Before

SPECIAL BOARD OF ADJUSTMENT
ESTABLISHED PURSUANT TO 45 U.S.C. SECTION 153 SECOND
PETER R. MEYERS
Neutral Member and Chairman

In the Matter of the Arbitration between:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION/IBT,

Organization,

And

UNION PACIFIC RAILROAD COMPANY,

Carrier.

DECISION AND AWARD

Appearances on behalf of the Organization

Steven V. Powers—Director, Arbitration

Appearances on behalf of the Carrier

Wayne E. Naro—General Director, Labor Relations

This matter came to be heard before Neutral Peter R. Meyers on the 9th day of May 2006 at the offices of the Brotherhood of Maintenance of Way Employees located at 150 South Wacker Drive, Suite 300, Chicago, Illinois. Mr. Steven V. Powers presented on behalf of the Organization, and Mr. Wayne E. Naro presented on behalf of the Carrier.

Introduction

This matter involves a dispute between the Union Pacific Railroad Company (hereinafter "the UP" or "the Carrier") and the Brotherhood of Maintenance of Way Employees Division/IBT (hereinafter "the BMWED" or "the Organization") over the number of General Chairmen that the Organization may designate to administer and enforce the collective bargaining agreement between the parties. This dispute was the subject of a lawsuit that the Carrier filed before the United States District Court for the District of Nebraska, which ultimately found that this dispute is minor and must be resolved in arbitration.

Accordingly, this matter was orally argued before this Special Board of Adjustment, with Peter R. Meyers as the Neutral Member and Chair, on May 9, 2006. The parties had filed written pre-hearing submissions and rebuttal submissions, as well as an extensive documentary record. The parties opted to stand on the written record and their oral arguments, so there was no witness testimony before this Board.

The Carrier's Question At Issue

Does the Organization violate the parties' July 1, 2001, collective bargaining agreement when it seeks to designate multiple General Chairmen to administer that contract?

The Organization's Questions At Issue

Whether there is an express or implied agreement under which the Organization waived the statutory rights of the Organization and its members covered by the BMWED-

UP 1973/2001 Agreement to make their own designations of representatives for bargaining with the carrier and administration of the parties' agreements; or whether the Organization in any way agreed that only a single General Chairman could administer the BMWED-UP 1973/2001 Agreement; or that other Organization General Chairman may not participate in the administration of that Agreement?

Relevant Contract Provisions

I. COLLECTIVE BARGAINING AGREEMENT, EFFECTIVE JULY 1, 2001

RULE 46 – REPRESENTATION

(a) Subject to the provisions of the Railway Labor Act, the right of the Brotherhood of Maintenance of Way Employees to represent employees coming within the scope of this Agreement is recognized, and the interpretation of this Agreement as agreed upon by the Company and the Brotherhood of Maintenance of Way Employees will govern.

(b) Where the term "duly accredited representative" appears in this Agreement, it will be understood to mean the regularly constituted committee and the officers of the Brotherhood of Maintenance of Way Employees of which such committee or officers are a part.

RULE 49 – TIME LIMITS ON CLAIMS

(c) This rule recognizes the right of representatives of the organization to file and prosecute claims and grievances for an on behalf of the employees they represent.

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. . . . 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 . . . . 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. Said Company and organization representatives will make a good faith attempt to reach an understanding concerning said contracting . . . .

II. JANUARY 13, 2006, AGREEMENT

It is Agreed:

1. There will be established a Special Board of Adjustment, in accordance with the provisions of the Railway Labor Act, as amended which hereinafter will be known as the Board. This Board will have jurisdiction provided for under Section 3 First and Second of the Railway Labor Act to decide the questions identified in the Attachment "A".

2. The Board will consist of three members. One member will be selected by the Carrier and will be known as the "Carrier Member". One member will be selected by the Union and will be known as the "Employee Member". The third member, who will be Chairman of the Board, will be a neutral person that is unbiased as between the parties. The Carrier Member and the Employee Member may be changed at any time by the respective parties designating them. W.E. Naro is designated by the Carrier as the Carrier Member. S.V. Powers is designated by the Union as the Employee Member of the Board. The parties have agreed that Peter R. Meyers will be the Chairman of the Board.

3. The compensation and expenses for the Carrier Member will be borne by the Carrier. The compensation and expenses of the Employee member will be borne by the Union. The compensation and expenses of the Chairman of the Board and all other expenses that relate to this Board will be borne half by the Carrier and half by the Union.

. . .

6. The Board will make findings and render an award in the case submitted to it within thirty (30) days after the issue is presented to the Neutral. Any two members of the Board will be competent to render an award. Findings and award will be in writing and copies will be furnished to the respective parties to the dispute.

7. If a dispute arises requiring an interpretation of the award, the provisions of Section 3 First (m) of the Railway Labor Act applies provided that such request is made within ninety (90) days of the issuance of the award.

8. The Award of the Board will be final and binding on the parties, subject to the provisions of the Railway Labor Act, as amended by Public Law 89-456. The resolution of this dispute is without prejudice or precedence to the parties' respective positions as to the appropriate forum to resolve similar disputes.

9. This Board is not empowered and has no jurisdiction to act or decide the dispute as an "interest arbitration" board. The Board will not have the authority to add contractual terms or to change existing agreements governing rates of pay, rules and working conditions.

