In the matter of the arbitration between:

AMALGAMATED TRANSIT UNION LOCAL 1342

and

NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC.

Leader rate for Specialist

Appearances

For the Company

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Counsel

For the Union

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Counsel

ISSUES

The parties were unable to propose a stipulated issue. They agreed to let the Arbitrator frame the issues. I determine the issues to be:

Is the present Grievance properly denied by reason of *Res Judicata?*

Should the incumbent in the position of Specialist (Engine, Transmission and As Assigned) be paid at Leader rate?

BACKGROUND

On April 15, 2011 Local 1342 of the Amalgamated Transit Union [hereinafter the "Union"] filed a grievance against the Niagara Frontier Transit Metro System [hereinafter the "Company"] which reads in pertinent part:

> **On or about 2/15/11, the Company posted and filled the open position of Specialist [Engine, Transmission and As Assigned]. . . . Given the increased responsibility associated with the posted position, the Union believes said position is most similar to the classification of Leader rather than Specialist. Consequently, the wage rate of the posted position should be increased from Specialist to Leader. [Joint Exhibit 2]**

On May 2, 2011, David Rugg wrote a first and second step disposition of the Union's grievance which reads in pertinent part:

> **The Company created the Specialist position on or about November 7, 2002. An arbitration decision was ruled June 8, 2007. I believe Arbitrator Ahern determined**

on the 18.2 CBA right of Management creating the position within the classification of Specialist as so stated on pages 16, 17 and 18 of his decision. [copy attached]

Furthermore, the job was bid again as a Specialist, and awarded as a Specialist. To even consider and upgrade now would violate the rights of members.

There was no violation of the CBA or any other MOU. The grievance is denied. [Joint Exhibit 2]

An arbitration hearing was held on October 19, 2011, with the undersigned as Arbitrator. At the conclusion of the hearing, the advocates of the parties discussed "the need to further supplement the record and agreed to explore the possibility of developing a joint stipulation thereby obviating the need for an additional date of hearing." [Union brief, pg. 1] The parties agreed to submit briefs and additional exhibits to the undersigned by March 12, 2012.

AFFIRMATIVE DEFENSE OF *RES JUDICATA*

COMPANY POSITION

The Company submits a border issue: "Is the present Grievance properly denied by reason of *Res Judicata?"* The Company claims that the doctrine of *res judicata* bars the Union from processing this grievance because "a decision in one action is conclusive both with respect to matters actually litigated in that action and with respect to matters that could have been litigated in that action." [Company brief, pg. 10] It cites the case of ***O'Brien v. City of Syracuse***, 54 N.Y. 2nd 353, 357 (1981) as saying that "once a claim is brought to a conclusion all other claims out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." [Company brief, pg. 10]

Further, the Company cites ***Doherty v. Cuomo,*** 76 A.D. 2d (4th Dept. 1980) as providing a corollary to the *res judicata doctrine* stating that "a party may not "split up" available claims against another party and pursue only some claims initially and hold others back in reserve in case the action commenced does not prove successful." The Company also relies on this case to say, "Nor can a 'new' claim or argument be pursued if the reason it was not raised in the prior proceeding was mere inadvertence as opposed to an intentional holding back." [Company brief, pg. 10-11]

The Company then cites several cases which apply the *res judicata doctrine* to arbitration:

Particularly noteworthy is *Lari v. Slanetz*, 240 A.D. 2d 581 (2d Dept. 1997). Here, after an arbitration was held in regard to the dissolution of a corporation and final distribution of its assets, the disappointed shareholders wished to pursue a second arbitration to resolve certain matters were claimed to be "unresolved" by the first arbitration. This attempt to gain a second arbitration on the ground that it was intended to resolve certain issues supposedly left unresolved by the first

arbitration was likewise barred by application of *res judicata*. Again, the *res judicata* effect of a prior award operates to resolve and preclude all other claims related to the transaction or series of transactions even if the later raised claims are premised on different theories and/or seek a different remedy. [Company brief, pg. 12]

The Company concludes:

