organization disagrees with Carrier's assertion that it has not replaced any of the work previously performed by BMWE-represented employees, but has only contracted the power car work. It notes Carrier's own admission that the use of the Loram equipment and operators will reduce the number of BMWE employees required on a rail loading operation from 15 to 4, and the fact that the work of lifting, pulling and threading the rail on the train that the two gantry crane operators perform replaces crane car and breaker car work as well as the work of

walking the point on top of the rail train previously performed by BMWE employees.

The Organization relies upon Third Division Award 32327 for the proposition that, absent a showing that Carrier is required or permitted to contract out rail removal and loading work under Rule 52, it violates the UP Agreement by doing so. Noting that all three Agreements contain similar contracting out and notice provisions, the Organization argues that Carrier cannot meet any of the exceptions listed which may permit it to contract this rail loading and unloading work to Loram. It notes that Carrier's reliance on the special equipment or skills exception is invalid for three separate reasons.

First, the Organization asserts that Carrier is precluded from raising any exception as a result of its violation of the mandatory notice provision, citing Third Division Awards 25967, 28486, 30970, 30977, 33324. It notes that the issue of whether work might have been performed by employees and the necessity of use of this equipment could have been the subject matter of a conference in advance of the contracting had proper notice been given.

Second, the Organization avers that the special equipment exception only applies when special equipment is "required." In this case the Organization points out that Carrier has its own fleet of 25 rail train sets used for rail loading and unloading, and that the Loram rail train is developmental equipment being tested out under the terms of this contract in the hope that it will prove to be more safe and efficient and that, if successful, Carrier will reap a financial benefit in its future use. The Organization asserts that, since Carrier can perform its rail loading

and unloading operation without the need for this new Loram equipment, its use is not "required" as the term was intended in Article 52.

Finally, the Organization maintains that the Loram rail train is not "special equipment" under Rules 52(a) or 1(B). It asserts that if it is used on a regular daily basis to perform routine predictable work of a craft, it is not special. Rather, the Organization posits that it is the latest development in constantly evolving rail handling equipment. It states that if the Board was to find advancing technology to constitute "special equipment" it would undermine the scope protections contained in all collective bargaining agreements.

The Organization relies upon the testimony of Jeff Rankin, Charles Hogue and Wayne Kerman concerning the comparison between the operation of the Loram rail train they have personally witnessed and UP rail trains they have worked on to support the conclusion that this is neither special equipment nor is any special skill required to operate it. In fact, the Organization points out that Loram gantry cranes are less complicated than Jimbo car top cranes operated by BMWE employees (both of which travel across the top of the rail train), the equipment is operated hydraulically like the booms and speed swings employees operate daily, the lack of experience of the Loram gantry crane operators who are being trained on the job has resulted in malfunctions and mishaps on the equipment, and BMWE employees already have all the necessary skills to operate the gantry crane on the Loram equipment.

In conclusion, the Organization contends that Carrier violated Rule 52 of the UP Agreement, Rule 1B of the C&NW Agreement and Rule 59 of the SPW Agreement when it failed to meet the advance notice and

conference requirements prior to entering into the Loram contract in February, 2005, and failed to establish that the contracting transaction in dispute meets any of the listed exceptions to the prohibition to contracting contained in the three Agreements. The Organization believes that Carrier's January 17, 2006 letter is an admission against interest, seeking the Organization's agreement to a contracting transaction it had already entered into that it knew encompassed work reserved to employees under the three Agreements. As a remedy, the Organization requests that the work of rail loading and unloading being performed under the Loram contract be returned to employees, and that appropriate employees on the CSG roster be compensated an equal proportionate share of the man-hours expended by Loram gantry crane operators for the lost work opportunities. See, Public Law Board 6671, Award No. 3.

Carrier's question in dispute focuses on whether all work associated with rail loading and unloading done by the new technologically advanced Loram equipment is exclusively reserved to BMWE employees. Carrier argues that the work in dispute is not work that has been performed by BMWE employees and the Organization does not retain or have exclusive jurisdiction for the operation of cranes. It asserts that the gantry cranes on the Loran rail train are replacing the work of the power car on the existing rail trains. Since the power car is operated by ARASA members, Carrier posits that the Organization does not have standing to claim the work.

Carrier contends that BMWE-represented employees are still performing the same work on the Loram equipment as they perform on current UP rail trains. It explains that on existing rail trains, the loading of rail requires BMWE employees to attach hoists to the rail, the ARASA

operated power car pulls the rail onto the train and threads it into racks, the BLET locomotive engineer moves the train pushing the rail onto it, BMWE employees walk atop the rail cars to watch the traverse of the rail and assist in keeping it on track, and perform any cutting necessary in connecting or disconnecting the rail once it is on the train by use of a welding torch.

Carrier notes that the Loram gantry crane replaces the power car and the necessity to move the train, as well as the potential for personal injuries to BMWE employees who no longer are required to walk atop the rail cars monitoring the rail. Carrier explains that BMWE employees operate a winch to pull the end of the rail closer to the track where it can be reached by the gantry crane, which picks it up, places it into the threaders, and pulls the rail onto the cars. Any cutting or disconnecting is still performed by BMWE employees. While the Loram rail train has decreased the number of BMWE employees needed in the rail loading and unloading operation, it is the nature of the equipment that has changed the way the operation is performed.

In a side by side comparison, Carrier notes that the speed swing operator and trackman who pull the rail closer to the track have been replaced by the winch on the Loram equipment, which is connected to the rail by a BMWE employee. The function of the rail pick up car foreman and 4 trackmen who removed anchors and operated the boom to pull and connect the next string of rail is performed by 2 trackmen on the Loram train itself, where the safety of the cutting and drilling has been enhanced. Carrier notes that the part of the work putting guide shoes on the end of the rail performed on the breaker car by an assistant foreman and two trackmen is no longer required on the Loram train, and the cutting of the

rail they did is part of the work performed by the 2 trackman working on the train. The two trackmen used in the tie down operation are still working to tie the rail to the car on the Loram train. Carrier states that the positions of point men are no longer required as the rail is no longer pushed over the rollers.

Carrier contends that the Loram gantry cranes are not the same units of equipment as the gantry cranes employees have operated on the Concrete Tie and Rail gang. It relies upon the write up put together by Carter Jones, Manager MW Equipment Operations, for the meeting held with the Organization representatives in February, 2006, to support the fact that the Loram rail train is a radically new concept in getting rail onto and off off trains. His evidence states that the Loram gantry operator is a highly trained individual who performs functions never done by any gantry operator on any railroad in the U.S.A. He explains that each gantry is equipped with rail grippers on telescopic booms to grasp, pull and guide rails onto specially designed work units, and travels on high-mounted I-beam rails utilizing a unique "forced traction" drive. Jones believes that their operation is extremely difficult since the operator must control a piece of rail that is moving at a different speed than the speed of the train (whose movement is performed through the use of a remote controller), and work in coordination and conjunction with two other operators. Jones concludes that this is one of a kind new technology which Loram will not sell, but only lease under the terms of its contract.

Carrier asserts that, since the Organization has failed to show that the gantry cranes are replacing their work, rather than the power car work performed by ARASA employees, it has raised a jurisdictional dispute (rather than a subcontracting dispute) requiring it to prove that

the work function in dispute (operating cranes) belongs exclusively to its craft. See, Third Division Awards 26453, 30444, 30811, 32644, 32646. Carrier relies upon the May 20, 2006 written statement of ARASA General Chairman Ricky Brown that any assignment of Loram gantry crane work to Carrier employees should be made to ARASA covered employees, and the April 13, 2006 claim filed by United Transportation Union (UTU) General Chairman Dean Hazlett protesting the operation of the Loram rail loading train at a particular location without a train crew as evidence that this is a jurisdictional dispute.