Fact Summary

The record in this matter reveals that the Organization is composed of the "Grand Lodge," System Divisions and Federations, and Local Lodges. The Organization is party to collective bargaining agreements with a number of individual rail carriers, stand-alone national agreements that apply to all of the major rail carriers, and national agreements that modify uniform national terms, such as wages, health benefits, and vacations. The Grand Lodge exercises general supervision and control over all System Divisions and Federations, the Local Lodges, Officers, and the entire membership. The Organization's System Divisions and Federations are headed by General Chairmen, who may negotiate tentative agreements with carriers and may enter into agreements with the approval of the Grand Lodge President or his designated representative.

The record further establishes that in 1996, the Organization adopted a policy statement specifying that when a carrier has employees who are represented by more than one Organization System Division or Federation, that the Grand Lodge should designate a committee of co-chairmen for collective bargaining, that no individual General Chairman could unilaterally alter an agreement affecting members of another Division or

Federation, and that no agreement affecting members could be changed without full compliance with the Grand Lodge processes and approval of the Grand Lodge President or his designee.

The record further indicates that the Organization established bargaining committees of General Chairmen to deal with merged carriers with expanded regional and system gangs that work across multiple seniority agreements and across the boundaries of formerly separate railroads.

The evidentiary record additionally establishes that the "current" UP is a product of a number of mergers approved by the Interstate Commerce Commission and the Surface Transportation Board, and it is radically different from the "historic" UP. In a series of mergers and acquisitions, the Carrier acquired control of the former Missouri Pacific (MP) Railroad, the former Missouri-Kansas-Texas (MKT) Railroad, the Chicago & North Western (CNW) Transportation Company, the Southern Pacific (SP) Railroad, and the Denver Rio Grande and Western (DRGW) Railroad. All of these later were merged into the current Carrier.

All of these previously separate railroads had separate collective bargaining agreements applicable on their different territories. In December 1998, however, the UP and the Organization agreed to put the former DRGW lines under the agreement that applied on the territory of the former UP. This agreement applicable to the former UP's territory was entered into by the parties in 1973, and it was most recently updated in 2001; accordingly, it is known as the 1973/2001 Agreement. The record further demonstrates

that in July 2000, the territories of the former SP eastern lines, the former MP, and the former MKT all were put under a single collective bargaining agreement between the UP and the Organization. The former SP western lines and the former CNW lines continue to be under agreements that had been in effect on these former carriers. The Carrier also is a party to certain national agreements between the Organization and multiple rail carriers.

As a result of the above-described mergers, collective bargaining between the Organization and the major carriers, and the UP's invocation of the *New York Dock* provisions, the UP ultimately obtained the ability to operate regional and system gangs over very large geographic areas, including across many seniority districts and across the boundaries of formerly separate railroads where different collective bargaining agreements applied. Moreover, after the merger that created the current UP, the Carrier sought to place regional and system gangs under a single collective bargaining agreement.

The record reveals that in 1997, the Carrier served a *New York Dock* notice to create consolidated system gangs that could operate across the territories of the former UP, former DRGW, and former SP western lines, all under a single collective bargaining agreement. Upon the issuance of a *New York Dock* arbitration award, the parties entered an agreement effective January 1, 1998, known as the Consolidated System Agreement (CSA), that provided for the creation of consolidated system gangs that could operate over the territories of the former UP, former CNW, former DRGW, and former SP western lines, under what was then the 1973 Agreement applicable to the former UP. The record establishes that this arrangement meant that employees whose seniority originated

on these former carriers, and who were members of Local Lodges that were parts of the CNW Federation, the Mountain and Plains Federation, and the Pacific Federation, were put under the then 1973 Agreement for the former UP in order to perform consolidated gang work.

The record further establishes that the 1996 National Agreement required that the Organization meet with each carrier to prepare updates of the various existing collective bargaining agreements in order to consolidate and incorporate various provisions from the national agreement, side letters, and memoranda of understanding into single, more usable documents.

The 1973 Agreement that had been applicable on the territory of the former UP had been signed only by the then UP System Division General Chairman and the Western Region Vice President. The parties created an update to the 1973 Agreement that became effective on July 1, 2001. The updated agreement, known as the 1973/2001 Agreement, was a restatement of the old agreement, incorporating national and side agreements. The updated agreement was signed by UP System Division General Chairman Tanner and Vice President Wehrli.

During the winter of 2001-2002, the Carrier began to respond to grievances filed under the 1973/2001 Agreement by the General Chairman for the Pacific Federation and the CNW Federation, on behalf of their members who were working under that Agreement as consolidated system gang employees, by stating that those General Chairmen were not authorized to file and process grievances under the 1973/2001

Agreement, and that only UP System Division General Chairman Tanner could do so. In response to this and other issues, the Organization decided to confirm to the Carrier in writing that all of the General Chairmen are Organization representatives for bargaining in connection with the 1973/2001 Agreement, and to inform the Carrier that the General Chairmen would be a committee of General Chairmen for bargaining on changes to that Agreement.

During discussions between the parties about this communication, the Organization informed the Carrier that it was appointing five General Chairmen as co-chairmen to administer the 1973/2001 UP-BMWED Agreement, that any one of these five General Chairmen could progress claims to final resolution on behalf of their respective members, and that the unanimous consent of all five General Chairmen would be required before any agreements could be signed. The record shows that the Carrier responded by rejecting the Organization's designation of a committee of General Chairmen and stating that the Carrier would deal only with the General Chairman for the UP System Division.

