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In the Matter of the Arbitration between :  
Local 1342, Amalgamated Transit Union, Union :  
- and - : **OPINION  
AND AWARD**  
Niagara Frontier Transit Metro System, Employer :

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**BEFORE:** Lise Gelernter, Arbitrator<sup>1</sup>  
**HEARING DATE:** June 4, 2014

**APPEARANCES**

**For the Union:**

Robert J. Reden, Esq.  
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**For NFT Metro System:**

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**OVERVIEW OF CASE, THE ISSUE TO BE RESOLVED AND STIPULATIONS**

This case concerns a contractual dispute over the temporary placement of temporarily disabled employees of the Niagara Frontier Transit Metro System (NFT or Company) in Customer Care positions. Customer Care or Customer Service<sup>2</sup> clerks answer the phones for the NFT and respond to customer inquiries concerning trip routing, fares, schedules, complaints and other customer inquiries. T-Barker.<sup>3</sup>

The terms of the Transitional Return to Work (TRTW) Program agreed to by Local 1342

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<sup>1</sup>The parties notified me that they had selected me to serve as the arbitrator in a letter dated March 26, 2014. The hearing was held on June 4, 2014 at 181 Ellicott Street (NFT Metro Offices) in a conference room. Each party had a full opportunity to make opening statements, examine and cross-examine witnesses and submit written closing statements by August 1, 2014.

<sup>2</sup>The Company and the Union use the terms "Customer Service" and "Customer Care" interchangeably.

<sup>3</sup>References to "T-" followed by a last name indicate that the testimony of the person indicated was the source for the information provided.

of the Amalgamated Transit Union (Local 1342 or Union) and the NFT govern the periodic placements of temporarily disabled employees. Jt. Ex. 2. Local 1342 represents regular, full-time customer care employees, as well as drivers, maintenance employees and other office and clerical workers. Jt. Ex. 1, §2.

At the hearing, the parties agreed on the following issues to be resolved:

Was the Company in violation of the Parties' TRTW Agreement[s] and any related Collective Bargaining Agreement (CBA) provisions, in or around September 2013 through January 2014?

If so, what shall be the remedy?

The parties made three stipulations at the hearing:

1. In 2000, there were 10 customer care representatives, and in 2002, one retired, who was not replaced, leaving nine until the present.
2. The remedy for this case cannot include requiring the Company to hire any more regular full-time Amalgamated Transit Union personnel in customer care.
3. In this proceeding, the Union is not claiming that using a temporary employee in the customer care department is violative of the CBA or the TRTW agreement. This understanding is without prejudice to any future such claims made by the Union.

### EVIDENCE PRESENTED

**The Creation of the TRTW Program.** Vince Crehan, the Union President and Business Agent, testified that in 2001, as part of the collective bargaining process, the Union and the Company reached a side agreement on the temporary assignment to other duties of employees who could not perform their regular jobs due to "injury and/or illness." T-Crehan; Jt. Ex. 2. The agreement, entitled the "Transitional Return to Work Program" (TRTW"), provides that "[w]henver possible, METRO will provide transitional duty assignment to employees who because of an injury and/or illness may not be able to perform their full jobs." The temporarily disabled employees in the TRTW Program are members of the bargaining unit represented by the

Union. Jt. Ex. 2, §4 (“All regular full time local #1342 union members are eligible to participate in the TRTW Program”).

The Company had approached the Union about an agreement on TRTW during contract negotiations in 2001, but the Union was concerned that it would be used to replace full time employees. This led to the Company drafting Section 1 of the agreement, T-Crehan, which provides: “The TRTW Program will not cause a reduction of the work force, nor will it violate or conflict with an employee’s seniority rights.” Jt. Ex. 2, p. 1. The agreement also provides that TRTW assignments will last no longer than 90 days, but exceptions can be made in exceptional cases if the Union and the Company agree to the extension. *Id.*, §2; T-Crehan.

In 2011, the parties negotiated an amendment to the TRTW agreement because there had been ongoing disputes about placements. T-Crehan. The agreement identifies “old tasks” in the TRTW Program which “can be filled by the company without the approval of the union.” Jt. Ex. 2, last page. The “old tasks” listed include various duties at the Babcock, Cold Spring and Frontier Garages and Stations, and “taking calls and handling customer service needs” in the Customer Service Department. “New tasks,” which include “OCC, 2<sup>nd</sup> TRTW assignment in customer service and all small boat harbor assignments,” must be approved by the Union and the Company “or the tasks will not be filled.” *Id.* For the Customer Service Department, this meant that the assignment of a second TRTW employee would always require management and union approval. T-Crehan.

