Training/leader Rate. 17

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In the Matter of Arbitration

between

Niagara Frontier Transit Metro System, Inc.

and

Amalgamated Transit Union, Local 1342

Opinion

and

Award

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AMALGAMATED TRANSIT UNION
LOCAL 1342

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This arbitration was heard on December 6, 2011, and January 25, 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 July 6, 2012, the record was closed.

APPEARANCES

For the Employer:

Wayne R. Gradl, Attorney
David Rugg, Manager of Bus Maintenance and Equipment
James N. Thorpe, Labor Relations
Louis Giardina, Manager of Labor Relations
Gene Fezer, Maintenance Coordinator
Michael Pepin, Unit Change Supervisor
Tim Ayler, Machine Shop Supervisor

For the Union:

Terry M. Sugrue, Attorney
Frank Boice, Executive Board
Steven French, Witness
Ronald Skibicki, Witness

THE ISSUE

The parties were unable to agree on a statement of the issue and authorized the Arbitrator to frame it. Here are the Union's and the Company's versions respectively:

Union. Did the Company violate the parties' collective bargaining agreement, including sections 18-2 and 19-1 thereof, when, on or about April 13, 2011, it failed to pay the "Leader" rate to individuals who provide training to employees on trial in the Maintenance Department? If so, what shall be the remedy?

Company. Did the Company ever agree to pay the leader's rate for one or more species of instruction or training given by one Maintenance Department employee to another? If so, was that agreement violated in connection with the present Grievance? And if so, what shall be the remedy?

After hearing the testimony and reviewing the evidence, I believe a fair statement of the issue is this:

Did the Company violate the Collective Bargaining Agreement (hereafter CBA) when it assigned certain mechanics, who were not Leaders, to assist in the training of other employees who were preparing for rate tests, and then refusing to award the Leader rate to the mechanics for the time they provided such training? If so, what shall the remedy be?

BACKGROUND

On April 20, 2011, the Union filed the following grievance (in relevant part):

On or about 4/13/11, the Union learned for the first time that the Company is regularly reassigning A mechanics to perform other work, including Specialist work, for purposes of training . . . . [W]hen training assignments occur, the individual who is actually providing the training, whether they hold a Specialist or A Mechanic title, should be paid at a Leader rate as the act of training itself is an integral part of the Leader function. In relevant part, Section 18.2 of the parties' cba provides that when an employee is assigned other work said employee "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." Contrary to said language, the Company has failed to pay the highest applicable rate when training assignments are made as referenced above. As a remedy, all affected bargaining unit members should be paid and/or reimbursed at the appropriate rate for all training assignments.

On May 6, 2011, the Company responded as follows:

There is no reference of training in the Leader's job description, only supervision relief. However, in all Maintenance job descriptions, except

> perhaps Helpers, it does state as a requirement, "Explain and demonstrate to others all job details, methods and procedures when directed to do so by the Supervisor or his deputies."

The context for this grievance is the situation in which an employee is hired into or promoted to a new position. The employee assumes the position provisionally pending a "rate test." In the period preceding the rate test, the employee is assigned an experienced mechanic, who may or may not be a Leader, to help orient the trainee to certain methods and procedures of the job. The central issue in this grievance is whether the experienced mechanic is performing Leader work during the period of training. If the experienced mechanic is actually a Leader, there is no dispute, but when the experienced mechanic is in another title, the question is whether he or she is acting as a Leader and thus entitled to the Leader's rate.

Sections 18-2 and 19-1 of the CBA read in relevant part as follows:

> 18-2. 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.
>
> 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 . . . .

The job description for a Shop/Garage Leader provides the following "general statement of duties":

> The job involves the inspection, preparation and completion of any type of assigned work done in the Maintenance Department at any location connected with the operation of the Metro system. It principally consists of giving adequate instruction relative to work performed, the spot checking of work performed by maintenance personnel; the responsibility, by special

> assignment, for all department activities for any shift; the supervision of employees on such shifts; observing for and reporting of unsafe and irregular conditions; and the protecting of Company property.

The job descriptions for all other mechanics' titles in the Maintenance Department, including that of the Leader, contain this item:

> Explain, instruct and demonstrate to others all job details, methods and procedures when directed to do so by supervisory personnel.

