
IN THE ARBITRATION BETWEEN

**THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION**

and

UNITED TRANSPORTATION UNION

OPINION ON IMPLEMENTATION

In the initial Opinion and Award in this case, the arbitrator ruled that a merger between Sheet Metal Workers Association (SMWIA) and United Transportation Union (UTU) had been successfully consummated, thereby forming a new union, International Association of Sheet, Metal, Air, Rail and Transportation Workers (SMART). Paragraph 5 of the Award provided:

The arbitrator retains jurisdiction for the limited purpose of entertaining motions that more specific requirements should be ordered because the general command of Par. 4 of the Award [directing the presidents of the two merging unions to meet to discuss and resolve all issues regarding implementation of the merger] is not adequate to achieve full and effective implementation of the merger.

The Transportation Division of SMART [TD] has now invoked Paragraph 5, asking that the arbitrator rule on a number of issues respecting the authority of the President of the Transportation Division [PTD] vis-à-vis the authorities of SMART's General President, General Secretary-Treasurer and General Executive Council [GEC].¹ A hearing on these issues was conducted via telephonic video-conference on September 16, 2013. At the conclusion of the hearing, it was agreed that the arbitrator would address and resolve certain specified issues, while leaving the remainder for future resolution. The hope is that the decision on the specified

¹ While the parties have chosen to use the same caption as in the original case, the parties listed in the caption no longer exist. The present dispute is between the Transportation Division of SMART on one side, and the General Officers of SMART on the other.

issues might be sufficient to enable the parties to agree on how the remainder should be resolved without the need for further arbitral involvement. The issues addressed in this opinion are as follows:

1. In general terms, what is the authority of the PTD vis-à-vis SMART's General Officers and General Executive Council?
2. Whether, upon the attrition of the office of the TD General Secretary and Treasurer, the duties of that office devolve to the PTD?
3. Who selects Designated Legal Counsel to serve the members within the TD?
4. How are vacancies in officer positions within the TD to be filled?

Issue No. 1: In general terms, what is the authority of the PTD vis-à-vis SMART's General Officers and General Executive Council?

At the root of most of the unresolved issues is a fundamental disagreement between the parties as to what autonomy, if any, remains in the TD and its President following the merger. The General Officers, in their briefs, contend that the PTD is in all respects subordinate to the authority of the General Officers: "he is subordinate to and must take direction from the union's CEO, its General President." Reply Brief, p.5. They contend that nothing in the Merger Agreement contemplates that the TD will be a "semi-autonomous entity," Brief, p. 2, and that the General Officers have the same authority over the TD as they do "with respect to the rest of the organization." Id. p.3; see also id. at 14 (TD to be treated the same as "other SMART departments.").

The TD's briefs, in contrast, argue that the TD retains considerable autonomy over its own affairs. While acknowledging that the merger necessarily transfers control of some matters to the General Officers and GEC, the briefs contend that as to matters affecting only the TD membership the PTD has full autonomy. Brief, p.3. "[T]he TD should certainly be treated no worse (i.e., more restrictively), than other subordinate units within SMART" such as local unions and district councils. Reply Brief, at 9.

The arbitrator believes that the correct answer lies somewhere between the positions laid out in the parties' briefs. TD's status is *sui generis*. The TD (and consequently the PTD) do enjoy considerable autonomy, but not the degree of

autonomy that is enjoyed by subordinate bodies such as local unions and district councils that are separate legal entities. The hard task is defining the dimensions of this semi-autonomy the TD enjoys.

(a) *The General Officers' "No Autonomy" Thesis is Incorrect*

In the initial opinion, the arbitrator found that “the central premise of the merger” was “that UTU would preserve its autonomy with respect to affairs affecting only its membership.” (Op. 13). UTU chose SMWIA as its merger partner because “SMWIA was willing to grant UTU substantial autonomy in the merged organization;” “UTU would become the Transportation Division of SMART, with its own set of elected officers and the power to decide most matters affecting the former UTU membership.” (Op. 3).

These findings had a strong basis in the record. The Merger Agreement provided for the creation of the TD, which would be “led” by the “President” of the TD. It is quite unusual to find an entity with two “presidents”, but SMART would have two officers with that title. The choice of that title for the head of the TD connoted the executive power that official would exercise – presidents are bosses, decision makers, not persons who take orders from others. Presidents *lead*, as the Merger Agreement declared the PTD would do. The Merger Agreement did *not* say that the PTD would “lead, subject to the authorization or approval of the SMART General President.”