> **Filing a grievance to protest one issue and then requesting that the Arbitrator assigned to that grievance rule on different complaints is inappropriate. (citations omitted) Here the grievance at issue protests the posting and filing of a Specialist-(Engine, Transmission and as assigned) job that carries a Specialist's rate which, . . . is exactly the same job duties and pay rate connected with Specialist job that was previously subject to a grievance which in turn was resolved by this Arbitrator's Award of June 8, 2007. Hence, as has also been discussed, all issues that were raised or could have been raised about the posting and filling of the Specialist's job were resolved via the June 8, 2001 Award and pertinent principles of *res judicata*. [Company brief, pp. 15-16]**

UNION POSITION

The Union says of the *res judicata* contention of the Company:

> **". . . said argument totally misses the mark as the Union's challenge in the prior arbitration case was limited to the issue of whether or not the Company violated the parties' cba when it failed to negotiate over the job content of the newly created position. . . . Rate was never an issue in that case nor could it have been as the incumbent of the position at that time . . . never performed Engine Specialist Work and/or Welding work of any kind. [Union brief, pg. 7]**

The Union adds that given that the incumbent at that time didn't do the work anticipated by the Company, the Leader rate sought in the instant grievance, "would have lacked merit."

The Union argues that the "increased qualification requirements" of posting of the Specialist-(Engine, Transmission, and As Assigned) position in early 2011 was significantly different from that posted in 2002 which was the issue in the prior arbitration.

The Union concludes:

> **Consequently, unlike before, the wage issue presented in the instant grievance has now ripened for the first time. As such, the merits of the instant grievance should be fully heard by this Arbitrator.**

DISCUSSION

Black's Law Dictionary defines "claim" as "to assert, state, to urge, to insist.[1] The Union's claim in the June 8, 2007 case was:

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[1] Black's Law Dictionary, 4th Edition, West Publishing Co., 1968, pg. 313

Did the Company violate the Collective Bargaining Agreement and/or other agreements between the parties when it unilaterally created/changed the position of Specialist in the Unit Change Department? [Joint Exhibit 4, pg. 1]

The Arbitrator in this case found for the Company and relied mainly of Sub-section 18.2 of the CBA, "Schedules, Places, Hours and Assignment of Work" to do so. [Joint Exhibit 1, pp. 161-162]

In the instant case the relevant claim is:

Should the incumbent in the position of Specialist (Engine, Transmission and As Assigned) be paid at Leader rate?

Specifically, the Union refers to Sub-section 13-2.1 entitled "Job Classifications and Rates of Pay" to justify its position. [Joint Exhibit 1, pg. 114]

The Company says that *res judicata* doctrine should end the Union's grievance because "all issues that were raised or could have been raised about the posting and filling of the Specialist's job were resolved via the June 8, 2007 Award and pertinent principles of *res judicata.*" [Company brief, pg. 16]

However, the Supreme Court has spoken on the matter. In **Allen v. McCurry**, 449 U.S. 90, 94 [1980] the Court defined the *res judicata* principle:

Under res judicata, a final judgment on the merits of an action precludes that parties or their privies from relitigating issues that *were or could have been* raised in that action" (emphasis added]. The "essential elements" of res judicata "are generally stated to be (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits."[2]

The "essential elements" of *res judicata* apply to the instant case with respect to requisite items (1) and (3), but they do not apply to item (2): in the first case, the Union challenged management's right to design a new job under section 18.2 of the CBA; in the instant case, the Union asks the Company to set an appropriate rate for the changed job under 13.2.1 of the CBA. Thus, the two causes of action are not identical.

