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In the Matter of Arbitration

between

Niagara Frontier Metro System, Inc.

and

Amalgamated Transit Union, Local 1342

Opinion

and

Award

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This arbitration was heard on February 15, May 2, and June 13, 2008, at the Company's offices in Buffalo, New York. The undersigned was appointed to arbitrate the controversy by direct selection of the parties. Upon submission of post-hearing briefs by both sides, the record was closed.

APPEARANCES

For the Employer:

Susan Wheatley, Counsel
Howard Scholl, Manager of Bus Maintenance
David Rugg, Superintendent of Bus Shops
William McGee, Consultant

For the Union:

Robert Reden, Attorney
Richard J. Chambers, Executive Board Member
George R. Bailey, Vice President
Frank Boice, Steward

THE ISSUE

The parties were unable to agree on a statement of the issue and authorized the Arbitrator to frame it. I do so as follows: Did the Company violate the Collective Bargaining Agreement by failing to rebuild alternators for MetroLink vans in its own

shops and instead purchasing reconditioned alternators from outside vendors? If so, what shall the remedy be?

BACKGROUND

MetroLink vans are vehicles used by the Company for certain specialized runs, including those serving handicapped passengers. Like the "big buses," they are maintained and repaired in the Company's garages and shops. As this service was being introduced in the 1990s, the parties realized that certain issues uniquely applicable to it would arise, and they therefore negotiated terms and conditions specific to the operation, maintenance, and repair of MetroLink vehicles. This "MetroLink Agreement" was negotiated in 2000 and is now included in the CBA as Section 12-A. While the MetroLink Agreement does not address subcontracting as such, it states that "the MetroLink service will not jeopardize the job security of Metro fixed-route-full-time employees or the present and future integrity of the bargaining unit." In addition, Paragraph 2c of the Agreement reads as follows:

> All maintenance and repairs on all MetroLink vehicles leased or owned by NFTA and NFTA Metro Systems Inc. will be exclusively performed by members of Metro ATU Local 1342, with the understanding that regular warranty work (standard manufacturers or 3 years/36,000 miles, whichever is less) may be performed by members of ATU Local 1342 or, at the Company's discretion, a service provider designated by the vehicle supplier. No extended warranties will be purchased for any MetroLink vehicle.

One of the functions regularly performed in the Company's shops is the reconditioning of alternators for the big buses. The grievance, which was filed in October 2005 by Richard Chambers, asserts that "the Company has been buying remanufactured alternators for the MetroLink vans." It is undisputed that the rebuilding

and replacement of big-bus alternators is bargaining-unit work, although there is no indication in the record that bargaining-unit mechanics have ever rebuilt the alternators on the smaller vehicles. The grievance also asserts that using the remanufactured alternators "is a violation of the 12/15/00 Metrolink Agreement, the 10/25/94 Subcontracting Agreement, and any other sections of the CBA or agreements that may have been violated."

The 1994 Subcontracting Agreement provides as follows:

> Both parties agree that regarding the Cold Spring Shops, NFT Metro will consult with the Union prior to any decision to outsource (subcontract) the repair and/or rebuilding of vehicles, components of vehicles or other equipment. NFT Metro and the Union agree to meet promptly when issues of this nature arise and to make a good faith effort to reach a mutually satisfactory resolution. In the event that an agreement is not reached, the Union retains the right to utilize the grievance-arbitration procedure contained in the Labor Agreement.

The Company's substantive response to the grievance, issued at the first step by the Superintendent of Bus Shops, David Rugg, reads as follows:

> The Ford cutaway vans used for both Paratransit and MetroLink have been on property since 1993. This service has remained separate and distinct from "big bus." Subcomponents such as water pumps, starters, alternators and brake calipers for these vehicles have always been purchased from the outside and never remanufactured in-house.

POSITION OF THE UNION

The Union contends, in summary, that the Company made a specific promise in the CBA to give "all maintenance and repair work" on MetroLink vans to bargaining-unit members, a promise that it has failed to keep. This is not a matter of balancing equities to determine whether a particular piece of subcontracting was appropriate, since this approach applies only where there is no contract language prohibiting such

subcontracting. Moreover, the Company has failed to prove that complying with its promise was impossible.