That the Merger Agreement meant what it said was confirmed in the testimony of Michael Sullivan, then the President of SMWIA, at the original hearing in this case. He testified that shortly before the merger’s effective date he told Michael Futhey, the President of UTU, that Futhey “is to run the Transportation Division on a day-to-day basis, *as he would as President of the UTU.*” (Tr, 1529 (emphasis added))²

² Sullivan did say that Futhey would run the TD “with some discussion with me” (ibid). Thus the SMART General President would have input, but the PTD would run the TD “as he would as President of UTU.”

This was also the understanding upon which the UTU members voted to approve the merger. The President of the UTU, prior to the vote, published a series of questions and answers about the effects the merger would have. Q&A 14 was as follows:

Q. How will the merger of the UTU and the SMWIA, and the creation of SMART, assure the continuing control over the train service crafts?

A. The SMART Constitution establishes a Transportation Division that will be under the direction of the SMART Transportation Division President elected from the UTU ranks, *thus assuring autonomy and control of issues affecting operating employees.*

The General Officers, in support of their no-autonomy thesis, note that the parties in post-merger discussions have described the PTD as the chief operating officer (COO) of the TD. They then cite several sources demonstrating that in the business world the general understanding of the relationship of a COO to the chief executive officer (CEO) is that the latter can in every instance direct the duties of the COO and overrule decisions with which he (the CEO) disapproves. Thus, they contend, the PTD is in every respect subordinate to the General President, who is SMART's CEO. This suggests the danger in analogies. The Merger Agreement does not use the term COO to describe the role of the PTD; it uses the terms "president" and a TD that "will be led by" him.³

The General Officers also tender a textual argument in support of their position. The SMWIA Constitution conferred on its General President the authority to supervise all others, and the Merger Agreement provides that wherever the UTU and SMWIA Constitution conflict, the latter controls. But there is no conflict in this instance. The SMART President will continue to have authority over all those positions that were in SMWIA before the merger (and, indeed, many others, as will appear *infra*). The semi-autonomy enjoyed by the TD and its President is a product of the Merger Agreement, and creates a *sui generis* relationship that is distinct from, and not in conflict with, the powers previously enjoyed by the President of SMWIA.

³ True, the PTD signed a memorandum of understanding that declares the PTD will be the COO of the TD. But it is clear that in doing so the PTD was not embracing the *interpretation* of that term now provided in the General Officers' briefs.

(b) The TD's "Subordinate Body" Thesis is Incorrect

While, as explained above, TD is correct in arguing that it enjoys some degree of autonomy, its claim that it should be accorded all the autonomy enjoyed by subordinate bodies within SMART, such as local unions and district councils, is not correct. TD is not a free-standing legal entity, as are subordinate bodies. It is a piece of a single entity, SMART. The autonomy it enjoys is limited "to matters affecting only the former UTU membership" (Op. 3) There are three ways in which the TD's autonomy is constrained.

First, unlike subordinate bodies, whose status as separate entities means that their sins ordinarily will not result in legal consequences for SMART, the TD is not a separate legal entity. Any legal problems created by the TD will be SMART's legal problems. Actions that threaten adverse legal consequences for SMART do not affect only the TD.

Second, again unlike subordinate bodies, the TD does not have its own treasury. The Merger Agreement contemplated that there will be a single SMART treasury. Inevitably, as the TD concedes, it is not a free actor with respect to finances, and to the extent financial matters implicate more than the interests of the TD it does not enjoy autonomy. The assurance that all receipts reach the general treasury, and the determination of what the TD's budget will be, are examples.

Third, even actions that seemingly involve only the "TD" members of SMART might indirectly affect the rest of the SMART membership, if they have a rippling effect that significantly impinges on the interests of other members of SMART.

(c) Identifying the Area of Autonomy Enjoyed by TD

The difficult task is devising a formula that marks the area of autonomy enjoyed by the TD and the PTD (and, conversely, marks the area in which the PTD is subject to direction by and/or being overruled by the SMART General Officers and/or GEC.) The three considerations mentioned in the previous section are the building blocks for constructing that formula.

The first question in every case is whether the action or decision of the PTD on its face involves only the interests of the TD and the members it serves. If the answer is yes, then the action or decision is presumptively within the area of PTD autonomy, to be overridden only if one of the three considerations cited above is

present.⁴ If, on the other hand, the answer to the first question is no, then the action or decision is not within the area of PTD autonomy.

In order for the General Officers to be able to determine whether there are spillover effects that justify intervention in areas otherwise within the TD's autonomy, there must be transparency, and the General Officers are entitled to procedures that will assure such transparency.