POSITION OF THE UNION

The Union contends, first of all, that Section 18-2 of the CBA requires out-of-title pay for out-of-title work, including the training of on-trial employees. In this case, the relevant duties of the Leader include "giving adequate instruction relative to work performed" and "supervise subordinates to insure that work is performed correctly, competently, and in a timely fashion." Given these components of the Leader's job, the training of employees on trial is Leader work. While it is true that most positions include a responsibility to "explain, instruct and demonstrate . . . methods and procedures," there is a qualitative difference between simply showing a co-worker how to do a particular task and spending the time to ensure that the worker can do the task competently. This is why the job description of the Leader contains *both* the "supervise" language and the "explain, instruct and demonstrate" language. In this case, the Company has assigned bargaining-unit personnel to train employees who are on trial for new jobs. A key difference between what almost everybody does and what the leader uniquely does lies in the type and amount of attention provided to the trainee. Only the Leader's position involves "giving *adequate* instruction relative to the work performed." When the Company assigns a knowledgeable employee to train an on-trial candidate, so

that the new employee can perform the work "correctly, completely, and in a timely fashion," that is the Leader's work.

The Union further argues that Section 19-1 of the CBA provides for the continuation of all present working conditions, including payment of the Leader rate for time spent training on-trial employees. The record shows that when employees have been assigned to train employees on trial, they were paid the Leader rate *when it was requested*. How that actually happened depended on the circumstances. Sometimes the employee asked the supervisor for the rate and got it. Sometimes employees were paid the rate without asking. Sometimes employees did not ask for the rate but ultimately got it after Union officials intervened on their behalf. And sometimes the employee did not ask, the Union did not know, and the rate was not paid. But the practice was unequivocal. Steven French, although mis-remembering when he received the rate, correctly testified that he received it for training four on-trial employees. Contrary to Mr. French's supervisor's testimony that he never approved the rate, the record shows that the payment was in fact approved. Ronald Skibicki also received Leader's pay for training, and there is testimony in the record that the Union was repeatedly successful in going to managers to get the rate approved. And although the Company asserts that paying the rate was not a consistent practice, the record shows that the rate was paid consistently whenever it was put in for.

In sum, asserts the Union, the practice of paying the Leader's rate for training, when requested, is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time. It is therefore binding. Moreover, Section 19-1 requires that present working conditions and practices not altered by the

Agreement be continued in full force and effect. When the present contract was signed, this practice was in effect and should have been continued. The Company's stated concern that such payment would be subject to abuse is overblown. Even binding practices may be regulated and policed against abuse.

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

POSITION OF THE COMPANY

The Company contends that the principal dispute in this grievance is whether there is an established past practice of paying the Leader's rate to a non-Leader for providing training to a co-worker. Section 18-2 of the CBA does not by its terms resolve the dispute. What this section provides is that when employees are assigned to work they will be paid the rate applicable to the position assigned; it does not address the question of whether a non-Leader assigned to train another employee is performing in the role of a Leader. Contrary to the Union's argument, the job description of the Leader does not say that training other workers is uniquely the Leader's work. The Company plainly has the right to prescribe the duties and responsibilities of the various grades of mechanic in the Maintenance Department, including the instruction of others in the skills associated with their jobs. The duty and responsibility that distinguishes the Leader from other mechanics is supervisory relief. Training other employees is a responsibility of all positions. That a Union official may read the Leader's job description as making employee training uniquely the Leader's work is irrelevant, given the Company's prerogative to assign work.

With nothing in the CBA supporting the grievance, argues the Company, the Union now relies on Section 19-1 and "past practice." There was certainly no such practice in 1994 when employee Steven French first filed a grievance seeking training pay. In that grievance no past practice was claimed; rather, Mr. French wrote that "in the future I would like to see leader rates paid to non-Leaders when they are training other Union members to perform their jobs." Thus the Union was not seeking to enforce a practice but to create one. The issue of training pay was actually scheduled to be arbitrated in 1995 or 1996, but for unexplained reasons it never was. In 1997, a similar grievance was withdrawn without prejudice. Since 1997, the Union has from time to time importuned first-line supervisors to pay the Leader's rate for training, with mixed success. The Company acknowledges that on some occasions non-Leaders, including Mr. French, have been paid the Leader rate for training. But there have also been occasions when non-Leaders have *not* received the Leader rate when training other employees. It is also relevant that the supervisors who the Union claimed had approved training pay were unionized first-line supervisors, whose actions do not reflect management acceptance of an alleged practice. Whenever management has addressed the question, it has insisted that training is part of everyone's job, with no extra pay warranted.