In this case, Carrier notes that there are positions for operation of certain cranes on the territories covered by all three Agreements that are encompassed within agreements with the International Brotherhood of Electrical Workers (IBEW), Fireman & Oilers (F&O) and Transportation Communications Union (TCU), citing Public Law Board 5246, Award No. 43. It also points to the fact that over the last 14-17 years both contractor and BMWE employees have operated the gantry cranes assigned to the Concrete Tie Gang to defeat any claim by the Organization of exclusivity.

Carrier relies upon the testimony of Assistant Vice President Engineering William Van Trump and Rail Train Supervisor Jeffrey Bestul to establish the fact that Rail Train Supervisors and ARASA Supervisors have operated the hydraulic cranes on the rail cars up until five years ago (when Carrier reduced the number of supervisors with a rail train) when BMWE employees began operating them on a more frequent basis. It asserts that there is currently a mixed practice with respect to the operation of these cranes, thereby defeating any claim to exclusive performance by BMWE-represented employees. Further, Carrier notes that the testimony of William Fennewald, Director Track Maintenance,

establishes that only ARASA Rail Train Supervisors have operated the power car during the loading operation, and that since 1997 when former SPW employees have worked under his jurisdiction, all power cars have been operated by Rail Train Supervisors.

Next Carrier argues that Rule 9 of the UP Agreement is not a work classification rule which reserves work to BMWE employees but simply an enumeration of work that can be performed by the Track Subdepartment, citing Public Law Board 4219, Award No. 8; Third Division Awards 32534 and 33420. Carrier distinguishes Third Division Award 32327 as dealing with work normally performed by trackmen on current rail trains, rather than the work of a power car operator. It notes that the operation of the power car is not specifically included within the contractual phrase "rail loading and unloading." Carrier asserts that C&NW Rule 1 does not specifically mention the loading or unloading of rail or reserve work to the Organization, relying on Third Division Award 37480. Similarly, Carrier relies upon Third Division Award 36515 as establishing that Rules 1 and 59 of the SPW Agreement do not reserve work to BMWE employees.

Carrier posits that the Berge/Hopkins letter relied upon by the Organization is neither applicable nor enforceable since the Organization's failure to satisfy the reciprocal obligation which was the basis for Carrier's commitments destroyed mutual consideration. It points to a series of correspondence between the parties concerning this letter to support its position that the Berge/Hopkins letter is not a valid enforceable contract between these parties, relying on Third Division Award 31281.

With respect to the allegation of subcontracting, which Carrier

disagrees occurred in this case, Carrier first notes that it had no obligation to serve a contracting notice to the Organization in this case because the work in issue is not work performed by BMWE employees or work reserved to them by Agreement. It agrees with the Organization that since the Loram rail train is being used on CSG projects, it is the UP Agreement that applies regardless of which territory the work is being performed on. Carrier points to a listing of over 200 awards on the property recognizing that the classification of work, seniority and scope rules do not confer exclusive work rights to BMWE work, and holding that Carrier has the right to contract out various types of work, even in instances where no advance notice was served. See, e.g. Third Division Awards 30004, 31649. Carrier distinguishes the three awards cited by the Organization as dealing with a roofing decision rendered 8 years prior to the negotiation of Rule 52 (Third Division Award 14061), dealing with cleaning of debris from the right-of-way where no evidence of past practice was offered by Carrier (Third Division Award 28817), and dealing with fencing which explicitly limits its presidential value (Third Division Award 29916).

Carrier argues that under Rule 52 it has the right to contract work involving specialized equipment, citing Public Law Board 6205, Award No. 1. It posits that neither it nor the Board can compel a company like Loram to place railroad employees on specialized equipment that the railroad does not own or maintain. Carrier references the January 24, 2006 letter from Loram Vice President of Marketing Philip Homan in which he states that the gantry operator is a completely new position unique to this equipment requiring specialized skill and training, that in order to manage the property and personal liability issues and meet the productivity requirements in its contract with Carrier it must maintain

operating control over the equipment, and that the contract is for both service and equipment and Loram's position is that the specialized machines must be run by trained Loram operators.

Carrier takes issue with certain statements made in the declaration of Tanner, asserting that he gave an inaccurate description of the performance of rail loading and of BMWE employees performing power car work, distorted the record with respect to the two prior awards sustaining contracting claims, and relied upon nonprecedential settlements which reveal his bad faith, citing Fourth Division Award 4906. Carrier submits Naro's statement to rebut the assertion that the reason for his sending the January 17, 2006 letter to the Organization was because he understood it was BMWE work. Naro explained that in this letter he was seeking an understanding similar to the Concrete Tie Renewal Agreement spelling out which work was to be performed by the contractor.

Carrier contends that the statements of Morrow and Scoville confirm the practice of having ARASA employees run the power car on the UP territory, and the testimony of Bushman and Waldeier confirm generally that power cars were not operated by BMWE employees. Carrier asserts that the evidence of Below and Canchola shows that any operation of the power cars by BMWE employees occurred on SPW territory prior to 1997, and that since that time they have not performed power car work and there has been no protest from the Organization concerning this change. Under such circumstances, Carrier relies on Third Division Award 31420 in affirming that no contracting notice was required in this case.

Finally, Carrier posits that the Organization is asking the Board to

rewrite the Agreement to give them the work of ARASA employees on the rail train, a power the Board does not have, relying on Third Division Awards 12818 and 20383. It maintains that the Organization has failed to meet its burden of proving that the work being performed by the Loram gantry crane operators is specifically reserved to them by Agreement language or practice, or that their Agreements limit Carrier's ability to contract out the disputed work in this case. It asserts that if there is any work that was reserved to, or performed by, BMWE employees that the Loram gantry crane now does, it is "*de minimis,*" thereby negating the basis for any damages. Carrier requests the Board to answer "No" to every question posed to it for resolution in this case.

In dealing with the questions posed, the extensive record and numerous arguments of the parties, the Board is faced with resolving the following issues: (1) Do the contract scope rules specifically reserve rail loading and unloading work to employees represented by the Organization? (2) Is the work performed by Loram gantry crane operators (the work in dispute) "rail loading and unloading" akin to work performed by BMWE employees, or operation of the power car performed by ARASA employees? (3) Has the work in dispute been customarily and historically performed by BMWE employees? (4) Is this a jurisdictional dispute rather than a contracting dispute? (5) If this is a contracting dispute, did Carrier comply with its obligations under Rule 52 and/or the Berge/Hopkins letter? (6) If not, what is the appropriate remedy?

The first issue is one of contract interpretation, where the Board is guided by the general principles of that endeavor. These include the plain meaning rule, which holds that the best measure of the intent of the parties is the language used, requiring us to interpret collective bargaining

agreements giving the normal and common meaning to the words agreed upon, and to enforce clear and unambiguous terms without the need to resort to external evidence of intent. See, the Suntrup award; Fourth Division Award 3442; Third Division Awards 18352 and 24306. Additionally, the parties are assumed to know outstanding Board interpretations of a contract provision at the time they renegotiate contracts, and any readoption of the same contractual language implicitly carries those interpretations forward. See, e.g. Third Division Award 11790.

In this case, since the parties agree that the Loram equipment is being used by CSGs who operate systemwide under the terms of the CSGA which applies the UP Agreement, our focus will be on the language of that Agreement. While Rule 1 ("Scope") only provides that the Agreement's coverage extends to the classifications listed in Rule 4 (which includes the B&B, Track, Roadway Equipment and Miscellaneous Subdepartments), Rules 8, 9 and 10 specify a description of the work to be performed by each subdepartment. In this case it is Rule 9, Track Subdepartment, that applies. The pertinent language of Rule 9, the Track Subdepartment component of Scope Rule 1, states that "construction and maintenance of ... track, such as rail ... loading, unloading and handling of track material and other work incidental thereto will be performed by forces in the Track Subdepartment."

