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AMALGAMATED TRANSIT UNION
LOCAL 1342

In the Matter of the Arbitration

between

AMALGAMATED TRANSIT UNION, LOCAL 1342

-and-

**NIAGARA FRONTIER TRANSIT METRO
SYSTEM, INC.**

**OPINION AND
AWARD**

(Eye Safety Arbitration)

Before: Stuart M. Pohl, Arbitrator

In Attendance:

For Union

Terry M. Sugrue	- Attorney
Jerry Borden	- Executive Board Member
George Bailey	- Retired (Day #2 only)

For Company

Wayne Gradl	- Counsel
William McGee	- Consultant
David Rugg	- Superintendent, Bus Shops (Day #2 only)
David Ernst	- Building Maintenance Supervisor
Howard Scholl	- Manager Bus Maintenance

By letter dated March 12, 2009, from Joseph E. O'Donnell, Esq., I was advised I had been selected by the above parties to hear and decide a certain controversy between them. A hearing in this matter was held at the headquarters of the Niagara Frontier Transportation Authority, 181 Ellicott Street, Buffalo, New York, on September 17 and November 3, 2009. At those times, the

Niagara Frontier Transit Metro System, Inc. (hereinafter referred to as the “**Company**”) was represented by Wayne Gradl, Esq., of counsel, David M. Gregory, General Counsel, and the Amalgamated Transit Union, Local 1342 (hereinafter referred to as the “**Union**”) was represented by Terry M. Sugrue, Esq., of counsel, Reden & O’Donnell, LLP.

At the conclusion of the hearing, I declared the hearing to be closed. The parties agreed to submit post-hearing briefs, postmarked and exchanged within thirty (30) days. After a brief extension, I received their briefs by December 24, 2009.

BACKGROUND

On or about February 13, 2007, George Bailey filed a grievance on behalf of the Union (Jt. 2, p. 1 and p. 5). In it he explained:

“This grievance is being filed to the unilaterally done change by management in the jointly negotiated eye safety program. As stated, understood and accepted at these talks, lines were drawn up to show where safety glasses were not needed to be worn. Because of these new antics by management supervision, it is required to stop these wrongful actions and to abide by the negotiated policy. Any write ups must also be removed from all employee files.”

James Jones, Jr., the Company’s Vehicle Maintenance Supervisor, answered the grievance for the Company on February 19, 2007:

“... There is no date referenced in the grievance as to when the agreement was signed or agreed to. However, the lines that are referred to are a guide for non-maintenance people entering the building to fuel non-revenue vehicles or operators to report defects.

As per the attached agreement dated February 1, 1995, signed by Frank Verso - A.T.U. President and Anthony J. Schill - General Manager on Metro, I refer to the very first line of the agreement which states ‘All Maintenance Employees/Supervisors must wear safety eyewear approved by Metro when in any area where there is a reasonable potential of eye injury.’

On this basis, this grievance is denied.” (Jt. 2, p. 2)

On February 27, 2007, Thomas N. Marstellar, Superintendent, Bus Garages wrote to Union President/ Business Agent, Vincent Crehan in which he again denied the grievance, stating as follows:

“ . . . I concur with the . . . decision of . . . James Jones, Jr.

The Metro Eye Safety Program aims at protecting the safety and well being of employees. No changes have been made in enforcing the Metro Eye Safety Program that became effective February 1, 1995.

The Metro Eye Safety Program Statement clearly states, ‘All Metro work areas, including shops, garages, field locations and other work sites where there is a reasonable potential for eye injury. Only areas such as offices, lunch rooms and lavatories are excluded.’

A maintenance employee must wear protective eyewear during working hours.

I see where no parts of the Collective Bargaining Agreement, Memorandums of Agreement, or past practices have been violated . . .” (Jt. 2, p. 6)

The matter then proceeded to arbitration in accordance with the collective bargaining agreement (Jt. 1¹ - hereinafter referred to as the “CBA”).

ISSUES

The parties stipulated to the following statement of the issues:

Did the Company violate the collective bargaining agreement and the Eye Safety Program when supervision asked employees to put on their safety glasses when standing within the pen-shaded area depicted in Joint Exhibit #5?²

¹All references to Joint Exhibits received into evidence at the hearing in this matter are cited, herein, as “Jt. ___.”

²Apparently the parties have agreed, by entering into this stipulation of the issues, that the negotiated Metro Eye Safety Program, agreed to by the parties, is a part of the collective bargaining agreement, and

If so, what shall be the remedy?

**PERTINENT PORTIONS OF
METRO EYE SAFETY PROGRAM (Jt. 3 and Jt. 6)³**

All Maintenance Employees/Supervisors must wear safety eyewear approved by Metro when in any area where there is a reasonable potential of eye injury. This means that maintenance employees/supervisors who are performing, observing, inspecting, or supervising work, or who are in the vicinity of any work that may result in injury, must wear approved safety eyewear.