The Company also notes that the record includes examples of non-Leaders' not being paid for training, but even more important is the borderless vagueness of the claimed practice. The present grievance is a first step in imposing a practice on the Company, to be followed by a host of additional training-pay grievances, raising myriad questions of application. The concern for the Company is less the modest pay difference

involved in this case than the birth of an entire cottage industry of training-pay grievances. As a result of this concern, at the hearing the Union effectively reduced the claim to training employees on trial, but even thus circumscribed the issue leaves many open questions. Moreover, this limitation was not contained in the grievance itself, nor was the claim of a past practice. The Union's willingness to limit the issue at the hearing is further evidence that there is no established, mutually accepted past practice in the first place.

For these reasons, the Company urges that the grievance be denied.

FINDINGS AND OPINION

The Company's formulation of the central question of this grievance is correct; namely, whether the Union, which carries the burden of persuasion here, has shown that there is an established past practice of paying the Leader rate to non-Leaders who provide certain training to other employees. The Union's invocation of Section 18-2 of the CBA, providing for out-of-title pay for out-of-title work, simply moves the debate to whether the training involved here is out-of-title work. Its invocation of Section 19-1 focuses the argument on whether out-of-title pay for training is one of those "present working conditions, practices, rules and regulations [that must] continue in full force and effect." But past practice has a central role to play in this grievance beyond its explicit reference in Section 19-1. The Company suggests that job descriptions are essentially irrelevant to the issue here because they are not part of the bargain between the parties, but rather an exercise of management's prerogative to determine what work shall be included in each job. Now, it may be that management makes this determination (subject to bargaining over terms and conditions), but having made the determination it must live

by it. Otherwise the language in Section 18-2 regarding a "regular position" makes no sense. If an employee is entitled to the pay associated with his assignment or that of his regular position, whichever is higher, then there must be a way to know whether the assignment is in fact part of the regular position. The obvious source of that information is the job description. Thus the job descriptions are relevant in helping us to determine whether training by non-leaders is out-of-title work. To say that they are relevant, however, is not necessarily to say that they are helpful.

The Company stresses that all the relevant job descriptions include among their "responsibilities" this task: "Explain, instruct and demonstrate to others all job details, methods and procedures when directed to do so by supervisory personnel." It argues, accordingly, that *all* employees may be tasked with training within their "regular position." The Union, on the other hand, points to language in the "general statement of duties" of the Leader saying that the position "principally consists of giving adequate instruction relative to work performed." There is thus an argument for the proposition that while some training is part of everyone's job, there is certain training that is uniquely part of the Leader's job. But this is surely not the only construction that can be given to the language in the general statement of duties. The reference there to "instruction" may be to training, but it may also be to direction, as in "You are hereby instructed to perform this task." To instruct may mean to show someone how to do something, or it may mean to tell somebody what to do. That is presumably what the Company means when it argues that the primary function of the leader is supervisory relief. Neither the language of Section 18-2 nor the job descriptions make it clear what

kind of "instruction" is meant. In short, the language is ambiguous, and in labor arbitration past practice is a time-honored standard for resolving such ambiguity.

As the Union suggests, there are accepted arbitral standards for determining whether a past practice has become part of the parties' bargain, either by creating an independent right or by clarifying existing language in the Agreement: that the practice is unequivocal, that it is readily ascertainable, and that it is mutually understood as the accepted way of doing things. The record here, however, fails to establish that the "practice" of paying the Leader rate to non-Leaders for helping to prepare new or promoted employees for a rate test meets these standards. There are several elements of the record that are problematic for the Union's position.

1. As the Company points out, the past-practice argument itself has not been consistently advanced by the Union. Over time the Union has relied essentially on the (ambiguous) language of the job descriptions. In the 1990s, at least two grievances were filed over Leader pay for training, neither of them moving to arbitration. More important, there is no indication that either grievance invoked past practice as a basis for the claim. (Indeed, in one instance the *Company* cited past practice in denying the grievance.) Similarly, the instant grievance cites Section 18-2 of the CBA, but it makes no mention at all of past practice. Moreover, the grievance asserts that *all* training by mechanics should be paid at the leader rate, "as the act of training itself is an integral part of the Leader function." Thus the claim in the grievance was not limited to training for rate tests. At arbitration the Union has made a point of this limitation in both its testimony and its argument, which calls into question whether the asserted practice is "readily ascertainable."