The Union argues that the applicable contractual language in this case is clear and unconditional, but even if it is ambiguous, the Union's position is supported by bargaining history and the parties' post-bargaining behavior. The contractual provision explicitly reserves to unit members "all maintenance and repairs" on MetroLink vans, and the only possible argument is over the meaning of "repairs." On this point, the Company's Superintendent of Bus Shops, David Rugg, testified that when the Company itself made a proposal to *allow* all subcontracting of maintenance and repair work, it contemplated the term "repair" to include rebuilding. Thus when the Company ultimately agreed that all maintenance and repairs of Metrolink vans would be performed exclusively by unit members, that body of work necessarily included rebuilding.

Further, notes the Union, the record shows that the intent of the language as proposed was to add work to the unit. Richard Chambers, a Union official involved in the negotiations, testified that he expected to get new work from this agreement. He feared that, as the Company added to its fleet of vans, the big buses would be replaced, and the Union's goal was to make sure that, if that happened, unit members would capture all the work. Another Union official, Al LaGreca, testified similarly. In addition, the Company's own literature belies its position in this arbitration, as it uses the terms "repair" and "rebuild" interchangeably, and it defines "repair" as to include "rebuild."

The Company's argument that its position is supported by the parties' practice following the 2000 negotiations is without merit, asserts the Union. Soon after these negotiations, Mr. LaGreca saw a pile of alternators being send to the shop for rebuilding,

and he was later told by the Company that they could not be rebuilt. But the fact that the Company initially sent the alternators to the Cold Springs Shops for rebuilding shows the parties' understanding that such work would henceforth be done in-house. The fact that a grievance was not filed at the time may limit back pay, but it does not negate the continuing violation.

Any argument that unit members have continued to do the work that they were doing before the Agreement is irrelevant to the issue, contends the Union. The intent of the negotiations was to secure *additional* work. If the parties meant to do no more than maintain the status quo, they could have said just that. Indeed, they did not have to bargain any language at all, since Section 19-1 of the CBA already protects against the subcontracting of work currently being performed by unit members. Clearly, the Union's fear of losing big-bus work in favor of MetroLink work induced it to demand, and the Company to agree, that *all* maintenance and repairs of MetroLink vehicles would be performed by unit members.

The Union further argues that the usual 11-factor balancing test is inapposite here. In a prior case, Arbitrator Rabin found the contract's past-practice language to protect the bargaining unit against the subcontracting of existing work. The 11-factor test is used to determine whether the Company may contract out work that is typically performed by unit members. These cases apply, however, where there is no specific contract language at issue. They do not apply where, as here, there is specific language that bars subcontracting. The controlling provision in this case is Section 12-A(2)(c), not Section 19-1. The explicit promise in the former provision is not subject to the 11-factor evaluation.

The Union insists, finally, the Company has failed to prove impossibility of performance. It did little checking into what parts kits for rebuilding were available. The Union's research showed that such kits with OEM or equal parts were available and could be purchased for unit members to use to rebuild the alternators. Moreover, the bench currently used to test big-bus alternators could be modified to test MetroLink alternators. The Company's claim that the necessary parts were not available should at least have been tested by soliciting bids for suppliers to submit proposals. Moreover, since the Company purchases rebuilt alternators, it is obvious that the parts to rebuild the alternators are available somewhere.

For all of the foregoing reasons, the Union urges that the grievance be granted and the affected members made whole.

POSITION OF THE EMPLOYER

The Company contends, in summary, that the use of remanufactured alternators to repair MetroLink vans has been a longstanding practice that does not constitute subcontracting, and even if it is could be viewed as subcontracting, it does not violate the CBA in light of arbitral precedent.

The Company notes that Union members have performed repair and maintenance work on vans from the beginning of their use in 1993. This work included repairing alternators by replacing them with rebuilt parts. Unit members have never rebuilt van alternators (of which there are several different ones), although they do rebuild alternators on big buses (of which there is only one). The alternators themselves are not comparable. Moreover, the Company does not possess the testing equipment required for rebuilding the van alternators, as it has never rebuilt those alternators in-house.