After further correspondence failed to resolve this matter, the Carrier filed a lawsuit in the United States District Court for the District of Nebraska, challenging the Organization's assertion of the right to designate more than one General Chairman to administer and enforce the collective bargaining agreement between the parties. The District Court ultimately determined that it lacked jurisdiction over contract-interpretation disputes, and that this matter was a "minor" dispute involving the interpretation and

enforcement of an existing collective bargaining agreement. The District Court found that this dispute must be resolved through arbitration, and it dismissed the Carrier's lawsuit for lack of subject matter jurisdiction. The parties thereafter agreed to submit their dispute to this Board.

The Carrier's Position

The Carrier initially contends that the collective bargaining agreement between the parties limits the Organization's right to designate multiple General Chairmen to administer that agreement. Moreover, the record demonstrates that there is a well established past practice, dating back 79 years, under which the parties have interpreted the provisions of this and prior agreements to provide for only one General Chairman. The Carrier insists that the Organization cannot unilaterally alter the provisions of the parties' agreement without first following the procedures set forth in Section 6 of the RLA, which requires the parties to maintain the express and implied provisions of their agreements.

The Carrier maintains that following the implementation of the CSA, UP General Chairman Tanner continued to hold himself out as the sole General Chairman under the UP/BMWE collective bargaining agreement, having authority to negotiate changes to the agreement as well as to make any necessary interpretations. The Carrier points out that from January 1, 1998, through March 14, 2002, General Chairman Tanner continued to resolve disputes and enter into a large number of agreements as the sole General Chairman, doing so with the knowledge and approval of the Organization's international

representatives.

The Carrier asserts that although it may have entered into an occasional agreement in which the Organization had more than one General Chairman sign the agreement, the Carrier insists that this was done as a matter of expediency. The Carrier argues that there generally was a pressing need for the agreement, and the issue of whether there should be one or more General Chairmen was ignored in order to obtain the agreement. The Carrier contends that it also was understood that it would require the signature of all General Chairman to amend the CSA because they had been signatory to the original agreement. The Carrier argues that these few instances certainly were not sufficient to overcome the very long practice that had been established on this property.

The Carrier maintains that although the parties' collective bargaining agreement does not specifically state that there will be only one General Chairman, the parties have a practice spanning 79 years under which a single General Chairman administered the collective bargaining agreement. The Carrier asserts that the Organization understood and applied the collective bargaining agreement in line with this long-standing practice, which has ripened into an agreed-upon interpretation of the collective bargaining agreement.

The Carrier goes on to assert that the contractual language is clear, with over twenty-five rules stating that the Organization will administer the Agreement through a General Chairman. The Carrier insists that there is not a single reference in the Agreement to "General Chairmen." The Carrier points out that these rules touch upon

every aspect of the Agreement, including requirements that where the Carrier is required to give notice of an action that it wishes to take, that the notice be given to the "General Chairman."

As further support for its position, the Carrier then points to the signature page of the parties' 2001 collective bargaining agreement, which is signed only by UP General Chairman Tanner, with Vice President approval, even though employees from other federations were working under the provisions of this Agreement. The Carrier additionally emphasizes that no other Organization General Chairman participated in this process, even though their members were working under the provisions of this Agreement. The Carrier insists that the parties understood what the understanding and practice on this property had been.

The Carrier cites the fact that the parties updated the collective bargaining agreement on the former Missouri Pacific. The Carrier maintains that on that territory, the parties had consolidated five different collective bargaining agreements in the former Missouri Pacific collective bargaining agreement, and this agreement was updated in July 2000 under the same circumstances as the Agreement at issue here. The Carrier argues that in that instance, all five General Chairmen participated in the updating process and signed the agreement, and the reference to "General Chairman" was changed to reflect "General Chairmen" where appropriate. The Carrier asserts that this underscores the significance of only General Chairman Tanner signing this collective bargaining agreement, as well as the use of the term "General Chairman."

The Carrier emphasizes that any interpretation of the singular term "General Chairman" to mean something other than one General Chairman is clearly inconsistent with the plain meaning of this term and the course of handling over the many years that these rules have been in effect. The Carrier insists that "General Chairman" clearly refers to a single individual and has been consistently applied in that manner by both parties.

The Carrier then cites Rules 48 and 49 as further proof that the parties intended that the UP General Chairman would be the sole representative to administer this Agreement. The Carrier points out that under Rule 49, only the "duly accredited representative" of the Organization is authorized to progress grievances and claims. Rule 46 defines "duly accredited representative" to be "the regularly constituted committee and the officers of the Brotherhood of Maintenance of Way Employes of which such committee or officers are a part." The Carrier argues that although the Organization may assert that this language is ambiguous, it always has been interpreted to mean the Union Pacific System Division.

The Carrier maintains that in a deposition in the lawsuit preceding this arbitration, General Chairman Tanner testified that this was the historical interpretation given to these provisions. Tanner also admitted that the designation of five General Chairmen in March 2002 changed the parties' prior interpretation of "regularly constituted committee." The Carrier emphasizes that Tanner acknowledged that prior to March 2002, the "regularly constituted committee" was the Union Pacific System Division, while after March 2002, this was expanded to include the other federations. The Carrier submits that the

Organization does not have the authority to unilaterally expand what had been an agreed-upon interpretation and application of those rules. The Carrier insists that the "regularly constituted committee" is the Union Pacific System Division Federation, and only the General Chairman of that federation is authorized to process claims under Section 3 of the RLA.

