SPECIAL BOARD OF ADJUSTMENT

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees,
Organization

and

Union Pacific Railroad Company,
Carrier.

OPINION AND AWARD

Pre-Plated Tie Dispute

FINDINGS OF THE BOARD:

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

As noted in the previous paragraph, this Board has been constituted by September 4, 2002 agreement of the parties to establish an un-numbered Special Board of Adjustment to resolve a dispute over the pre-plating of track ties. By this agreement, the parties have chose to have this Board proceed on a "parties pay" basis. In all other pertinent respects, however, the Board is to follow the customary analytical procedures that apply to the resolution of minor disputes under Section 3 First and Second of the Railway Labor Act.

By their agreement; the parties also agreed to the method by which the evidentiary record was to be developed to accommodate the unusual manner in which the dispute arose and was progressed to this Board. Each party provided an initial written submission containing all known argument and evidence upon which it relied. Rebuttal submissions were also provided that contained additional evidence in exhibit form. The submissions also contained a number of prior decisions of the National Railroad Adjustment Board as well as various adjustment boards constituted pursuant to the Railway

Labor Act. A hearing was held at the organization's offices in Chicago, Illinois on March 26, 2003. This closed the record, and the board took the matter under advisement.

The basic facts of this controversy are essentially undisputed. Indeed, much of the same factual background was set forth in the "Wallin" Award discussed more fully below and in the detailed submissions of the parties herein. Although the Carrier's present size and operations are the result of past mergers, consolidations and combinations that have absorbed several other railroads, the instant controversy concerns only the original Union Pacific territory and arises out of the parties' July 1, 2001 Agreement, as amended, ("2001 Agreement") whose scope is limited to that original territory.

The Carrier has, for many years used the "panel method" for construction and maintenance of its track. There are three basic types of track panels: Tangent track panels, which are straight sections of track, turnout track panels, which also contain a switch and associated devices that allow rolling stock to move from one line of track to another, and curved track panels, which are not straight as their name denotes, but are substantially similar in their fabrication to tangent track panels in most other respects.

This controversy deals with the work functions that constitute "construction and maintenance of ... track" as this phrase is used in Rule 9 of the 2001 Agreement. Rule 9 reads, in pertinent part, as follows:

RULE 9 – TRACK SUBDEPARTMENT

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

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

Although the records shows the phrase "construction and maintenance of ... track" to have included several related but different work functions, one of the more significant and time-consuming steps involves accurately positioning and affixing tie plates to wood cross ties. The tie plate performs several critical functions. For example, it distributes the weight transferred to the tie from the rail flange

over a larger bearing surface to minimize crushing the wood fibers. The accurate location of the plate on the tie also serves to ensure the rails will be separated to the correct gauge when they are placed on the plate. Finally, the cant angle cast into the plate tilts the rail to achieve optimal contact between the rail and wheels.

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

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

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

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

The parties concluded their 1973 Agreement effective January 1st. Among other things, that Agreement recodified predecessor language (Rule 4 of the May 1, 1958 agreement) to become Rule 9 and added the phrase "fabrication of track panels" to the other types of work carried forward from Rule 4 of the 1958 agreement. There have been no significant modifications to Rule 9 since then despite several rounds of collective bargaining.

In approximately 1984, Carrier began experimenting with the use of concrete cross ties, wherein the manufacturing process must embed the equivalent of a tie plate into the concrete tie at the

time of its casting. Track Subdepartment employees represented by the Organization continued to do the same plating work and other fabrication work on track panels using wood ties as well as the remaining fabrication work on track panels using concrete ties.

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

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

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

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

The Organization immediately objected to what it saw as a major change to the 1973 Agreement. Ensuing discussions failed to produce a resolution. When it became apparent the Carrier was going to move ahead with implementing its plans, the Organization commenced a strike on February 24, 2000 at 6:00 a.m. The parties filed cross lawsuits for injunctive relief against one another in the federal courts of Colorado and Nebraska. The two suits were consolidated and heard in Colorado on March 2, 2000. The United States District Court there ruled in favor of the Organization. Carrier appealed to the 10th Circuit Court of Appeals. In an unpublished decision, the 10th Circuit reversed the District Court and found the controversy to be a minor dispute.

The issue of whether the Carrier violated the collective bargaining agreement by purchasing track panels and turnout panel kits containing pre-plated ties was submitted to arbitration before Referee Gerald Wallin who rendered a decision on November 6, 2001. He concluded that "arrangements" for

persons other then its own Track Subdepartment forces to fabricate tangent or turnout track panels in whole or in part or to perform other work incidental thereto for the purpose of constructing or maintaining track, violated the 1973 Agreement. He further noted that even if the 1973 Agreement gave the Company the right to purchase such track panels or kits, its failure to do so until 1996, constituted a waiver of that right.

The Carrier, believing that Wallin's decision was contrary to the terms of the collective bargaining agreement, invoked the jurisdiction of the United States District Court to review and set aside the decision on grounds he exceeded his jurisdiction and failed to comply with the Railway Labor Act. The matter is now scheduled to oral argument on May 13, 2003 before the United States District Court for Colorado.

By letter dated April 11, 2002, General Chairman Tanner contacted the Carrier concerning its continued purchase of pre-plated ties. By letter dated April 22, 2002, Carrier advised that it had purchased pre-plated ties for construction for many years and such actions were not encompassed by the Wallin Award. General Chairman Tanner further was reminded that UP's long standing practice of purchasing pre-plated ties for new construction had been established during the handling of the turnout dispute without contradiction from BMWE.

General Chairman Tanner responded by letter dated May 3, 2002, taking exception to the "so called 'purchase' of pre-plated ties in connection with new track construction." It was his position that such work was exclusively reserved to Track Subdepartment employees not only through the "clear and unambiguous language of the collective bargaining agreement, but by long standing practice." Mr. Tanner also disputed Carrier's assertion that it had been purchasing pre-plated ties for new track construction for years. Mr. Tanner further argued that such a position was inconsistent with prior correspondence provided by the Carrier. In conclusion, he requested advice as to whether UP had obtained pre-plated ties in the preceding sixty days and whether it intended to purchase such ties in the future. In its response to Mr. Tanner dated May 23, 2002, Carrier advised that the agreement and that the long standing practice in fact supported the Carrier's position in this matter:

> 'As I stated in my initial brief in the arbitration with Referee Wallin, the Carrier has been purchasing wooden ties with the specialized bracket attached since 1996. I further stated that the Carrier also has been purchasing wooden ties with tie plates attached since 1991. You

will find these comments on page three and footnote 1 of my brief. Since the Carrier has been purchasing ties with plates since 1991, I do not agree that there is a "long standing practice" on this property. If anything the practice is just the opposite.'