This Board is persuaded that the plain meaning of this provision reveals an intention to reserve the work of rail loading and unloading in connection with construction and maintenance of track to the BMWE Track Subdepartment. The mandatory language used - **will be performed by** - does not support Carrier's assertion of intercraft

assignment only, or the holding in PLB 4219, Award No. 8 that such rule only describes "what portion of the work belonging to the Organization is to be allocated to B&B forces." Such rationale assumes that "work belonging to the Organization" includes the items specified in Rule 9. As noted by the Organization, Rule 9 and its predecessor (Rule 4) have been held to be reservation of work rules for the items specifically listed, Third Division Awards 14061 (1965), 28817 (1991), 29916 (1993), and the Fishgold Award (2003). This interpretation of the 1958 Agreement spans the parties' subsequent negotiation of the 1973 and 2001 Agreements where the operative language has remained the same. Additionally, as noted in Third Division Award 29916, and relied upon in the Fishgold award, Carrier's own internal memoranda and letters denying claims in 1986 appear to acknowledge that work specifically included in Rules 8 and 9 is reserved to BMWE employees, while work not so listed is not.

The Board finds Carrier's dissents to Third Division Awards 28817 and 29916 and to the Fishgold award, as well as the cases it relies upon to support its contention that the Scope Rule is general in nature and Rule 9 is only a classification of work rule, are distinguishable from the interpretation issue presented in this case. First, Third Division Awards 32534 (remodeling) and 33420 (excavating and concrete construction in the yard) cited by Carrier do not deal with work which is specifically listed within Rule 8 ("construction, maintenance and repair of building, bridges .... and other structures...as well as appurtenance thereto.."), and rely upon records found to contain a verified past practice of contracting the types of work involved, an arbitral history supporting the propriety of Carrier's contracting out that type of work, and Carrier's compliance with the notice and conference provisions of Rule 52.

Second, PLB 4219, Award No. 8 deals with a claim involving roofing, which is also not specifically listed in Rule 8. Further its rationale, applying the exclusivity doctrine to contracting cases and requiring proof by the Organization of an exclusive past practice on a system-wide basis prior to any burden being placed on Carrier to show either a practice of contracting or the ability to do so under Rule 52, stands alone amidst a plethora of decisions undermining such rationale. See, e.g. Third Division Awards 13237, 25934, 32858 and cases cited therein. For these as well as the reasons stated in the Labor Member's Dissent, we find this award of limited presidential value and decline to follow it.

Third, Carrier's dissent to the Fishgold award deals primarily with the fact that the case involved a contract to purchase an assembled product rather than a contracting transaction, referencing Rule 9 only in that context. Carrier's dissent in Third Division Award 28817 relies on the rationale of PLB No. 4219, Award 8 which we have previously rejected. Its wholesale dissent based upon the principles of *res judicata* and *stare decisis* in Third Division Award 29916 which deals with construction and repair of right-of-way fences makes no specific mention of Rule 9. Thus, we conclude that the work of rail loading and unloading is specifically reserved to the BMWE Track Subdepartment under Rule 9 of the UP Agreement.[1]

The Board next addresses the core issue of whether the work performed by the Loram gantry crane operators is rail loading and unloading akin to that performed by BMWE employees and protected by

[1] The issue of whether Rule 1(B) of the C&NW Agreement is a work reservation rule, a position supported by Public Law Board 1844, Award Nos. 16 & 17 and Third Division Award 37022, need not be directly addressed here since our focus is on the UP Agreement under which the disputed work is being performed. The Board will address the scope rules of the C&NW and SPW Agreements in the context of the customary and historical practice evidence adduced with respect to each of the three different Agreements.

Rule 9, or whether it is best classified as work operating the power car on rail trains which has traditionally been performed under the UP Agreement by ARASA employees. There is no dispute that the work of operating the power cars on the Loram rail train is not work that the Organization claims in this case.

The answer to this difficult issue is best found by resort to the February 1, 2005 Loram Contact for Work or Services, Naro's January 17, 2006 letter to the Organization explaining the type of services encompassed within that contract, the diagrams of equipment including the video of the UP rail car operation as well as Carrier's instructions, and the numerous written statements of individuals concerning their familiarity with the UP operation and observation of the Loram rail train operation. The substance of this evidence has been detailed previously in this award.

There is no question that the Loram contract is to supply equipment and services to perform rail pick up and delivery work. As such, this contract covers rail loading and unloading services to be performed over the UP system, which we have previously found is the type of work that is specifically reserved to BMWE Track Subdepartment employees. Carrier does not really contest that the purpose of the Loram contract is to accomplish rail loading and unloading with special technologically advanced equipment performing the operation in a new and different fashion.

In his January 17, 2006 letter, after detailing the equipment, Naro sets out the specific Loram employees that Carrier has contracted for and their functions. They include one supervisor to direct operations, two

gantry crane operators "who will work in conjunction with the power car operator and be responsible for picking up from or delivering rail to the work site," and one power unit operator responsible for the power cars and movement of equipment. As a result of this new operation, the BMWE rail loading gang is reduced from 15 employees to 4 laborers responsible for cutting rail, drilling holes, adding joint bars and securing the rail for transit.

Carrier claims that the gantry crane operators primarily perform the work of UP rail train power car operators. The written evidence of Jones clarifies that there are three operators on each Loram rail train that must work in conjunction with each other. One is at the control panel. This must refer to the power unit operator, who is responsible for the power car and movement of the unit. It is the function of the gantry crane to lift, pull and thread rail throughout the car. The two gantry crane operators sit in units that travel on mounted I-beams across the top of the rail car which may also be moving, and operate rail grippers to guide the rail on and off the train. The UP power car also functions to pull the rail onto the train and thread it onto the racks, with the aid of BMWE gang members providing various functions to assure the rail is properly loaded (or unloaded) and secured. The design of the Loram gantry crane permits it to do some of this work without the aid of certain gang members needed on the UP rail train. The Loram rail train also has a supervisor to direct operations, a function included within the ambit of the RTS on the UP rail train.

There is little doubt that the technology and manner in which the Loram rail car generally, and gantry crane specifically, accomplishes the task of rail loading and unloading is different from how it is performed on

UP rail trains. While part of the work function of the gantry crane may be similar to the function performed by the UP power car, a review of the record leads to the inescapable conclusion that the gantry crane operator is also, at the very least, doing a substantial part of the rail loading and unloading work previously performed by BMWE employees on UP rail pick-up and unloading gangs, including work of the crane car.

As noted by the Organization, it is the character of the work, not the method of performing it, that determines the craft to which it should be assigned. See, Third Division Awards 20703, 25934, 28486 ("The equipment utilized does not alter the work. Rather, it alters the method of performing the work.") The following reasoning of PLB 6671, Award No. 3 at pp. 23-24, applies in this case.

> .... If newer methods and technologies allow certain work to be completed more quickly and/or more cheaply, without harming the quality of the finished work, the the carrier must have the right to utilize such newer technologies as part of its on-going operations. If the carrier chooses to adopt new methods and technologies in connection with Scope-covered work, however, then it must make it possible for its own employees to perform that work in accordance with the Scope Rule. If adoption of a new method or technology to perform work, requiring the use of equipment that the Carrier does not already own, was sufficient to allow the Carrier to contract out Scope-covered work, the the Scope Rule's protections would be completely undercut.....
>
> The Carrier has pointed to one Scope Rule exception, "lack of essential equipment," as justifying its decision to contract out the work at issue. Again, there is no question that the Carrier does not own a Georgetown Slot Machine, but this does not necessarily mean that the Carrier can avoid the Scope Rule and contract out covered work by choosing to have certain work done by utilizing a piece of equipment that it does not own, when its own employees regularly have performed the work using other pieces of equipment that are owned by the Carrier.

