

STATE OF NEW YORK  
COUNTY OF ERIE

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MAY 29 2008

In the Matter of Arbitration Between:

ATU LOCAL 1342

AMALGAMATED TRANSIT UNION  
LOCAL 1342

-And

NFT METRO SYSTEM, INC.

Re: Andy Smith (Rate Test –  
Grievance 6/27/05)

Before: Dennis J. Campagna, Esq. – Neutral Arbitrator  
George Bailey, ATU/V.P. – Union Panel Member  
William McGee, Consultant – Company Panel Member

Hearing Date: February 6, 2008

**APPEARANCES**

A. For the Union

Terry M. Sugrue, Esq., Counsel  
Richard Chambers, Executive Board Member  
Andrew Smith, Mechanic/Grievant

B. For the Company

Susan P. Wheatley, Esq., Counsel  
David Rugg, Superintendent, Bus Shops  
Howard Scholl, Manager, Bus Maintenance Dept.  
Terry Hildebrandt, Manager of Operations

**THE ISSUE** (By Stipulation)

Did the Company violate Section 19-1 of the parties' Collective Bargaining Agreement and/or Memorandum of Understanding dated 8/22/83, by requiring an employee (Andrew Smith) making a lateral move from Mechanic Specialist Machine Shop to Mechanic Specialist Electrical to undergo a trial period and written examination for the position of Mechanic A Electrical as well as the trial period and written examination for Mechanic Specialist Electrical?

If so, what shall be the remedy?

## **BACKGROUND**

The Niagara Frontier Transit Metro System, Inc. (“Company”) and Local Union 1342 of the Amalgamated Transit Union, (“Union”) are parties to a Collective Bargaining Agreement with effective dates August 1, 2003 through July 31, 2006. (CBA or Contract, Joint Exhibit 1)<sup>1</sup> Richard Chambers, the Grievant herein, holds the position of Executive Board Member for the Union. Mr. Chambers filed the instant grievance “on behalf of all members of ATU Local #1342 and Andy Smith.” (Joint Exhibit 2, page 1) Andrew (“Andy”) Smith was hired by the Company in 1992. Accordingly, under the terms of the CBA at Section 10-8.2, Mr. Smith was exempt from skill testing for promotions or lateral moves within the shops and garages. He was, however, subject to the qualifying for rate, testing and trial period procedures as set forth in the Memorandum of Understanding dated August 22, 1983. (Hereinafter referred to as the “1983 MOU” – Joint Exhibit 3) Mr. Smith qualified as a Specialist in the Unit Change work group in the Cold Spring Shop during the 2001-02 time period. He also qualified and held the position as a Specialist (Mechanical) in the Machine Shop work group in the Cold Spring Shop.

### **A. Facts Giving Rise to the Instant Dispute**

In or about June 2005, Mr. Smith successfully bid on a position as Specialist (Electrical) in the Machine Shop work group. On or about June 23, 2005, Mr. Smith was issued a “Mechanic A Electric Cold Spring Machine Shop Test Outline” by his supervisor. (Union Exhibit 1) The Grievant was scheduled to take the Mechanic A (Electrical) rate test on May 19, 2006, a date approximately 240 work days in the future. The fact that the Company imposed an extended trial period on the Grievant resulted in the filing of the instant grievance claiming that “[u]nder the MOU on testing procedures he should get the time of an “A” man bidding up, but should take the electrical test, as he is a qualified specialist.” (Joint Exhibit 2) On June 30, 2005, the Grievance was denied by David Rugg, Superintendent, Bus Shops. The relevant part of Mr. Rugg’s written denial stated:

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<sup>1</sup> This 2003-06 CBA was succeeded by a Collective Bargaining Agreement with effective dates August 1, 2006 through July 31, 2009. The instant grievance arose under the terms of the 2003-06 Contract.

The MOU on testing procedures defines the Electrical Shop as a completely different Shop Department, distinct and separate from any other Mr. Smith has previously qualified in. Mr. Smith will have 240 days to test and qualify at the A rate. He will then have an additional 120 days to test and qualify in the Specialist rate. . . . His rate of pay will remain consistent as a Specialist, again, as per the MOU.