Mr. Tanner responded by letter dated June 28, 2002, contending that Rule 9 did reserve such work exclusively to Track Subdepartment employees, that there was no real past practice of Carrier's purchase of pre-plated ties, and that in any event BMWE was not aware of such purchases. Mr. Tanner went on to point out what he considered "less than frank comments" made in Carrier's letter of May 23, 2002. He further requested that the Carrier provide the information requested in his previous letter. In its response, UP disagreed with every aspect of Mr. Tanner's letter and declined to provide the information requested.

By letter dated July 22, 2002, General Chairman Tanner responded and advised that he considered Carrier's actions to be a unilateral change of the collective bargaining agreement. Notwithstanding that position, Mr. Tanner proposed submitting this matter to expedited arbitration. Mr. Tanner's proposition was accepted and the matter comes now before this Board for resolution.

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

BY THE ORGANIZATION

1. Does the Union Pacific violate its July 1, 2001 Agreement with BMWE (as amended when it arranges for persons other than its own Track Subdepartment forces to pre-plate wood ties or to perform other work incidental thereto for the purpose of constructing or maintaining its track?

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

BY THE CARRIER

1. Does Union Pacific violate its July 1, 2001 Agreement with BMWE (as amended) when it purchases pre-plated ties for use in the construction and maintenance of its tracks?

POSITION OF THE ORGANIZATION

Briefly stated, BMWE's position is that, for many of the same reasons expounded in the Wallin decision, the 2001 UP/BMWE Agreement (as revised), and in particular Rule 9 and Rule 52 thereof,

does not permit UP to arrange for persons other than its own Track Subdepartment forces to pre-plate wood ties or to perform other work incidental thereto for the purposes of construction or maintaining its track.

BMWE contends that its position is supported by the clear and unambiguous language of Rule 9, which constitutes an exclusive reservation of work to the Track Subdepartment forces; by the prior precedents, including the Wallin decision, concerning Rule 9 and its predecessor and companion rules; and by UP's own prior written interpretations of Rule 9 and its predecessor and companion rules. Moreover, even of Rule 9 were ambiguous, as held by Wallin, past practice resolves that ambiguity in favor of BMWE.

Finally, while not a contracting-out case per se, Rule 52-Contracting also supports BMWE's position because i) Rule 52 (a) preserves "work customarily performed by employees under the Agreement; ii) Rule 52 (b) preserves "prior and existing rights and practices of either party"; and iii) UP's "off the shelf" argument is contractually and factually invalid.

POSITION OF THE CARRIER

Briefly stated, it is the position of Carrier that Rule 9 is ambiguous, and does not exclusively reserve to BMWE represented employees the attachment of plates to ties. Even if there was such an exclusive reservation, a Carrier's right to purchase a finished product such as a tie with the plates already attached rather than have its own employees perform that work is well established. UP has a well-documented practice of purchasing pre-plated crossties since at least 1991. It further is Carrier's position that the Wallin Award is of no force and effect and is so flawed in its reasoning that this Board should not give it any precedential value whatsoever. If any consideration should be given to the award, it is that the purchase of turnouts and track panels was not prohibited by Rule 9.

DISCUSSION:

At the outset, it must be noted that the Board has reviewed all of the cases referred to by the parties in support of their respective positions. Since this case is essentially one involving the interpretation and application of Rule 9, the Board finds those cases which solely involve "scope" rules and/or subcontracting are of less probative value. However, they do serve a useful purpose in developing

this Board's analysis of Rule 9 vis-à-vis the instant dispute, and, where appropriate, will be so referred to.

With regard to Rule 9, the record shows that it, or its predecessor, has been the subject of consideration by Third Division cases over the years, and that the developing "history" of Rule 9 is relevant. Indeed, BMWE's argument that Rule 9, as set forth in the 2001 Agreement, is "clear and unambiguous", and constitutes an exclusive reservation of work to the Track Subdepartment workforce, is based, in large measure, on the bargaining history and evolving practices pertaining thereto under the predecessor 1958 and 1973 Agreements.

In that regard, Rule 4 of the 1958 Agreement provides:

> "Construction and maintenance of roadway and track... shall be performed by forces in the track department."

Rule 9 of the 1973 Agreement provides:

> "Construction and maintenance of roadway and track... shall be performed by forces in the Track Subdepartment."

Rule 9 of the 2001 Agreement provides:

> "Construction and maintenance of roadway and track... will be performed by forces in the Track Subdepartment."

In Award No 14061 (Dec. 22, 1965), involving UP and BMWE, the Third Division of the NRAB rejected the Carrier's contention that Rule 3, Note 9 of the 1958 Agreement was only a classification of work rule and determined that it was a specific grant of work to the Bridge and Building Department employees.

In addressing the significance of Award 14061 to the issue before him, Arbitrator Wallin noted:

> ...[I]n negotiating their 1973 Agreement, the parties recodified the 1958 Agreement Rules 3 & 4 to the 1973 Agreement 8 & 9 without significant change in the language to offset the precedent value of Award No 14061. Moreover, the parties added "fabrication of track panels" to Rule 9... [which] strongly suggests the Carrier knew, or should have known, that the then existing practice of the parties would be looked to as a dispute resolution tool to determine the nature and extent of the grant should questions arise. In 1973, Track Subdepartment employees performed a considerable amount of track panel fabrication work. While Carrier did purchase pre-assembled frogs for turnout track panels, the record herein shows that Carrier's Track Sub-development forces performed virtually all other fabrication work, including all tie-plating: (p. 7)

While, as noted above, Carrier has sought to have Wallin's Award vacated, the Board finds his rationale regarding the context in which Rule 9 should be considered, to be sound. In that regard, even without relying on Wallin's analysis, the Board finds the analysis of Arbitrator Wesman in Award 29916 (1993) to be definitive.

In Award 29916, involving UP and BMWE, the issue was the contracting out of construction and repair of right-of-way fences by outside forces. The Carrier contended that the Scope rule is general in nature, and that the work at issue could not be reserved exclusively to bargaining unit employees. BMWE contended that Rules 8, 9 & 13 clearly reserve the work at issue.