Thus, we cannot agree with Carrier that the work involved in its contract with Loram was not work over which the Organization had a legitimate claim. Even if there is arguably overlapping jurisdiction between the BMWE and ARASA concerning the performance of the gantry crane operator work on the Loram rail train, that does not establish this as a jurisdictional dispute since Carrier did not assign the work to another craft (ARASA), as it did in Third Division Awards 32646, 32644, 30811, but chose to contract it to Loram, as was the situation in Third Division Awards 11733 and 16372. The written statement from the ARASA General Chairman contending that any assignment of Loran gantry crane work to employees should go to ARASA employees does not convert this to a jurisdictional dispute since no such assignment has been made by Carrier.

The record supports the finding that this is a subcontracting dispute governed by the provisions of Rule 52 of the UP Agreement. In this case the Board has found that the work of rail loading and unloading is specifically reserved to the Track Subdepartment under Rule 9. However, with respect to the rail loading and unloading function performed by the gantry crane operators, the Organization need not prove exclusivity of performance, but only that it has customarily and historically performed the disputed work. See, e.g. Third Division Award 27012; SBA 1016, Award Nos. 43 & 66; PLB 6671, Award No. 1.

The record is replete with factual declarations by Organization officials and employees that BMWE members perform rail train CWR pick-up and unloading work by use of various types of cranes, and operate cranes that are stationery, those that are mounted to the rail train, and those that traverse the rail train, moving from car to car. The three Agreements contain work classifications covering different types of crane

operators, as do agreements of other crafts. Carrier's evidence in rebuttal asserts that the gantry crane operated by BMWE employees on the Concrete Tie and Rail gangs is not the same type of equipment as the Loram gantry crane, and that it requires far more specialized skills and training than possessed by its own forces. Carrier has clarified that the functions involved with loading and unloading rail not being performed by the Loram gantry crane are still assigned to BMWE employees.

Rankin states that the Jimbo car top loader, which traverses along the top of gondolas, is very similar to the gantry crane, but is more complicated since it must adjust to the different heights of rail cars. Kerman notes that the hydraulic operation of the gantry crane is similar to the booms on the trucks and speed swings that are used by BMEW employees daily to handle rail. Hogue states that from his observation the Loram gantry operators were inexperienced causing numerous equipment malfunctions and a train derailment, and that his conversation with an operator brought to light that he was learning on the job.

The Organization introduced "past practice" evidence establishing that its employees have customarily and historically performed the disputed work on all three territories for over three decades. Under the UP Agreement, Tanner identified 17 instances of contracting rail handling, with 5 being settled on the property (with monetary relief), twelve going to either the NRAB or PLBs with two sustained with payment to Claimants, and the remaining ten being denied based upon the sale of the rail handled to these contractors on an "as is-where is" basis. All 14 contracting notices involving rail loading concern "as is-where is" sales, with no unloading work being the subject of a contracting notice. The statements of the Organization representatives and employees working

under both the C&NW and SPW Agreements reveal a consistent practice of having BMWE employees performing all rail loading and unloading work, to the exclusion of contractors. On the SPW it appears that BMWE employees also routinely operated the power car on the rail trains. Carrier produced little contrary evidence except as to its assertion that, at best, there is a mixed practice with respect to the operation of the power car on the SPW property.

Carrier points to a listing of over 200 on property awards involving contracting of various types of work under Rule 52, many of which were denied by the Board. None of them involve rail loading and unloading work of a non-emergency nature. Third Division Award 32327 involves a contracting transaction which included removal of rail from cross-ties. In the contracting notice and conference Carrier claimed that the rail was to be sold "as is-where is." The Board found that only a portion of the rail picked up was subject to such sale, and that such part was not covered by the Scope of the Agreement. However, it held that "the portion of the work of dismantling and removing rail retained by Carrier is work 'customarily' performed by Maintenance of Way forces, and falls within the Scope Rule of this Agreement." Thus it was held that the removal and loading of rail onto Carrier's trains for transport to its facility was within the Scope Rule and "absent Carrier's demonstration that it was required or permitted to contract such work under Rule 52, its assignment to outside forces violated the Agreement." Carrier's dissent focuses on the fact that prior awards relied upon by the Board concerning the customary practice did not involve the UP territory.

Even without relying on the conclusion in Third Division Award 32327, or determining whether the Scope rule in the C&NW Agreement

reserves the disputed work to BMWE employees, the evidence in this extensive record meets the Organization's burden of proving that it has customarily and historically performed the rail loading and unloading functions being accomplished by the Loram gantry crane operators under each of the three separate Agreements. Thus, under the plain language of Rule 52, (as well as Rule 1B of the C&NW and Rule 59 of the SPW Agreements) the Organization is entitled to no less than fifteen days advance written notice of Carrier's intent to contract this work to Loram.

There is no dispute that the contract with Loram for provision of both equipment and operators was entered into in February, 2005 and that written notice of Carrier's intent to contract out rail unloading and loading work under the terms of such contract occurred in January, 2006, with conference being held at the end of February, 2006. While the notice and conference occurred prior to the actual work under the Loram contract commencing, Carrier failed to comply with the notice and conference requirements of Rule 52, thereby violating that provision of the UP Agreement. See, e.g. Third Division Awards 32397, 36966.[2]

As noted above, in Third Division Awards 32534 and 33420 relied upon by Carrier, it was found that Carrier had satisfied its notice and conference obligations. Even in PLB 6205, Award No. 1, where Carrier argued that its use of the cartopper material handler and operators was a technological breakthrough and it was found that Carrier proved its Rule 52 affirmative defense of necessity of specialized equipment and its inability to procure the patented equipment without operators, Carrier gave timely notice and held a conference with the Organization focusing

[2] These and other on property awards taken from the detailed listing submitted by Carrier reveal that when Carrier fails to meet its notice and conference obligations, the claim is often sustained in part on that basis. However, when Carrier meets its notice and conference obligations, its resultant contracting is often held not to violate the Agreement.

on this very issue.

Under Rule 52 (and the corresponding rules of the C&NW and SPW Agreements), Carrier is permitted to contract out work customarily performed by BMWE employees if one of the listed exceptions applies. In this case Carrier relies upon the specialized equipment exception, arguing that the Loram rail train is a new and innovative technology that makes the rail loading and unloading operation more efficient and safe, is not available to Carrier elsewhere, and could only be procured by lease from Loram under the terms specified.

However, the Board is persuaded by the argument of the Organization that Carrier is foreclosed from raising that affirmative defense in this case as a result of its notice violation. See, Third Division Awards 25967, 30970, 30977. The topic of whether the Loram gantry crane could have been operated by employees after having received whatever training was deemed necessary from Loram, and to what extent they could have continued to be involved in the gantry crane loading and unloading operation is the very type of discussion intended to be fostered by the advance notice requirement. PLB 6671, Award No. 3; *Cf.* PLB 4219, Award No. 8.

