In the Matter of the Arbitration between

AMALGAMATED TRANSIT UNION LOCAL 1342

and

NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC.

OPINION

AND

AWARD

Grievance: 16 Hour Limit

Before: **THOMAS N. RINALDO, ESQ.**
P O Box 1334
Williamsville, New York 14231-1334

The undersigned was duly designated Arbitrator in accordance with the provisions of the Parties' Collective Bargaining Agreement. Hearing were held in Buffalo, New York on July 27 and September 12, 2011. Appearing on behalf of the Amalgamated Transit Union, Local 1342 ("Union") was the law firm of Reden & O'Donnell, LLP by Joseph E. O'Donnell, Esq., and on behalf of Niagara Frontier Transit Metro System, Inc. ("Company") was David J. State, Esq., General Counsel, by Wayne R. Gradl, Esq. of Counsel. The Parties were in all respects accorded a full and fair hearing, including the right to present oral and written evidence and to examine and cross-examine witnesses. Post-hearing briefs have been filed by both Parties.

ISSUE

The Parties did not stipulate to an issue to present for decision.

The Union proposed the following issues:

1. Are maintenance clerks governed under the provisions of Section 13-5.6 of the parties' cba?

2. If not, did the Company violate the parties' cba when it unilaterally imposed a 16-hour work limitation for maintenance clerks on or about 11/29/2010?

3. If so, what shall the remedy be?

The Company presents the following issues:

1. Did the Company act in violation of the Parties' Agreement[s] by prohibiting regular maintenance clerks in the garages from working more than 16 consecutive hours?

2. If so, what shall be the remedy?

In reviewing the Parties' proposed issues within the context of the grievance that was filed, the Company's responses thereto, and the Parties' presentation of their respective positions at the hearing and in the post-hearing briefs submitted by the able counsel for both Parties, the Arbitrator finds that the Union's issue is too narrow. That is, the question presented for decision, as the Arbitrator's analysis set forth below discloses, requires a consideration of more than just Section 13-5.6 of the Parties' Agreement. Accordingly, the Arbitrator will adopt the Company's proposed issue.

PERTINENT CONTRACT PROVISIONS

SECTION 2 - COVERAGE

...

2-1.1 **Operating and Maintenance Unit**. All regular and extra bus operators, all regular and extra train operators, all regular and extra Metrolink/Paratransit operators, all regular fare inspectors, all maintenance employees, bus station clerks, rail station clerks, traffic-checker clerks, porters, helpers and all part-time outside sales employees.

...

2-1.2 **Office and Clerical Unit**. All office and clerical employees including clerks, stenographers, cashiers, messengers, telephone operators, bookkeepers, typists, file clerks, all office machine operators, engineering assistants, schedule designers, timekeepers, time clerks, storekeepers, and all part time clerks.

...

2-2 **Definitions**. The words "employee" and "employees" in this Agreement, unless the context shall otherwise indicate, are defined to refer exclusively to employees, both male and female, who are employed by the Company full-time within the above described Units.

SECTION 13 - PROVISIONS RELATING EXCLUSIVELY TO MAINTENANCE EMPLOYEES

13-1 **Employees Covered by Section**. The provisions of this Section shall apply only to full-time employees in the Operating and Maintenance Unit and Porters who are employed in the Shops and Garages or in the Rail Stations.

...

13-5.6 **Maximum Daily Overtime**. No employees shall be permitted to work more than sixteen (16) hours in any twenty-four (24)

hour period. In determining whether an employee is working or has worked more than 16 hours in a 24-hour period, lunch breaks, whether paid or unpaid, will not be counted. If this results in an employee not being permitted to work part of his or her regular scheduled shift, the employee shall be excused, without pay, from such time on his or her regular shift to the extent necessary to comply with this section. Further, any employee who is passed over on one or more of the overtime lists, by reason of this rule, will not drop on the list(s).

SECTION 16 - PROVISIONS RELATING EXCLUSIVELY TO OFFICE AND CLERICAL EMPLOYEES

16-1 **Employees Covered by this Section**. The provisions of this Section shall apply only to full-time employees in the Office and Clerical Unit.