At the hearing, the General Officers' counsel suggested that if the PTD is to have some degree to autonomy, it should be only with respect to "external" affairs, *i.e.*, those involving collective bargaining and the representation of the members of SMART served by the TD. As to "internal" affairs, including all questions of finance, staffing, and the like, the PTD would have no autonomy..

This would unduly truncate the autonomy that the Merger Agreement promised the PTD. Money and staff are critical to effectuating every action. If, as the General Secretary-Treasurer proposed in his November 29, 2012 memorandum to TD officers, the PTD "has no authority over the expenditure of SMART funds from any account..." (p.4) and cannot "enter into any contracts for property, goods or services that entail the expenditure of International Union funds" (p.5), the promised autonomy would be a chimera. Virtually every action requires the expenditure of funds, and this would mean that the General Officers could prevent the implementation of every decision made by the PTD within the scope of his autonomy simply by refusing to authorize or expend the necessary funds. To be sure, a budget must be established that determines how much of SMART's assets will be available for operation of the TD, and perforce that determination is not within the PTD's autonomy (as it necessarily affects the rest of SMART). But once the budget is determined, decisions as to how that budget should be expended rests with the PTD, except where the decisions would have spillover effects on the rest of SMART. True, the SMART Constitution vests the issuance of checks in the General

⁴ A recent example in which intervention was warranted by legal concerns is the disapproval of a decision by the TD Board of Directors to advance legal fees to a TD officer with regard to an ongoing DOL investigation. The General Officers believed that such payment might be a violation of Title V of the LMRDA, and reasoned that reimbursement of fees would be appropriate only after it is clear that there was no potential impropriety by the officer. Assuming there was a reasonable basis for the concern about Title V difficulties, this was not an impingement on the TD's autonomy,

Officers, but checks should issue at the direction of the PTD unless one of the grounds for intervention is present.

This leaves unanswered when grounds for intervention *would* exist, *i.e.*, when a within-budget expenditure would have spillover effects that justify the General Officers in refusing to pay what the PTD wishes. An example that poses this question is the desire of the PTD to give a salary increase to TD staff members. This might conceivably (but not necessarily) have spillover effects if it creates disharmony between the TD staff and the rest of the SMART staff, or otherwise compromises the interests of SMART generally. That is a question of fact, which the arbitrator is no position to determine on the present record, and that in any event would be better determined by the parties, who have the requisite knowledge. There is also the claim of the General Officers that an unbridled power to raise salaries in the PTD would give the PTD greater authority than the General President possesses, for the latter must secure the approval of the GEC for proposed salary increases. It seems right that the PTD would need approval of the GEC whenever the General President needs approval, but the GEC cannot withhold approval from a PTD request except upon grounds that it would apply equally to a request from the General President.

Another aspect of the dispute is who appoints the office staff within the TD. The General Officers take the position that all office positions are subject to appointment by the General Officers. The arbitrator concludes that this is overbroad. Surely some of the office staff members serve functions that are uniquely "TD," and respect for the TD's autonomy should mean that the selection of those staff members resides in the PTD. The PTD should be entitled to advisors and implementers who are sympathetic to his views on TD-only issues. And, with respect to finances, the PTD is entitled at the least to have a person of his choosing to help prepare the budget requests, etc., that determine the resources that will be available to the TD over the coming year.

On the other hand, much if not all of the day-to-day accounting and bookkeeping functions presently performed in TD's Cleveland office appear to be outside the zone of PTD autonomy, as they relate to the flow of money into and out of the general treasury. There may be some bookkeeping and accounting functions that are uniquely "TD," and if so the choice of those individuals might rest with the PTD, but the present record does not permit the arbitrator to make that determination, and it is best left in the first instance to decision by the parties. Certainly the General

Officers have a point that the integration of finances called for by the Merger Agreement justifies substantial involvement of the General Officers and their appointees in achieving that integration. The General Officers in their briefs argue that so long as the TD remains physically apart from the SMART headquarters, they are entitled to have “eyes and ears” in Cleveland to determine what is happening there. That is surely correct, and is dictated by the principle of transparency noted above. And the arbitrator appreciates that there might be economies of scale warranting a single set of personnel handling most financial matters of SMART, and if so that would constitute a spillover effect satisfying the third consideration for General Officer intervention. Moreover, once the TD is physically integrated into the SMART headquarters, as the Merger Agreement contemplated it would, the case for a consolidated financial staff would be even clearer. Hopefully, the parties can work this out without the need for further arbitral intervention.

At the hearing, the parties did not appear to be far apart on the appointment of field staff. The General Officers’ counsel stated that it was accepted that the PTD would select such personnel, but subject to the approval of the GEC. Assuming comparable selections by the General President are subject to GEC approval, it is appropriate that selections by the PTD similarly be subject to GEC approval, provided that the GEC must apply the same criteria to the PTD’s selections as it does to those of the General President. Of course, if the GEC rejects a selection, the choice of a replacement selection would remain with the PTD.

