18-2 Violations / Pay for higher rated assignments 16

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In the Matter of Arbitration

between

NFT Metro System, Inc.

and

Amalgamated Transit Union, Local 1342

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Opinion

and

Award

This arbitration was heard on August 17 and October 3, 2012, at the Company's offices in Buffalo, New York. The undersigned was appointed to arbitrate the controversy from a panel maintained by the parties. Upon submission of post-hearing briefs by both sides on November 21, 2012, the record was closed.

APPEARANCES

For the Employer:

Wayne Gradl, Attorney
David Rugg, Manager of Bus Maintenance and Equipment
Tim Ayler, Supervisor, Machine Shop

For the Union:

Joseph E. O'Donnell, Attorney
Frank Boice, Executive Board Member for Cold Spring Shops
Richard Chambers, Executive Board Member (Ret.)
Len Oleksy, Executive Board Member, Cold Spring Garage
Ronald Bohn, Former President
Mark Sargent, Grievant

THE ISSUE

The parties were unable to agree upon 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 when it assigned the grievant, Mark Sargent, a Mechanic B, to certain work in February and April, 2012, without paying him at the Mechanic A rate for such work? If so, what shall the remedy be?

BACKGROUND

The grievant, Mark Sargent, is employed in the machine shop at the Company's Cold Spring Shops. In February and April 2012, he held the position of Mechanic B – Drum Lathe, Utility and As Assigned. The primary function of this position is to refurbish brake drums from buses, a task that is shared with a Mechanic A. At the time of the grieved events, this Mechanic A position was held by C. Czaplicki.

On February 24, 2012, the grievant received a work order from his supervisor, Tim Ayler, to "assist w/drag link disassembly." In this assignment he was to assist another Mechanic A, Dennis Manikowski, for whom drag-link repair was his primary function. In his work report for the day, the grievant indicated that "any mechanic assisting & doing any A mechanic work should be paid A rate." When the Company refused to pay the A rate, the Union filed a grievance, stating that the Collective Bargaining Agreement was violated "when supervisor Tim Ayler refused to pay Mark Sargent the regular hourly rate applicable to the position to which he was assigned."

On April 19 and 20, 2012, the grievant received a work order to "assist w/mowers etc." This assignment involved maintenance work on lawn mowers and other equipment, on which the grievant was to assist yet another Mechanic A, Brian Schaefer. In his work report the grievant again stated, "Working on A job and supervisor won't pay rate of pay." This assignment was also grieved by the Union, on the same basis as

the earlier grievance. The two grievances were denied by the Company and have been consolidated for purposes of this arbitration.

The essential claim of the grievances is that with these assignments the grievant was performing the work of a Mechanic A and should have been paid as such under the terms of §18-2 of the CBA. This provision reads in relevant part as follows:

> The Company may assign any employee to such work which he or she is reasonably capable of performing, and when so assigned any such employee shall be governed during the period thereof by the rules, regulations and working conditions applicable to the department or subdivision to which he or she is so assigned, but shall be paid the regular hourly rates applicable to the position to which he or she is so assigned or to his or her regular position, whichever is greater.

POSITION OF THE UNION

The Union contends, in summary, that the grievant in this case was assigned to work that had never before been assigned to a person holding a Mechanic B or lower-rated position. This was true of both the drag-link assistance assignment on February 24, 2012, and the lawn-mower assignment on April 19-20, 2012. All of the work to which the grievant was assigned on these days was regularly and customarily performed by the Mechanic A employees with whom he was assigned to work. All the jobs in question have been in existence for more than 40 years, and during that time no Mechanic B has been assigned to perform the work regularly and customarily performed by the incumbent of either of the Mechanic A positions at issue in these grievances. Had such assignments been made without a corresponding increase in pay, they would have been grieved.

Under the circumstances of this case, therefore, argues the Union, the grievant was entitled to the Mechanic A rate for the assigned work. Section 18-2 of the CBA

requires that an employee assigned out of his regular job be paid the hourly rate applicable to the position to which he is assigned, if that rate is greater than the rate of his regular position. The question thus reduces to whether the grievant was in fact assigned to a higher-rated position on the days in question. This question must be answered in the affirmative, since the assignments required that the grievant leave his work area and his regular work; placed him in the work area of a higher-rated position; required that he perform work that he had not before performed and was exclusive to a higher-rated position; and constituted assignments that had never before been made in the Cold Spring Shops.