In referring to the 1965 Award 14061, Arbitrator Wesman noted:

> ... Subsequent contract negotiations retained the controlling rules. Rule 8 of the 1973 Agreement is nearly identical to Rule 3, Note 9 of the 1958 Agreement upon which 14061 based its holding... [I]t is a firmly established principle that when rules are carried forward essentially unchanged into subsequent agreements, so too is their interpretation. (p. 10)

Arbitrator Wesman goes on to note that Carrier letters and memoranda, beginning in 1986, acknowledged that Rules 8 & 9 of the Agreement are work reservation rules, but were limited to the work identified therein. Indeed, UP denied contracting out claims when the work in question was not listed in Rules 8 & 9.

Thus, the remaining issues were whether the particular work in that case – right-of-way fences – fell under the specific provisions of Rules 8, 9 and 13. Having answered in the affirmative, Arbitrator Wesman next determined that the Carrier failed to establish that there had been a compelling past practice of subcontracting such work out.

A similar analysis is applicable to the instant dispute. At the time the parties added "fabrication of track panels" to Rule 9 in the 1973 Agreement, with the exception of the Carrier's purchase of pre-assembled frogs for turnout track panels, the Carrier's Track Subdepartment forces performed virtually all other fabrication work, including all tie plating.

At issue herein is the work of attaching the tie plates to wooden ties, which is an integral step in track construction and maintenance work. Herein, there is apparently no dispute that the work of fastening tie plates to wooden track panels belong to Track Subdepartment forces if it is done in connection with (1) maintaining existing track in-place; (2) constructing a panel in a panel plant; or (3)

pre-plating ties for later use in constructing a track panel out-of-track on UP's right-of-way. Track Subdepartment forces have customarily, traditionally and historically performed all wood tie plating work, irrespective of whether that work was performed on in place track construction or maintenance or out-of-track at distant locations such as panel plants. What the Carrier contends herein, vis-a-vis Rule 9, is that pre-plating to construct new track in-place is not track Subdepartment work.

Collective bargaining agreements may include implied as well as express terms, and the parties' usage and custom is of significance in interpreting their agreement. In that regard, and based upon the above discussion, the Board finds that Rule 9 reserves track construction, of which tie plating is an integral part, to BMWE. Tie plates must first be attached to the wood tie and that work has historically been done by Track Subdepartment forces irrespective of whether the work was done in-track or out-of-track. There is no language in Rule 9 that expressly limits such work only if performed on UP's operating property.

Notwithstanding, the Carrier maintains that it has a long-standing past practice of purchasing pre-plated ties from vendors for new construction projects as early as 1991. Since it began purchasing pre-plated ties, UP represents that it has purchased approximately two million such ties, with approximately 300,000 shipped to territory covered by the CBA Agreement at issue, all of which was done without objection by BMWE.

By way of more specific examples, UP claimed it had purchased pre-plated ties for approximately 61 track panels over a 5-year period beginning in 1996, and that it had purchased and installed thousands of concrete ties with brackets that had been cast-in by the manufacturer.

With regard to the purchase of pre-plated ties beginning in 1996, the record establishes that the BMWE had no knowledge of the purported purchase and could not reasonably be expected to have such knowledge because BMWE forces would have no way of knowing where the fabrication work had been done on those pre-plated ties when they arrived in the field, since the Carrier's North Little Rock Plant produced pre-plated ties during this time.

As to the Carrier's purchase of concrete ties with brackets cast-in by the manufacturer, BMWE contends that there is a distinction between wood ties and concrete tie installation processes. More

important, when the concrete ties were first introduced on UP, UP negotiated a specific agreement with BMWE concerning the use and installation of concrete ties.

Thus, even if UP established that some minimal fraction of its wood ties had been pre-plated by a contractor, that fact, standing alone, would not establish a controlling practice because UP has not and cannot show that BMWE had knowledge of or assented to such a practice.

Finally, the Carrier claims that, notwithstanding Rule 9, there is a recognized exception to any reservation of work. In support of this argument, Carrier claims that there is a well-established line of awards that allows a Carrier to purchase a product "off-the-shelf" even though the work constructing/fabricating that product has been performed exclusively on the property by a particular craft.

The Carrier cites Third Division Award 5044 Brotherhood of Railroad Signalmen of America v. Southern Railway Co. (1950), wherein the carrier purchased pre-wired signal housing, and the organization relied upon Scope, Classification of Work and other seniority rules to support its claim. As stated by Referee Carter:

> The claim here is that the Carrier violated the scope rule of Signalmens Agreement when it purchased from [Contractor] the factory, fitted and wired signal instrument and relay cases... which were installed and used in connection with the interlocking plant and signal system at Decateur in accordance with the plans and specifications provided by [Contractor] (p. 16)

In finding no contractual violation, Referee Carter, citing similar purchases by the Carrier between 1936-1949, noted:

> The employees had full knowledge of the purchase and use of the above factory equipped instrument cases and as stated no claim such as here made was filed. They have, therefore, tacitly agreed to the interpretation that there is no prohibition in the Signalmen's Agreement against the purchase of instrument cases, equipped with instruments and wiring in place ready for installation on the job (p. 17)

With regard to the intent of the parties, be further noted:

> ... It seems to us that a Carrier, in the exercise of its managerial judgment could properly decide to purchase the engineering skill of the seller of railroad equipment, the benefits of its research and experience of seller's employees, and a guarantee that it would operate efficiently and economically. (p. 20)

Referee Carter then concluded:

> The contentions advanced by the Organization amount to an encroachment upon the prerogatives of management in one of its most important function Management should not be limited in its managerial prerogatives by placing a strained construction upon a rule that was never mutually intended by the parties. Such limitations upon the primary functions of management can be obtained only by negotiation, a function in which this Board can take no part. (p. 22)

UP then argues that the term "off-the-shelf" is a term of art that applies to the purchase of any item, regardless of the complexity of the product or the variations within the product. E.g., Third Division Award 29208 Brotherhood of Railroad Signalmen v. Southern Pacific Transportation Co. (Western Lines) (1992), wherein Referee Lieberman dealt with the Carrier's purchase of racks containing 33 pre-wired relay bases, three electronic units and a display panel from an outside source to be used at a crossover at Vail, Arizona; Award 436 of Special Board of Adjustment No. 570 System Federation No. 99 Railway Employees Dept. AFL-CIO-Carmen v. Illinois Central Gulf Rm. (1978), wherein Referee Lieberman dealt with the purchase of "fifty new electric cabooses.