All Metro work areas, including shops, garages, field locations and other work sites where there is a reasonable potential for eye injury are included. Only areas such as offices, lunchrooms, storerooms and lavatories are excluded. The Manager, Safety has final authority in determining whether safety eyewear is required in specific circumstances. . .⁴

CONTENTIONS OF THE PARTIES

A. The Union.

The Union contends that the grievance should be sustained for the following reasons:

1. The language found in the first two paragraphs of the Program establishes that the Program only applies to areas where there is a "reasonable potential of eye injury." The language is not clear and unambiguous, as suggested by the Company.

2. The Company's assertion at the hearing that the use of the phrase "reasonable potential

that alleged violations of the Program are arbitrable under the collective bargaining agreement.

³Although the parties did negotiate a change in the Program effective July 1, 1996, the changes were to other aspects of the Program, not to the first two paragraphs of the Program which form the basis for the instant grievance.

⁴Jt. 3, the Program effective February 1, 1995, includes diagrams for Company facilities at Cold Spring Facility, Frontier Garage, Gisel-Wolford Garage and the Yard and Shop. Whether originally attached or not, Manager, Safety, John MacVittie's June 13, 1995 letter makes it apparent the Program included "location maps" (U. 8).

for eye injury” in the third sentence only modifies the words “other work sites,” is without merit. The absence of a comma makes it apparent the phrase “reasonable potential for eye injury” modifies the full sentence in which it appears.

3. The Union’s interpretation is consistent with the agreement as a whole, whereas the Company’s interpretation is inconsistent, since there are “work areas” within the listed work areas where there is no reasonable potential for eye injury.

4. Those areas include areas not shaded on the maps or diagrams which are a part of the Program, since there is not a reasonable potential for eye injury in those areas.

5. There is no support for the Company’s contention that the maps or diagrams only apply to non-maintenance employees like bus operators and visitors. They are not mentioned in the Program. Some visitors aren’t in the Union’s bargaining unit.

6. If the Company is right, there would have been no reason for the Company to allow the Eye Safety Committee to bargain over excluded areas for visitors, but not for maintenance employees. There were no non-maintenance employees on the Eye Safety Committee. Yet, bargaining notes placed into evidence by the Union show that the maps or diagrams were negotiated contemporaneously by the Eye Safety Committee representatives along with bargaining over a 30 day grace period for discipline.

7. The Union’s contention that the location maps are part of the Program is further supported by the inclusion of the same location maps in the Supervisor’s Eye Protection Program (U. 8 Distribution memo and U. 9 “Supervisor’s Program”).

8. The maps clearly demonstrate that not all parts of work areas have a reasonable potential of eye injury. That is why they are unshaded. It follows that eye safety glasses cannot be required in certain work areas.

9. Nor is there any merit in the Company's insistence that the areas of exclusion from the eye safety glass requirement, found in the Program, is an all-inclusive list, given the use of the phrase "such as," preceding the four listed exclusions.

10. As Mr. Ernst testified, injuries can happen anywhere, but it's not likely or reasonable that they will occur in places like offices, so eyewear is not required. In the Union's view, the same rationale applies to "unshaded areas along the wall near the time clock and spare nuts and bolts in the repair bay."

11. The use of the words "work" and "work areas" and "performing" work, or being "in the vicinity" of work that could "result in injury," in the Program language on page 1 supports the Union's contention, since such language would be nothing more than surplusage if the Company's interpretation was upheld. Interpreting the language in a way that would nullify such language should be avoided.

12. Furthermore, if the Program actually requires maintenance employees to wear safety eyewear everywhere "during work hours," as maintained by the Company in its grievance denial, the parties certainly would not have used two and one-half paragraphs of the Program to detail the scope of the eyewear requirement. Also, there would be no need for the language confirming that the Manager, Safety has the final word on the specific circumstances under which safety eyewear is required, if the Company's interpretation of the eyewear requirement is upheld.

13. The grievance should be sustained. The arbitrator should direct the Company to cease and desist from requiring maintenance employees to wear safety eyewear while outside "eye protection areas" unless they are working or in the vicinity of work that has a reasonable potential of eye injury.

B. The Company.

The Company maintains that the grievance must be denied. Its arguments can be summarized as follows:

1. The Union failed to meet its burden of proof in this contract interpretation arbitration.
2. Also, to the extent this matter involves an “ambiguity” in the language of the Eye Safety Program, it should be resolved against the Union.
3. The Union’s interpretation of the opening sentence to the Metro Eye Safety Program (the “1995 Program” or “1996 Program”) that glasses must be worn in work areas only when there is a “reasonable potential of eye injury,” would render the Program and its goal of protecting employees’ vision, meaningless.
4. Applying the Union’s interpretation would allow employees to “taunt” management by potentially allowing them to grieve each time a direction is given to an employee to put on safety glasses in an area the Union claims is not one where there is a reasonable potential for eye injury.
5. The rule of interpretation known as “expressio unius est exclusio alterius” states that, where an agreement contains a list of exceptions, the implication is that no other exceptions exist. The notes of Mr. Bailey, taken during bargaining over the Program, corroborate that the Cold Spring Repair Bay at issue in this proceeding is “restricted” with no exceptions listed for it (U. 1⁵).
6. Mr. Bailey’s testimony regarding Jt. 3, in which he claimed that garages were improperly listed as eye glass areas; that shop areas were supposed to have been unshaded; i.e., a no eye glasses required area (although the whole shop area is shaded on the diagrams); and that

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in the garage area, maintenance employees need only wear eye glasses when they are working on a bus, is unsupported by the Program language and diagrams or any other evidence produced by the Union to support the grievance.