**Events Leading to the Grievance.** Mr. Crehan testified that he had not been aware that there was often continuous or almost continuous use of TRTW employees assigned to Customer Care until around September 2013 when Kim Kifer, the NFT Workers’ Compensation Medical

Coordinator, called him seeking the Union's approval for filling a second TRTW position in Customer Care. He asked how often the Company used TRTW employees in Customer Care and she said that it was almost all the time. T-Crehan. Although he had been notified of all TRTW assignments made pursuant to the agreement, he had not known that most lasted a full 90 days. *Id.*; Jt. Ex. 4.

In 2013, when Ms. Kifer called about approval for a second TRTW placement, Mr. Crehan checked with Kathy Ehrig, the Union's Financial Secretary and Treasurer, who also was the designated board member to oversee clerical staff issues, about the second TRTW assignment in Customer Care. At the time, they understood that the TRTW assignment would replace someone who would be sick for about two to three weeks. Ms. Ehrig talked with the employees in Customer Care, and found out that they thought that any absences and illnesses could be covered by overtime by the regular full time employees. T-Ehrig. Mr. Crehan and Ms. Ehrig agreed that it would not be a good idea to approve a second TRTW position and rejected the Company's request.

Because the Company needed to cover the absences of two employees on sick leave and one other person on vacation every week for several weeks, the Company then hired one temporary employee to cover Customer Care work for one month. T-Barker. The Company has the authority to hire temporary employees for 90-day periods pursuant to Section 3-3 of the CBA. Jt. Ex. 1, p. 4. Jacquelyn Barker, the manager of the Customer Care Department, testified that she could not depend on using overtime performed by the regular full time employees to cover the vacancies because employees could decline overtime and she knew she needed consistent coverage for the work of two to three employees for several weeks.

After the hiring of the temporary worker, the Union submitted a grievance on September 10, 2013, Union Ex. 3, that claimed, after January 28, 2014 amendments:

the Company has and continues to overly utilize one TRTW position in its Customer Service Department to the detriment of regular full time Clerical positions in that department.

Said over utilization is an abuse of the TRTW Program in general and a specific violation of Section #1 thereof.

Jt. Ex. 3. The remedy the Union sought was “the elimination of all TRTW positions within the Customer Service Department.” *Id.*, p. 2. The Company denied the grievance, noting that there had been no reductions in force in the Customer Service Department and that there had been nine clerks answering phones since 2001 when the TRTW Program started.<sup>4</sup> Jt. Ex. 3. In addition, the TRTW agreement does not address “over utilization,” and, according to the Company, “expressly contemplates that there will . . . always be one TRTW position assigned to Customer Care and the possibility of a second position as well, if Union approval is given.” Jt. Ex. 3.

Although NFT Metro had placed TRTW employees in Customer Care on a nearly continuous basis from 2010-2013 (with gaps totaling about 2 months in 2012 and three months in 2013), Jt. Ex. 4, and almost continuously in many prior years, Mr. Crehan said the Union had not been aware of the amount of TRTW work being done there due to being notified only when TRTW work started. T-Crehan; *see also* Co. Ex. 1 (notifications to Union re: TRTW placements, 2003-2014). Because the Union had not requested the available information about TRTW utilization nor had it been aware that there should be any cause for concern, the Union

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<sup>4</sup>The Company’s contention was somewhat inaccurate. The parties stipulated at the hearing that there had been 10 clerks answering phones in 2000 and that one retired in 2002, leaving only nine clerks starting in 2002 and continuing to the present. In any case, although the TRTW agreement was formulated in 2001, there were no TRTW placements in Customer Care until 2003, Jt. Ex. 4, at which time there were nine full-time clerks in Customer Care.

had not submitted a grievance prior to 2013. T-Crehan; T-Ehrig. When Mr. Crehan asked Ms. Kifer in 2013 how often TRTW placements were being made in Customer Care, and she said it was done on an almost continuous basis, Mr. Crehan concluded that the Company was over-utilizing the program. T-Crehan.

**The Past Operation of the TRTW Program.** Joint Exhibit 4 is a listing of all employees in the TRTW Program in Customer Service, with their assignment dates. Kim Kifer prepared Joint Exhibit 4 and it shows that the TRTW Program started placing employees in Customer Service in July 2003 and continued until the day of the hearing. One, and sometimes two TRTW employees worked fairly constantly, except for some significant lulls. No TRTW employees worked in Customer Service for the following periods: 1) January 23, 2004 through February 6, 2006 (more than two years); 2) August 24, 2007 through October 17, 2007 (almost two months); and 3) November 28, 2008 through November 9, 2009 (almost one year). Jt. Ex. 4. As mentioned before, there were smaller gaps in 2012 and 2013 that amounted to two months in 2012 and three months in 2013.