In Elkouri & Elkouri, *How Arbitration Works,* the doctrine of *res judicata* is explicated as follows:

The doctrine of res judicata, or "claim preclusion," is "[a]n affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit." To be applicable, the doctrine requires that the following four elements be present:

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[2] Elkouri & Elkouri, *How Arbitration Works, Sixth Edition,* Bureau of National Affairs, Inc., Washington, D.C., footnote pg. 579

1. **Identity of the thing sued for in both actions;**
2. **Identity of the cause of action in both actions;**
3. **Identity of the parties to the actions;**
4. **Identity of the quality or capacity of the persons for or against whom the claim is made.**[3]

The Union's claims and "causes of action" are distinct and not identical in the two [2] arbitrations. The Union's claim in the first case was to nullify management's right to unilaterally design a new position. Thus, the Union's cause of action was restrictive in the sense that it had no thought about a wage increase given that only extended experience with the complete duties of new position would be essential to justify an increase in wages. Both parties concur that the first incumbent did not do the welding part of the job during the more than nine [9] years he held the position. Thus, this first incumbent did not do the complete job duties of the position. As it turns out, the parties concur that the second, present incumbent also did not do any welding work, therefore he also lacked the complete job. [see below]

In the case of **Doherty v. Cuomo**, 76 A.D. 2d 14 (1980), submitted by the Company, Judge Schnepp quotes Chief Judge Cardozo in **Schuylkill Fuel Corp v. Nieberg**, 250 NY 304, 306-307 (1929): "A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first." Clearly, the setting of pay for the changed job would not "destroy or impair rights or interests established by the first," which determined the management right to design jobs.[4]

Justice Schnepp also adds:

> **"Claim", in the context of res judicata, has never been broader than the transaction to which it related. . . . *The present trend is to see claim in factual terms and to make it conterminous with the transaction* regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff, regardless of the number of primary rights that may have been invaded, and regardless of variations in the evidence needed to support the theories of rights. *The transaction is the basis of the litigative unit or entity* which may not be split. . . . The law of res judicata reflects the expectation that parties who are given the capacity to present "entire controversies" shall in fact do so.**[5] **[emphasis added]**

Since the claim in the first arbitration concerns a management right and the claim is "conterminous with a transaction," and the "transaction is the basis of the litigative unit or entity," the Company would prevail if the Union had again

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[3] Ibid., pg. 387

[4] Doherty v. Cuomo, 76 A.D. 2d 14 (1980), pg. 3

[5] Ibid. pp. 3-4

challenged the management to design jobs and positions or some variant. However, in the instant case, the Union has requested an increase of wage for the Specialist – (Engine, Transmission, and As Assigned) to the Leader rate which is a different "litigative unit or entity" or claim.

In another case submitted by the Company, **O'Brien v. City of Syracuse,** 54 N.Y. 2d 353 [1981]. Chief Judge Cooke says:

> **This State has adopted the transactional analysis approach in deciding *res judicata* issues (Matter of Reilly v. Reid, 45 NY2d 24). Under this address, once a claim is brought to a final conclusion, *all other claims arising out of the same transaction or series of transactions are barred*, even if based upon different theories or if seeking a different remedy (id, at pp 29-30). *Here, all of defendants' conduct falling in the first category was also raised during the 1973 suit as the basis for that litigation.* That proceeding having been brought to a final conclusion, no other claim may be predicated upon the same incidents. [emphasis added][6]**

Note the two [2] underlined sentences. The Union in the first arbitration challenged the Company's right to unilaterally establish the position of Specialist – (Engine, Transmission and As Assigned) which included some incidental welding duties. The Arbitrator in that case upheld the Company. In the instant case, the Union is asking for an increase in pay for the established position. In my view, these are two [2] distinctive, different "claims," "causes of action," "transactions," and "incidents" and I am not precluded from hearing the substantive issue.

The border issue of a *res judicata* affirmative defense is dismissed.