7. In over ten years of experience working under the Program, neither the Union, nor any employee prior to Mr. Bailey, has ever grieved or otherwise advised the Company that the inclusion of “garages” as among those work areas where safety glasses had to be worn, was erroneous.

8. The inclusion on the Program diagrams of shaded and unshaded areas was conclusively explained by Supervisor, David Ernst and by Manager of Bus Maintenance and Equipment, Howard Scholl, as being inapplicable to maintenance employees. The Union failed to meet its burden of proving, by introducing written proposals or testimony regarding any bargaining over them, that the diagrams were intended by the parties to override the express and clear provisions of the Program.

9. The Union failed to prove that the clearly worded and executed Program, as posted, does not mean what it says. Nor did it prove that the Program document contains an exclusion for the area disputed in this proceeding.

10. The grievance must be denied.

OPINION

I have carefully reviewed the testimony of the parties' witnesses called to testify in this proceeding. I have also carefully considered the documentary evidence, as well as the parties' well-stated contentions in support of, and in opposition to, the grievance in this matter. Having

completed my deliberations, I have concluded that the grievance should be denied, for the reasons set forth below.

In this contract interpretation arbitration, the burden of proof was upon the Union to establish that the Company violated the 1996 Program (Jt. 6) by requiring maintenance employees to wear safety eyewear in the pen-shaded area of the Cold Spring Facility, depicted on Joint Exhibit #5 (photographs of that area).

The Union offered certain documentation and the testimony of now-retired Garage Helper, George Bailey, who still maintains his position as the Union's Vice President., in support of the grievance. He has served as Vice President since 1995, the same year the 1995 Program (Jt. 3) became effective. It also called Jerry Borden, a mechanic at the Cold Spring Garage, as a rebuttal witness. For their testimony to be considered relevant, I must first determine whether or not the meaning of the disputed language in the 1996 Program is clear, as argued by the Company, or whether it is ambiguous, as urged by the Union.

The relevant portions of the Program⁶ giving rise to the instant controversy contain several components which delineate *who* must wear safety eyewear, as well as *when* and *where* they must do so. Thus, the first paragraph of the Program provides that (1) "All Maintenance Employees/Supervisors must wear safety eyewear approved by Metro. . ." Said staff are mandated to wear such protective equipment (2) ". . . when in any area where there is a reasonable potential of eye injury." Clearly, if this was the only language describing *when* the eyewear must be worn, the Union's contentions would be more difficult to reject. For, such language, standing alone, would leave room for circumstances or areas where (a) there was not a reasonable potential for eye injury

⁶The language in the first two paragraphs of page one are the same in both the 1995 Program and the 1996 Program.

and, therefore (b) no need or requirement to wear safety eyewear. But, the language was not so limited by the parties.

Instead, the Company and Union agreed to many of the circumstances under which safety eye glasses would, or would not, have to be worn. Hence, they used the words “This means . . .” to clarify the words that follow; i.e., the circumstances under which the wearing of safety eyewear would be required. Thus, in their commendable attempt to reduce eye injuries, the parties provided that maintenance employees/supervisors (1) “. . . who are performing, observing, inspecting, or supervising work. . . , or (2) “. . . who are in the vicinity of any work that may result in injury. . .” will be required to “wear approved safety eyewear.” I find this language is not ambiguous or subject to more than one interpretation. Instead, I must conclude that the parties, to this point in the Program language, simply tied the obligation to wear safety eyewear to work typically performed in the areas encompassed by the Program. Thus, whether maintenance employees or supervisors are simply observing or inspecting that work, or performing or supervising said work, they must wear safety eyewear if that work “may result in injury.” Even if they are not doing any of those functions regarding work then being performed, the language in the first paragraph clearly provides that they still must wear safety eye glasses if they “. . . are in the vicinity of any work that may result in injury.” Although the words “may result in injury” (rather than the words “reasonable potential for eye injury” as used in the first sentence) are used in the second last line of paragraph 1, either phrase reinforces the goal of reducing workplace eye injuries.

Thus, if all that appeared in the Program language was the first paragraph, it could be argued that wearing safety eyewear would be required in any location at which, or in the vicinity of which, work could be observed, inspected, performed or supervised. But, the parties chose to also include

in the Program language, a detailed description of what areas of the Company's work sites would be restricted areas requiring the wearing of the safety equipment. Thus, what remains to be determined is *where* those areas are for purposes of the Program's safety eyewear mandate.

The parties' attempt to better define *where* the safety eye glasses must be worn is found in the language in paragraph 2. But I am mindful of the need to read the second paragraph without losing sight of the requirements of the first paragraph.