The Company argues that the terms and bargaining history of Section 12-A(2)(c) indicate that discussions in 2000 centered on whether normal and customary work on vans would be performed by unit members or at dealerships. The vans come with factory warranties and the opportunity to purchase extended warranties. The parties ultimately agreed that standard warranty work could be performed by a service provider, but no extended warranties would be purchased. During the negotiations, there was no discussion of or negotiation over the meaning of"all maintenance and repairs." After the negotiations, unit members continued to perform repair work on vans, including the installation of rebuilt replacement alternators. No equipment was purchased to enable the van alternators to be rebuilt and tested in-house, nor did any mechanics or shop stewards inquire about when this equipment would arrive, a natural question if everybody understood that the work would be henceforth done in-house. Instead, the Company continued to purchase and stock rebuilt alternators, and unit members continued to install them. Moreover, between 2001 and 2005 the Company purchased and stocked significant numbers of rebuilt alternators, some of which were received by a member of the Union's Executive Board.

The record also shows, asserts the Company, that rebuilding the alternators in-house would require the Company to purchase new equipment, incur greater costs, forgo any guarantee that the products would satisfy OEM specifications, and thus entail safety risks.

In this grievance, contends the Company, the Union is attempting to gain through arbitration what it did not gain, or even ask for, at the bargaining table. The work in question is not "Union work," as unit members have never performed it. There is also a

timeliness question, as the grievance was not filed until four years after the violation alleged began. The Union's explanation of this delay is not credible. If the 2001 Agreement required that van alternators be rebuilt in-house, then the Union would be expected to notify its members and stewards of this new term and condition of employment, especially since new equipment would have to be purchased. There is no evidence in the record that the local leadership ever advised its mechanics and stewards of this new condition, nor did it inquire of the Company as to any new equipment. Everything was status quo until October 2005, evidencing that there was no agreement to have the rebuilding of van alternators done in-house. Section 19-1 of the CBA, notes the Company, says that working conditions and practices shall continue unless specifically modified by the CBA.

As for Richard Chambers' asserted "expectation" that outside work would be brought inside, the Company has honored the agreement that was actually made, including the non-purchase of extended warranties. However, the work that might have been done on an extended warranty never included the rebuilding of van alternators, as the dealership that does the work purchases rebuilt alternators, and does not rebuild them itself.

The Company argues, as well, that if the grievance were held to have merit, there would be no limit to subcontracting claims by the Union, even where the work has never been done by unit members. The Union could claim the right to rebuild a range of parts, including computers. Section 19 of the CBA plainly provides for continuity of working conditions. New work should be assigned to Union members through negotiations and inclusion in the CBA, not by creative arguments assigning a meaning to terms that were

never discussed, much less agreed to. Arbitration is to enforce contracts, not make them.

To the extent that using rebuilt alternators in van repairs could be viewed as subcontracting, asserts the Company, prior arbitrations between these parties hold that the practice would not constitute a violation of the CBA. In one case, Arbitrator Rinaldo held that the Company has a right to subcontract that is limited only by the past-practice provision of Section 19-1 and prior awards requiring an application of the 11-factor test. One of these tests is the adverse impact on the bargaining unit; in this case there is no adverse impact. Another test is efficiency; in this case doing the work in-house would be decidedly inefficient and very possibly entail inferior parts. In another case, Arbitrator Rinaldo ruled that having bus-warranty work performed by the manufacturer did not constitute improper subcontracting, even though there was no question that Union members had the necessary skills and equipment to perform the work. And in a third case, Arbitrator Kowalski ruled that using an outside vendor to install a new digital video system did not constitute subcontracting, as the work went beyond the traditional scope of maintenance work performed by unit members. In the present case, the work in question has likewise never been performed by unit members. In none of the foregoing instances was work taken away from unit members, just as no work was taken away from unit members in the instant case. Indeed, the instant grievance has even less merit than the other ones, all of which resulted in findings of no violation.

For all of the foregoing reasons, the Company urges that the grievance be denied.

FINDINGS AND OPINION

The Union is clearly correct to argue that the Company made a promise in 2000 regarding work to be done on MetroLink vans. The instant grievance ultimately reduces to the question of just what this promise was. It will be useful at the outset to set forth the facts that are not materially in dispute, or at least not contested in the record.