The Carrier argues that the language of the parties' collective bargaining agreement leaves no doubt that the Organization contractually committed to having a single general chairman administer this Agreement. The Carrier maintains that the Organization's attempt to unilaterally change its contractual commitment violates Section 6 of the RLA.

Rebutting the Organization's arguments, the Carrier acknowledges that the Organization does have the right, pursuant to the RLA, to organize in whatever manner it deems appropriate. The Carrier contends, however, that the Organization has contractually limited its rights by entering into a course of conduct over a span of 79 years that has ripened into a contractual requirement. The Carrier maintains that although the Organization has a right to organize, it may not do so in contravention of long-standing contractual understandings with the Carrier.

Addressing the Organization's argument that there was no need to designate multiple General Chairmen to administer a single collective bargaining agreement until after the Carrier began to consolidate its operation, the Carrier submits that this ignores the fact both parties understood that there was to be only one General Chairman and one

Carrier officer who would be responsible for administering a collective bargaining agreement. The Carrier insists that this understanding has been in place since the Organization gained the right to represent UP employees, and the terms of the collective bargaining agreement have been written with that understanding in mind. The Carrier acknowledges that the Organization is correct in pointing out that no one rule explicitly states that there will be only one General Chairman, and that this will be the UP System Division General Chairman, but the Carrier maintains that this does not defeat the point that the whole structure of the Agreement is predicated upon the long-standing understanding that there will be a single General Chairman responsible for administering the Agreement.

The Carrier asserts that the Organization's interpretation of the rules would lead to the absurd result of two different General Chairmen taking differing interpretations of the same rule. The Carrier insists that there has to be one authority for interpreting the Agreement for the Organization, and this always has been the General Chairman who is signatory to the Agreement.

As for the Organization's reference to Third Division Award 37368, the Carrier emphasizes that the Organization failed to include the Carrier Members' dissent to this Award. The Carrier argues that the Board gave little, if any, rationale for its erroneous conclusion, and this Award provides little, if any, guidance as to a full and complete resolution of the instant matter.

With regard to the Organization's attempt to distinguish the Southern Division

agreement, the Carrier emphasizes that it agreed to recognize the five General Chairmen as co-chairmen only upon an agreement between the parties. The Carrier maintains that this was not unilaterally imposed upon the Carrier, as the Organization seeks to do here. The Carrier argues that if the Organization wishes to change the collective bargaining agreement, it must do so by agreement and not through unilateral action.

The Carrier further points out that if the Organization is taking the position that this is a committee of co-chairmen, then it should have insisted that it was necessary for all of the General Chairmen to sign the 2001 update of the 1973 Agreement. The Carrier asserts that the Organization did not do so, and the Agreement and its long-standing practice remain intact. The Carrier acknowledges that it allowed the various General Chairmen to file claims under the UP agreement, without objection, for no more than three years. The Carrier maintains that the fact that it may have done so does not prohibit it from asserting its rights under the Agreement. The Carrier insists that the Agreement is quite specific and that a lapse in enforcement of no more than three years would not work to bar it from asserting a clear right under the collective bargaining agreement.

The Carrier ultimately contends that the Carrier's Question at Issue must be answered in the affirmative, and that the Organization's Question at Issue No. 1 also must be answered in the affirmative.

The Organization's Position

The Organization initially contends that the Carrier cannot show that the Organization ever agreed that the Organization could not designate a committee of

General Chairman to administer the parties 1973/2001 Agreement, or that only one General Chairman could administer the Agreement. The Organization points out that before the District Court, the Carrier repeatedly argues that the Organization's reliance on RLA Section 2 was irrelevant because the Organization had contractually waived those rights. The Organization maintains, however, that this argument assumes the point that the Carrier has to actually prove here: that the Organization agreed to a single General Chairman. The Organization insists that the Carrier cannot demonstrate such an agreement, and the Carrier cannot carry its burden of showing a contractual prohibition on administration of the Agreement by a committee of General Chairmen.

The Organization asserts that prior to 1998, there was no reason for more than one General Chairman to participate in the administration of the 1973/2001 Agreement because there was a direct overlap among the former UP's territory, the agreement applicable on the former UP, the jurisdiction of the UP System Division, and the Organization membership that worked on the former UP. The Organization emphasizes that prior to 1998, no other General Chairman had members who were affected by the 1973/2001 Agreement.

The Organization argues that this changed in 1998 after the UP invoked the STB's *New York Dock* implementing agreement provisions to create consolidated system gangs that could cross the lines of previously separate railroads and that would work under the 1973/2001 Agreement, even if the gangs included employees who were not members of the UP System Division and even if these gangs were not working on the former UP's

territory. The Organization points out that as a result of this process, employees who belonged to Federations/Divisions other than the UP System Division became subject to the agreement applicable on the former UP. The Organization emphasizes that all of the General Chairmen were signatories to the agreement concerning system gangs, and General Chairmen other than the UP System Division General Chairman routinely filed claims and grievances under the 1973/2001 Agreement for their members on system gangs.

The Organization maintains that after the Carrier began to dispute the authority of the other General Chairmen to represent their members in matters arising under the 1973/2001 Agreement, the Organization acted to insure that its members who were not in the UP System Division, but who would work under the 1973/2001 Agreement, would be able to participate in negotiations over changes in the Agreement through the participation of their elected General Chairmen. The Organization asserts that the creation of a committee of General Chairmen was based on the policy adopted by the Organization's Officers to respond to this sort of situation on any of the major railroads.