The first sentence of the second paragraph starts with the phrase:

"All Metro work areas, including shops, garages, field locations and other work sites where there is a reasonable potential for eye injury ***are included . . .***"
(Bold and italics added)

As it applies to the instant dispute, I conclude, as the Company contention suggests, that the parties did agree that all work areas at Cold Spring Garage were *potentially* included. I say *potentially* because, if they intended the first sentence to mean that all work areas would be restricted areas where safety eyewear had to be worn, there would have been no need to add more language to paragraph 2.⁷ They could have simply stated that safety eyewear had to be worn in all garages, shops and field locations. Instead, the parties decided to use language in the second sentence of the second paragraph to explain the types of areas at Company facilities which would not be designated as restricted areas where eye glasses would have to be worn. Thus, they agreed that "Only areas ***such as*** offices, lunchrooms, storerooms and lavatories are excluded." (Bold and italics added).

I agree with the Union's assertion that the use of the phrase "such as" indicates that the list

⁷The Union's claim that the phrase "reasonable potential for eye injury" modifies the four listed exclusions, as well as the phrase "other work areas," is somewhat convincing, although not determinative of the instant dispute. The sentence is ambiguous and could be interpreted in the way suggested by the Union and Mr. Bailey. However, it is also susceptible to the interpretation offered by the Company; i.e., that it was intended to only define "other work areas," not the four listed areas.

of four areas (i.e., offices, lunchrooms, storerooms and lavatories) is not, as argued by the Company, clear and exhaustive; i.e., there could be other work areas that are similar to offices, lunchrooms, etc. that would, therefore, also be excluded from the eyewear mandate. Despite this conclusion, I also note that the Union's claim ignores the fact that the second paragraph starts with the phrase "All Metro work areas." The use of that phrase strongly suggests that the parties believed all metro areas had the potential for eye injury and intended to make all metro work areas restricted, unless a particular work area was of the type exemplified by the four listed exclusions. Thus, the Union had the burden of establishing not only that the list of four exclusions was not exhaustive, but more importantly, that the parties discussed and agreed, either in 1995 or 1996, that the disputed area in the Repair Bay at Cold Spring Garage was another excluded area.

As explained by Elkouri and Elkouri in How Arbitration Works, 5th ed., 1997:

"An agreement is not ambiguous if the arbitrator can determine its meaning without any other guide but the knowledge of the simple facts on which, from the nature of language in general, its meaning depends. [footnote omitted] But an agreement is ambiguous if 'plausible contentions may be made for conflicting Interpretations' thereof. [footnote omitted] Moreover, it is recognized that whether a document is or is not ambiguous is a matter of impression rather than of definition; and this is obviously so, because each provision 'may be as clear and definite as language can make it, yet the result of the whole be doubtful from lack of harmony in its various parts.' [footnote omitted]" at pp. 470-471

I have carefully read and re-read the first two paragraphs of the Program and considered them in the context of the entire 1995 Program and 1996 Program. What remains unclear to me is what the parties intended when they agreed to the language in the first sentence of the second paragraph (see footnote 6, at p. 9, herein). The Union claims that the language in the first two paragraphs of the Program, clearly states that maintenance employees must wear safety eyewear only where there is a reasonable potential of eye injury. It argues further that the parties intended that even in areas

listed as mandatory safety eyewear areas, the parties negotiated certain work areas within those areas, described in the Program, which were excluded from the safety eyewear requirement. The question is whether or not they presented convincing proof to support that self-serving conclusion.

Specifically, Mr. Bailey claimed that the parties agreed to define those areas that would be restricted and used system maps of the Company's maintenance facilities, to indicate where, within each area, safety eyewear had to be worn and where they were not required. Because I have concluded that the language in the 1996 Program concerning *where* eye glasses must, or need not be worn is unclear, it is necessary and appropriate for me to turn to other tools of interpretation to assist me in resolving the instant grievance. In doing so, I reiterate that the Union has the burden of proving that its interpretation is what was agreed to by the parties.

A. Union Case.

Testimony of George Bailey.

On direct examination, Mr. Bailey testified that the Program was negotiated by the Company and the Union, in 1995, in an attempt to cut down on eye injuries occurring at the Company's garages. The 1995 Program was a follow-up to an earlier, unilaterally imposed safety eyewear program that contained no discipline component and which was ineffective.

He then described the bargaining for Jt. 3⁸, which did contain an eight (8) step disciplinary ladder. He noted that the maps attached to Jt. 3 were negotiated between the parties contemporaneously with the remainder of Jt. 3, including the opening paragraphs on page 1. He testified that the purpose of the maps was to show which areas were restricted (i.e., those where

⁸The agreement was amended to correct the amount of reimbursement an employee is entitled to from \$75 to \$90 (See U.4 and U. 5). Jt. 6 is the Revised Eye Safety Program dated July 1, 1996. There was no change made to the two paragraphs which detail by whom, when and where safety eyewear must be worn.

safety eyewear was required) and which were not restricted. He further recalled that the maps were developed from blank copies of the maps which initially had no shaded areas on them. He remembered that it was on the last day of January 1995 that the committee members went to the locations and added shaded areas to the maps to show where safety eye glasses had to be worn U. 3).