SECTION 19 - WORKING CONDITIONS, PRACTICES, ETC. TO CONTINUE

19-1 The present working conditions, practices, rules and regulations of the Company not altered or modified by this Agreement, shall continue in full force and effect except it is understood and agreed that the hours of work and scheduling of runs may be revised by the Company if it deems such revision necessary by reason of the Award or determination of any Board of Arbitration herein provided for. However, it is understood and agreed that the Company shall always be privileged from time to time to revise, supplement and otherwise change its rules, provided same are not in conflict with any specific provision of this Agreement, and if in conflict or inconsistent with any such specific provision, such revised, supplemental, or changed rules or regulations shall be subject to the approval of the Union which approval the Union agrees not to unreasonably withhold.

MEMORANDUM OF AGREEMENT

[October 2010]

Niagara Frontier Transit Metro System, Inc. (hereinafter "Company") and Amalgamated Transit Union Local 1342 (hereinafter "Union") enter into the following agreement:

WHEREAS, the Union and the Company are in the midst of several outstanding grievances regarding the filling of open tricks (also called temporary openings or vacancies) for maintenance clerk positions at the Cold Spring Garage at the Company; and

WHEREAS, in the interest of achieving harmonious relations, to resolve all controversies and ambiguities in regard to filling garage maintenance clerk open tricks, and to avoid the expenses and uncertainties of arbitration, the Parties are desirous of settling on a compromise basis the issue present in those grievances;

NOW, WHEREFORE, the Parties agree as follows:

...

OPEN TRICKS (except holidays)

5. Regular maintenance clerks in the garages will be offered overtime in accordance with current practice to fill any single day's open trick (temporary opening or vacancy of a clerk's shift).

6. If no regular maintenance clerks agree to work the open trick (following the process described in paragraph 5), the shift will be filled with a relief clerk or remain open, in accordance with the business needs of the Company as determined by management.

7. Open tricks of two (2) or more consecutive business days will be filled or left open in accordance with the business needs of the Company (the first such day will be filed as set forth in paragraphs 5 and 6), except as required herein.

8. Any single day's open trick following a maintenance clerk's return to work following any absence will tripper the requirements of paragraphs 5 and 6, but a call-off for the second day and subsequent consecutive days off shall be considered an absence of two (2) or more days covered by paragraph 7, above.

...

14. At the end of each ten (10) day period, another relief clerk will be asked to fill the open trick.

15. If a relief clerk is filling in for the whole week, his or her absence of one day or more will trigger the same option to work the day as shown in paragraph 5 through 12, above.

16. Except as required herein, relief clerks will be used to fill vacancies in accordance with the business needs of the Company as determined by management.

BACKGROUND FACTS

The instant grievance was filed by the Union on behalf of Rita Johnson, a Maintenance Clerk assigned to the Babcock Garage. The grievance claimed a violation of the Parties' Agreement occurred on November 29, 2010, when Ms. Johnson was prevented from working beyond 16 consecutive hours after she had agreed to accept an open trick for a third shift. The Company denied the grievance. David Rugg, Manager, Bus Maintenance and Equipment, issued a December 24, 2010, response to the grievance, stating in pertinent part:

> Your grievance only specifically cites Sections 19 and 10 as being violated. Section 10 has nothing in it that contemplates that any group of clerks can work 24 consecutive hours or more. With respect to the generic working conditions and practices provisions of Section 19-1, we are aware of no longstanding practice of Maintenance Department clerks working for 24 or more consecutive hours and your grievance does not cite any such instances.
>
> In fact, the Agreement negotiated for Maintenance Clerks implicated in the current dispute was not even consummated until October 2010 and thus there simply can be no Section 19-1 past practice issue here. Further, the aforementioned Agreement that was negotiated this past October for Maintenance Department clerks only was negotiated against the background of Maintenance Department specific issues and agreements, including, but not limited, Section 13-5.6, which recites that "No employee [in the Maintenance Department] shall be permitted to work more than sixteen (16) hours in any

> twenty-four (24) hour period. Section 13-5.6 could have been written to say mechanics only, but it was not. Additionally, the argument that only Section 16 sets forth terms and conditions for Shop, Garage and other ATU clerks ignores that Section 16 contains absolutely no provisions requiring the filling of "open tricks." Overtime distribution and filling of "open tricks" has always been handled on a Department by Department basis. In this regard, clerks in the Maintenance Department have their own specific overtime and "open trick" provisions which include the 16-hour work day limitation for Maintenance Department employees.
>
> There was thus no violation of the CBA and the grievance is denied.