After considering the Awards relating to the concept of "off-the-shelf" purchases, the Board does not find there is a well-established line of awards routinely applicable, but rather a line of divergent awards involving different parties, rules and circumstances.

While the Board recognizes that a "managerial prerogative" may exist, any application of a right to purchase "off-the-shelf" must be measured against any applicable contractual and/or practice limitations. Herein, as is clearly evidenced by the Wallin Award, as to the work in question, as of 1999 the Organization put the Carrier on notice that the Organization intended to insist upon the strict application of the work presentation provisions of Rules 8 & 9.

Moreover, while Referee Carter referred to the parties' intent as tacitly evidencing the exercise of that Carrier's managerial right, that intent is more clearly evidenced in the parties' Agreement herein. Thus, even though the instant case is not a subcontracting case per se, it is evident that the concept of the exercise of managerial rights is addressed in Rule 52 – Contracting. In particular, Rule 52 established substantive contracting rights for the parties, providing inter alia,

> (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...

(b) Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out...

Thus, particularly as relates to 52 (b), those "prior and existing rights and practices" were those in place as of the 1973 Agreement, and remain unchanged, absent mutual agreement, under the current 2001 Agreement.

As to 52 (a), there are specific conditions which must be met before work customarily performed by Track Subdepartment forces may be let to contractors and be performed by contractor forces. And, as identified, they are somewhat similar to Referee Carter's criteria for the exercise of the Carrier's managerial judgment: (1) skills not possessed by the Carrier's employees; (2) special equipment not owned by the Carrier; (3) special material available only when applied or installed through supplier, are required; (4) or when work is such that Carrier not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement beyond the capacity of Carrier's forces.

None of the above-referenced conditions are applicable to the work at issue, nor were they relied upon by the Carrier, who maintained it was not subcontracting the work. Rather, as part of its affirmative defenses of an alleged right to purchase "off-the-shelf", the Carrier asserts that it was involved in an arm's length purchasing arrangement for track panels, rather than a contracting arrangement. While the parties dispute the number of variables and permutations inherent in the fabrication of pre-plated ties as to enable the purchase of pre-plated ties off the shelf, the Board finds it unnecessary to resolve that disagreement.

As BMWE points out, the NRAB has developed and applied a consistent set of principles for evaluating attempts by Carriers to remove work from CBAs by purportedly ceding control of facilities or materials to third parties so as not to have the work performed on property controlled by the carrier.

As most recently stated in Third Division Award 32941 BMWE and Belt Railway Co. of Chicago (1998), a carrier will not be held liable for contracting out:

> (1) Where the work, while perhaps within control of Carrier, is totally unrelated to railroad operations.
>
> (2) Where the work is for the ultimate benefit of others, is made necessary by the impact of the operations of others on Carrier's property and is undertaken at the sole expense of that other party.
>
> (3) Where Carrier has no control over the work for reasons unrelated to having contracted out the work.

Applying those principles to the instant case demonstrates that the ties pre-plating is not only within UP's control, but is intimately related to UP's railroad operations; the tie pre-plating work is for the ultimate benefit of UP, has nothing to do with the operations of others in UP's property and is ultimately at UP's expense; and UP retains significant controls over the tie plating work because it is causing it to be done by contracts with others.

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

Having found a violation, the remaining issue before the Board is whether damages are appropriate.

The Organization contends that the appropriate remedy herein is to (1) return all the tie plating and other work incidental thereto to Track Subdepartment employees covered by the 2001 Agreement; and (2) compensate the appropriate Track Subdepartment employees at their respective rates of pay for an equal proportionate share of the man-hours expended by the outside forces on performing the disputed work.

In that regard, UP would have the information on how many pre-plated ties it has contracted for and where these ties were eventually installed. At the hearing herein, Carrier introduced a February 15, 2002 letter contract with NRM Railroad Materials for the period 2/1/02 – 1/31/04. Accordingly, the

BMWE asks that the question of remedy be remanded to the parties so that the Carrier's records can be checked to determine the number of man-hours and specific locations involved in order to identify appropriate claimants for compensation.

UP asserts that the question of damages is inappropriate and should be dismissed since there was no agreement to include the question of damages inasmuch as no claims have been filed by the BMWE pursuant to Rule 49:

> "All claims or grievances must be presented in writing by or on behalf of the employee involved to the officer of the carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claims or grievance is based."

Accordingly, BMWE has not followed the proper procedures and is improperly seeking to avoid the time limit provisions of Rule 49.

At the outset, the Board notes that the questions in Attachment A to the Agreement to establish this SBA specifically include a question on remedy, i.e., "If the answer to Question No. 1 above is "Yes", what shall the remedy be?" Having answered "Yes" to Question No. 1, the Board must next consider what, if any, remedy would be appropriate.

As for the argument regarding Rule 49, the Boards finds that Rule 49 is a general rule concerning the handling of claims and grievances, whereas the parties' Agreement to establish this SBA supercedes that general application. Moreover, the record demonstrates that prior to entering into the September, 2002, Agreement, BMWE, beginning in May, 2002, sought, unsuccessfully, to acquire information from UP about its intended use of pre-plated ties.

Of greater concern to the Board is the Carrier's assertion that "... It would be inappropriate for this Board to allow the Organization to lie behind the log for the last 12 years, belatedly raise this issue and seek damages for what the Carrier had been doing [since 1991] in good faith..." (Carrier's Sub. at p. 18).

The record shows that prior to November, 1999, BMWE had no knowledge of the Company obtaining pre-plated ties, and, therefore, did not concur or acquiesce. But by letter dated November 16, 1999, BMWE was put on notice by UP that UP intended to use ties that had been plated by outside forces, and as evidenced by the Wallin Award, BMWE then registered its opposition. Thus, at that point

in time, UP knew that BMWE was challenging the use of ties that were plated by outside forces, and it proceeded to use them over this objection at its own peril.

Therefore, to some degree, it would appear that the SBA created for the Wallin Award (November 6, 2001), would encompass any remedial relief arising out of the period November 1999 through November 2001.

In the instant SBA, based upon the purchase contract with NRM Railroad Materials, the Board finds that the applicable onset of work performed by outside forces corresponds with the effective date, February 1, 2002, for which UP committed itself.