The Organization emphasizes that there never was any question about the participation of non-UP System Division General Chairmen in administration of the 1973/2001 Agreement before the STB transactions of the mid-1990s and the creation of system gangs. The Organization insists that once members of other Federations/Divisions became subject to that Agreement, their General Chairmen jointly negotiated the agreement for system gangs to operate under the 1973/2001 Agreement, and they also

participated in administration of the Agreement on their members' behalf without objection. The Organization asserts that the issue presented here did not even arise until the Carrier said that it would not deal with any General Chairman other than the UP System Division General Chairman. The Organization contends that the Carrier's whole argument is premised on an erroneous characterization of the situation under the 1973/2001 Agreement and its predecessors prior to the fall of 2001. The Organization argues that the participation of multiple General Chairmen in administering the Agreement never was the subject of bargaining, nor was there ever any intent to limit the participation of non-UP System Division General Chairmen because only UP System Division members were covered by that agreement prior to 1998.

The Organization goes on to assert that there is no provision in the 1973/2001 Agreement that states that only one General Chairman will administer and enforce the Agreement, or that provides that only the General Chairman of the UP System Division will administer the Agreement. In light of the presumption against waivers of statutory rights, the Organization contends that the absence of any express contract language regarding the provision of representation through General Chairman is dispositive of the issue here. The Organization insists that without such a specific provision, the Carrier cannot demonstrate a clear and unmistakable waiver of those rights.

The Organization points out that the Carrier has attempted to infer a waiver from several Agreement provisions that refer to "General Chairman" or "committee" only in the singular and by the fact that only the UP System Division General Chairman was

signatory to the 2001 update of that Agreement. The Organization submits that the Carrier essentially is arguing that the Organization backed into a waiver of statutory rights and those of its members, or surrendered control of its internal structure, by operation of singular references in Agreement provisions that do not actually address whether a single General Chairman or multiple General Chairmen may administer the Agreement. The Organization argues that if it actually had agreed to such a significant limitation, then this would have been done expressly.

The Organization goes on to argue that none of the contractual references cited by the Carrier, whether standing alone or together, has the effect that the Carrier has asserted. The Organization maintains that none of these contractual references may be understood to prohibit the Organization from having a committee of General Chairmen, whose members are covered by the Agreement, participate together in administering the Agreement. Moreover, the language of the cited Rules actually refute the Carrier's assertion in that these Rules expressly refer to "representatives of the Organization" and "duly authorized representatives of the Organization" as being empowered to process claims and grievances. In addition, because these Rules address specific substantive issues, these Rules do not constitute a general commitment that only one General Chairman can administer the Agreement.

The Organization also argues that there is no basis for concluding that the lone General Chairman signature on the 2001 restatement means that other General Chairmen cannot participate in the administration of the Agreement once members of their

Federations became subject to that Agreement. The Organization maintains that the signature blocks merely confirm that the Organization has accepted the Agreement. That one General Chairman had a lead role in negotiations, subject to the approval of the Organization through its Vice President, does not in any way suggest that other General Chairmen may not later participate in administering the Agreement when their members are affected. The Organization additionally asserts that there was only one General Chairman's signature on the 2001 restated Agreement because this was a non-substantive update of the existing Agreement that was mandated by the 1996 National Agreement. Accordingly, the Organization contends that there is no basis for concluding that the replication of the signature lines from the old agreement constituted an express commitment that only the UP System Division General Chairman could participate in the administration of the Agreement, once it was extended to Organization members who were in other Federations. The Organization insists that the purpose of the 2001 restatement was to incorporate such things as side letters and memoranda of understanding so that the Agreement would be a single, stand-alone document. There is no basis for arguing that this update effected a new restriction as to which General Chairmen may participate in its administration.

As for the Carrier's assertion that there was an admission that having a committee of General Chairmen was a change in the Agreement, the Organization insists that the Agreement was silent on the question of whether multiple General Chairmen could participate in the administration of the Agreement; the Agreement was silent on this point

because it was a question that did not exist at the time that the Agreement was entered. The Organization has a statutory right, independent of the Agreement, to determine how it will provide representation to its members, and it did not waive that right. Moreover, the Organization has an inherent right to determine how it will structure itself to serve its members, and this would not simply disappear through an updating exercise. The Organization insists that it did not need to add language to provide a right that it already had, nor did it need to negotiate to exclude a limitation that did not exist. The Organization maintains that the Carrier's argument essentially assumes the point that it wants to prove – that there was a pre-existing requirement that only one General Chairman participate in administration of the Agreement. The Organization asserts that there was no such requirement, and a signature line would not have created one.

The Organization acknowledges that the parties could have agreed to negotiate over the consequences, with respect to Organization representation, of subjecting members of Federations/Divisions other than the UP System Division to the Agreement. The Organization insists, however, that no such provision on administration of the Agreement was negotiated, and there never was a prohibition against multiple General Chairmen administering the Agreement prior to the update. The Organization contends that the restatement could not create a prohibition that did not exist before, so the issue of who actually signed the restatement is a red herring with respect to the issues presented here.