(Id., page 2)

On July 14, 2005, the grievance was denied by Howard Scholl, Jr., Manager, Bus Maintenance and Equipment for the identical reasons set forth in Mr. Rugg's denial noted above. (Id., page 4)

The inability of the parties to resolve this grievance at the lower administrative steps of the grievance procedure resulted in the Union advancing the matter to arbitration. (Id. Page 5) The undersigned was selected by the parties to arbitrate this dispute.

One day of hearing occurred on February 6, 2008. At all times during the hearing process, the parties were accorded and took full advantage to call and examine witnesses as well as the right to introduce relevant evidence. At the conclusion of the hearings, the parties elected to summarize their respective positions with the filing of post-hearing briefs, ultimately postmarked on March 17, 2008. Upon receipt of said briefs, the proceedings were closed.

## **POSITION OF THE PARTIES**

### A. The Union's Position

As its initial note, the Union stresses its objection to the Company's attempt to "broaden the stipulated issue submitted by the parties to address possible application of the 1983 MOU, 'test requirements,' paragraph D, to the Rail Department without the consent of the Union." In this regard, the Union suggests that this Arbitrator rule on the much narrower issue submitted, limiting its reach to the question of whether the Company violated the CBA and/or 1983 MOU

as it applies to Andrew Smith. Indeed, the stipulated issue is totally silent on the application to the Rail Department the Union asserts.

Finally, the Union suggests that the issue as it involves Mr. Smith is all but conceded by the Company who acknowledged that it violated the 1983 MOU.

#### B. The Company's Position

While conceding the Union's interpretation of the language in paragraphs (B) and (D) on page 2 of the 1983 MOU, the Company seriously questions the motive and intent of the Union in its filing of the instant grievance. In this regard, the Company notes that while there is no consistent practice regarding the implementation of Paragraphs (B) & (D) as it applies to lateral moves, the imposition of a longer trial period actually helps some candidates while at the same time does not prejudice them. This is so the Company notes since during their trial period employees have been paid at the same rate and therefore have not lost any money in the process.

With respect to the Union's assertion that the issue in the instant matter cannot include the Rail, the Company disagrees. In support of this position, the Company notes that there is no dispute that the 1983 MOU governs the grievance in this matter. In addition, the Company notes that both parties agree as to how Paragraphs (B) & (D) on page 2 of the MOU interact and should be interpreted with respect to lateral moves. However, given the undisputed fact that there is no consistent practice for bus positions and the fact that the parties have historically applied the 1983 MOU to both bus and rail mechanical employees, the application of the 1983 MOU to the Rail is self evident the Company asserts.<sup>2</sup>

Finally, the Company notes that this is a contract/MOU interpretation case and accordingly, any interpretation must apply to all employees or situations governed by the CBA and/or MOU absent further negotiations between the parties.

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<sup>2</sup> In support of this point, the Company refers the parties to recent awards issued by this Arbitrator in the Skills Testing and Miguel Lugo matters.

## DISCUSSION

### A. Does the Stipulated Issue Include Positions at the Rail?

In this very interesting twist of fate, the Company concluded its brief by stating:

For the foregoing reasons, the grievance should be granted. Regardless of any past inconsistent practice, and based on the clear language in the 1983 MOU, the Company should have assigned Smith a trial period limited to 120 work days and administered a Specialist rate test only to him, unless the Company invoked one of the available exceptions.

(Company brief at page 5)

Given the foregoing admission, with which this Arbitration Panel agrees, the only issue to be decided is the extent to which the 1983 MOU applies to Rail positions. As noted above, it is the Union's position that this Arbitrator is guided by the stipulated issue.

While the stipulated issue clearly refers to "an employee (Andrew Smith)", the fact remains that the grievance giving rise to the instant proceeding listed "all members of ATU Local #1342 and Andy Smith." This is a sophisticated Local with a sophisticated leadership, and it is significant that the instant grievance listed "all members of ATU Local #1342" thereby extending this grievance's reach to "all members" occupying all bargaining unit positions, including positions at the Rail. Had the Union intended to exclude positions at the Rail, they would have done so. Accordingly, I find that the stipulated issue, while focusing on Andrew Smith for the obvious reason that the Company's action was applied to Mr. Smith, includes all bargaining unit positions, including those at the Rail.

