In the Matter of the Arbitration	*	
	*	
between	*	
	*	OPINION
Amalgamated Transit Union, Local 1342	*	
	*	AND
and	*	
	*	AWARD
Niagara Frontier Transit Metro Systems, Inc.	*	
	*	

BEFORE:
Ronald E. Kowalski, Ph.D.
Arbitrator

APPEARANCES

For the Company

Wayne R. Gradl, Esq.	Attorney for the Company
Jeffrey Heitman	Payroll Manager
Patrick Dalton	Director of Internal Audits

For the Union

Jules L. Smith, Esq.	Attorney for the Union
Charles Sikora	ATU Treasurer

A hearing on the above-referenced matter in Buffalo, New York on July 6, 2017 before the Undersigned who had been appointed as Arbitrator in accordance with the parties' Collective Bargaining Agreement. 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. Briefs were submitted to the Arbitrator as agreed at the hearing.

ISSUE

The parties were unable to agree to the issue in the Arbitration. The Arbitrator would frame the issue as follows:

> Did the Company violate the Collective Bargaining Agreement or any existing past practice when the Company paid time worked after a 12 hour spread at time and one half rather than time and one half plus straight time?
>
> If so, what shall the remedy be?

BACKGROUND FACTS

The Niagara Frontier Transit Metro System, Inc. (hereafter "Company") has an Extra Board to maintain transit service. Bus and train operators volunteer to work the Extra Board which is to fill in for absent operators. The volunteers are on-call for 12 hour spreads to fill in for operators. The Collective Bargaining Agreement has established pay rates for these operators.

In October of 2016 Payroll Manager Jeffrey Heitman became aware that an operator on the Extra Board was being paid a total of double time and one half for hours he worked beyond his twelve-hour spread. The Company, after reviewing

the matter, denied the double time and one half as the Company concluded the Collective Bargaining Agreement only provided time and one half for such work after the 12 hour spread under Article 12-10.4(c). The Amalgamated Transit Union (hereafter "Union") filed a grievance over the denied payment on October 10, 2016. The grievance was pursued through the contractually provided procedures to this arbitration.

RELEVANT CONTRACTUAL PROVISIONS

The relevant contract provisions are found Section 12-10.4; 12-10.7 and Section 19 of the Collective Bargaining Agreement as follows:

Section 12-10.4. REPORTS

An extra bus or train operator shall not be held longer than three (3) hours on his or her first report.

12-10.4(a). **An extra bus or train operator required to make a second report in a day and who is not assigned work during such report, shall not be held longer than three (3) hours or shall be released after eleven and one-half (11 ½) consecutive hours computed from the time of his or her first report, whichever first occurs.**

12-10.4(b). **An extra bus or train operator who is required to make a second report in a day and who is assigned and works a complete scheduled run on his or her second report shall receive holding time pay at the rate of one-half his or her straight-time hourly rate for the time he or she is held on his or her first and second reports. Holding time shall not be paid an extra operator under any other circumstances.**

12-10.4(c). **Extra operators to receive the minimum eight (8) hour guarantee shall report twice daily within a twelve (12) hour spread (i.e., twelve (12) hours from time of first report.**

Any time worked by extra operators after a twelve (12) hour spread will be paid at the time and one-half rate and the half-time portion of such pay will not be applied toward the operator's daily guarantee.

If an operator makes such a request, the Company will use its best efforts to so relieve the operator as close to the twelve (12) hours point as possible, which efforts shall include requesting other operator overtime and, if necessary, an all-call. Until relieved, the extra operators must complete the assigned work.

12-10.4(d). Pay for work performed by an extra bus or train operator before or after completion of his or her regularly scheduled reports or work assignments shall not be included in calculating his or her daily guarantee.

Section 12-10.7. PRESENT PRACTICES TO CONTINUE – EXTRA OPERATORS.

The present working conditions, practices, rules and regulations governing extra operators, shall continue in full force and effect, except as otherwise provided in this Agreement.

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 or 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 changes rules or regulation shall be subject to the approval of the Union which approval the Union agrees not to unreasonably withhold.

POSITION OF THE PARTIES

Union

The Union argues that for more than a decade the Company has provided a special incentive for Extra Board operators. The incentive is that if he or she worked a run beyond their scheduled 12 hour spread they would be paid the regular hourly rate for the time of the run plus time and one half for all hours worked beyond the 12 hours. In October of 2016 the Company ceased paying the incentive without notice to the Union in violation of the Collective Bargaining Agreement.

The Union asserts the parties Collective Bargaining Agreement prohibits the Company from unilaterally discontinuing or modifying the past practices of the parties. The Collective Bargaining Agreement contains in Section 12-10.7 a past practice clause specific to Extra Board operators which provides that present working conditions, practices, rules and regulations shall continue in full force and effect. (Joint Exhibit 1) There is also an additional past practice clause in Section 19.1. that provides that practices shall be continued and not altered or modified.

The Company cannot dispute that the past practice of paying Extra Board operators straight time plus over time for all hours worked beyond the 12-hour spread has continued without exception for more than a decade. (Joint Exhibit 3-5)

The practice is thus long standing and consistent. Company supervisors have also for years signed individual payroll documents specifically approving the payment of straight time plus time and one half confirming and demonstrating the Company's awareness of the practice. (Joint Exhibit 3-5)

The Company has a large audit department which regularly and consistently audits the payroll. The Company cannot pretend it was thus unaware of the payroll practices administered by its own supervisor for years. There is clear mutuality with respect to this practice as it was well known to the Company.