The Union also notes that its argument is supported by a previous award rendered by me. Under the principles of that award, the grievant here was assigned to work in the "secondary designation" of his picked job, which means there are limits on the length of such assignments. Although the assignments did not exceed the prescribed lengths, the fact that they were not in the grievant's primary designation shows that they were to a different position, requiring application of the pay provisions in §18-2. Also relevant here is that in his regular position the grievant works with, and performs the same functions as, a Mechanic A (Drum Lathe), but that work does not qualify for extra pay because for histprical reasons it is within his regular job. The requirements of §18-2 apply only when there is an assignment outside the employee's regular job. As the assignments to drag-link assembly and lawnmower repair were outside the grievant's regular job, and as these functions are performed exclusively by a Mechanic A, the applicable rate of pay under §18-2 is that of the Mechanic A.

The Company's response to this argument, asserts the Union, misses the point. While the Company stresses the relatively simplicity of the work that the grievant actually performed on the days in question, the issue in this case is not the difficulty of the work, but rather who normally performs it and at what rate of pay. Here the work assigned to the grievant was normally performed by a Mechanic A at the Mechanic A rate. Indeed, applying §18-2 this way takes the guesswork out of the picture, as supervisors do not need to speculate on when the assigned work is sufficiently skill-demanding to warrant the extra pay. The complexity of the task is not what determines the entitlement to Mechanic A pay under §18-2.

Furthermore, argues the Union, and contrary to the Company's position, the job descriptions of the positions at issue are not determinative of the proper wage when an employee is assigned outside his regular job. Neither is Section 13-2.1 of the CBA, which gives the Company the right to establish classifications and set pay according to similar classifications. The job descriptions, which were established unilaterally by the Company in 1990, cannot supersede negotiated provisions in the CBA, including the job-picking procedure and §18-2. Moreover, the Union's argument here is not inconsistent with a previous award by this Arbitrator, which held that training was not exclusively the work of a Leader. In the instant case, the record shows that the work at issue has been performed exclusively by A mechanics. The best evidence of what defines a position is what the incumbents of that position have done on a consistent basis over time, rather than a unilaterally created job description. At the least, the previous case does not stand for the proposition that job descriptions alone define the work of a job.

Even if the job descriptions are found to be weighty, argues the Union, the Company's reliance on them here is still misplaced. Unlike some other job descriptions, the one for the Mechanic B – Drum Lathe does not refer generally to assisting employees in higher classifications. The only references to "assisting" are to work clutches, engine tests, and transmission building, none of which is involved here. Furthermore, any reference to "assisting" is irrelevant here because the grievant did not in fact assist a Mechanic A but rather worked independently.

The Company's reliance on other Mechanic B positions in the garages is also misplaced, asserts the Union. In the garages, when a Mechanic B picks a position, he knows in advance that the job will involve working with other members of a team and performing essentially the same work as the Mechanic A on the team. The overlap of assignment forms the basis of his regular work. In the shops, by contrast, the Mechanic B picks a job with the expectation that he will usually be performing work in his "primary designation," and while he may be given other assignments, these will be limited and subject to the pay provisions of §18-2. And when he is assigned to work that has always been performed by a Mechanic A, it cannot be reasonably said that such work is part of his regular job duties. In such cases, the higher rate of pay is required.

The money involved in this case is not large, notes the Union; hence the Company's motivation in pushing it to arbitration reflects its desire to expand its right of assignment without incurring a corresponding increase in pay. In the past, it has sought to create a new position without negotiating its pay; here it seeks instead to expand the scope of an existing position though the use of an antiquated job description. If it is permitted to do so in this case, in the future it will be free to assign a Mechanic B to

work historically performed by a Mechanic A simply by claiming that the Mechanic B is "assisting" the Mechanic A. It will also be obtaining in arbitration that which it tried and failed to obtain in negotiations a number of years ago.

Finally, contends the Union, its position is supported by the vast majority of reported arbitration cases. In these cases, arbitrators have looked at the work assigned and determined which job classification had performed the work and at what rate. Here the record shows that the grievant was assigned to performed Mechanic A work and thus should have received Mechanic A pay.

For all of the foregoing reasons, the Union urges that the grievances be granted and the grievant paid at the Mechanic A rate for the three days in question.

POSITION OF THE COMPANY

The Company contends, in sum, that the work assignments that the grievant was given on the day in question fell within the scope of his regular duties as described in the job description of his position or of subordinate classifications. These job descriptions have been around for decades, and the Union has never before suggested that they are superseded by past practice. Under the CBA, the Company may assign to employees any work that is a regular part of their jobs in exchange for the agreed-upon rate of pay.