Carrier's claim in its January 17, 2006 letter that Loram was insisting on using its employees on the gantry crane (and Loram's January 24, 2006 letter to that effect) does not negate the possibility that a conference prior to Carrier's negotiation of the terms of the February, 2005 contract with Loram might have resulted in suggestions by the Organization affecting Carrier's ability to get BMWE employees involved in operating the equipment, since Loram was given a 12 month period of

time before delivering the equipment which could have been used to satisfy any training requirements it deemed appropriate. In fact, evidence contained in the record indicates that Loram employees were receiving on the job training after commencing operations under the contract with UP. The justification for the use of Loram operators - managing the property, personal liability issues and productivity requirements - were all matters that were subject to negotiation between UP and Loram at the outset, before entering into its contract. As Loram needed UP's agreement to utilize its service in order for it to complete development and production of this new machinery, it cannot be said that UP's insistence on having BMWE employees involved in the operation would have been rejected out of hand, especially as many are already experienced with the intricacies of the rail loading operation and could have been "bonded" or "certified" in the operation of the gantry crane.[3]

Unfortunately, this is all speculation as Carrier did not follow the procedure designed to address contracting issues of this type. It would be patently unfair to permit it to belatedly rely upon self-serving claims that Loram required use of its own operators and would not lease the equipment to Carrier in any other fashion without giving the General Chairman the opportunity for timely input specifically provided for in Rule 52.

Whether the Loram rail train meets the definition of "special equipment" under the exceptions permitting contracting in Rule 52 or whether it is just newer rail loading technology, as well as whether it is "required" under the rule, are matters which need not be addressed

[3] The matters discussed in the February 28, 2006 meeting may well have been the subject of a pre-contracting conference, with Carrier retaining the ability to address the issues of concern expressed by the Organization in its negotiations with Loram before committing to the investment in the equipment.

herein since Carrier cannot avail itself of this affirmative defense when it it has not satisfied its advance notice and conference obligations. Similarly, the dispute as to whether the operation of the Loram gantry crane is less or more complicated than other UP equipment and if more skill is needed than that possessed by employees is also not ripe for resolution by the Board.

The fact that Carrier has shown that it can contract out numerous types of work under the UP Agreement, even without prior notice, without violating Rule 52 does not change the result in this case. See, e.g. Third Division Award 30004, 29393. The cases Carrier relies upon deal mostly with work not specifically reserved to employees by Agreement language or not shown by the Organization to be customarily and historically performed by them rather than by contractors. Here, whether the gantry crane operator performs part of the ARASA power car function (a fact contested by the Organization) and part of BMWE rail loading and unloading work, the evidence does not reveal that there was a past practice of contracting these functions as existed in the cases relied upon by Carrier.

Accordingly, the Board answers the Organizations questions 1-3 "Yes" on the basis of Carrier's violation of the advance notice and conference provisions of Articles 52, 1(b) and 56 of the UP, C&NW and SPW Agreements respectively, when a more than "*de minimis*" part of the rail loading and unloading work either specifically reserved to, or customarily performed by, BMWE employees was contracted to Loram in February, 2005 without prior notice to the Organization. The Board does not agree that the Organization has the burden to prove that all work associated with the rail loading and unloading by the Loram owned rail

change out machine is exclusively reserved to BMWE employees, as posited by Carrier in its question at issue herein.

What remains for determination is the appropriate remedy for such violation in this case.[4] The Organization seeks return of the disputed work to BMWE employees under the terms of the applicable Agreements and compensation for such work performed by Loram gantry crane operators. Carrier asserts that the Board would be exceeding its authority and rewriting the Agreement by awarding ARASA power car work to BMWE employees.

The Board is cognizant of the fact that, in the past, contracting violations premised upon Carrier's failure to meet its notice and conference requirements under Rule 52, limited a monetary remedy to furloughed Claimants. See, e.g. Third Division Awards 26422, 27011, 28443, 28619, 31730, 31652. In this case, it is not clear whether the BMWE rail loading and unloading gang positions lost as a result of the contracting of the Loram rail train resulted in any furloughs or whether the affected employees were reassigned to other work. What is apparent is that, by its very nature, this new rail train technology will reduce the number of BMWE employees needed in the rail loading and unloading operation. Thus, the loss of the gantry crane operator rail loading and unloading function represents a real loss of work opportunity for BMWE employees.

[4] The Board determines that, in order to resolve the questions before us, it is not necessary to enter the fray of whether the Berge/Hopkins letter is an enforceable contract between these parties creating independent rights and responsibilities. This conclusion is based upon our belief that finding a violation of Carrier's commitment to make a good faith effort to reduce the incidents of contracting and increase the use of BMWE forces to the extent practicable contained in the Berge/Hopkins letter would not alter the remedy we deem appropriate in the circumstances of this case, and a focus on allegations of bad faith may well undermine the process of effectuating that remedy.

The work in dispute centers around the Loram gantry crane operator functions. Each train has two such operators. This Board has found that the work of rail loading and unloading performed by gantry crane operators is reserved to BMWE Track Subdepartment employees and customarily performed by them, and that it is not "*de minimis.*" It has also acknowledged that some of the work performed by the Loram gantry crane may be associated with part of the function performed by ARASA employees operating the power cars.

Thus, in order to remedy the violation of Rule 52 found herein, the Board directs that the rail loading an unloading work performed by the Loram gantry crane operators be returned to BMWE employees under the UP Agreement. The parties are directed to meet to determine which aspects of the Loram gantry crane operation are directly related to power car functions not customarily performed by BMWE employees, as well as the number of hours expended by Loram operators in the performance of the disputed work found to belong to the BMWE. In the absence of such agreement, the matter will be returned to the Board to determine the percentage of the work of the gantry crane operators that must be returned to employees as well as the number of hours expended by Loram employees associated with it. The affected CSG BMWE employees who have suffered a loss of work opportunity as a result of Carrier's use of Loram gantry crane operators will be paid a proportionate share of the number of work hours identified at their straight time rate of pay. See, PLB 6671, Award No. 3; Third Division Awards 25967, 28486, 30970, 30977, 33324.

The Board retains jurisdiction to deal with any issues arising from the implementation of this award.

Margo R. Newman
Margo R. Newman
Neutral Chairperson

Dominic A. Ring
Dominic A. Ring
Carrier Member

Steven V. Powers
Steven V. Powers
Employee Member

Dated: December 12, 2006

Carrier Dissents

Dated: December 18, 2006

Concurring in part and dissenting in part - written opinion to follow.

LABOR MEMBER'S
CONCURRENCE AND DISSENT
TO
REFEREE NEWMAN'S AWARD DATED DECEMBER 18, 2006

This was an extremely complicated case that involved complex work processes and the interaction of multiple collective bargaining agreements. Moreover, the Board was not only charged with answering five separate questions posed by the parties, but also required to make multiple preliminary findings in order to answer these questions. In addition to this legitimate complexity, the carrier created artificial complexity by attempting to restyle the dispute as an inter-craft work jurisdiction dispute because it knew that it could not prevail in a contracting out dispute. The Neutral Member deftly worked through these complex issues and rendered a series of findings that were both well reasoned and consistent with established precedent. Indeed, any fair reading of the Award shows that, with only one exception, each of the Neutral Member's multiple findings was consistent with well-reasoned precedent by other highly regarded arbitrators with considerable experience in the railroad industry. Consequently, with only one exception, I concur with the findings of the Neutral Member.