Next, he identified U. 1 as the notes he took on January 31, 1995, at the Safety Committee meeting. He noted that the writing and handwritten words on the pages are his. He stressed the importance of the fact that the maps are referred to at page 2 of his notes, in Item #5 and at page 3 in Item #8.

According to Mr. Bailey, the Safety Committee met again on February 10, 1995, as reflected in Mr. Bailey's notes (U. 2). He testified that the maps that were handed out, as indicated in his notes, were the maps marked in evidence as U. 3. The shaded areas on the maps were added in February 1995 and, according to Mr. Bailey, denote "restricted" work areas where safety eye glasses must be worn.⁹ He next testified that the unshaded areas represent areas where wearing safety eyewear is not required "unless certain work is performed." He gave an example suggesting that safety eyewear was required in a non-shaded area only when work was actually being performed in that area.

Regarding the last sentence in the second paragraph of Jt. 3, Mr. Bailey explained that it meant that if something new came up, the Company would discuss it with the Union and then make a decision. He gave several examples. Thus, if a bus stalled and a road call or service call had to be made by a mechanic, the mechanic would have to wear safety eyewear. If lawn mowers or rider

⁹U. 3 represents the maps before the shaded areas were added by the parties.

mowers are used to cut grass, the employees must wear safety glasses. Or if an employee has to clean up broken glass, eyewear has to be worn. Although all this makes sense, none present circumstances common with those raised in the instant dispute.

He was asked to explain why he filed the instant grievance. He indicated that the precipitating incident occurred at the Cold Spring Garage when A Mechanic, Fred Rozier, who was standing in the unrestricted area near the time clock, bulletin board and yellow pole (see pen-shaded area on the photos of that area [Jt. 5, U. 6 and U.7]), was directed by supervisor, Jim Jones, to put on his safety eyewear. The area he was standing in was a non-shaded area of the Repair Bay, reflected on the Cold Spring Facility map (Jt. 3, at p. 3). He testified that, until Jim Jones became supervisor, maintenance employees had never been required to wear safety eyewear in the disputed area at Cold Spring. He added that, although "to his knowledge," the Company currently expects employees to wear safety eyewear in the disputed area, he recently observed the Supervisor and the Day Safety Supervisor in that area and they were not wearing safety glasses. He completed his direct testimony by noting that the yellow line on Jt. 5 is longer than, but is the same line as the black line in the Cold Spring Repair Bay indicated on Jt. 3, p. 3.

He identified Co. 1¹⁰ as General Manager, Metro, Tony Schill's letter announcing the implementation of the 1995 Program, effective February 1, 1995. He conceded the documents were posted to advise all employees of the Program and that it was likely they also were distributed to employees with their paychecks. When he was asked to admit that the maps were not attached to the 1995 Program documents, he answered in a confusing way, that that was not so, because at Cold Spring the map was posted on the Union board. But then he added that the posting took place within

¹⁰All references to Company Exhibits received into evidence at the hearing in this matter are cited, herein, as "Co. ___."

thirty (30) days of the distribution of Co. 1. He conceded he did not know what occurred at the Company's other three facilities. He noted that the maps could not have been attached to Co. 1 because he didn't visit the locales until mid-February 1995.

He explained that U. 5 came out on June 21, 1996, and was agreed to due to a problem with the amount of money employees would be reimbursed. U. 5 led to the most recent version of the Program, Jt. 6 (the 1996 Program), which was distributed on or about July 1, 1996. He testified that he did not know whether or not *maps were attached to it*. The 1996 Program is the most recent version of the Protective Eyewear Program.

He was next shown Jt. 3 and Co. 1 and conceded that both documents do say that "[o]nly areas such as offices, lunchrooms, storerooms and lavatories are excluded." However, he insisted that additional areas of exclusion were discussed during negotiations between the parties for the 1995 Program. He gave no details. He presented no document to corroborate his self-serving statement.

To test the veracity of this claim, Mr. Bailey was cross examined about his notes of the 1995 negotiations. He conceded that at page 3, he expressly noted that the Cold Spring ("CS") Repair Bay was a "restricted area." But, he then claimed that the parties agreed to go out to the maintenance locations and add shading to the maps to reflect restricted versus non-restricted areas. Nevertheless, he was asked and did concede that no additional areas of exclusion were added to his notes, despite his claim that they were discussed. Certainly the area in dispute in the instant matter is not reflected in his notes or in the express language of the 1996 Program.