The record would show that the Company's Maintenance Clerks, which would include Grievant, are assigned to four Company operational facilities: South Park Rail, Babcock Garage, Cold Spring Garage, and Frontier Garage. The South Park Rail facility, it would appear, has traditionally been staffed with three Maintenance Clerk positions spread over three shifts during the course of each day. Between the years 2001 and 2005, the Company added a Maintenance Clerk position to the afternoon shift at each of its three garages. In approximately 2005, the Company added a third, or evening shift, to each of its garage locations for the Maintenance Clerk position.

Section 13 of the Parties' Agreement was modified in the 2000 to 2003 Agreement, when the Union accepted the Company's proposal to add Section 13-5.6, setting forth the maximum daily overtime limitation for employees to whom the Section applies. The Parties modified 13-5.6 in a July, 2003 Letter of Understanding, which modification found its way into the Parties' current Collective Bargaining Agreement whereby the one-half hour unpaid lunch of employees to whom Section 13-5.6 applies is not counted as part of the 16 hour

limitation set forth therein. The October 2010 Memorandum of Agreement, the record further shows, sets forth the Parties' specific understanding concerning filling open shifts/tricks for Garage Maintenance Clerks. The remainder of the record evidence the Parties have considered relevant to their positions is set forth in the description of their positions and is addressed, to the extent necessary, by the Arbitrator in his determination of the question presented for decision.

POSITION OF THE UNION

The argues that Section 13-5.6 does not apply to Garage Maintenance Clerks and, instead, applies only to Mechanics. In support of this observation, the Union points to the testimony of the negotiators for both the Company and the Union when 13-5.6 was added to the Parties' Agreement. The Union claims that a reading of Section 13 of the Agreement underscores the conclusion that Section 13 "contains terms and conditions which are exclusive to Maintenance Employees (i.e. mechanics), as opposed to Maintenance Clerks." This conclusion allows the Union to argue that "[h]ad the parties wished to apply the 16 hour rule to Maintenance Clerks they would have placed a similar provision into Section 16 of the parties cba which sets forth terms and conditions which are exclusive to Office and Clerical Employees, which includes Maintenance Clerks" or, the Union proffers, "the parties could have placed said rule into Section 18 of the parties cba which contains provisions relating to all employees." Accordingly, the Union identifies the rule of interpretation of "expressio

unius est exclusio alterius" as establishing its position in this proceeding.

The Union emphasizes that it "does not contend that Maintenance Clerks have an absolute right to work as many hours as they want" but "when overtime opportunities arise for Maintenance Clerks, they should be offered said work consistent with established procedures." The Union also asserts that its position is supported by the practice at South Park Rail where, according to the Union's understanding of the record, Clerks "have historically worked overtime in excess of 16 consecutive hours." The Union acknowledges that the practice at the Company's garages "is not as extensive since the addition of a third shift for Maintenance Clerks," but maintains that "since Rail Maintenance Clerks and Garage Maintenance Clerks are governed under Section 16 of the parties cba, a practice allowing Rail Maintenance Clerks to work beyond 16 consecutive hours should also extend to Garage Maintenance Clerks when similar opportunities arise." The fact that there might be a small difference in the procedure for filling open shifts/tricks at the bus garage and rail operations, the Union maintains, cannot alter this observation "absent a clear restriction" regarding filling the open shifts and tricks at the bus garages.

Finally, the Union asserts that the record establishes that the 16 hour rule applied to Mechanics under Section 13-5.6 "was centered upon safety." No evidence can be found in the record, the Union maintains, that this "safety" policy was ever intended to be applied to Maintenance Clerks. Thus, the Union maintains, "there has never been a policy precluding Maintenance Clerks from working in excess of 16 consecutive hours until Mr. Rugg

unilaterally imposed one back on 11/29/10." The Union seeks to have the grievance sustained "in all respects and to make all negatively affected employees whole."