The single point on which I can not concur is the finding at Page 43 which, in context, reads:

> "The work in dispute centers around the Loram gantry crane operator functions. Each train has two such operators. This Board has found that the work of rail loading and unloading performed by gantry crane operators is reserved to BMWE Track Subdepartment employees and customarily performed by them, and that it is not '*de minimis*.' It has also acknowledged that some of the work performed by the Loram gantry crane may be associated with part of the function performed by ARASA employees operating the power cars.
>
> Thus, in order to remedy the violation of Rule 52 found herein, the Board directs that the rail loading and unloading work performed by the Loram gantry crane operators be returned to BMWE employees under the UP Agreement. **The parties are directed to meet to determine which aspects of the Loram gantry crane operation are directly related to power car functions not customarily performed by BMWE employees, as well as the number of hours expended by Loram operators in the performance of the disputed work found to belong to the BMWE. In the absence of such agreement, the matter will be returned to the Board to determine the percentage of the work of the gantry crane operators that must be returned to employees as well as the number of hours expended by Loram employees associated with it.** ***" (Emphasis in bold added)

I certainly concur with the Board's directive that, "... the rail loading and unloading work performed by the Loram gantry crane operators be returned to BMWE employees under the UP Agreement. ***" However, I can not concur with the directive to, "*** determine which aspects of the Loram gantry crane operation are directly related to power car functions not customarily performed by BMWE employees ***". This directive implies that there is an inter-craft dispute between BMWE and ARASA and presupposes that ARASA employes have a contract right to perform certain power car functions in connection with rail loading and unloading work. I am compelled to dissent with regard to this directive for three reasons: (1) there is no inter-craft dispute involved in this case; (2) the directive is at odds with well-reasoned precedent which this Board itself has cited with favor at Page 35; and (3) this Board should not presuppose the outcome of an inter-craft dispute in the event one were to arise.

It is clear that there is no inter-craft dispute involved in this case because the carrier did not assign employes represented by ARASA or BMWE to perform the rail loading or unloading work in question and ARASA did not file a claim in connection with the contracting out of the disputed work. Indeed, the Neutral Member specifically recognized and ruled that the *potential* for overlapping jurisdiction between BMWE and ARASA did not establish this as an inter-craft jurisdictional dispute:

> "Thus, we cannot agree with Carrier that the work involved in its contract with Loram was not work over which the Organization had a legitimate claim. **Even if there is arguably overlapping jurisdiction between the BMWE and ARASA concerning the performance of the gantry crane operator work on the Loram rail train, that does not establish this as a jurisdictional dispute since Carrier did not assign the work to another craft (ARASA), as it did in Third Division Awards 32646, 32644, 30811, but chose to contract it to Loram, as was the situation in Third Division Awards 11733 and 16372.** The written statement from the ARASA General Chairman contending that any assignment of Loram gantry crane work to employees should go to ARASA employees does not convert this to a jurisdictional dispute since no such assignment has been made by Carrier." (Emphasis in bold added) (Award at P.35)

The Neutral Member correctly relied upon Third Division Awards 11733 and 16372 (as well as Third Division Award 27012; SBA No. 1016, Awards 43 and 66; and PLB No. 6671, Award 1 which were also cited at Page 35) to conclude that this was not an inter-craft jurisdictional dispute. I certainly concur with this finding because it is not only well reasoned, but consistent with ample precedent by other highly regarded arbitrators. But, I am unable to reconcile this finding at Page 35 with the directive at Page 43 which implies that there is an inter-craft jurisdictional dispute between BMWE and ARASA with respect to certain rail loading and unloading work, i.e., power car functions. This is a contracting out dispute and not an inter-craft dispute and, therefore, I do not believe that the remedy or any other aspect of the Award should take into account the *potential* for overlapping jurisdiction or an inter-craft dispute between

BMWE and ARASA. Rather, as was the case in Third Division Awards 11733, 16372 and 27012; SBA No. 1016, Awards 43 and 66; and PLB No. 6671, Award 1 which were cited with favor at Page 35, I believe the appropriate remedy would be to pay the proper BMWE claimants for all hours expended by Loram employes performing rail loading and unloading work. No consideration whatsoever should be afforded to the *potential* for a subsequent inter-craft claim by ARASA if UP subsequently assigns the disputed work to BMWE-represented employes.

The directive at Page 43 concerning power car functions is doubly distressing because it not only seems to imply the existence of a jurisdictional dispute where one does not exist, but also seems to presuppose a contract right for ARASA-represented employes to perform certain aspects of rail loading and unloading work. I can not concur in this implication because inter-craft jurisdictional disputes are governed by their own particular set of well defined analytical standards and the fundamental elements necessary to apply those standards are not present in the record of this case precisely because it is <u>not</u> a jurisdictional dispute.

It is well established that the threshold analysis in inter-craft jurisdictional disputes is a comparison of the work reservation provisions in the collective bargaining agreements of the competing crafts. If one craft can establish a clear contract right to the disputed work, while the other can not, that ends the inquiry. In those cases where the written agreements do not resolve the dispute, the parties may look to extrinsic evidence (such as past practice) to clarify their intent. In this case we know that the work of loading and unloading track material in connection with rail laying operations has been reserved to BMWE members by the clear language of their collective bargaining agreement with UP since at least the May 1, 1958 Agreement (Award at PP.29-31). But what we do not know is whether the ARASA Agreement includes legitimate overlapping jurisdiction for such work because that agreement has not been placed in evidence in this case by UP. Hence, even if this was a work jurisdiction dispute (which it is not), there is no basis for presupposing that ARASA-represented employes have a competing contract right to perform any aspect of rail loading or unloading work, including power car functions.[1/]

[1/] UP asserts a past practice and BMWE does not dispute that ARASA employes have sometimes operated power cars in the past. However, past practice has no force or effect in the face of clear rules and Rule 9 of the BMWE/UP Agreement clearly reserves rail loading and unloading work to BMWE. Consequently, unless ARASA can meet the threshold test of showing a legitimate overlapping contract right in the ARASA/UP Agreement, there is no ambiguity to be resolved by external evidence such as past practice. To the contrary, the clear language of Rule 9 should control and BMWE has the right to insist upon the enforcement of this clear rule at any time irrespective of any acquiescence to a contrary practice in the past. *See* Elkouri & Elkouri, *How Arbitration Works* 576-77 (5th ed. 1997) cited with favor in PLB No. 6399, Award 1 (Arbitrator Malin).

In sum, with only one exception, I concur with the myriad findings of the Board because each of those findings are not only well reasoned, but consistent with well-established precedent set forth by other highly regarded arbitrators in the rail industry. However, to the extent that the directive at Page 43 implies that there is an inter-craft dispute or presupposes that ARASA-represented supervisors have a contract right to perform machine operator work in connection with loading or unloading rail, I am compelled to respectfully dissent. This is simply not an inter-craft jurisdictional dispute and even if it was, there is insufficient evidence in this record for ARASA to meet its threshold obligation to prove a competing contract right to perform rail loading or unloading work.

Respectfully submitted,

Steven V. Powers

Steven V. Powers
Labor Member

SPECIAL BOARD OF ADJUSTMENT

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

PARTIES
TO DISPUTE: and

UNION PACIFIC RAILROAD COMPANY

IMPLEMENTATION AWARD

The issue presented at the supplemental implementation hearing held on July 10, 2007 arises from certain of the findings contained in the Award executed on December 18, 2006, in which Carrier dissented and the Organization filed a separate Concurrence and Dissent, and the remedy directed therein. The relevant section of the remedy is set out below.

> This Board has found that the work of rail loading and unloading performed by gantry crane operators is reserved to BMWE Track Subdepartment employees and customarily performed by them, and that it is not "*de minimis.*" It has also acknowledged that some of the work performed by the Loram gantry crane may be associated with part of the function performed by ARASA employees operating the power cars.
>
> Thus, in order to remedy the violation of Rule 52 found herein, the Board directs that the rail loading and unloading work performed by the Loram gantry crane operators be returned to BMWE employees under the UP Agreement. The parties are directed to meet to determine which aspects of the Loram gantry crane operation are directly related to power car functions not

> customarily performed by BMWE employees, as well as the number of hours expended by Loram operators in the performance of the disputed work found to belong to the BMWE. In the absence of such agreement, the matter will be returned to the Board to determine the percentage of the work of the gantry crane operators that must be returned to employees as well as the number of hours expended by Loram employees associated with it. The affected CSG BMWE employees who have suffered a loss of work opportunity as a result of Carrier's use of Loram gantry crane operators will be paid a proportionate share of the number of work hours identified at their straight time rate of pay. See, PLB 6671, Award No. 3; Third Division Awards 25967, 28486, 30970, 30977, 33324.
>
> The Board retains jurisdiction to deal with any issues arising from the implementation of this award.