Accordingly, the question of appropriate remedy shall be remanded to the parties so that the Carrier's records regarding the implementation of the NRM Railroad Materials purchase contract can be checked to determine the number of man-hours and specific locations involved in order to identify the appropriate TS employees who shall be compensated in accordance with the findings herein related to pre-plated wood ties.

AWARD

The questions proffered by the parties are answered in the affirmative. The issue of remedy is remanded to the parties for resolution based upon the findings and conclusions in the body of the decision the Board shall retain jurisdiction to decide any unresolved remedy issues.

Dated: April 30, 2003

Herbert Fishgold, Chairman
and Neutral Member

Steven V. Powers
Organization Member

Wayne E. Naro
Carrier Member

See attached Dissent

CARRIER MEMBER'S DISSENT TO REFEREE FISHGOLD
AWARD DATED APRIL 30, 2003

The majority has fashioned an award that has no basis in fact, arbitral authority, or collective bargaining agreement provisions. This is a simple case of a carrier exercising its managerial prerogative to purchase an assembled product. As anyone with any experience in railroad arbitration knows, there is a long line of precedent that upholds the Carrier's right to purchase such assembled products. This principle is not limited to any particular Carrier, to any particular collective bargaining agreement, or to any particular product. There was no legitimate reason for the majority to ignore this well-established principle in this case, and therefore the majority's award is palpably erroneous. I emphatically dissent.

There is no dispute that the product the Carrier purchased in this case is already assembled when the Carrier receives it. This purchase is no different than any of the myriad other purchases which have been the subject of prior arbitration awards, and there is no justification whatsoever for this Board to find otherwise. It was not this Board's function to obliterate decades of railroad arbitration precedent, yet that is exactly what the Board has attempted to do with its unfounded award. Experienced railroad arbitration practitioners surely will recognize the lack of reason in this award and accordingly give it no credence whatsoever.

It is well established that a Carrier may purchase finished products. Numerous railroad referees with many years of railroad arbitration experience have considered similar cases involving purchases of assembled products and have uniformly rejected the arguments raised by the Organization in this case. For example, in Third Division Award No. 28195, Referee Robert McAllister, who has authored literally hundreds of railroad arbitration awards, held as follows:

> "The Board has considered numerous claims involving the purchase of a finished product which, if it had been purchased unfinished or in component parts, would have required the work of covered employees. See Third Division Award 27184 concerning preassembled track panels and Third Division Award 19645 concerning a prewired CTC

bungalow. In Third Division Award 23020, involving preassembled car retarders, we held:

> 'This is not the situation where the unassembled equipment was on the property and then sent out for assembling. If that was the case, the rights of the employes under the Scope Rule would attach. Here these rights have not yet attached. In short, the purchasing of a finished product, in the circumstances presented here, cannot be viewed as the contracting out or the farming out of bargaining unit work.'

It is significant that the Carrier's invoices show it purchased treated lumber rather than having lumber it had purchased elsewhere treated at Conroe. Under these circumstances, we must conclude the Carrier exercised its right to purchase a finished product, and the Agreement was not violated."

This principle also was stated succinctly by another experienced railroad arbitrator, Referee Joseph Sickles in Third Division Award 21232. Like Referee McAllister, Referee Sickles recognized that purchase of pre-assembled products does not violate any collective bargaining agreement:

> *"The Employes asserted a Scope Rule violation when Carrier obtained a pre-assembled retarder.*
>
> ***This dispute does not deal with work performed on the property. Rather, it deals with an item made at a factory. Such off-property work is not contemplated by the Agreement.*** See, for example, Award 20926." (emphasis added)

Likewise, in Third Division Award 23020, quoted in Award 28195 above, Referee Martin Scheinman affirmed the Carrier's right to purchase assembled products. The petitioner in that case contended, like the Organization does here, that the Carrier's purchase of preassembled equipment violated the applicable collective bargaining agreement. Referee Scheinman, another prolific railroad arbitrator, rejected that contention in no uncertain terms:

> "The Organization contends that Carrier violated the Agreement when it assigned employes, other than signal employes, the work of assembling car retarders for its East St. Louis Yard car retarder system. The preassembled retarders were installed by signal employes.

The Organization's claim rests primarily on the Scope Rule. It asserts that construction of car retarders falls within the work rule. The Organization also argues that signal employes had performed the disputed work since car retarders were installed on Carrier's property in the 1920's.

On April 19th, 1978, Carrier received a preassembled car retarder section from the Lucey Boiler Company of Chattanooga, Tennessee.

The evidence on the property as well as the submissions to this Board clearly establishes that Carrier purchased the end product of the Lucey Boiler Company. **The disputed work was completed prior to the time that Carrier acquired possession of the equipment. That is, there is nothing to indicate that this did not constitute a purchase.**

This is not a situation where the unassembled equipment was on the property and then sent out for assembling. If that was the case, the rights of the employes under the Scope Rule would attach. Here these rights have not yet attached. In short, the purchasing of a finished product, in the circumstances presented here, cannot be viewed as the contracting out or the farming out of bargaining unit work.

This Board has consistently held that Carrier may purchase assembled equipment without violating the Scope Rule. See for example Awards 5044, 21824. Those cases are applicable here. Therefore, we will deny the claim." (emphasis added)

The only thing that distinguishes these awards from the present case is the type of product, which itself is insignificant. In all other respects, these awards are directly on point and there was no reason for this Board to reach a different conclusion. Other Awards reaching a similar conclusion regarding the Carrier's right to purchase finished products include Third Division Awards 21824, 28648, 28879, 29208 and 33472. In light of this long line of well-reasoned and compelling authority, it is readily apparent that the transaction here, a purchase of materials, does not violate the collective bargaining agreement and should have resulted in a denial of the claim.

Faced with this long line of railroad arbitration precedent, the majority here reached the astounding conclusion that there is no such line of awards routinely applicable. Rather than apply the prior precedent which has uniformly upheld the

Carrier's right to purchase assembled products, the majority created a heretofore unknown rule which attempts to compare the Carrier's managerial prerogative to purchase materials to factors which are only relevant in contracting cases. Even then, the board is internally inconsistent, first stating that the "case is not a subcontracting case per se," but then applying criteria applicable in contracting cases to the Carrier's purchase of assembled materials. Never before has such an analysis been employed, and the Carrier trusts that no experienced railroad referee will ever apply such an unsound approach to any other case.