POSITION OF THE COMPANY

In setting forth its position, the Company observes that members of the bargaining unit, according to its understanding of the Parties' Collective Bargaining Agreement and the Company's operational decisions, can be found in three different categories: Maintenance Department employees; Bus and Rail Transportation Department employees; and Office and Clerical Unit employees. The Office and Clerical Unit employees, according to the Company, "do not work as a single clerical department" but "[t]o the contrary, separate and distinct seniority lists are maintained for clerical employees working in each 'subdivision' or Department of the Company." (Emphasis in original). Further, the Company claims, "[w]ork rules and procedures for clerical employees have ... been generally set on a department by department basis as opposed to a general clerical unit basis." These observations allow the Company to maintain that practices that are associated with Clerks in Rail Operations do not reflect practices of Clerks that are employed in the Maintenance Department. The Company also notes that a second shift was not added to the Maintenance Department Clerks' positions until approximately 2001 and a third shift was not added until 2006. Moreover, the Company relies on the testimony of Mr. Rugg "that the establishment of the third shift of clerks in the Maintenance Department did not, in his view, necessarily

lead to the prospect where a clerk in the Maintenance Department would need to be asked to work 24 consecutive hours or more, because vacancies in that third shift prior to the October 2010 Memorandum of Agreement could be 'blanked' or left unfilled." The October 2010 Memorandum of Agreement regarding the filling of open tricks for clerical employees in the Maintenance Department, the Company notes, resulted from the Parties' disagreement as to whether the Company was contractually obligated to fill open tricks. Again relying on the testimony of Mr. Rugg, the Company points to his observation that he "viewed the October 2010 Agreement as covering 'regular maintenance clerks' and relief clerks, i.e., an agreement for Maintenance Department personnel, and in Mr. Rugg's view, the 'current practice' for overtime distribution to Department personnel included the limitation set forth in Section 13-5.6, which provides that Department employees are not to work more than 16 hours in any period of 24 consecutive hours."

It is the Company's contention that "the prerogative that the Company is afforded in Sections 18-2 and 18-2.1 to set hours of work, including number of work-hours per day," mandates that "the construction of the October 2010 Memorandum of Agreement advanced by the Company is entitled to acceptance and implementation." The Company rejects any reliance by the Union on Section 19-1, the "Past Practice Clause," which was the only provision in the Agreement that the former Head of Personnel, Ms. Ruszala "could cite as arguably breached by not allowing garage clerks in the Maintenance Department to work for 24 consecutive hours or more." The Company identifies the relevantly recent addition of

second and third shifts to the Maintenance Department clerical assignments and is able to conclude, therefore, "that there was no established 'practice' of clerks in the Maintenance Department being offered the opportunity to work 24 or more consecutive hours."

Insofar as Section 16 of the Parties' Agreement applies to Clerks, the Company responds that such application "does not mean as a matter of logic or reality that Section 16 is the only portion of the CBA that governs clerks." The Company claims that "the terms and conditions of clerical employees are also governed by separate, Department specific agreements and circumstances." Hence, the Company claims, "[o]vertime and clerk fill in issues in the Maintenance Department ... are governed by agreements limited to only clerks working in the Maintenance Department." The Company then offers that "the resolution of the present matter turns on interpretation or gap-filling of the Parties' October 2010 Memorandum of Agreement." Paragraph 5 of the Agreement, which reads "[r]egular maintenance clerks in the garages will be offered overtime in accordance with current practice," the Company submits, "should be interpreted to mean that consistent with longstanding Maintenance Department policy ... in Section 13-5.6, no clerk will be offered overtime that would involve that clerk working more than 16 consecutive hours in a 24 hour period." The Company points to Sections 18-2 and 18-2.1 of the Agreement as setting forth language to support its interpretation.

The Company claims that the fact it has negotiated a maximum daily hour limitation in one context cannot be seen to assist the Union in advancing its position in this proceeding.