SUBSTANTIVE ISSUE

UNION POSITION

The Union bases its argument on Sub-section 13.2.1 "Job Classification and Rates of Pay," and the sentences in the second paragraph to justify its demand that the Specialist – (Engine, Transmission and as assigned) position be upgraded to the Leader Rate:

> **The Company shall have the right to establish such other classifications as necessary. The rate of pay shall be equal to the current classification most similar to the job content of such new jobs. [Joint Exhibit 1, pg. 114]**

The Union supports its argument by comparing the posting for the position of Specialist – (Engine, Transmission and as assigned) [Joint Exhibit 3] to the posting of the position of Engine Leader. [Company Exhibit 4]. The Union points out that a comparison of these postings "reveals a striking similarity between each position." It cites the top three [3] bullet points of the "Requirements of

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[6] O'Brien v. City of Syracuse, 54 N.Y. 2d 353 [1981], pp. 2-3

Position" section of the posting for the Specialist position as proof of the statement that it is "more expansive than that of the Engine Leader position." Those three [3] bullet points are:

> 1. **Perform diagnostic testing and repair of all Company vehicles and equipment.**
> 2. **Perform general acetylene cutting/welding and brazing or soldering.**
> 3. **Remove, repair/overhaul or replace all Company vehicle and equipment components such as engines, transmissions, clutches, starter, water pumps and accessory equipment or parts thereof. [Joint Exhibit 3]**

Further, under the "Duties and Responsibilities" section a comparison shows that the Engine Leader requires "Inspection, preparation, and completion of af any work normally done in the department," while the Specialist position requires "this job involves all manner of preparation and completion of operations of any type of work normally done in the department **at any location of Company property.** [Union brief, pg. 4, emphasis added in the original]

Continuing the comparison of the Engine Leader position with the Specialist position, the Union says: [1] the Engine Leader position requires only work on engines, while the Specialist position calls for "ability and experience to diagnose/discover defective or unserviceable conditions of **all Company equipment**" (emphasis in brief] and to "perform skilled tasks in planning, inspecting, testing and repairs/overhauls"; [2] the Specialist position requires "general acetylene cutting/welding" which is absent from the posting of the Engine Leader; [3] while the Engine Leader position is "unique" in requiring examination or spot checking of work performed by mechanics in the department and ordering parts for engines, the Specialist position must perform work on engines, transmissions and welding "to a lesser degree"; and, [4] "the qualifications standards associated with the Specialist . . . position, are far more rigid and thus deserving of a higher rate" because said Specialist must pass the Engine Specialist Rate Test and the welding test as well. [Union brief, pg. 5]

In further support for its position, the Union quotes Elkouri & Elkouri, *How Arbitration Works:*

> **Where, however, a new . . . operation involves more than a slight increase in duties, skill, responsibility, or hazards, rate revision may be required. [5th Edition at page 688]**
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> **Changes in operation methods, which are largely left within the discretion of management, often necessitate adjustments in wage rates. [id. at page 686]**
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> **The rule generally applied in the case of employees who work for hourly rather than incentive rates is that an increase in hourly rates should accompany any material increase in the workload. [id. at page 687]**
>
> **Finally, it should be remembered that while management often has wide authority to assign duties and tasks to employees, they in turn may challenge the fairness of the rate paid for the job after its change. [id. at page 710]**

parties responded immediately to my requests and their answers included: [1] the second incumbent, Mr. Nance, was given work on engines and transmissions during his trial period, but has done no welding work; [2] Mr. Nance has not been trained on welding, although a union-management group is working to establish a training program; and, [3] Mr. Nance does not have welding equipment near his work station.

The distribution of assignments to work is obviously a critical factor in establishing a wage rate. This is especially true when the assignment in question is "incidental to the primary function." It is critical because the parties must determine how much welding work is beyond the borders of "incidental to the primary function."

Since the two [2] incumbents in the position of Specialist – (Engine, Transmission and As Assigned) have done no welding work, the Union case is incomplete. Unsurprisingly, the Union did not demonstrate its proper burden of proof in the instant case. Therefore, I must deny the grievance.

I am encouraged that a union-management group is working out a training program to provide Mr. Nance with welding skills he needs. While the grievance is denied, there is no bar to the Union filing a grievance when Mr. Nance has developed the skill necessary for his welding duties, successfully completed his trial period, and has an extended period of work wherein the parties document his welding work.

AWARD

The grievance is denied.

Dated: **April 30, 2012**

Robert W. Ahern

Robert W Ahern

Arbitrator