The parties exchanged proposals but were unable to agree upon the percentage of work of the Loram gantry crane operators that belonged to the BMWE under the Award, and should be returned to employees.

The Organization argues that all rail handling work should be returned to BMWE employees and they should be compensated for all work hours expended by the Loram gantry crane operators. It contends that, since the Board found that this was not a jurisdictional dispute (despite potential overlapping jurisdiction between BMWE and ARASA), but a contracting dispute involving Loram, no further inquiry into the potential for overlapping craft jurisdiction should be required to fully implement the Award. The Organization notes a conflict between the finding of the Board that this is a contracting and not a jurisdictional dispute, and the direction that the parties determine which portion of the gantry crane work belongs to ARASA rather than BMWE employees.

The Organization asserts that ARASA's rights under its collective bargaining agreement with Carrier are not relevant to this dispute. Even if they were, the Organization posits that ARASA has no contractual right to claim rail loading and unloading work. Relying upon the terms of the ARASA agreement, the Organization notes that it has no scope or reservation of work clause and there is no reference anywhere in the agreement to the performance of rail loading or unloading work in general or power car work in particular. The Organization relies upon the language of Section 7 of the ARASA agreement which states, in pertinent part:

> The parties recognize the work performed pursuant to the Agreement clearly is not within the scope of any agreement with ARASA and is nonagreement work. In addition, it is recognized that the positions identified in Section 2 hereof may be agreement covered as provided herein or nonagreement. By the Agreement, the Carrier reserves its prerogative to return this work to nonagreement employees at any time. Furthermore, such work cannot be used as a basis for a claim on behalf of any employees.

The Organization asserts that this language clearly shows that ARASA has no claim to the work in issue, which the Board has already determined is reserved to BMWE employees under Rule 9 of its agreement.

Additionally, the Organization argues that any aspects of the Loram gantry crane operations related to ARASA power car functions are *de minimis*. First it notes that it is locomotive power on the UP rail train that is the primary source of power for loading and unloading rail, and that the power car was devised to perform the limited preliminary step of getting the rail in place. The Organization asserts that since the Loram rail train does not depend on locomotive power to load or unload rail, there is no need for a power car to position the rail, and that a better analogy is between the Loram gantry crane which lifts and pulls rail into place and

cranes operated by BMWE employees to load and unload all types of track material including rail.

Second, the Organization maintains that the primary duty of the ARASA Rail Train Supervisor is to supervise the crew of 9 or 15 employees in performing their loading and unloading functions, and not the operation of the power car, which takes only a small portion of his work day, and constitutes only a small percentage of the overall work necessary to load and unload rail. The Organization notes that only a small fraction of the work performed by a single ARASA supervisor is being subsumed by gantry crane operations, while the work of 11 BMWE employees is subsumed in gantry crane loading operations and 5 BMWE employees in unloading operations.

Thus, the Organization insists that all rail handling work including Loran gantry crane work is encompassed by Rule 9, should be returned to BMWE employees and that they should be compensated for all time that the Loram gantry crane operators worked. The Organization states that the Consolidated System Gang members who were adversely affected by the closure of one rail train could be identified from the roster as the proper recipients, or the monetary relief could be directed to the craft, citing Third Division Awards 11733, 16372, 27012; Public Law Board No. 6670, Award 1.

Carrier states that it acted in good faith when it attempted to comply with the Board's direction to determine which functions of the Loram gantry crane operation are associated with power car work not traditionally performed by BMWE employees, so that it could calculate the percentage of work to pay the affected employees. It notes that, despite the Board's finding that a portion of the work on the rail train belonged to

ARASA employees, the Organization continues to claim all of the work associated with the gantry crane, and has been unwilling to agree to reasonable proposals made by Carrier including the addition of one or two BMWE employees to the work crew assigned to the Loram rail car. Carrier emphasizes that it ceased using the Loram rail car to load rail after the Board's order issued, and never used it to unload rail, attempting to arrive at an agreement with the Organization concerning its use. Carrier also points to a July 5, 2007 Memo by Jim Wessel, Manager of Track Projects, indicating, among other things, that the power car is not an adjunct to the locomotive in loading rail and can load a quarter mile string with the train not moving.

Carrier considers the Organization's position to be a raid of work, and supplements the record with the following cases finding that Rule 9 is not a reservation of work rule: Third Division Awards 37490, 32349, 31170, 30444. It notes that although Section 7 of the ARASA agreement indicates that Carrier can make its work non-agreement work, it does not state that it then becomes BMWE work, especially when such work was never claimed for over 40 years and the Organization slept on its right to do so now, citing Third Division Award 28610.

At the hearing Carrier presented a copy of a DVD making a side-by-side comparison of the original UP rail train with the Loram train, in an effort to show the point on the Loram rail train that corresponds with the power car on the UP rail train. It notes that this visual makes clear that the power car takes over the movement of rail once it has been placed in the threader box on the rail car. Carrier also presented a Rail Train Time Study conducted in September attempting to separate the different functions involved in loading different length rail using the Loram rail car. It asserts that this evidence supports the conclusion that it takes only 3

minutes to perform the BMWE-associated function of loading of the rail to the threader box on the train, and that the balance of the time involves moving the rail from the threader box to the end of the train, which was a function performed by the power car.

The three different scenarios presented involve the loading of 1477 feet of rail with no joints, one and two joints, and sets out the process steps necessary to perform this function. Carrier identified at the hearing which parts of the steps were already performed by BMWE employees, which it believed were attributable to power car functions, and the 3 minutes involved with grabbing the section of rail and placing it in the rotator (threader) box, which it acknowledges is the only additional work which the Award would return to BMWE employees. Using these figures, Carrier argues that the work on the Loram gantry cranes attributable to BMWE employees is *de minimis*, at best, and amounts to between 30 and 45 minutes of its daily operation.

Carrier also introduced production reports from November, 2006 which it observes indicates that the Loram rail train was used in 9 of the 11 days of the month submitted for production reporting, for a total of 22 hours with just over 4 hours spent in loading the rail from the ground to the threader box. Carrier asserts that the rest of the time was spent moving the rail through the train. Carrier contends that, since less than 4% of the total work time of the Loram crane operator was spent loading rail into the threader box, it would not be operationally feasible to assign work on that basis, thus supporting its offer to increase the BMWE crew complement by two employees. Carrier contends that the appropriate remedy for the notice violation would be to compensate the employees identified by the Organization for the percentage of work attributable to the pick up and threading of rail into the threader box performed by

Loram gantry crane operators, and that the Board has no jurisdiction to rewrite the agreement by making an additional remedy of directing that work not reserved to BMWE employees be assigned to them and that they be compensated for it.

The Organization first disputes the legitimate use of the proffered time studies, since they are new evidence undertaken without Organization knowledge, involvement or approval. It takes issue with the accuracy, assumptions underlying the rail train studies and the conclusions drawn from them as well as the production reports offered by Carrier. The Organization notes that, if the Board deems it appropriate, it has the power to direct the parties to conduct relevant time studies. The Organization states that conditions differ and change repeatedly on tracks, and that separating a percentage of work functions associated with the gantry crane operation will not work or be helpful in returning loading and unloading work to BMWE employees.