When "an employer opts to negotiate over matters on which management has a prerogative to act on certain occasions," the Company argues, "does not operate to require negotiations over such maters on all occasions." The Company also claims that it fulfilled any obligation to provide the Union with "reasonable notice" of the maximum daily work-hour limitation that Mr. Rugg found in the October 2010 Memorandum of Agreement. Section 19-1, the Company adds, grants it the right "from time to time to revise, supplement and otherwise change its rules, provided the same are not in conflict with any specific provision of this Agreement, and if in conflict or inconsistent with any such specific provision, such revised, supplemental, or changed rules or regulations shall be subject to the approval of the Union which approval the Union agrees not to unreasonably withhold." As the Company views the matter, "[e]ven if there was some provision in the CBA which required the Company to continue to offer clerical employees available overtime assignments regardless of how long such assignments would keep a given employee at work, Section 19-1 would still preclude the Union from unreasonably withholding approval of some maximum consecutive work hour limitation introduced for the protection of the employee and the general public." Clearly, the Company argues, the 16 hour limitation is amply justified as a safety protection for employees and the general public.

DISCUSSION

The central task of the Arbitrator is to identify the Parties' contractual understandings, if any, that are applicable to the subject matter of the Parties' dispute. Contractual understandings, though often are set forth in explicit language, sometime emerge from an interpretation not only of the language set forth in the four corners of the Agreement but circumstances that reflect the understandings. Included among the circumstances are the Parties' past practices, which sometime shed light on the understandings or, in the case of a binding past practice, establish the existence of the understanding itself.

The only explicit statement of a 16 hour limitation on "maximum daily overtime" is found in Section 13-5.6 of the Parties' Agreement. Section 13 applies "only to full-time employees in the Operating and Maintenance Unit and Porters who are employed in the Shops and Garages or in the Rail Stations," as set forth in Section 13.1. A more specific understanding, however, is available as to the application of Section 13 when one considers the language of all of its subsections and the credible testimony of the negotiators for both Parties when Section 13-5.6 was added to the Agreement. A reading of the subsections found in "Section 13" clearly reveal, consistent with the testimony of the negotiators, that Section 13 applies to Mechanics and not Clerks. In Section 13-2.1, "Job Classification and Rates of Pay," it is clear that the Parties are referring to Mechanics. The "Wash-Up Period" in Section 13-11; the "Clothing Allowance and Laundry Allowance", in Section 13-15.5; and

the "Tool Allowance" in Section 13-15.7 underscore the fact that Section 13 applies to Mechanics.

If, as the Arbitrator has found, Section 13 does not apply to clerical employees, then the explicit understanding in Section 13-5.6 regarding a "Maximum Daily Overtime" is an understanding that cannot be applied to clerical employees. The provisions of the Parties' Agreement relating "exclusively to Office and Clerical Employees" is found in Section 16. As with Section 13, Section 16 sets forth detailed agreements regarding the "Office and Clerical Employees." Unlike Section 13, however, there is no provision relating to "maximum daily overtime."

When the Parties negotiated Section 13-5.6 and added it to their Agreement, they could have but did not add a similar provision to Section 16. Further, the record shows that the Parties have entered into successor Agreements including their current Agreement for 2006 to 2009, which the Parties' executed on March 15, 2007. In none of the successor Agreements, the Arbitrator notes, did the Parties add any "maximum daily overtime" provisions that would apply to the Clerks covered by Section 16. While the Company has pointed out that at one time Garage Clerks worked only one shift, the record is also clear that by 2006 there were three shifts of Clerks at the garages. Hence, when the Parties negotiated the 2006 to 2009 Agreement, the factual circumstances were ripe for a "maximum daily overtime" provision to be added to Section 16 if it was the Parties' intent to do so. Nevertheless, it would appear that the Company sought no such "maximum daily overtime"

limitation in the negotiations.

In their October 2010 Memorandum of Agreement, the Parties specifically addressed how open tricks at the Company's garages for the Maintenance Clerk position would be filled. When the Parties negotiated this particular Agreement, it is clear that they knew that the 2006 to 2009 Agreement contained no "maximum daily overtime" limitation for the clerical positions addressed in the Memorandum. It is also evident that the Parties knew that there were three shifts of Clerks at the Company's garages and, if the Company was to be obligated to fill open tricks at the garages, the possibility would exist that an occupant of the clerical position at the garages would be able to bid successfully for open tricks on two consecutive shifts. Reason demands that, if the "maximum daily overtime" limitation applied to Mechanics was also to be applied to Clerks at the Company's garages, the limitation would have found its way into the October, 2010 Memorandum of Agreement. The Memorandum, however, reflects no such limitation. The question then arises as to whether the Company's decision to apply the limitation to the Grievant was in accord with the Parties' contractual understandings.