Not only does the majority improperly apply contracting criteria to this purchase of materials case, but also fails to even comprehend the significance of the cases upon it does rely. For example, the majority's reliance on Third Division Award 32941 demonstrates a profound lack of understanding of the subject matter in question. That case involved construction of track on property leased by the carrier to another railroad. The issue did not involve a purchase of materials, but instead involved a short-term lease, which terminated after the track was constructed. As the Board there noted, "What is in dispute is whether Carrier retained sufficient control over the leased property, or benefited from the construction of the new track, to hold it responsible for the subcontracting."

Despite the fact that Award 32941 was a contracting case, which the majority here purportedly recognizes this is not, the majority improperly applied the criteria pertaining to contracting to the present purchase of materials case. Not only does such shoe horning distort the significance of the contracting criteria, but moreover, the majority's conclusions regarding those irrelevant criteria are completely unfounded. For instance, the majority states that the pre-plating is within UP's control. This conclusion is patently false. The Carrier may well specify that it wishes to purchase an assembled product, but the pre-plating work is performed by the manufacturer, at the manufacturer's facilities, and under the manufacturer's control.

Likewise, the majority states that "UP retains significant controls over the tie plating work because it is causing it to be done by contracts with others." Again, the work in question is under the control of the manufacturer, but more importantly, the majority fails to grasp the most basic element of any purchase: a purchaser may indeed buy only the products that fit its needs. The fact that UP makes its needs known to the manufacturer and buys only products that fits its needs does not make this case different than any of the other purchase of materials cases which have upheld carriers' rights to purchase goods that fit their needs.

Similarly, the majority's statements that the tie plating is "intimately related to UP's railroad operations" and that the work "is for the ultimate benefit of UP" have no bearing on the outcome of this purchase of materials case. Obviously, UP is a railroad, and the products it purchases are typically related to its railroad operations, just as all the other railroads have done in the numerous cases cited above. Furthermore, it should also be obvious that the products UP purchases are for its benefit, just as the products purchased by the other railroads have been for their benefit. The very fact that the majority found such factors to be somehow significant demonstrates that the majority was applying criteria that have no place in a setting such as this. There is no connection between UP's purchase of materials and a contracting case involving the short-term lease of a carrier's real estate. Again, the majority's attempt to make such a connection demonstrates its failure to grasp the issues it was charged with deciding.

Because the issue in this case concerns the Carrier's right to purchase assembled materials, it mattered not whether the Carrier had ever purchased such materials before. Other than the misguided Wallin award, no other arbitration award has ever concluded that a carrier must immediately begin to purchase a product as soon as it becomes available or forever be prevented from doing so. A carrier may decide at any time to exercise its managerial right to purchase a product irrespective of whether it has done so in the past.

Nevertheless, because the Wallin award purported to create such a requirement without the Organization even making the argument, the Carrier did provide history of purchasing the materials in question. The Carrier in this case has shown that it has purchased pre-plated ties for many years, so even under the rationale of the Wallin award, the Carrier's purchase of ties in this instance violates no agreement provision. The majority ignored that evidence however, based on its conclusion that the Organization did not have knowledge that pre-plated ties had been purchased. The majority states that "BMWE forces would have no way of knowing where the fabrication work had been done on those pre-plated ties when they arrived in the field, since the Carrier's North Little Rock Plant produced pre-plated ties during this time." Here again, the majority demonstrates its complete lack of understanding of the principles of railroad arbitration.

It is not the Carrier's obligation to label a product as to its source of origin. Furthermore, the Organization cannot remain mute and claim ignorance as the Carrier accepts delivery of pre-plated ties. The Organization has an obligation to raise instances of alleged agreement violations within 60 days, and here the Organization sat mute and took no action for years. The Organization should not be rewarded for its lack of diligence.

More importantly, even if the majority is correct regarding pre-plated ties from North Little Rock, this only proves that the Organization did indeed have knowledge that pre-plated ties were being produced by someone other than the employees covered by the applicable collective bargaining agreement. As the majority is well aware, employees who were subject to the Missouri Pacific collective bargaining agreement, not the Union Pacific agreement, which is the subject of this arbitration, staffed the North Little Rock tie plant. The Organization has always jealously guarded the boundaries of the territories of its various collective bargaining agreements and routinely files claims whenever it believes those boundaries have been breached. Many awards have been rendered addressing such claims, and the Organization cannot now argue in good faith that employees under the Missouri Pacific agreement could perform work on

Union Pacific territory. Thus, the majority's reliance on fabrication work at North Little Rock does not support its conclusion but rather refutes it. Therefore, the award is not only devoid of agreement support but is internally inconsistent as well.

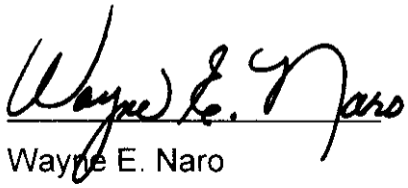
The majority also errs in its conclusion that Rule 9 of the agreement somehow negates the Carrier's right to purchase materials. The Carrier will not repeat the detailed analysis of that rule set forth in the submissions in this case, but again the Carrier would point out that the case relied on by the majority was a case involving contracting of work and not purchase of materials. That case has not been followed in any subsequent awards even though the Organization continued to make the same arguments accepted once in Award 22916. Although the majority has chosen to ignore the many subsequent awards and resurrect the dicta of the one discredited award, the majority's conclusion here should not be relied on in any future case. It simply does not reflect the commonly accepted interpretation of the collective bargaining agreement by many experienced railroad arbitrators.

Finally, the majority also has erred in awarding damages in this proceeding, and again its analysis of the issue is sorely lacking in agreement support or common sense. The Organization filed no claims contesting the Carrier's purchase of ties, it identified no claimants whom it contended were deprived of work opportunity, nor did it provide any of the basic information required of any claim or grievance to be entitled to an award of damages. This basic failure of proof deprived the Carrier of any opportunity to contest the measure of damages, as is the Carrier's right in any claim. Rule 49 of the collective bargaining agreement sets forth specific requirements applicable to such requests for relief, and the Organization's utter failure to comply with any of those requirements has eviscerated the Carrier's contractually reserved right to defend itself. The majority had no right to relieve the Organization of its contractual responsibilities.