Jacquelyn Barker, the Manager of the Customer Service Department, explained that at the time the first TRTW employee was placed in Customer Care in 2003, there were nine regular, full time customer care representatives working there. The parties had stipulated at the hearing that there had been 10 customer care representatives in 2000, but that after one representative retired in 2002, there was no replacement.

Sometimes Customer Care does not really need a TRTW employee to cover another employee's absence, but the department accommodates the employee anyway, provided the TRTW employee can perform the essential tasks of the job. T-Barker. The Company does this

because the program allows an employee to do productive work within his or her temporary limitations and receive regular wages rather than workers' compensation benefits. Jt. Ex. 2, § 16. There have been a few occasions where Ms. Barker took on two TRTW employees as a favor even though they were not needed to cover absences; the Union has made a request for a second TRTW placement on at least one occasion. T-Barker; T-Kifer; T-Crehan.

### **THE PARTIES' POSITIONS**

Both parties presented their closing arguments in well-written and well-argued briefs that provided in-depth analyses of the contractual language and the evidence presented at the hearing. The summaries of their positions, below, contain just the main points of contention and are not meant to obscure the much more detailed arguments the parties made.

**The Union.** The Union argues that the near continuous use in recent years of at least one TRTW employee in Customer Care shows that the Company is using the TRTW program to substitute for the hiring of a full-time Customer Care clerk. This is a *de facto* reduction in the work force, which is banned by the TRTW agreement, which states that “[t]he TRTW Program will not cause a reduction of the work force.” Jt. Ex. 2. This constitutes over-utilization of the TRTW program, as the grievance contended. Jt. Ex. 3.

Furthermore, the Union argues, the TRTW agreement provides that if the Union does not agree to the Company's request for a “new task,” such as the assignment of a second TRTW employee to Customer Care, “the tasks will not be filled.” Using a temporary employee to fulfill Customer Care tasks therefore violated the agreement.

**The Company.** The Company takes the position that because the TRTW program has not resulted in any reductions in the number of clerks in Customer Care since the actual inception

of TRTW placements, there has been no “reduction in force” that violates the TRTW agreement. The fact that there has been near continuous use of TRTW employees in Customer Care in recent years does not mean that it would have been necessary to hire a full-time clerk if the TRTW program did not exist. There have been many periods of a month and longer during which there were no TRTW employees in the department, including the more than two-year period between January 23, 2004 and February 6, 2006 and an eleven-month period in 2009. Jt. Ex. 4. This indicates that nine clerks have been sufficient at many times and that hiring another full-time clerk is not necessary.

The Company also argues that the grievance is not really about the alleged “over-utilization” of the TRTW program, but rather, is a product of the Union’s dissatisfaction with the slow progress of negotiations to replace the current collective bargaining agreement, which expired on July 31, 2009. Jt. Ex. 1. The fact that the TRTW agreement says nothing about “over-utilization” and that the Union had no problem with the sometimes constant placement of TRTW personnel in Customer Care for many years shows that the grievance has no basis or that the Union is bringing an untimely grievance, according to NFT Metro.

### DISCUSSION

It’s important to identify what this grievance is not about. As the Company and the Union acknowledged in their stipulations, the use of a temporary employee is not at issue in this case. Stipulation No. 3.<sup>5</sup> The CBA contemplates the hiring of temporary employees for periods not exceeding 90 days by requiring the temporary employees to pay the equivalent of union dues

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<sup>5</sup>That stipulation states: “In this proceeding, the Union is not claiming that using a temporary employee in the customer care department is violative of the CBA or the TRTW agreement. This understanding is without prejudice to any future such claims made by the Union.”



after their first 30 days on the job. Jt. Ex. 1, Art. 3-3. The contract is otherwise silent on the temporary employee issue. The stipulation in this case preserves the Union's opportunity to contest the use of temporary employees in future cases.

This case concerns only the question of whether the near-continuous use of TRTW personnel in Customer Care violates the TRTW agreement's prohibition against causing a "reduction of the work force." Jt. Ex. 2. Based on the stipulated fact that there were nine Customer Care Clerks in 2002 and that nine remain today, there has been no "reduction of the work force." There was no dispute that TRTW placements did not begin until July 28, 2003, more than one year after the complement of Customer Care clerks declined from ten to nine due to a retirement. *See* Jt. Ex. 4. Therefore, the implementation of the TRTW program did not reduce the number of full-time clerks and did not violate the agreement.