There are likely dozens if not hundreds of potential issues where drawing the line as to what is and is not within the TD’s autonomy will be difficult, and it may well be that these issues have to be addressed one by one (and hopefully by the parties rather than by the arbitrator). Perhaps the parties, in addressing other discrete issues, will make progress in developing a “common law” that calibrates the application of the formula set out above.

Issue No. 2: Does the PTD assume the duties of the UTU Secretary and Treasurer upon the attrition of that office?

Article V of the Master Agreement provides for the post-merger attrition of the position of General Secretary and Treasurer of UTU. The issue between the parties is who acquires the duties that were assigned to that office by Article 19 of the UTU Constitution. The TD contends that upon attrition these duties devolve

upon the PTD. The General Officers contend that upon attrition these duties devolve upon the General Secretary-Treasurer of SMART.

The TD contention is not sustainable. While the Merger Agreement does not recite why the UTU's Secretary and Treasurer office was to attrite, it seems evident that the reason was the redundancy of some of those duties once the funds of the two unions were merged as required by Article X of the Merger Agreement. That redundancy would persist if the PTD now enjoyed all the responsibilities previously conferred upon the General Secretary and Treasurer of UTU.

On the other hand, it does not follow that all of those duties devolved upon the General Secretary-Treasurer of SMART. The position of International President of UTU now continues in the form of PTD, and the powers of that position, as spelled out in Article 16 of the UTU Constitution, overlap somewhat with those in Article 19. (Article 16 provides that the International President shall "exercise general supervision over [UTU's] affairs and interests" and "may employ sufficient personnel and such other assistance as necessary to properly conduct the business and affairs of the [UTU].")

The proper interpretation is that upon attrition of the office of General Secretary and Treasurer of UTU the language in Article 19 simply disappears. The question of where those duties now reside rests upon the calibration of the duties of the PTD as spelled out in Article 21B of the SMART Constitution with the powers of the General Officers and GEC as spelled out in Articles 3, 5 and 6 of the SMART Constitution. That, of course, is to be determined in the manner discussed under Issue No. 1 above.

Issue No. 3: Who Appoints the Designated Legal Counsel Who Will Serve the TD Members?

The parties are in dispute as to who appoints and/or removes Designated Legal Counsel to serve the members in TD-represented bargaining units. TD contends that the PTD has the authority to recommend the appointment and/or removal of Designated Legal Counsel to the Board of Ethics and Qualifications. That, indeed, is what the parties agreed to in a Memorandum of Understanding dated March 3, 2013, signed by the General President and the PTD. There was a suggestion two days before the signing of this MOU that the parties "explore combining the SMART

and Transportation Division DLC programs,” but no agreement to combine appears to have been reached between the parties.

On June 4, 2013, the General President sent a letter to both the PTD and the Director of the Division of Railroad & Shipyard Workers, SMART Sheet Metal Division, announcing that “I am appointing Weldon Granger ... as one of SMART-TD & SMART-SM division’s designated legal counsel. When the PTD demanded that the appointment be rescinded, at least as it applied to the TD, the General President refused, declaring that “there is a need to have one policy with regard to all designated legal counsel for SMART” and “[i]n my opinion the issue of designated legal counsel is an unsettled area” and is one to be decided ultimately by the GEC.

It may well be that combining the programs is a good idea. But until TD agrees to such a consolidation, both the Merger Agreement and the MOU confer the right of designation for the TD program upon the PTD.

When the merger was under consideration, and in anticipation of the vote of the UTU members on whether to approve the merger, the President of UTU included the following Q&A in the voting materials (Q&A 45):

Q. What will be the future of the present designated legal counsel and its representation? Who will choose future DLCs?

A. The designated legal counsel will not change and they will still be appointed by the president of the Transportation Department of SMART.

This was one of several Q&A’s submitted in advance to the President of SMWIA, and while he requested changes in some of the other answers, he did not request any change in this one. Thus, it was understood by both parties entering the merger that the PTD would have this authority.

This understanding was carried forward in the MOU of March 3, 2013, signed by both presidents, and it has not been rescinded by agreement of the signatories.

The General President is of course entitled to appoint DLC's for the SM Division, but until he secures the agreement of the TD to a combined program, he is not entitled to appoint DLC's for the TD.⁵

Issue No. 4: How Are Vacancies in TD Officer Positions to be Filled?