Next, he conceded that Jt. 3 lists "garages" as restricted areas. Yet, he acknowledged that, on the Cold Spring map attached to Jt. 3, the garage is not shaded as a restricted area, except in one

small area. His attempt to explain why parts of the garage are unshaded and another is shaded was unpersuasive. In any event, he produced no notes or other documents to substantiate that any of this was discussed and agreed to by the parties. Although he conceded that the Cold Spring map does show an Eye Protection Sign in the garage near Pump #2, he claimed he was unable to state whether such a sign is actually posted in that location. Perhaps recognizing that his answers were weakening the Union's claim, he then claimed, with absolutely no corroborative evidence, that the listing of "garages" *was a mistake*. He had to concede that the alleged mistake has never been corrected; that "garages" were not listed in his notes of the 1995 negotiations as 'non-restricted;' and that he had sufficient time to write down all other restricted and non-restricted areas. When asked who proposed the small shaded area as an Eye-Glass Protection area, Mr. Bailey first repeated the question and then said he couldn't recall.

When he was again shown the photos of the Repair Bay (Jt. 5), he said he had no notes regarding the dimensions of the safe (i.e., no safety eye glasses required) area. He asserted that he knew what the dimensions were from discussions at the bargaining table from the start to the middle of February 1995. Nor do his notes of the February 10, 1995 (U. 2) meeting reflect any such details. Further, although those notes mention other dates for future meetings, Mr. Bailey testified he could find no notes of those meetings.

The questioning then turned to any proposals the Union made regarding non-restricted areas within restricted work areas such as the Cold Spring Repair Bay. Mr. Bailey testified he *believed* the Union made such proposals, but conceded he couldn't find any. Then he admitted that no dimensions were given in the 1995 discussions regarding the Program, but that the participants did give descriptions of "from where to where" the zone would be. He claimed that, for example, there

was discussion about the zone dimensions by referencing the sewer grate running all the way down to the people door at the east end of the building. And, for the Repair Bay at issue in the instant proceeding, he asserted that a “safe area” was discussed, but that no specific dimensions were agreed to.

Mr. Bailey also was asked to explain how the wall areas around the inside of the Repair Bay were any different from the wall areas around other areas of Cold Spring. His responses were not convincing. He answered that the Unit Change area being completely shaded on the map *was a mistake*. He said the complete shading of the Jt. 3 “doesn’t mean what it says,” but that there is no writing between the parties to support that assertion. Moreover, he had to concede that, although the Program language has existed since 1995, there had been no prior grievances filed and no charges filed with the Public Employment Relations Board.

On re-direct examination, Mr. Bailey was asked whether there was any repair work performed along the walls at Cold Spring. He hedged his answer, admitting that there could be, “but very little if any.” And, as for the Garage area, he noted that buses that park there are those coming off-route or previously serviced. He insisted that no planned repairs are performed on these buses while parked there “most of the time.” It is difficult for me to reconcile Mr. Bailey’s insistence that the parties always stressed the “potential for eye injury” and the need to prevent it, when they discussed and agreed to the language in the first two paragraphs of Jt. 3, with his claim, first raised on cross examination, that the map for Cold Spring Facility has been wrong since 1995. He insisted the parties had agreed to certain easements or pathways within Cold Spring Facility where safety eyewear was not required. When I asked him about the striped areas on the Frontier map (Jt. 3, p. 4), he explained that these were walkways leading from the entrance doors where eyewear was

required only when work with the potential for eye injury “ was occurring.” Yet there is no documentation to support this assertion. Not even his own notes of the important meeting, where he says the maps were discussed, remotely support his claim that this exclusion was discussed and agreed to.

Rebuttal Testimony of Jerry Borden.

Mr. Borden has worked as a mechanic at the Cold Spring Garage since 1983. He testified he was familiar with the disputed area in the Repair Bay and has worked in the area represented on the upper left corner of U. 3. He described the area as containing cabinets, tires, lifts, an office area, blue bins and a desk to the left of the blue bins. He worked in that area from 1995 to the time of the filing of the instant grievance. He testified that during that period, the Company has not enforced the safety eyewear requirement. He said it was only in the past two or three years that employees have been required to wear safety eyewear in that area. He explained that he has removed his safety glasses in that area because they allegedly make him dizzy when he wears them. He pointed out that this has occurred when the supervisor is in his office with a view of the area. He did not claim that any supervisor actually saw him with his glasses off. He also testified that employees regularly punch in and out on the time clock without wearing their safety glasses.

On cross examination he was asked why wearing the glasses while he worked didn't make him dizzy. He asserted that was because he does not walk around while he is working, so the glasses don't trouble him.

B. Company Case.

The Company presented the testimony of Building Maintenance Supervisor, David Ernst and Howard Scholl, its Manager Bus Maintenance.

Testimony of David Ernst.

Mr. Ernst explained that he was not the Building Maintenance Supervisor from 1992-1996, the time period during which the 1995 Program was discussed and agreed to. During that period he was serving as the Superintendent of Bus Shops. Neither the Garage nor the Repair Bay were within his jurisdiction. He identified the Company representatives on the Safety Committee that negotiated the 1995 Program and stated that he participated in the discussions with the Union that resulted in the 1995 Program.

Next, he identified Co. 1 as the cover sheet and the 1995 Program that was agreed to with the Union and distributed to all employees. He insisted that Co. 1 is the complete document that was distributed. No maps like those attached to Jt. 3 were attached to Co. 1. He was certain that the only safe (exclusion) zones that were specifically discussed were those named in Co. 1; i.e., locker rooms, offices, storerooms and bathrooms. When he was asked to look at the Repair Bay area at Cold Spring Garage on U. 1, he noted that the Repair Bay is a restricted area where safety eyewear must be worn.