The Organization goes on to emphasize that the 1973/2001 Agreement alludes to

representation by multiple General Chairmen through its express incorporation of the System Gang agreement that was jointly negotiated by all of the General Chairmen whose members work on those gangs. The Organization points out that in connection with a claim under the 1973/2001 Agreement filed by the CNW Federation for a member working on a System Gang, the Carrier asserted an objection to the claim because it was not progressed by the UP System Division General Chairman. The Board, in Third Division Award 37368, rejected this argument. The Organization therefore argues that to the extent that the Agreement deals with its coverage of Organization members from multiple Divisions/Federations, it acknowledges the role of multiple General Chairmen, and the legitimacy of their participation in the Agreement's administration has been recognized in arbitration.

The Organization further argues that there is no validity to any comparison between the Agreement at issue and the agreement applicable to the so-called "Southern Division." The Organization points out that the most important difference between these two situations is that all of the formerly separate railroads and Federations on the "Southern Division" were covered by a single agreement, the former Missouri Pacific Agreement, prior to the update that refers to "General Chairmen" and that was signed by multiple General Chairmen. The Organization insists that the fact that the July 2000 update of the Southern Division agreement was amended to refer to "General Chairmen" and was signed by all of the General Chairman reflected that all of the other Southern Division agreements had been abrogated. The Organization therefore asserts that the

Southern Division agreement was more than a mere update of the prior agreement.

The Organization asserts that in contrast, separate agreements still exist on the "Northern Division," except for the system gangs and the former DRGW. The Organization contends that comparison of the 1973/2001 Agreement to the agreement applicable on the Southern Division does not support the Carrier's inference that the 1973/2001 Agreement mandates that only the UP System Division General Chairman can administer that Agreement.

The Organization then addresses the Carrier's assertion of an established past practice that only the UP System Division General Chairman may administer the Agreement. The Organization argues that the Carrier did not establish the existence of an implied agreement to limit administration of the Agreement to a single General Chairman. While arguing that only one General Chairman had administered the Agreement over the 79 years between the first agreement and the point at which the Carrier filed its lawsuit, the Carrier ignored the fact that for the first 75 of those years, the Agreement covered only members of the UP System Division. The Organization maintains that the CNW and the SP became part of the UP for maintenance of way labor relations matters only in 1997, the same year in which the Carrier served notice under the *New York Dock* merger conditions for creation of system gangs. The System Gang agreement that placed members of the CNW Federation, the Pacific Federation, and the Mountain and Plains Federation under the 1973 agreement became effective on January 1, 1998. The Organization therefore argues that there was no reason for any other General Chairman to

participate in the administration of the 1973 agreement and its predecessors for most of its existence because no other General Chairman had members who were affected by that agreement.

The Organization further argues that the Carrier's argument here is undercut by the fact that from January 1, 1998, and until 2001, the other General Chairmen processed claims for their members under the 1973/2001 Agreement. The Organization emphasizes that the Carrier responded to these claims and grievances without objecting to their handling by General Chairmen other than the UP System Division General Chairman. The Organization insists that there was no issue at all about the multiple General Chairmen administering the Agreement until the fall of 2001, when the Carrier began to respond to claims by saying that only the UP System Division General Chairman was authorized to handle claims under the 1973/2001 Agreement. The Organization therefore contends that to the extent that there was an established practice under the Agreement in the period after the mergers, this practice was that all of the General Chairmen participated in negotiations, albeit informally; and that all of the General Chairmen processed claims under the Agreement and without objection from the Carrier.

The Organization additionally asserts that to the extent that the practice on the Southern Division is relevant, this practice refutes the Carrier's position. The Organization maintains that prior to the 2000 update of the former MP agreement, the Organization designated all of the General Chairmen who had members covered by the 1975 MP Agreement. Over the Carrier's request that the Organization appoint a single

representative, the Organization insisted on its designations and the Carrier ultimately dealt with the multiple General Chairmen. The Organization points out that prior to the July 2000 update of the former MP agreement, the Carrier handled hundreds of claims under the 1975 MP agreement that were filed by the General Chairmen of System Divisions and Federations other than the Missouri Pacific Federation. The Organization emphasizes that these claims were handled by multiple General Chairmen at a time when the 1975 MP Agreement still used the term "General Chairman" and still was signed by one General Chairman. The Organization argues that the practice on the Southern Division therefore indicates that the Organization's designation of multiple General Chairmen would be recognized and respected.

The Organization maintains that the Carrier has not carried its burden to overcome the presumption against waiver of statutory rights. Moreover, the evidentiary record provides no support for the Carrier's claim of an implied agreement. The Organization insists that it cannot be said that the Organization implicitly agreed that a single General Chairman would administer the Agreement. The Organization asserts that it is evident that there was no such implied agreement between the parties.

Rebutting the Carrier's arguments, the Organization contends that there simply cannot be an implied agreement from a past practice governing a situation that did not exist for most of the duration of the alleged past practice. There was not a long-standing situation of members of multiple Federations/Divisions being subject to the 1973/2001 Agreement, so there could not have been an implied agreement from past practice that

only one of the several Divisions/Federations could administer the Agreement.

The Organization insists that more than duration is required to find an implied agreement from past practice. Even if the Carrier successfully demonstrates a pertinent, long-standing course of dealing, this would not meet the standard for establishing such an implied agreement because the circumstances that gave rise to this dispute did not exist for 95% of the period cited by the Carrier. The Organization further asserts that the UP's evidence certainly does not establish mutual intent, knowledge of and acquiescence in prior acts, assurances of continuation, or a practice that is unequivocal, clearly enunciated, acted upon, and readily ascertainable. The Carrier has failed to prove an agreement implied from past practice that the Organization cannot designate a committee of General Chairmen to administer the 1973/2001 Agreement, or that only one General Chairman can administer this Agreement.