2. The Union Steward, Mr. Boice, testified that the stewards have "always fought" for Leader rate for training, and that the supervisors always paid it (except employees sometimes took a paid lunch instead). He said that he talks to supervisors three or four times a year on this issue. But if paying the Leader rate is the normal and accepted way of doing things, one must ask why the stewards have felt impelled to question supervisors repeatedly as to whether the Leader rate was being paid. Even if supervisors acquiesced in the payment upon intervention by the Union, rather than contest the matter over a small amount of money, the fact that there is this apparently frequent intervention argues against a mutual understanding that the payments are an unwritten rule that must routinely be followed.

3. Ron Skibicki testified about the instances, verified by his calendars, that he has been paid the Leader rate for training. But he also acknowledged that there are times when he trained and did not receive the rate. His testimony reinforced the impression that sometimes the rate has been paid and sometimes it has not.

4. Steven French testified to examples of his receiving the leader rater for training, which he had written down from memory. The parties have stipulated that a review of time cards for 2008-2011 showed that Mr. French received the leader rate on two occasions, for two days in 2008 and three days in 2009. Most of the instances recalled by Mr. French occurred in 2010 and 2011, yet apparently none of these could be verified from the time cards. On this evidence it is difficult to conclude that Mr. French has consistently received the Leader rate whenever he has helped to prepare another employee for a rate test, although clearly he has received the rate on some occasions.

5. The record shows that training for rate tests occurs several times a year. It is curious that an inspection of time cards for a four-year period could uncover only two instances of a non-Leader being paid the Leader rate.

6. Mr. Boice testified that he has obtained the Leader rate for non-Leaders through conversations with Supervisors Rogowski, Ayler and Pepin. Ayler and Pepin testified in this arbitration. Pepin said that he once paid the Leader rate to Skibicki for his help in diagnosing a problem, after intervention by the stewards. He later discussed the issue with a manager, David Rugg, who told him that Leader pay is not given for one Union employee to train another. He has not paid it since 2008, even though there has been much training by non-leaders. Ayler testified that he would frequently be approached by the stewards over the issue but did not pay the Leader rate. It appears from the parties' stipulation that Ayler did in fact authorize Leader pay for Steve French in 2008 and 2009, but Ayler was not asked specifically about that (as the information was not available during his testimony). In any event, Ayler also testified to several specific (and documented) instances of training by non-Leaders where the Leader rate was *not* paid. In addition, Supervisor Gene Fezer testified that he approved the Leader rate for Skibicki for his help in diagnosing a difficult problem. He was asked to do that by a steward and agreed because it "seemed fair." He also approved the Leader rate on other problem-solving occasions. However, he has never been told that the Leader rate should be paid when a non-Leader trains another employee.

I am unable to discern from all this testimony a mutual understanding that the Leader rate should always be paid to non-Leaders who train employees, for a rate test or otherwise. It is doubtless done, but not "unequivocally."

In sum, the record in this case falls short of demonstrating that the parties, through their practice, have entered into a bargain to pay non-Leaders for training employees, whether such training is broadly or narrowly defined. Neither is there a bargain, to be sure, *not* to so pay the Leader rate. There is, in other words, no rule at this workplace – established by a practice that is unequivocal, readily ascertained, and mutually recognized – that is binding on the parties. Such a rule, especially one limited to the kind of training stressed by the Union at arbitration (if not before), could doubtless be established by the parties and might well be entirely justified. But that is a topic for negotiation by them, not imposition by a third party. The question before me is whether they have already established the rule, and on the record before me the answer to that question must be no.

AWARD

The Company did not violate the Collective Bargaining Agreement when it assigned certain mechanics, who were not Leaders, to assist in the training of other employees who were preparing for rate tests, and then refusing to award the Leader rate to the mechanics for the time they provided such training. 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.

July 27, 2012 — Howard G. Foster

(dated) (signature)