Moreover, the majority's rationale for answering the Organization's question regarding damages completely defies logic. Rather than engaging in any analysis as to whether the question is appropriate, the majority relies on the mere fact that the

Organization chose to raise the question of damages. The majority concludes that, simply because the Organization posed the question, the Board "must" answer it. This circuitous reasoning is commonly referred to as "begging the question." Thus, it appears that the majority has simply looked at the question posed by the Organization, and like a mountain climber, decided to answer the question "Because it is there." Such analysis or more accurately the lack thereof has no place in a serious proceeding such as this.

In summary, this decision is an ill-reasoned, uninformed opinion that ignores the holdings of many experienced arbitrators. This award is palpably erroneous, of no precedent, and should be considered an anomaly in the history of railroad arbitration. I vigorously dissent.



Wayne E. Naro

LABOR MEMBER'S RESPONSE
TO CARRIER MEMBER'S DISSENT
TO
REFEREE FISHGOLD AWARD DATED APRIL 30, 2003

In a transparent effort to blunt the precedential value of the well-reasoned Opinion and Award of the Majority, the Carrier Member has misstated the facts of record, the arbitral precedent and the plain terms of the collective bargaining agreement in a mean-spirited diatribe masquerading as a dissent. If future readers accept the inexorable logic that the precedential value of an award is proportionate to the clarity of reasoning in the award, then the Fishgold Award will carry powerful precedential value. The fact is, that this was a straightforward contract interpretation case and there was nothing unique about the facts of the case or the principles employed in deciding the case that would undermine the precedential value of this carefully reasoned award. Indeed, with respect to the principles employed in deciding the key "purchased product" issue, the Fishgold Award is entirely consistent not only with prior precedent on this property, but similar awards on other carriers throughout North America. Likewise, the remedy is consistent with literally hundreds of awards concerning the improper siphoning of work from the bargaining unit.

The Facts

Contrary to the Carrier Member's assertions, the carrier did not simply exercise a management prerogative to purchase a finished product. Rather, the carrier contracted with a third party to obtain work (attaching tie plates to ties) that had customarily and historically been performed by the carrier's own Track Subdepartment forces under the terms of the collective bargaining agreement for more than 50 years. What the Carrier Member can not seem to grasp is that management prerogatives are limited by the collective bargaining agreement. In fact, the very purpose of collective bargaining agreements is to limit management prerogatives and, in this case, the agreement limited the carrier's right to obtain track construction work (of which tie plating is an integral part) from anyone other than its Track Subdepartment forces. Irrespective of the name the carrier attaches to the transaction ("purchase of a finished product", etc.), any fair reading of the record shows that the ultimate result of the transaction was to transfer work from union members represented by BMWE to low wage non-union workers in order to reduce labor costs. As the Neutral Member correctly pointed out, "*** '[i]t is a well established rule of law that one may not accomplish by indirection what he is forbidden to do in a direct manner...'"

Arbitration Precedent

The Carrier Member tells only half of the truth when he asserts that there is a line of precedent that upheld the rights of various carriers to purchase assembled products. The union does not dispute that there are awards that uphold the rights of carriers to contract out or purchase assembled products under certain contractual or factual sets of circumstances. However, what the

Carrier Member fails to say is that there is also a line of carefully reasoned precedent, including an award on this property, that held to the opposite effect. The key point is that there is no "principle" that carriers have a right to purchase so-called finished products. To the contrary, the rights of the parties in any particular case are determined by the express and implied terms of the applicable collective bargaining agreement as revealed in its plain terms and associated practices.

In apparent recognition that the arbitrator's reasoning could not be fairly challenged, the Carrier Member turned his sights on the arbitrator himself and charged that Neutral Member Fishgold was not an "experienced railroad industry practitioner". Of course, this charge is both irrelevant and untrue. It is irrelevant because the principles of contract interpretation are immutable and do not change when an arbitrator enters the realm of railroad industry arbitration. The charge is false because in addition to being a distinguished member of the National Academy of Arbitrators, Neutral Member Fishgold is an experienced railroad industry practitioner with more than 40 NRAB Third Division Awards under his belt. Moreover, as the Carrier Member knows full well, the Fishgold Award is fully consistent not only with the Wallin Award on this property, but with Third Division Award 33044 by Arbitrator Fletcher and CROA Case No. 3041 by Arbitrator Picher. In addition to being NAA members, Messrs. Wallin, Fletcher and Picher are all experienced railroad industry practitioners with literally hundreds of railroad arbitrations to their credit. Consequently, even if railroad industry experience was a relevant consideration (which it is not), it is clear not only that Neutral Member Fishgold has such experience, but that other experienced railroad industry practitioners reached similar conclusions.

Finally, after mischaracterizing the relevant precedent and falsely maligning the Neutral Member's experience, the Carrier Member next asserts that the Majority's reliance on Third Division Award 32941 "... demonstrates a profound lack of understanding of the subject matter in question." Once again, the Carrier Member is simply and obviously wrong. Award 32941 is directly analogous to the instant case because both cases involved carrier efforts to siphon work away from the bargaining unit by creating the appearance that the carrier did not instigate, control, finance or benefit from the work. In this case, the carrier attempted to end-run the collective bargaining agreement by arranging to have tie plating work done by a third party before the ties and plates were delivered to the carrier's right-of-way. In the case decided by Award 32941, the carrier attempted to end-run the collective bargaining agreement by leasing the right-of-way to a third party who then arranged for track construction work (including tie plating) to be performed on that property before the right-of-way and newly constructed track was returned to control of the carrier. In other words, both cases involved carriers who used legal niceties to give the appearance that they had no control of facilities or materials while in reality they continued to control, finance and benefit from work performed on those materials or facilities. Consequently, the reasoning applied in Award 32941 clearly applied by analogy to the instant case.