As for the Carrier's reliance on the contractual references to "General Chairman," the Organization argues that none of these references either expressly or implicitly exclude any of the other General Chairmen. Moreover, none of the Agreement Rules state that the Organization may not designate a committee of General Chairmen or that only the UP System Division General Chairman may participate in administration of the Agreement.

The Organization ultimately contends that the Carrier's claim should be denied in its entirety.

Decision

This System Board has reviewed all of the documentary evidence, as well as the parties' written pre-hearing submissions and verbal arguments in support of their respective positions. In this dispute over the proper interpretation and application of the parties' collective bargaining agreement, the Carrier bears the burden of proof because it is alleging that the Organization has committed a violation of that Agreement.

Although the factual history is somewhat complex, there is little disagreement between the parties as to the material facts giving rise to the instant dispute. The Carrier, in its current form, is a product of a series of mergers and acquisitions of several formerly separate carriers. Prior to these mergers, each of these formerly separate railroads had its own collective bargaining agreements, which were applicable on these carriers' different territories. In connection with the UP's acquisition of control of these several other carriers, the UP and the BMWED agreed to place the territories of some of the former carriers under a single collective bargaining agreement, while the territories of other former carriers continued to operate under agreements that had been in effect on these former carriers. The current UP operates over a significantly larger geographic area than did the historic UP that existed prior to these many acquisitions.

Another critical factor here is that after the various mergers and acquisitions that resulted in the current Carrier, the Carrier ultimately obtained authorization, pursuant to a *New York Dock* arbitration award, to create consolidated system gangs that operate across the territories of the former carriers that now make up the UP. These consolidated system

gangs were put under a single collective bargaining agreement, then known as the 1973 Agreement, which applied to the former UP.

After all of these steps were taken, the parties met to update the 1973 Agreement that had been applicable on the territory of the former UP. This updated Agreement took effect on July 1, 2001, and it commonly is referred to as the 1973/2001 Agreement. The 1973/2001 Agreement is a restatement of the old agreement, and it also incorporates national and side agreements, thereby creating a single governing Agreement.

While the Carrier was consolidating and growing through the process of merger and acquisition, the Organization essentially continued to operate through its existing, historic structure. The Organization consists of a number of Divisions and Federations, which originally were organized to be more or less consistent with the territories of the formerly independent carriers. The general structure of the Organization's Divisions and Federations has not been modified in response to the consolidation of the formerly independent railroads that resulted in the UP in its current, and much larger, form. Each Division or Federation has a General Chairman, who is elected by the members of that Division or Federation, and these General Chairmen have been responsible for negotiating with the carrier and for handling member claims and grievances.

In the wake of the negotiation and implementation of the 1973/2001 Agreement, the Carrier began to object to grievances being filed by the General Chairmen for the Pacific Federation and the CNW Federation on behalf of their members who were working on consolidated system gangs that operated under the 1973/2001 Agreement.

The Carrier asserted that only the UP System Division General Chairman was authorized to file and process grievances under the 1973/2001 Agreement. The Organization responded by arguing that all of the General Chairmen from the different Federations and Divisions were Organization representatives for purposes of bargaining and administering the 1973/2001 Agreement. The Organization then formally notified the Carrier that it was appointing five General Chairmen as a committee to administer the 1973/2001 Agreement, that any one of these five could progress employee claims and grievances on behalf of their respective members, and that the unanimous consent of all five would be required before any agreements could be signed.

In an effort to resolve this dispute, the Carrier filed a lawsuit in the United States District Court for the District of Nebraska. After that court determined that this matter involved a "minor" dispute over the interpretation and application of a collective bargaining agreement, and that any such dispute must be resolved through arbitration, the parties submitted their dispute to this Board for resolution.

The Carrier has emphasized that the 1973/2001 Agreement contains references to a "General Chairman," but never refers to "General Chairmen," and that this Agreement was signed by only one General Chairman, the UP System Division General Chairman. In arguing that these references, as well as an established past practice of the 1973 Agreement and its predecessors being administered by a single General Chairman, require a finding that only one General Chairman may negotiate and administer the 1973/2001 Agreement, this Board finds that the Carrier is emphasizing the importance of form over

substance.

The 1973/2001 Agreement's references to "General Chairman" actually are nothing more than a historic remnant of the Agreement's prior application solely to the former UP territory, as the UP existed before the mergers and acquisitions that created the much larger, current UP. The 1973/2001 Agreement also contains references to Organization representatives in the plural form in connection with several different administrative and/or representational duties, suggesting that there was no universal understanding and agreement between the parties that one, and only one, Organization official was authorized to administer this Agreement and act on behalf of the Organization's membership.

The evidence related to established practice between the parties also fails to solidly support the Carrier's position here. In fact, the evidence of established practice offers some measure of support to each side. Although it is true that only the UP System Division General Chairman administered the 1973 Agreement and its predecessors in the decades prior to the effective date of the parties' Consolidated System Agreement, the reason for this is that prior to the implementation of the CSA, the 1973 Agreement and its predecessors applied only on the former UP territory and covered only UP System Division members. If the "practice" of only one General Chairman being authorized to administer the 1973 Agreement and its predecessors on the former UP territory is recognized as meaningful to the instant dispute, then equally meaningful is the "practice" of there being a different General Chairman responsible for administering whatever

agreements applied to each Division and Federation associated with the several formerly independent railroads that now are part of the current UP. So long as those different Divisions and Federations continue to exist, as they do, then the Carrier's argument on past practice can conceivably be used to support continuation of the "practice" of having each one headed by its own General Chairman, responsible for administering whatever agreement covers the members of the respective Divisions and Federations.