The Company argues, first of all, that §18-2 of the CBA is premised on a work assignment to a different "department or subdivision" with "different rules, regulations and working conditions." Thus where the work assignment does not involve a different department or subdivision, the out-of-title pay provision does not apply. Any other interpretation requires ignoring much of the language in §18-2. In the present case, none of the assignments given to the grievant involved a different department or subdivision

of the shops. Accordingly, the plain language of the CBA requires that the grievances be denied. Furthermore, asserts the Company, if the plain language of the contract does not support the grievances, there is nothing left for the Union to argue, since any claim of a practice of paying B Mechanics the A Mechanic's rate for assisting an A Mechanic or Specialist is untenable.

The fact that the grievant picked the Mechanic B – Drum Lathe job does not mean that anything other than drum-lathe work is out-of-title work for him, asserts the Company. In fact, the job that the grievant picked included not just drum-lathe work, but also "Utility and As Assigned." The assignments in question were thus included in the secondary designation of the job he picked. Under the parties' Utility Agreement, such assignments on a limited basis are permitted. The assignments themselves were consistent with the work that the grievant could expect to be assigned as part of his B Mechanic job. The normal duties of a Mechanic B include those of "any jobs in subordinate or comparable classifications." The job descriptions of several such classifications expressly include assisting A Mechanics and doing the kind of work the grievant was assigned to do. In short, the nature of the work that the grievant was given to do plainly falls within the skill level and job description of a Mechanic B or lower classification. In addition, he was not assigned to work autonomously, but rather to assist A Mechanics and to be directed by them. The work in April included the minor repair of lawn mowers, and the work in February included the preparation of drag links for rebuilding by the A Mechanic. Some of the work also included cleaning and painting. This was all Mechanic B or lower work.

With these grievances, asserts the Company, the Union would introduce an entirely new scheme for differentiating the tasks of the various grades of mechanics. Up to now, all mechanics have been expected to use common shop tools to perform repair work. The established job descriptions reflect a scheme whereby the higher-rated mechanics are differentiated by their responsibility for diagnosing problems and completing the overall repair of a vehicle or major component. This diagnostic function is not found in the job descriptions of lower-rated mechanics. Lower-rated personnel provide assistance to the higher-rated ones, making minor repairs and performing prep work. A and B Mechanics have routinely worked together in the garages for many years to complete inspection and repair of buses without a claim that B mechanics must be paid the A rate for assisting A Mechanics with their work. The job descriptions in the shops plainly show that B Mechanics in the shops also perform minor repairs, replace components, and assist higher-classification mechanics. If the Union had an objection to this scheme, the time to grieve it was long ago. Indeed, in a recent arbitration before this Arbitrator the Union argued that certain work belonged to a job by virtue of its job description, while now it argues that the job descriptions should not be consulted for that purpose. If the present Union argument is accepted, there will be a host of future grievances over work assignments and out-of-title pay, all based on what the Union perceives is the "regular" job of a particular classification..

The Company argues, as well, that the Taylor Law gives Company management the right to create new positions and decide what duties and responsibilities are associated with them. In addition, the Company may change or add duties to existing jobs as long as the new duties do not alter the essential character of the job at issue.

These rights are unaffected by any "past-practice" argument offered by the Union. If such a claim were allowed to prevail, the Company would have to make periodic and unnecessary changes in job duties or work assignments simply to retain its prerogative (under the Taylor Law and the CBA) to make such changes when prudent to do so. In any event, the Company has nowhere waived its right to create jobs and prescribe their duties, which it has done in saying that the duties of a Mechanic B include assisting mechanics in higher-rated classifications, making minor repairs, and using common shop tools to replace parts. In this regard, the content of the job descriptions for given positions has significance and is not trumped by "past practice."

Ultimately, argues the Company, the present grievances stand for the proposition that the Taylor Law, the CBA, prior arbitration decisions, and long-established job descriptions are superseded by the opinions of Union officials as to what is and is not part of the job duties of various positions in the shops. They also suggest that the normal job duties of these positions are determined by the Union, not management. These premises have been rejected in prior arbitrations.

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

FINDINGS AND OPINION

This case is the latest in a line of arbitration decisions over the scope of the Company's right to make work assignments. In the earlier cases, the Union sought to constrain the Company's discretion in assigning work, while the Company sought to preserve the maximum latitude that it believed the CBA and related agreements permitted in this regard. The decisions in these cases have generally established that the Company has broad, although not unlimited, discretion in assigning employees to duties

that fall outside the primary designation of their picked job. More recent cases, like the present one, have not directly involved challenges to the Company's right to make certain assignments, but rather have raised the question of whether such an assignment requires extra pay while the work is being done. In this respect, the issue presented by the instant grievances is narrow and straightforward, involving nothing more than an application of §18-2 to the facts of the case.