There is no dispute that the rebuilding of big-bus alternators has historically been done by bargaining-unit members. To the extent that this has not been exclusively unit work, the exceptions have been limited to situations where the work is backlogged or where there are no core alternators available to be rebuilt. Similarly, there is no dispute that the alternators for MetroLink vans have always been purchased, either new or rebuilt; they have never been rebuilt in the Cold Spring Shop, either before or after the MetroLink Agreement was executed; and since the execution of that 2000 agreement no steps have been taken to equip the Cold Spring Shop for the new task of rebuilding van alternators. Nor is there any question that bargaining-unit members are entirely capable of rebuilding the van alternators.

In addition, although the parties to the 2000 negotiations may have come away from the bargaining table with different understandings of what they were talking about and what they agreed to, there was no explicit discussion at the table of whether the agreement to reserve all maintenance and repair work on the vans for the bargaining unit included the *rebuilding* of parts that had historically been purchased. Relatedly, there was no explicit discussion of whether the parties were agreeing to create *new* work for the bargaining unit, as opposed to simply preserving the work that it was already doing. It is certainly understandable that the Union may have had the objective of not only

preserving existing work but also bringing new into the bargaining unit, but the Union's objective is not by itself probative of what the parties actually agreed to. Had the Union *expressed* this objective explicitly at the bargaining table, we might have a different story, but as noted earlier there is no evidence that the parties had any discussion of creating new work for the shops (indeed there is testimonial evidence that there was no such discussion).

Although the parties spent considerable time at the hearing debating whether the work could be brought in-house, given the availability of component parts on the market, this question is largely tangential to the core issue. If the Company did make a promise to rebuild alternators in the shop, the matters of what efforts would be required to gear up for this new activity, or whether it would cost more than buying the parts from the outside, or even whether the in-house rebuilt alternators would be of as high quality as the ones that could be purchased (possibly because of inferior component parts), are irrelevant. These are considerations that must be taken into account before any promise is made to do the work in-house. As for the Company's suggestion that there is an impossibility of performance regarding this work, the record does not establish this proposition. The proposition is surely not established by a few phone calls and an Internet search (some of it done during and between arbitration hearings). In this regard, the Union is on firm ground in suggesting that, at the least, the Company would be obliged to put out a formal request for bids before concluding that the requisite components could not be obtained. The Union is also persuasive in pointing out that the component parts must be available *somewhere*, if the people who were rebuilding the alternators that the Company was purchasing were able to get them.

So we must return to the question of what promise was made in 2000, and on this point I am unpersuaded by the Union's contention that the bare language of the CBA is clear and unambiguous. To be sure, the phrase "maintenance and repairs" in Section 12-A(2)(c) can certainly be read to include the rebuilding of worn-out parts, since the rebuilding (by someone) is a necessary phase of repairing and replacing a malfunctioning alternator with a rebuilt one. But neither is it illogical to read the term "repair" as including only the removal of a bad part and the installation of a good one, with the replacement part being purchased from the outside, either new or rebuilt. Indeed, it would not seem at all strange for a retail garage to routinely "repair" vehicles by buying replacement parts and installing them. Moreover, it is not clear that these parties have routinely viewed the in-house "repair" of parts as necessarily including the "rebuilding" of the old ones. They have done so by practice, as noted before, with respect to big-bus alternators and other big-bus parts, but they have also executed a subcontracting agreement that makes reference to "the repair and/or rebuilding of vehicles, components of vehicles or other equipment." This terminology suggests that rebuilding and repair are distinct activities, which can be performed either separately or together.

In this regard, I am also not persuaded by the Union's argument that the Company's original proposal in 2000 showed an understanding on its part that "repair" necessarily includes "rebuilding," at least in the current context. That proposal, not adopted, would have removed any limit to the subcontracting of maintenance and repair work on MetroLink vehicles. If all repair work could be subcontracted, there would be no question of the parts to be installed by the subcontractor being rebuilt in the Company's

shops. The make-or-buy decision on rebuilding is inherent in the right to subcontract the "repair." The same is not true where the repair is done in-house, as we see in this very case. It is entirely feasible and logical to say that bargaining-unit people will repair a part by removing the bad one and replacing it with a good one, whoever produced the good one. Thus it cannot be said that, in ultimately agreeing to the language now in the CBA, the Company was acknowledging that the term"repair" included the rebuilding work that had historically been done outside.