The Company initially contended, in response to the grievance filing, that Section 13-5.6 justified its decision to apply the "daily overtime limit" to Clerks at the garages. As seen above, however, 13-5.6 has no application to clerical employees. The Arbitrator also does not find availing the Company's position asserted at the hearing and in its post-hearing submission that the 16 hour limitation should be "read into" the October, 2010 Memorandum

of Agreement. The fact that the Memorandum of Agreement does not contain the limitation, in light of what the Parties knew when the Agreement was negotiated, reflects that the Parties understood that the limitation would not be applicable rather than they believed it would be applicable. Having obtained the Union's agreement to impose a limitation on only one particular classification of employees in the bargaining unit, the Company, the Arbitrator finds, cannot insist upon applying the limitation to another classification of employees, particularly when the obvious reasons for the application to Mechanics, which centers on safety concerns, is less applicable to clerical employees. Any reliance by the Company on its rights of management, the Arbitrator finds, also cannot be considered as having merit because of the time honored rule that managerial rights are subject to those limitations found in the Parties' contractual understandings.

The Arbitrator therefore has been persuaded that the Union has sustained its burden of establishing a contractual violation as asserted in the grievance. Implicit in the 16 hour limitation of Section 13-5.6 is the right of Maintenance Clerks at the Company's garages to work more than 16 consecutive hours when a Maintenance Clerk is exercising the right to fill an open trick at the garages per the October, 2010 Memorandum of Agreement. The Arbitrator notes that the time limitation was not applied to Grievant. Accordingly, there is no basis for the Arbitrator to issue any compensatory award to Grievant. As to a "make whole" Award to other employees, the Arbitrator finds that the record is barren of evidence showing an application of the 16 hour limitation to garage Clerks. If, however, the Union

can establish by documentary evidence that Clerks at any of its garages, subsequent to the filing of the grievance, were denied an open trick in accordance with the October, 2010 Memorandum because of the Company's imposition of the "maximum daily overtime" limitation, then any such employee would be entitled to the hours he or she was prevented from working at the time and one-half rate. Within 30 days of the date of this Award, the Union shall submit such documentary evidence to the Company, and within 30 days of its receipt, the Company should either make the affected employee whole or state its reasons for refusing compensation. This Arbitrator will retain jurisdiction of the grievance for the limited purpose of addressing any questions arising under the Remedy portion of the Award.

AWARD

For the reasons set forth herein, the Company acted in violation of the Parties' Agreement when it prevented regular Maintenance Clerks in the garages from working more than 16 consecutive hours. There is no basis for the Arbitrator to issue any compensatory award to Grievant. As to a "make whole" Award to other employees, the Arbitrator finds that the record is barren of evidence showing an application of the 16 hour limitation to garage Clerks. If, however, the Union can establish by documentary evidence that Clerks at any of its garages, subsequent to the filing of the grievance, were denied an open trick in accordance with the October, 2010 Memorandum because of the Company's imposition of the "maximum daily overtime" limitation, then any such employee would be entitled to the

hours he or she was prevented from working at the time and one-half rate. Within 30 days of the date of this Award, the Union shall submit such documentary evidence to the Company, and within 30 days of its receipt, the Company should either make the affected employee whole or state its reasons for refusing compensation. This Arbitrator will retain jurisdiction of the grievance for the limited purpose of addressing any questions arising under the Remedy portion of the Award.

Thomas N Rinaldo

THOMAS N. RINALDO, ESQ.,ARBITRATOR

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
WILLIAMSVILLE, NEW YORK)

I, THOMAS N. RINALDO, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed the within Opinion and Award on January 10, 2012.

Thomas N Rinaldo

THOMAS N. RINALDO, ESQ., ARBITRATOR