Mr. Ernst was certain that there were no discussions about excluding certain parts of the Repair Bay or in the shop at Cold Spring after January 31, 1995. He said he was certain that was the case because he would have been present at any such discussions. As for the 1996 Program, the only substantive change from the 1995 Program increased the eyewear reimbursement from \$75 to \$90. He sounded certain that there were no discussions about changing the areas in which safety eyewear had to be worn, or to the exclusions to those areas.

Mr. Ernst next testified that maps eventually were issued. He added that U. 8 was issued on

June 13, 1995 and included the Supervisor's Eye Protection Program (U. 9)¹¹. The maps were attached as part of that program, but he made it clear that they were issued, not for the maintenance employees, but rather, for vendors, police and others (e.g., non-maintenance employees like bus operators) who might be walking through the unshaded areas or coming in to get keys for the gas pump without putting on safety glasses. He insisted there was no other purpose for the maps, since all maintenance employees had to wear their protective eyewear at all times. He agreed with Mr. Bailey that he walked around with the Union during the discussion about imposing discipline under the Program, but was sure he told the Union the maps would contain walkways so non-maintenance employees could walk through them without having to put on safety eyewear. He sounded certain that there was never a discussion about the dimensions of these areas. Finally, he disagreed with Mr. Bailey's assertion that the garage and shops were not included in the areas where safety eyewear would be required. He was emphatic that there were no discussions with the Union to exclude any areas from coverage except for the four exclusions listed on page 1 of the Program.

On cross examination, he again maintained that the first sentence of Co. 1, page 2, says that safety eyewear must be worn at all times, except in the four excluded areas listed therein. That position is not supported by the contract language. The sentence he referred to quite clearly provides that safety eye glasses must be worn in all Metro areas where there is a reasonable potential for eye injury. The second sentence does provide four listed exclusions, but it is clear from the parties' use of the words "such as" that the four exclusions are not an exhaustive list.

He asserted that *there is a "potential for eye injury"* in the areas of the Repair Bay and elsewhere where non-maintenance employees, bus operators and others are allowed to walk through

¹¹The Supervisor's Eye Protection Program does not state that the maps apply only to non-maintenance employees.

without wearing safety eyewear. Whether or not the maps were attached to the 1995 Program, or to the 1996 Program, was not established. Nevertheless, I am not at all persuaded that the maps apply only to non-maintenance employees. Rather, I find that, while they may be used for that purpose, as described by Mr. Ernst, they have also clearly apply to maintenance employees. They are mentioned in Mr. Bailey's notes of the January 31 discussion.¹² Further, I credit Mr. Bailey's testimony that the map for Cold Spring, even if it was not attached to the 1995 Program document, was eventually posted at Cold Spring Garage on the Union Board. Finally, given the parties' justifiable concern for the safety of all who enter areas where there is a reasonable potential for eye injury, it would be illogical to conclude that the maps did not apply to maintenance employees, as argued by the Company. But, even though I have concluded that they do apply, they do not sufficiently support the Union's contention urged in this proceeding.

Mr. Ernst admitted that the maps were negotiated by the Eye Safety Committee and that the committee had no non-maintenance employees as members. Also, when he was asked whether the *site visits* mentioned in U. 2, Mr. Bailey's notes of the February 10, 1995 meeting, were visits where the Eye Safety Committee met with employees to explain the Eye Safety Program, he agreed that was true at Cold Spring.¹³ He did not attend any visits that may have occurred elsewhere. He could not recall what was actually discussed with employees at Cold Spring. Significantly, he admitted there were site visits to lay out "safe areas" where safety eyewear would not have to be worn.

¹²Mr. Ernst recalled that the maps referenced on page 2 of Mr. Bailey's notes of the January 31, 1995 meeting were passed out at that time. He claimed the maps were discussed simply to state that all areas of the shops and garages were protective eyewear areas.

¹³On re-direct he insisted that the maps were not used in those discussions with employees. He claimed he simply told shop employees they would have to wear safety eyewear in all areas except for in the four exceptions listed in the Program. No other "carve-outs" were discussed or agreed to by the parties or their Eye Safety Committee members.

Testimony of Howard Scholl.

Mr. Scholl testified he has worked at Cold Spring as the Manager Building Maintenance since January 2004. At the time of the discussion leading to the 1995 Program, he served as the Assistant Vehicle Maintenance Supervisor at Babcock Gissel. In late 1995 or early 1996, he became the Vehicle Maintenance Supervisor in the same area. During those jobs, he was familiar with the 1995 Program and the 1996 Program. He testified that he knew of no areas at Babcock Gissel where maintenance employees were not required to wear safety eyewear.

He stated that he was aware of no change in the interpretation of the Program when Mr. Jones became supervisor at Cold Spring. That is, maintenance employees were still expected to wear safety eyewear at all times. Exclusion areas were carved out for non-maintenance employees like vendors and other employees who came in to gas-up.