The past practice is also not inconsistent with a specific provision of the Collective Bargaining Agreement. There is no provision which prohibits the payment of the straight time plus the time and one half set out in Section 12 of the contract. The Company therefore does not have a right to revert back to the contract as the practice is not inconsistent with the provisions of the Collective Bargaining Agreement.

The Company therefore violated the Collective Bargaining Agreement and a past practice when it unilaterally stopped paying straight time plus time and one half for hours worked beyond a 12-hour spread. The Union requests the Arbitrator sustain the grievance and make effected operators whole for loss of wages as remedy.

Company

The Company argues there has been no violation of the Collective Bargaining Agreement when it only paid the contractually agreed upon pay of one and one half times the wage for hours worked after the 12-hour spread. The Company had not agreed to any practice of paying double time and one half and had the right to revert back to the specific provisions of the parties Collective Bargaining Agreement.

The Company asserts that the decision of first level supervisory to ignore the fact that operators already received time and one half and also grant them straight time for the Plus Twelve does not constitute the Company having agreed to accepting a practice. The Collective Bargaining Agreement is the result of an exchange of mutual promises between the chief executive officer of the employer and the employee organization. First-level supervision simply does not have the authority to bind the Company to an agreement or pay out more wages than is provided for in it. There is also no evidence that the Company granted such supervisors the authority to increase the premium due under Section 12-10.4(c) nor that such pay was the intent of the parties in negotiations.

Accordingly, as in the Town of Cicero 46 PERB 4558 (Company Exhibit 1), the Company had the right to revert back to the actual contract language in this case which provides for just time and one half for such premium pay after the 12-

hour spread. There was no way the Company's internal auditors or senior management were aware of the over payment and the language in the contract is clear on this matter and does not provide for such payment.

The Company therefore asserts there was no violation of the Collective Bargaining Agreement when it stopped paying double time and one half for hours worked after a 12-hour spread. The Company requests the Arbitrator dismiss the grievance in its entirety.

OPINION

The issue before the Arbitrator is the instant matter is a question of contract interpretation and application. The facts are not in dispute in this instant case. The question is whether the Company violated the provisions of the Collective Bargaining Agreement, Sections 12-10.4(c), 12-10.7 or Section 19 when it payed time and one half instead of time and one half and straight time for hours worked by a 12-hour spread. The Arbitrator is of the opinion that the evidence and testimony adduced at the hearing sustains the Union's claim a past practice existed of paying straight time plus one and one half overtime for such hours worked and its unilateral change was a violation of Section 12-10.7 of the parties Collective Bargaining Agreement.

There is no dispute in the record that the Company has for over a decade since the language in Section 10-12.4(c) was negotiated paid one and half the hourly rate as well as straight time for hours worked beyond the 12-hour spread. It is a consistent practice which has occurred multiple times in the decade or more of its existence and it was a benefit to the employees. Moreover, it was a practice initiated by the Company which determined the payment for those hours not the operators. The operators simply submitted their hours and the Company elected to pay the straight time pay and time and one half after the language was negotiated. Company supervisors were aware of the practice and signed individual payroll documents after reviewing and authorizing payment. (Joint Exhibit 3-5) The Company was thus aware of the practice and had initiated it and continued to authorize and make the premium payments. The Company must therefore be assumed to have known or should have reasonably known of the practice. (See Arbitrators Justin, Owens-Corning. 19 LA 57 63 , Roberts 76 LA 773, 780) The additional payment of straight pay for the hours beyond the 12-hour spread was effectively a premium being paid in addition to the contractual one and one half hour pay for this specific work.

While the Company has argued that the clear language in Section 12-10.4(c) allows it to revert back to just the payment of one and one half times the hourly rate, that language does not preclude the payment of an additional premium for the

hours worked beyond the 12-hour spread. Unlike the case of Town of Cicero 46 PERB 4558 (Company Exhibit 1), the language in 12-10.4(c) does not expressly or otherwise exclude a practice of paying an additional premium amount along with the contractually required rate.

The parties Collective Bargaining Agreement in Section 12-10.7 expressly requires that all working conditions and practices governing extra operators shall remain in full force and effect. (Joint Exhibit 1) There clearly was a practice by the Company for over a decade of paying additional premium pay beyond the contractual one and one half hourly rate for the hours operators worked beyond a 12-hour spread. The unilateral termination of the practice is thus in violation of Section 12-10.7.

For the reason set forth above the Arbitrator would therefore adjudge the Company did violate the Collective Bargaining Agreement when it paid time and one half to operators for hours worked beyond a 12-hour spread instead of one and one half plus straight time. The grievance is sustained. The effected employees shall be made whole for any loss of wages as remedy. The Arbitrator will retain jurisdiction if there are disputes over the payments.

AWARD

The Company did violate the Collective Bargaining Agreement when it paid time and one half for hours worked beyond a 12-hour spread instead of one and one half plus straight time to operators.

The Company shall make the effected operators whole for all loss in wages.

9/22/17
Date

Ronald E. Kowalski, Ph.D.
Arbitrator

State of New York)
) SS:
County of Onondaga)

I, Ronald E. Kowalski, Ph.D., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

9/22/17