The upshot of the foregoing is that the language of Section 12-A(2)(c) is ambiguous in the basic sense of that word, namely, that it may reasonably be read more than one way. Arbitrators search out the meaning of ambiguous language in time-honored ways. One is to look at bargaining history, which in this case, as we have seen, does not take us very far. The other prime indicator of what the parties meant, of course, is how they subsequently behaved. Absent compelling evidence to the contrary, the presumption here is that the parties will have behaved in conformance with what they understand the bargain to have been. Put another way, if there are two possible constructions of the language, one of them consistent with the parties' behavior and the other not, it is logical to conclude that the construction consistent with the behavior is the one that the parties intended. It is on this consideration, which in my judgment is the central point of the case, that the grievance here must fail.

The MetroLink Agreement was reached in December 2000. The instant grievance was filed in October 2005. It is undisputed that during this time no van alternator was rebuilt in the shop. And although the record does not provide us with the actual number of van alternators that were purchased and installed in the nearly five years between the

Agreement and the grievance, it is clear that there were many. There is testimony to the effect that pallets of van alternators were seen by witnesses being transported in 2001 and 2005, which compels the conclusion that the removal and replacement of a van alternator was not an infrequent event. The record also shows that the removal and replacement of alternators was going on openly; the work itself was done by Union mechanics; and the parts were provided by Union clerks in the stockroom. There is evidence, moreover, that one of these clerks was a Union official. The unanswered question in this case is how all this could be going on for more than four years if people in the middle of it thought that it was contrary to the bargained arrangement.

In its opening statement, the Union suggested that in 2005 it discovered that the rebuilt alternators were being purchased from the outside and not rebuilt in-house. This state of affairs may have been discovered by Mr. Boice in 2005, but others must have been aware of it long before then. As the Company points out, not only did various Union members (and at least one Union official) handle the purchased parts, but, in order to implement the agreement the way the Union is arguing it should have been, equipment would have to be bought and work stations constructed. The fact that nothing was done to enable the rebuilding of van alternators in-house would have been evident to everyone in the shop, including Union members and officials. The Company is also persuasive in pointing out that if an agreement had been reached to bring a large volume of new work into the shop, the Union could reasonably have be expected to alert its mechanics and stewards to that fact, and to be attentive to the introduction of new equipment to enable the new work to be done. It is difficult to accept the proposition that the non-implementation of such a consequential agreement could have simply slipped beneath the

radar for more than four years. A more persuasive explanation is that the in-house rebuilding of van alternators was not understood to have been part of the 2000 Agreement.

The Union argues that the fact that no grievance was filed in 2001 may reduce the Company's back-pay liability, but as a continuing violation the Company's actions are still a breach of the CBA and should be remedied prospectively. But the failure of the Union to file a grievance in 2001 (or for four years afterwards) is not so much a question of timeliness as it is of what the contract means, or in the Union's words what the promise was. Unless it can be judged that the Union did not know, and cannot be charged with knowing, that this alleged violation of the CBA was going on regularly, we are left with no other explanation than that the people involved did not understand the promise that was made in 2000 to include rebuilding the van alternators in-house, for if that was their understanding, something would have happened long before October 2005. On the record here, while there is no reason to doubt that some individuals were unaware of the ongoing purchases, it cannot be said that "the Union" did not know and should not have known that van alternators were being bought from the outside, contrary to its understanding of the requirements of the CBA. This is, as noted, compelling evidence that the new agreement in 2000 was not understood to change the practice that had been going on for some years before that.

For these reasons, I must conclude that the grievance lacks merit and must be denied.

AWARD

The Company did not violate the Collective Bargaining Agreement by failing to rebuild alternators for MetroLink vans in its own shops and instead purchasing reconditioned alternators from outside vendors. The grievance is denied.

STATE OF NEW YORK} SS:
COUNTY OF ERIE }

I, Howard G. Foster, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

October 16, 2008
(dated)

Howard G Foster
(signature)