The Carrier has not cited any contractual provision that gives it any say in how the Organization structures itself. The Carrier has exercised its own managerial prerogative to expand its size and the scope of its operations through mergers and acquisitions, and this Board finds that the Organization must be similarly free to determine how to represent those of its members who are employed by this larger Carrier. The Carrier has the right to decide to consolidate, or not, the management structure relative to the formerly independent railroad operations that now form the UP, and this decision rightly is based upon the Carrier's own operating and administrative needs. Similarly, this Board finds that the Organization has the right to decide to consolidate, or not, its own administrative structure for representing its members, and this decision must be based upon the Organization's own operating needs, not the convenience of the Carrier.

It may be true that it would be more convenient and expedient for the Carrier to deal with a single General Chairman in connection with the representation of all of its employees who are members of the Organization. This does not necessarily mean that the imposition of a structure calling for a single General Chairman would be convenient,

expedient, or, most important, beneficial to the Carrier's Organization-represented employees. The needs and wishes of the Organization's members are of paramount importance as the Organization determines its own operational structure, and the Organization must be allowed the discretion to determine how to arrange itself in order to best meet those needs and wishes and to represent the interests of its members.

The Carrier has raised a legitimate concern about the potential for duplicative grievances and inconsistent contract interpretations that might result from having to deal with multiple General Chairmen. The Carrier also has pointed to possible negative consequences from the consultation and consensus that would be necessary between multiple General Chairmen before any agreement between the parties could be finalized. None of these possible problems are unique to situations involving multiple General Chairmen, and they would not necessarily be eliminated if a structure calling for a single General Chairman were to be imposed upon the Organization. A single General Chairman still presumably would regularly consult with other Organization representatives, and duplicative grievances might still be filed under a variety of different circumstances. As for the possibility of inconsistent contract interpretations being advanced by multiple General Chairmen, this too could occur even if the Organization designated a single General Chairman, particularly where a person filling that post resigns or retires and is replaced by someone else. Moreover, it is not unheard of for a single person, whether representing the Carrier or the Organization, to adopt inconsistent positions over the course of time.

While it may be easier and more efficient for the Carrier to be able to deal with a single Organization representative, rather than several General Chairmen, this Board holds that the Organization's administrative and representational structure cannot be imposed from the outside. The Organization and the members that it represents have the right to design that representational structure in any manner they see fit. There is no evidence in the extensive record in this matter that the Organization explicitly waived this right, and this Board finds that any such waiver would have to be explicit. The fact that the UP System Division General Chairman was the only General Chairman who signed the 1973/2001 Agreement certainly does not constitute such a waiver, in that the format for the signature page of this Agreement was simply copied from the earlier 1973 Agreement.

Both parties have pointed to the situation that exists on the former Missouri Pacific territory, in which the parties reached an express agreement under which the Carrier recognized five General Chairmen in connection with an updated collective bargaining agreement that consolidated five different collective bargaining agreements that had applied to this former territory. All five General Chairmen, in addition, signed the updated agreement, in which all references to "General Chairman" were changed to "General Chairmen." The Carrier's recognition of multiple General Chairmen on this former Missouri Pacific territory, however, does not have much impact upon the situation at issue here. Whatever factual circumstances, bargaining history, arguments, and allegedly "weak moments," led to the Carrier's agreement to recognize five General

Chairmen in connection with the negotiation and administration of a consolidated collective bargaining agreement on that territory, this Board finds that this recognition does not properly serve as any sort of precedent in the instant proceeding. The express agreement to recognize multiple General Chairmen on the former Missouri Pacific territory is a response to the unique history, agreements, and circumstances associated with that territory, so we find that it does not directly apply to support either party's position in the situation at issue here.

This Board finds no basis for allowing the Carrier, or any other outside entity, to determine the internal administrative and representational structure of the Organization. The manner in which the Organization chooses to structure itself is not governed by the parties' Agreement, despite that document's various references to "General Chairman," "representatives," "committee," and "officers" of the Organization. Organization representatives are referenced in both the singular and the plural throughout the 1973/2001 Agreement, so the Agreement offers no consistent approach that might suggest that the Organization had agreed to confine itself to a particular arrangement of its administrative and representational hierarchy. This Board therefore holds that both the Carrier's and the Organization's Questions at Issue must be answered in the negative because there has been no showing of any contractual violation in connection with the Organization's designation of multiple General Chairmen to administer the 1973/2001 Agreement.

Award

The Organization does not violate the parties' July 1, 2001, collective bargaining agreement when it seeks to designate multiple General Chairmen to administer that contract.

There is no express or implied agreement under which the Organization waived the statutory rights of the Organization and its members covered by the BMWED-UP 1973/2001 Agreement to make their own designations of representatives for bargaining with the Carrier and administration of the parties' agreements. The Organization did not in any way agree that only a single General Chairman could administer the BMWED-UP 1973/2001 Agreement.

PETER R. MEYERS
Neutral Member

FOR THE ORGANIZATION:

Steven V. Powers
STEVEN V. POWERS

DATED: 10-17-2006

FOR THE CARRIER:

Wayne E. Naro
WAYNE E. NARO

DATED: 10-17-2006