The parties have found themselves in disagreement in two respects about how vacancies in TD officer positions are to be filled:

(1). *Filling vacancies in the office of PTD.* The Merger Agreement, in Article V, states that vacancies will be filled "in accordance with the UTU Constitution." The UTU Constitution, now Article 21B, specifies in Section 2 that if the office of President [PTD] becomes vacant, it will be filled by the "Assistant President." But the Assistant President position will attrite in 2014, if not sooner, so there is a lacuna as to how vacancies in the PTD position will be filled thereafter. In their discussions, the parties have taken divergent positions as to how that lacuna should be filled.

TD advocates that at each TD Convention, when the delegates are voting for TD officers, one of the Vice President positions would be entitled "First Vice President," and the person elected to that office would succeed to the office of PTD in the event of a vacancy. The First Vice President would have no additional duties, and the only function of the designation "First" would be to identify the person who would succeed to the PTD in the event of a vacancy. PTD notes that this approach would place in the delegates' hands the choice as to who would succeed to the PTD position in the event of a vacancy.

⁵ The foregoing assumes that the PTD will not be nominating DLC's who pose a risk of legal jeopardy for SMART. UTU had an unfortunate history, predating its final two presidents, of appointments that resulted in kickbacks to the appointers – a violation of law. The need that nominees be approved by a Board of Ethics and Qualifications is a safeguard against any future occurrence of such behavior. And the inclusion of SMART counsel as one of the members of the Board – the apparent contemplation of both parties – may be all the input the General Officers need to protect the authority which they do enjoy to prevent TD actions that pose legal jeopardy for SMART.

The General Officers object that the designation “First Vice President” would be creating an office within TD that is not specified in the Merger Agreement, and thus would violate that agreement. A working draft submitted as an exhibit suggests that the General Officers’ position is that vacancies in the PTD would be filled by a 2/3 vote of the “Board of Directors” of TD [consisting of a number of elected officers of TD], “*subject to approval by the GEC*.”

The General Officers’ position that the selection should be “subject to approval by the GEC” is not consistent with the promises of autonomy that undergirded the merger. Neither the General Officers nor the GEC were to have any voice in filling officer positions within the TD.⁶ Plainly, they have no voice in selecting those officers initially; Article VI of the Merger Agreement provides that TD officers will be elected by the delegates to the TD Convention. The same principle of TD-only participation applies when a vacancy arises requiring the selection of a replacement officer. To the extent the Merger Agreement speaks to this issue, it is consistent with this understanding. Article V of the Merger Agreement provides that vacancies in TD officer positions will be filled “from among the other officers elected at the final UTU Convention [now to occur in 2014] *in accordance with the UTU Constitution* [now Article 21B of the SMART Constitution.]” This provision clearly indicates that the process of filling vacancies is to remain wholly within the TD, and it also highlights that this aspect of the UTU Constitution is not to be declared in conflict with the SMWIA Constitution.

But the General Officers are correct that the Merger Agreement does not contemplate the creation of an office called “First Vice President,” even if it has no duties beyond those of other Vice Presidents.

The manner of selecting the successor to PTD should be left to decision by the appropriate organs within the TD. If it is desired that the delegates make that designation at the time they are electing officers, there would seem to be two ways to accomplish that without creating a new office: (1) providing that the person who receives the highest number of delegate votes from among the entire slate of elected offices other than PTD (or some sub-set of all the offices, such as all Vice Presidents)

⁶ This is subject to the lone caveat that if a person is selected to hold office who is prohibited by law from serving, e.g. by Sec. 504 of the LMRDA, the General Officers and/or GEC would have authority to intervene to prevent that person from serving.

will be next in line to fill a vacancy in the office of PTD; or (2) informing the delegates in advance of the vote that the person elected to one specifically designated office will be next in line. Both approaches would seem to accomplish what TD proposed, but without creating a newly-title office.

(2) *Filling vacancies in other TD offices.* The same principle of TD-only participation in the selection of TD officers applies to filling vacancies in other TD offices. The GEC can have no voice in such selections. Prior to the merger, the method of filling vacancies was spelled out in Article 2 of the UTU Constitution. That provision carries forward, following the merger, as Article 21B, Section 2 of the SMART Constitution, and controls the filling of vacancies in all offices other than PTD.⁷

Dated: November 4, 2013

/s/ Michael Gottesman

Michael Gottesman, Arbitrator

⁷ Article 2 of the UTU Constitution specified a role for the UTU Board of Directors in filling some vacancies. The General Officers contend that the Merger Agreement does not contemplate the permanent existence of a TD Board of Directors, If the Board of Directors ceases otherwise to exist, the vacancy-filling function would devolve to the TD officers who would have constituted the Board of Directors had it survived.