Past Practice

The Carrier Member's assertion that the carrier's position was supported by past practice ignores the clear evidence of record. Contrary to the Carrier Member's unsupported opinion, what

the evidence showed was: (1) under three successive collective bargaining agreements (1958, 1973 and 2001), Track Subdepartment forces performed both in-track and out-of-track tie plating work on a regular daily basis and plated literally millions of ties; (2) the first time BMWE had knowledge of the carrier's intention to use pre-plated ties was when the General Chairman received the carrier's letter dated November 16, 1999 advising a "new" process known as pre-plating had been developed and the carrier intended to obtain pre-plated ties from a third party; (3) contrary to the Carrier Member's assertion that the union "sat mute", the General Chairman responded by vigorously protesting in writing, in conferences, and ultimately by suing in district court and striking; (4) the carrier's Chief Engineer testified in district court that Track Subdepartment forces in the field would have no way of knowing whether pre-plated ties delivered to a job site were plated by carrier forces or a third party contractor; and (5) if the carrier obtained pre-plated ties before 1999, it was a tiny fraction (much less than one percent) of total ties plated and was done without the knowledge of BMWE. Based on the evidence, Arbitrator Fishgold (and before him, Arbitrator Wallin) correctly concluded that past practice supported BMWE and not Union Pacific.

Rule 9

Contrary to the Carrier Member's hyperbole, the Majority did not conclude that, "... Rule 9 of the agreement somehow negates the Carrier's right to purchase materials." What the Majority correctly ruled was that the carrier violated Rule 9 if it arranged for other than Track Subdepartment forces to perform track construction work, of which tie plating is an integral step. More precisely, the Majority stated its conclusion thusly:

> "*** **the Board finds that Rule 9 reserves track construction, of which tie plating is an integral part, to BMWE. Tie plates must first be attached to the wood tie and that work has historically been done by Track Subdepartment forces irrespective of whether the work was done in-track or out-of-track. There is no language in Rule 9 that expressly limits such work only if performed on UP's operating property.**" (Emphasis in bold added)

The key point, which the Carrier Member simply refuses to recognize, is that Rule 9 reserves the work identified therein to Track Subdepartment forces and there is no language in Rule 9 which limits that work only if it is performed on the carrier's property. This interpretation is entirely consistent with Award 29916 which, contrary to the Carrier Member's diatribe, is not a "discredited" award. Rather, Award 29916 is part of a trio of awards (14061, 28817 and 29916) that applied a consistent interpretation to Rule 9 and its predecessor and companion rules over a period of nearly 40 years. Of course, that trio is now a quartet with the addition of the Fishgold Award.

The Remedy

While I hesitate to be pejorative, the Carrier Member's comments concerning the remedy are nothing short of bizarre. First, the Board not only had jurisdiction to consider the remedy, but had an obligation to do so. In the Agreement to establish this SBA, the parties expressly stipulated, "*** This Board shall have jurisdiction provided for under Section 3 First and Second of the Railway Labor Act to decide the questions in Attachment "A". Of course, the questions in Attachment "A" clearly included a question on remedy, i.e., "If the answer to Question No. 1 above is "Yes", what shall the remedy be?". Consequently, it is clear that once the Board answered Question No. 1 posed by the union in the affirmative, the Board had the authority and obligation to determine the appropriate remedy.

Second, the Carrier Member's complaint that BMWE failed to provide it with basic factual information regarding the purchase of the pre-plated ties and the names of specific claimants is disingenuous because it is the carrier that has the best records of that very information. That is, the carrier knows precisely how many pre-plated ties it purchased, when those ties were delivered, where they were installed and the names of the employes who were working at those locations and would have done the plating work if the ties had not been pre-plated by outside forces. Collective bargaining and arbitration are not games of hide the ball. Hence, it has frequently been held that once a prima facie violation has been established, neither party may frustrate the intent or application of the CBA by withholding information in its possession. Typical of the precedent on this issue is NRAB Third Division Award, 18447, which held:

> "We reaffirm the principle that Carrier is not required by agreement or otherwise to make available its records to a collective bargaining agent bent on a fishing expedition looking for information from which it might develop claims. But, after a claim has been filed, which contains in its content the procedurally indispensable substance, Carrier acts at its peril if it fails or refuses to adduce its records which contain material and relevant evidence. To hold otherwise would be destructive of the Congressional intent expressed in the Preamble and Section 2. First and Second; and, Section 3 of the Railway Labor Act.
>
> * * *
>
> ***** Further, a holding that this Board is without jurisdiction to order Carrier to produce its records to make certain 'dates and amount of time,' which are the gravamen in remedying the continuing violative conduct, would have the effect of absolving Carrier from its statutory duty to 'maintain agreements' which is imposed by law. Section 2. First of the Act. We find that the continuing claim is well pleaded and that this Board has jurisdiction to order Carrier to produce its records containing material and relevant evidence to fix dates and extent of violations within the ambit of the pleaded continuing violations.**" (Emphasis added)

Finally, the most serious problem with the Carrier Member's position on the arbitrator's authority to grant a remedy is that it is in direct conflict with what the carrier recently told a district court in the related dispute ultimately decided by Arbitrator Wallin. In that case, this carrier urged the district court to enjoin BMWE's strike and require the parties to resolve their dispute in arbitration where the arbitrator would have broad authority to grant relief and make the employes whole. More specifically, in its Memorandum In Support Of Plaintiff Union Pacific Railroad Company's Motion For Preliminary Injunction filed with the United States District Court For The District Of Colorado in Civil Action No. 00-Z-396, the carrier told the court the following:

> "In contrast to the immediate and irreparable harm that Union Pacific will suffer in the absence of an injunction, neither Union Pacific's employees nor the BMWE will suffer any injury if strikes, work stoppages and picketing are enjoined as BMWE-represented employees have an exclusive remedy in arbitration if they prevail in their claim that Union Pacific violated Rule 9 of the collective bargaining agreement. **Therefore, the employees will not suffer irreparable injury in the Court issues an order enjoining the BMWE from engaging in strikes, work stoppages or picketing since an arbitrator has broad authority to grant relief and make employees whole if they ultimately prevail in arbitration. 45 U.S.C. § 153, First (o).**" (Emphasis in bold added) (Memorandum at P.16)

Union Pacific simply can not have it both ways. That is, it can not reasonably tell a district court that Section 3 arbitrators have broad remedial authority under the Railway Labor Act and then allow its Carrier Member in this case to attack the Majority for exercising such authority.

In summary, the Fishgold Award is a well-reasoned, fully informed opinion that is consistent with a trio of awards on this property concerning the interpretation of Rule 9 (Awards 14061, 28817 and 29916) and in complete harmony with decisions by other veteran arbitrators (Fletcher, Picher and Wallin) on the so-called purchased product issue. Since the precedential value of an award is proportionate to the clarity of reasoning in the award, the Fishgold Award should carry powerful precedential value.

Respectfully submitted,

Steven V. Powers

Steven V. Powers
Labor Member