### B. Is the 1983 MOU Limited in its Application to Specific Bargaining Unit Positions?

The 1983 MOU outlined a procedure for determining job qualifications with respect to promotions and lateral moves in the Shops and Garages. It provided guidance on how an

employee would qualify for the full rate of a position after being awarded the job on a trial basis. An employee vying for a promotion or lateral move was required to take and pass the Helper with Tools test and complete one or more rate tests in order to qualify for the full rate associated with any position. In addition, the high seniority candidate who passed the Helper with Tools test was always afforded first opportunity to begin the requisite trial period for any open position.<sup>3</sup>

Taking “judicial notice” of past cases between the Company and this Union reveals an acknowledgment by both parties of the fact that the 1983 MOU has continued to apply to both bus and rail positions. For example, in September 1998, the Company posted a Fare Collection Specialist position at the Rail. Paul Gunnerson, who held an “A” Mechanic position in the Rail’s MOW Department represented the applicant with the greatest seniority. Based on the results of an interview held in October 1996, the Company rejected Mr. Gunnerson’s application as not meeting the qualifications for the position. The Union grieved and the matter was heard and decided by Arbitrator Robert Hull. Arbitrator Hull read Section 10-8.2 together with the 1983 MOU as requiring the Company to grant trial periods to the most senior employee-applicants. Accordingly, senior employee-applicants would be entitled to a trial period as part of the process of qualifying for a position, subject only to the Company’s right to curtail a trial period under certain circumstances.

Subsequent to the release of the Gunnerson decision, the continued viability of the 1983 MOU as applied to positions at the Rail was both recognized and approved. Thus, in the Arbitration Decision involving the Gerald Czuba, it was determined that the 1983 MOU would continue to apply to the filling of positions at the Rail so long as there was no conflict between this MOU and the “yellow sheeting” agreement. (See also the arbitration decision involving Miguel Lugo for the same holding).

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<sup>3</sup> The 1983 MOU was followed by a 1984 MOU, also known as the Rail Start Up Agreement, which addressed pre-entry requirements for existing bus employees applying for certain maintenance positions at the Rail. In 1996, the parties negotiated for the use of an Advance Comprehensive Skill Test or “ACST” for employees with a post December 16, 1996 hire date. This ACST was integrated into Section 13-2.1 of the CBA, thereby providing that positions in specified classifications would be awarded on the basis of seniority to that employee who passed the ACST test for that position. Throughout these changes, the 1983 MOU continued to apply to all positions, including those at the Rail.

Given the foregoing, it is clear that the 1983 MOU applies to bus and rail positions alike.

**CONCLUSION AND AWARD**

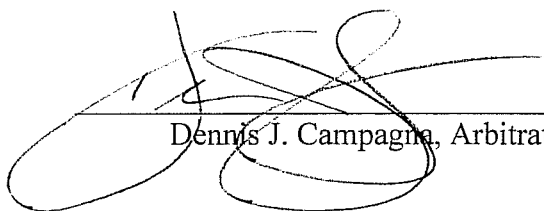
For the reasons noted and discussed above, the grievance is sustained. Accordingly, trial periods provided under paragraphs (B) & (D) of the 1983 MOU govern all lateral moves in the bus and the rail departments, absent any exception noted in either the CBA or the 1983 MOU itself.


As to the implementation date of this Award, for the Bus side of the Company, it shall have a prospective application based on the date of this Award. With respect to the Rail side, this Award shall also have prospective application. In this regard, the Company and the Union shall meet and discuss the effective date of implementation for all Rail employees. Where an impasse in these talks exists,, the matter shall return to this Arbitration Board who shall retain jurisdiction for the purpose of rendering a final and binding determination.


The Arbitration Board shall retain jurisdiction over the implementation of this Award, including any issue that might arise regarding the effective date associated with its prospective application.

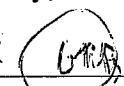
**I, Dennis J. Campagna, do hereby affirm that I am the individual described in and who executed this instrument, which is my Award.**

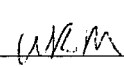
**DATED: MAY 13, 2008**

  
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Dennis J. Campagna, Arbitrator

  
\_\_\_\_\_  
George Bailey, Union Panel Member

 5/14/08  
\_\_\_\_\_  
William McGee, Employer Panel Member

Agree  

Agree:  

Dissent: \_\_\_\_\_

Dissent: \_\_\_\_\_