On cross examination, he was asked whether maintenance employees at Cold Spring wear safety eyewear at all times. Instead of simply answering yes or no, he stated that "that's the requirement," leaving the question essentially unanswered. When he was then asked whether or not he knew whether the Company had enforced the eyewear requirement in the disputed shaded area prior to the event grieved in this matter, he answered that since he had become Supervisor for Shops, he has counseled maintenance employees who had not been wearing safety eyewear in those areas and told them to put their glasses on.

I have carefully considered all the above summarized testimony and the various documents discussed by the witnesses. I have also carefully read and re-read the critical two paragraphs on page 1 of both the 1995 and 1996 Programs. In order to sustain the grievance, the Union had to convince me that, in addition to the four expressly stated exclusions to the safety eyewear mandate

found in paragraph 2 of the 1996 Program, the parties agreed that the dispute area in this matter was also discussed and set as another exclusion. I must conclude that the Union's vague and self-serving testimony in this regard was insufficient to meet that burden.

I agree with the Union's contention that the system maps are applicable to maintenance employees. However, there is insufficient evidence in the record to conclude, as the Union has asked me to do, that the non-shaded area in the Repair bay at the Cold Spring Garage is an safety eyewear-free zone. Rather, I find that close proximity to numerous areas of the garage where work is performed, or where it can be inspected, observed or supervised, raised a reasonable potential for eye injury, as acknowledged by Mr. Ernst.¹⁴ In the absence of proof that the parties agreed to exclude this area from the eyewear requirement, I cannot conclude that the area is one where there is not a reasonable potential for eye injury. If the Union believes, as it apparently does, that this particular area of the Cold Spring Repair Bay poses little or no potential for an eye injury, it will have to seek a modification of the Program by the Company and/or the Eye Safety Committee. However, as the language of the Program currently stands, although there exists the possibility of additional exclusions to the four listed in the second paragraph, I am unconvinced that the non-shaded area in the Repair Bay at Cold Spring was intended to be an additional exclusion. While it can be argued that, since the Company does not expect non-maintenance employees and non-employees to wear safety eye glasses while passing through this area, it should not require maintenance employees to do so either, it does not follow that the 1996 Program, as written, excludes the disputed area from the eyewear requirement.

¹⁴It is not clear why the Company does not enforce the 1996 Program with anyone but supervisors and maintenance employees. Clearly, even if vendors, police bus operators or others pas through the disputed area, they will be subjected to the same risk of eye injury as maintenance employees who may be standing in the area.

I also agree with the Union that the 1996 Program does not mean, as argued by the Company, that maintenance employees must wear their safety eyewear in all areas, at all times, except in the four excluded areas listed in paragraph 2 at page 1. However, it does not follow that the disputed language was intended by the parties, or should be interpreted, to mean that the non-shaded area on the Cold Spring map is another agreed to exclusion to the 1996 Program's safety eyewear mandate.

Finally, although it could be argued that Mr. Rozier, under unspecified circumstances, should not have been required to wear safety eyewear since there was not a reasonable potential for injury, there is no evidence at all describing the circumstances under which he was working, on some unspecified date, when he was apparently directed to put on his safety eye glasses. The burden of proof, as noted several times previously in this Opinion, was on the Union. The Company was not obligated to establish that the circumstances presented created a reasonable potential for eye injury. The Union failed to submit sufficient evidence from which to conclude that its position should be upheld. Nor was the self-serving testimony of Mr. Bailey and Mr. Borden that maintenance employees were never required to wear safety eyewear in the disputed area prior to Mr. Jones imposing such requirement sufficient to overcome the testimony of Mr. Ernst and Mr. Scholl that the eyewear mandate was enforced in the disputed area even before Mr. Jones's arrival.

The grievance is denied.

In the Matter of the Arbitration

between

AMALGAMATED TRANSIT UNION, LOCAL 1342

-and-

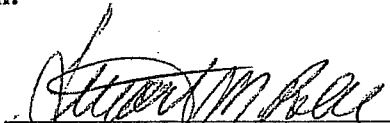
NIAGARA FRONTIER TRANSIT METRO
SYSTEM, INC.

(Eye Safety Arbitration)

AWARD

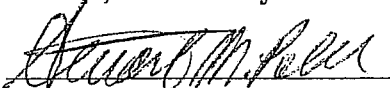
1. The grievance is denied.
2. The Company did not violate the Eye Safety Program or the collective bargaining when supervision asked employees to put on their safety eye glasses when standing within the pen-shaded area depicted in Joint Exhibit #5 at the Cold Spring Garage Repair Bay, for the reasons explained in the accompanying Opinion.

Dated: January 16, 2010


Stuart M. Pohl, Arbitrator

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
TOWN OF AMHERST)

On this 16th day of January, 2010, I, Stuart M. Pohl, do affirm pursuant to Section 7505 of the Civil Practice Law and Rules of the State of New York, that I am the arbitrator in the above-entitled matter and that I executed this instrument, which is my Award.


Stuart M. Pohl, Arbitrator