The Union's argument about "over utilization" encompasses more than a "reduction in the work force." It also posits that the Company violated the agreement by using the TRTW program in lieu of hiring an additional clerk. However, only a "reduction in the work force" violates the TRTW agreement, not the use of TRTW personnel to prevent the need for hiring additional clerks. Therefore, even if the Company's use of TRTW personnel had actually made it possible to do without an otherwise necessary full-time employee, the Company would not have violated the TRTW agreement. In any case, the Union did not prove that the TRTW program has actually prevented the hiring of a full-time clerk. The evidence shows that the Company has had some long and short periods in prior years during which it operated well with nine clerks in Customer Care and no TRTW employees.<sup>6</sup> Furthermore, Ms. Barker, the

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<sup>6</sup>No TRTW employees worked in Customer Care for the following periods: 1) January 23, 2004 through February 6, 2006 (more than two years); 2) August 24, 2007 through October 17, 2007 (almost two months); 3) November 28, 2008 through November 9, 2009 (almost one year). Jt. Ex. 4.

Customer Care Department Manager, testified that there were times that she did not need to take on TRTW personnel in order to handle the Department's work, but that she did so in order to accommodate management and union requests to give qualified personnel a chance to do meaningful work while they could not perform the full duties of their regular jobs.

The current TRTW agreement's authorization for the Company to make one TRTW placement in Customer Care without Union approval is consistent with the finding that the agreement does not address the avoidance of hiring additional personnel. The agreement's plain language contemplates that TRTW assignments can be made one at a time at any time, which allows, in theory, for continuous placement of a TRTW employee without Union approval. Without any language concerning whether these placements can or cannot be continuous and can or cannot supplant the need for an additional full-time worker, there is no limitation on one-employee TRTW placements in Customer Care. The only limitation occurs with a second placement, which the Union can refuse to accept.

The Union had argued that the Company violated another provision of the TRTW agreement: that "the tasks will not be filled" if the Union turns down a request for a "new task," including a second TRTW assignment to Customer Care. The temporary employee's fulfilling of the tasks that would have been done by a second TRTW employee contravenes the agreement, according to the Union. Union Brief, pp. 7-8. However, this argument addresses issues that are outside the scope of the present grievance as it concerns whether or not the Company had the right to use a temporary employee once Mr. Crehan denied its request for a second TRTW placement. The parties' stipulations make it clear that, without waiving the right to grieve this issue later, in this case, "the Union is not claiming that using a temporary employee in the

customer care department is violative of the CBA or the TRTW agreement.”

On the issue of Union waiver or acquiescence, contrary to the Company’s argument, there is not definitive proof that the Union’s failure to grieve this issue prior to 2013 indicates that it intentionally acquiesced in the continuous use of TRTW personnel in Customer Care. Mr. Crehan’s uncontroverted testimony shows that he was notified only when a TRTW assignment started, not when it ended. Therefore, he did not have a sense that many TRTW assignments lasted close to a full 90 days, making him unaware of the continuous nature of the placements. It is true that Mr. Crehan and Ms. Ehrig could have found this out rather easily from the Customer Care clerks themselves, as they did in 2013, when Ms. Ehrig consulted with them about the Company’s request for a second TRTW placement. It does not appear that the clerks ever initiated a complaint to the Union during the 11-year operation of the TRTW program. Nonetheless, the Union’s failure to grieve this issue earlier does not establish a waiver of the right to grieve, nor does it preclude the Union from grieving it in this case as an alleged continuing violation.

#### AWARD

The grievance is denied. NFT Metro did not violated the TRTW Agreement or any applicable CBA provisions in its use of TRTW personnel in the Customer Service Department between September 2013 and January 2014. This finding is without prejudice to any future claims the Union may make about the Company’s use of temporary employees.

Amherst, New York  
August 27, 2014

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Lise Gelernter, Arbitrator

**APPENDIX**

**WITNESSES**

For the Union:

Vince Crehan	ATU Local 1342 President and Business Agent
Kathy Ehrig	ATU Local 1342 Financial Secretary and Treasurer

For NFT Metro:

Kimberly Kifer	NFT Metro Workers' Compensation Medical Coordinator
Jacquelyn Barker	Manager, Customer Care Department

**EXHIBITS**

Joint Exhibit 1	Collective Bargaining Agreement
Joint Exhibit 2	TRTW Agreement package
Joint Exhibit 3	Grievance, as amended, 1/28/14
Joint Exhibit 4	Chart of TRTW Placements in Customer Service
Union Exhibit 1	12/15/09 e-mail from J. Barker to the Union re: second TRTW placement, with handwritten response from V. Crehan
Union Exhibit 2	Notification of TRTW placement, 1/16/14
Union Exhibit 3	Grievance submitted on 9/10/13
Company Exhibit 1	Notification of TRTW placements, 2003-2014
Company Exhibit 2	E-mail from V. Crehan to J. Barker re: second TRTW placement, 12/16/09