The Organization also disagrees with Carrier's conclusion that only the first step in the process is attributable to work reserved to employees. It insists that when the work is performed by equipment with a boom, as is the Loram gantry crane, it is no longer locomotive work but becomes BMWE work, which now includes guiding the rail along the top of the train. The Organization disputes the time allotments contained in the studies, contending that BMWE admitted work takes longer than noted on the studies. It observes that these studies do not consider the fact that BMWE employees have always hooked the rail on chains and walked the rail car performing duties all along the process after the rail is placed in the threader box. The Organization states that these time studies were not done as a result of the directive contained in the Board's award, as they encompass an earlier time period.

The Organization points out that the Award only states that ARASA employees **may** have some function involving the Loram gantry crane, it does not find that they do. The Organization contends that they do not, arguing that it does not matter that it did not grieve their power car work performance in the past since it can insist on its agreement rights at any time, citing Third Division Awards 6144, 23832, 19552, 22214, 11031, 18064, 20711, 25930. It also opposes consideration of the Wessel memo as new evidence which attempts to create a credibility issue it was not able to respond to.

The Organization contends that the Board has jurisdiction to direct that the work be returned to its employees under the joint arbitration submission agreed to. It notes that the reason that it is not interested in Carrier's featherbedding proposal is that the best way to protect jobs is to protect the core work reserved to its members under its agreement, and the Organization is convinced that the current consist on the Loram rail car is under inflated, as it is still in the experimental stages. The Organization argues that the best way to remedy the violation is to put two experienced BMWE machine operators in the Loram gantry crane positions, which it believes will ultimately provide a faster and safer operation. The Organization asserts that Carrier has tremendous leverage in negotiating how the Loram operation will be conducted on its property.

It is not the focus of the Board with respect to this implementation issue to determine whether the parties' proposals were reasonable. There is no question that both positions are reasonably based. Rather, the issue presented is what is the appropriate remedy for the Rule 52 violation found to have occurred in this case. Implicit in the original submission was the question of what would be the proper remedy if a violation of the Agreement was found, and the Board retained jurisdiction to deal with

such issue. The remedy directed in that Award was that the rail loading and unloading work performed by the Loram gantry crane operators be returned to BMWE employees. What was remanded to the parties was a determination of the amount of such work appropriately returned to BMWE employees. Since the parties were unable to agree, it would not exceed our jurisdiction, as Carrier contends, to direct that all or a substantial part of the Loram gantry crane operator's job duties be returned to BMWE employees.

Thus, the issue for resolution herein is what part of the gantry crane operator job is properly characterized as loading and unloading of rail falling within the Scope of the BMWE agreement. The cases cited by Carrier with respect to Rule 9 not being a reservation of work rule are not appropriate for consideration under the limited issue presented, and are distinguishable in any event as dealing with established past practices of contracting the disputed work. This argument was dealt with, and rejected, in the initial Award.

In determining the issue presented, the Board is not persuaded that the unilaterally conducted time studies introduced by Carrier are helpful, or supportive of Carrier's position. While the results are unclear, and the Organization has taken issue with the accuracy of the recorded times, these studies do show that over 50% of the work identified as being steps in the process of the gantry crane operation admittedly belong to BMWE employees. These include functions employees were assigned to perform and those admitted by Carrier should be returned to them under the Award.

Based upon the record evidence and findings of the Board in the Award, we cannot accept Carrier's claim that only the loading of rail to

the rotator (threader) box (which it claims to be less the 4% of the time) is BMWE work being performed by the gantry crane operator. BMWE employees on the UP rail train are involved with various functions on the rail pick up (crane) car which corresponds to the loading of rail into the threader box, as well as functions after that point including the breaker car, tie down car and as point men. The power car aids in threading the rails into the racks, while the breaker car is the point car for placing the rail in the racks and the tie down car houses the racks.

According to Carrier's documentation, the Loram rail car uses four employees: one supervisor, who, like the ARASA rail train supervisor (RTS) directs the operation; one power unit operator who is responsible for power cars and any movement of the unit, and two gantry crane operators who work in conjunction with the power car operator and are responsible for picking up and delivering rail from and to the work site. Since the unit is now integrated and it is a fluid operation, it is more difficult to separate out power car functions from the others performed by these employees. However, the character of the work being performed by gantry crane operators is work previously done by the 11 BMWE employees on the rail loading crew whose work has been subsumed by this new technology. Two of the four remaining BMWE crew members cut rail, drill holes and add joint bars and the remaining two secure rail for transit. The additional functions performed by BMWE employees are now a part of the gantry crane operation. The Loram crew still has a supervisor whose primary duty is to supervise the operation. This was the bulk of the work that the ARASA RTS performed. Carrier did not present any evidence to the contrary. Whatever power car work was done by the RTS was a small part of his overall job responsibilities, but the rail work performed by the gantry crane operators was a primary part of the BMWE rail crew's

job responsibilities.

In focusing on the character of the work performed, which the Board found to be the proper focus at p. 34 of the Award, the description of the gantry crane operator job function is that of pick up and delivery of rail. This work was found by the Board to be reserved to employees under the agreement. We also determined that the gantry crane operator was doing a **substantial** part of the rail loading work previously performed by the BMWE rail loading crew. The power car functions were a *de minimis* part of the work performed by the RTS, and appear to have been incorporated throughout the Loram rail car operation, not just within the gantry crane operator job duties. Since both parties have argued that it is not practical or feasible to return only a part of the gantry crane operator's functions to the BMWE, the Board sees no reason to direct a further time study to be performed jointly and cooperatively by the parties.

In agreement with the Organization, we conclude that the function and duties performed by Loram gantry crane operators encompass those previously performed by BMWE employees and involve the direct work of loading and unloading of rail which is encompassed within the Scope rule of the BMWE agreement, and not within any rule under the ARASA collective bargaining agreement. Even if the gantry crane operator job includes power car functions not previously performed by employees, and not sought by the Organization for 40 years, that work was a small part of the job of the ARASA RTS, and is not claimable under their agreement with Carrier. The Organization is not foreclosed from now claiming it as falling within the overall rail pick up and delivery work under its agreement in the context of this contracting dispute. See, Third Division Awards 25930, 20711, 18064. Third Division Award 28610 relied upon by Carrier is

distinguishable as the Board therein relied upon prior rights language in Rule 52 and the establishment of a past practice of contracting the disputed work. In this case, the Board found a violation of the timely notice and conference obligations under Rule 52, and there was no claim that the power car work was ever contracted out. It was either performed by employees (under the SP Agreement) or ARASA supervisors as a *de minimus* part of their functions. As noted by the Organization, the Board found this to be a contracting dispute, not a jurisdictional one.

The Board directs Carrier to return the work performed by the Loram gantry crane operators to BMWE employees and to compensate those employees identified by the Organization as being adversely affected for the total number of hours worked by Loram gantry crane operators during the relevant time period. As Carrier indicated that it has suspended use of the Loram rail car unit since November, 2006, any resumption of its contract with Loram will have to take into account the direction of the Board that the two Loram gantry crane operators must come from Carrier's BMWE work force. Any other terms necessary to effectuate the safe operation of Loram equipment by these employees may be the subject of further discussion between the Organization, Carrier and Loram.

Margo R. Newman
Margo R. Newman
Neutral Chairperson

Dominic A. Ring
Dominic A. Ring
Carrier Member
Dated: October 30, 2007

Steven V. Powers
Steven V. Powers
Employee Member
Dated: 10/24/07

Allen Strongly dissents!
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