Section 18-2 of the CBA allows the Company to assign any work to an employee that the employee "is reasonably capable of performing." There is no suggestion here that the grievant was not reasonably capable of performing the work in question. The only contractual conditions of the assignment are that the employee is governed by the rules, regulations, and working conditions of the department or subdivision to which he is assigned, and that he is paid at the rate of his regular position or the rate "applicable to the position to which he is assigned," whichever is greater. Thus the questions raised by the grievances are simply these: What was the "position" to which the grievant was assigned when he was told to work on drag links on February 24, 2012, and on lawnmowers on April 19-20? Was it his "regular position," and, if not, was it a higher-rated position than his regular one?

* * * * *

A few preliminary observations may be helpful in bringing us to the core of the issue raised by the grievances. First, the Company's suggestion that §18-2 applies only when an employee is moved to a different department or subdivision is unpersuasive. The contract simply does not say that. It says only that the employee is governed by the rules of the department to which he is assigned. If he is assigned to his home

department, then he is governed by the same rules, etc. under which he has been working all along. However, according to the same sentence, his *pay* is determined by the pay applicable to the *position* to which he is assigned. There is nothing in this language to suggest that an employee might not be assigned to a different position in the same department, possibly entitling him to higher pay.

Second, the language of §18-2 clearly contemplates that an employee might be assigned to a position different from his regular one that nevertheless does not warrant higher pay. The employee assigned to a different position gets the rate of his regular position or the different position, *whichever is greater*. This obviously means that an employee could be assigned to a different position carrying a pay rate higher than, equal to, or even lower than his regular pay rate, although the employee would always be entitled to his regular pay at a minimum. It is certainly not automatic that an employee assigned to a position different from his regular one is entitled to higher pay.

Similarly, the language also contemplates that an employee might be assigned to duties of a higher-paying job that he is "reasonably capable of performing," even if the employee is not generally qualified to occupy the higher-paying job. Since under the contractual language it is possible for the employee to be assigned to a higher-paying job, but any such assignment must involve work that the employee "is reasonably capable of performing," it follows that some employees must be reasonably capable of performing work associated with jobs that carry a higher pay rate.

Third, it should be noted that the positions involved in these grievances are all in same job family, involving mechanical work in the shops. In job families, duties typically overlap from one level to another, with higher-paid jobs distinguished from lower-paid

ones by a limited range of tasks and responsibilities. In the present case, the degree of overlap is very considerable, at least as reflected in the small differences in pay rates. The Mechanic B earns about 4 percent less than the Mechanic A; the Mechanic C earns 2 percent less than the Mechanic B, and the Helper with Tools earns less than 1 percent less than the Mechanic C. The implication of this fairly compressed wage structure is that the Mechanic B is expected to be able to perform many of the same functions that a Mechanic A performs.

Finally, §18-2 itself provides little guidance as to the precise meaning of the employee's "regular position" or the precise meaning of "the position to which he or she is so assigned." In the actual case here, in fact, the grievant was not assigned to "positions" on the days in question, but rather to tasks. Specifically, on February 24 he was instructed to "assist w/drag link disassembly," and on April 19-20 he was told to "assist w/mowers etc." Under these circumstances, my charge is necessarily to determine what position(s) these assignments are, in the words of §18-2, "applicable to." Since §18-2 does not tell us how to determine whether an assignment is within the employee's "regular position," or if not whether the position to which he was assigned is one that carries a higher pay rate, we must ask what there is in the record that assists with that determination.

Even if one agrees with the Union that the job descriptions are not the only possible source of guidance on the content of "positions," they are a decidedly relevant source. Apart from the fact that the Union has itself previously argued that a job description was relevant in determining what job certain training was "applicable to," the job descriptions in the record have been used by the parties as guides for more than

two decades, and it is hard to see the point of job descriptions if they are not to provide information as to the content of jobs. In addition to the job descriptions, however, the record also contains pick sheets that the parties have jointly used for years. When an employee picks a job, that pick should tell us something about the employee's "regular position." And, if further guidance is required, the parties' history of what functions have been performed by the occupants of various positions may constitute yet another source of information about what position an assignment is "applicable to."

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The starting point for applying the facts of this case to the foregoing considerations is whether on the days in question the grievant was assigned to his "regular position." This is not the same as asking whether he was assigned to work that he was "reasonably capable of performing," or whether the work to which he was assigned required much or little knowledge and skill. In the parties' system, a job is defined in the first instance by the pick sheets. From there it follows that an employee's "regular position" is the one he is expected to occupy on a regular basis by virtue of the job he has picked, even though he may be assigned to a different job from time to time according to the Company's needs. In this case, the grievant picked a job designated "Mechanic B – Drum Lathes, Utility and As Assigned." This means that most of the time he will be working on brake drums, and the word "regular" to me denotes what happens most of the time. There are in fact other positions in the shops that are designated only "Utility and As Assigned," but where a position specifies a particular job as its primary designation, even though the incumbent may be assigned to other things on occasion, that job logically defines the "regular position." Thus for present purposes the

grievant's regular position was working on brake drums, and when he was assigned to other tasks on the days in question, §18-2 required that he be paid the rate applicable to the position to which he was assigned.

What then was the position to which the grievant was assigned? The Union's argument is that it was a Mechanic A position simply because the tasks assigned had historically been performed by a Mechanic A and had never before been assigned to a Mechanic B. There is no factual dispute on this point, but the bare fact that something has not been done before does not necessarily establish that it can never be done. As we saw earlier, there is much overlapping work between positions in a common job family, and if certain tasks have been assigned to one position as a matter of convenience, it does not follow that the tasks "belong" exclusively to that position. The Union's argument is essentially a past-practice one, but the relevant practice for present purposes is not the assignment but the pay. There is no dispute here that the Company had the right to make these assignments to the grievant in the first place, so there is no practice at issue with respect to the assignments themselves. And as for the proper pay for these assignments, there is no past-practice question here because by all accounts the pay issue has not arisen before. Thus it cannot be said that the parties have established a binding practice of paying the Mechanic A wage to a Mechanic B who is assigned to assist a Mechanic A with work that the Mechanic A has historically done. It should also be noted in this regard that the situation here is different from the earlier Training-Pay arbitration, where the Union's past-practice argument was applicable, if not ultimately persuasive. There, the Union attempted to show not only that mechanics had performed training that was the Leader's work, but that they had actually been

given Leader's pay for it in the past. Here, there is no claim that the grievant or any other Mechanic B had been paid the Mechanic A rate for the type of assignment involved in this case.

On the record before me, I conclude that the position to which the grievant was assigned on the days in question was neither his regular position nor either of the Mechanic A positions. It was, rather, an unspecified Mechanic B position that, if it were a picked job, would carry primary designations reflecting the drag-link bench and the small-engine bench. The main reason for the finding that the position was not a Mechanic-A one is that the assignments were explicitly to *assist* the A Mechanics in their regular jobs. The various Mechanic-B job descriptions, in different ways, invoke the concept of "assistance" to other mechanics in the shops. Further, the record persuades me that the grievant did not have overall responsibility for the projects, and the more demanding aspects of them were performed by the A Mechanics. The grievant himself testified that he was not generally responsible for rebuilding the drag links, but rather he got the shaft ready for the Mechanic A to finish. He also testified that the Mechanic A "told me what to do" on the lawnmowers. Although the Union argues that the grievant worked independently of the A Mechanics, neither of the A Mechanics testified to the division of labor between them and the grievant, and the grievant's own testimony persuaded me that his role was a subordinate one. Since the A Mechanics had the ultimate responsibility for the finished product, it also follows that they were tasked with overseeing the grievant's work and ensuring that it was properly done. Under these circumstances, it cannot be said that the grievant was working *as a Mechanic A* on the days in question. Accordingly, the rate "applicable to" the position to which the grievant

was assigned was still the Mechanic-B rate, even though the assignments were not to the grievant's "regular position."

It is important that I be clear on the limits of this finding. Under §18-2 of the CBA, the Company may assign an employee to any work he is capable of performing (subject to limits under the Utility Agreement). If that work is not part of the employee's "regular position," which is largely determined by the job pick, the rate of pay "applicable to" the position to which he is assigned must be ascertained. If the employee is assigned to assist an employee in a higher-ranking position who is also working the job at the same time, there is a (rebuttable) presumption that the employee assigned to assist is filling a lower-ranking position than the person being assisted. It should also be noted that this finding does not rest solely on the difficulty or complexity of the tasks to which the employee has been assigned. In the present case, if the grievant had been assigned to do the same drag-link or small-engine work without any collaboration with the A Mechanics, the finding here might be different. However, to the extent that the central issue in this case is whether under the CBA the Company may assign a Mechanic B to assist a Mechanic A on a different bench without paying the Mechanic-A rate, the finding here is that it may.

For all of the foregoing reasons, the grievances must be denied.

AWARD

The Company did not violate the Collective Bargaining Agreement when it assigned Mark Sargent, a Mechanic B, to certain work in February and April, 2012, without paying him at the Mechanic A rate for such work. The grievances are 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.

December 10, 2012
(dated)

Howard G. Foster
(signature)