The stipulated issue is:
Are the grievances of RAYMOND BROWN and CHARLES FIORE arbitrable?
If so, was there just cause for the suspensions of RAYMOND BROWN and CHARLES FIORE, and if not what shall be the remedy?
Hearings were held on May 10 and June 6, 1996 at which time Messrs. Brown and Fiore, hereinafter referred to as the "grievants" and representatives of the above-named Union and Employer appeared.
All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.
The Employer's assertion that the grievances are not arbitrable is based on two arguments. First, that the grievances are untimely and secondly and alternatively, they were settled at a grievance meeting.
The grievants were suspended on August 21, 1995. The first written grievance on behalf of Mr. Brown was filed with the Undersigned by letter dated December 19, 1995; and one on behalf of Mr. Fiore, also to the Undersigned, by letter dated January 3, 1996.
Section H of the collective bargaining agreement reads in pertinent part:

Each grievance, in any event, shall be presented to the other party hereto in writing, on forms adopted by the Union and the Association. Grievances arising from discharges, other disciplinary action or layoffs shall be presented within thirty (30) work days from the time of the occurrence, or from the time such occurrence should reasonably have become known, whichever is later...

In the event that a grievance relating to discharge, other discipline or layoff is not presented within the time limitation set forth above, such grievance shall be deemed to have been waived by the aggrieved party and, for all purposes, barred.

The Employer points out that four months elapsed between the dates of the suspensions and the filing of written grievances; that that period of time far exceeds the thirty (30) working days time limit of the contract; and that therefore the grievances are "waived" and "barred."

Additionally and alternatively, the Employer asserts that at a meeting on August 21st the Employer's Administrator and the Union Business Representative agreed that the initial two week suspension of the grievants would be reduced to six days; that the Union would take no further action and would not submit the matter to arbitration. This settlement, the Employer contends, was affirmed in a subsequent meeting on August 29th with the President of the Union.
The Union contends that the contractual requirement to "present" the grievance "to the other party" within thirty (30) working days was satisfied by the meetings dealing with the suspensions which took place on August 21st and August 29th and by a subsequent discussion between the Administrator and the Business Agent on the afternoon of August 29th. And that in any event there was a bi-lateral understanding that the Union could wait three to four months to grieve and arbitrate.

The Union denies that any settlement was reached. Under its version of the meetings the Union protested the suspensions; asked for the identity and information about purported witnesses to the events which led to the suspension; said that the Employer’s willingness to reduce the suspensions to six days was unacceptable as a settlement; that it would arbitrate the six day suspension; that it would give the Employer three to four months to provide the names, statements and other information of the "witnesses" to the events leading to the suspensions and that if the information was provided and was acceptable to the Union "up to the day before the arbitration," the arbitration would be withdrawn.

From this version of the meetings, the Union concludes that the dispute was not settled, but the parties agreed to a procedure under which the case did not have to be officially grieved in writing or arbitrated until the requested "witness" information was provided within three to four months hence; and that therefore the letters to the Undersigned, dated respectively December 18, 1995 and January 3, 1996 were in accord with that Agreement and hence timely.

I am satisfied that there was "constructive" compliance by the Union with the thirty (30) day time limit for filing a grievance. Though technically deficient because they were not in written form on an official
grievance document, I accept as adequate notice to the Employer of the nature and details of the two grievances, the two meetings of August 21st and August 29th. Because those meetings followed the imposition of the suspension by only a few days, the currency of the dispute was maintained. The Employer was in no way prejudiced by the fact that the details of the grievances, which were thoroughly made known to the Employer by the Union representatives at those meetings, were not reduced to written form.

However, constructive compliance with the time limit for the Union to present the grievances to the Employer notwithstanding, I find that the dispute was settled at the meeting of August 21st, by persons on both sides with authority to do so and that whatever transpired on August 29th and thereafter did not revoke or nullify that settlement.

The Employer's Administrator, Evelyn Jones testified that on August 21st she and Union Business Agent Patricia Smith discussed what was then a two week suspension for each grievant and negotiated a reduction in those suspensions to six days. As of the arbitration hearing, the grievants had not served suspensions of two weeks but only six days each. Jones testified that the reduction to six days was in consideration for the Union's agreement not to take the issue further and not to submit it to arbitration.

I fail to see why or how the Employer would reduce or offer to reduce the suspension from two weeks to six days without some concession in return. Unless there was some quid pro quo for a shorter suspension, what logical reason could there by for the Employer to unilaterally reduce the originally imposed discipline? (Especially where as here the charge against the grievants was most serious -- namely that they "instigated, organized and led" an illegal work stoppage).
Following the August 21st meeting the Employer implemented the discipline -- namely a six day suspension for each grievant. If as the Union argues, there was no agreement on a six day suspension and the Union had reserved the right to go to arbitration on that measure of discipline, why would the Employer not have implemented the original penalty of a two weeks suspension? The logical answer is that it did not do so because there was an agreement not just on a six day suspension but on the shorter suspension in exchange for what Jones testified was to be "an end to the dispute."

It is well-settled contract law that performance by one of the parties of his part of an oral "agreement" is evidence that an agreement consistent with that performance was made. Here, the implementation of the disciplinary suspension at the level of six days is probative evidence of an agreement on that penalty. And for there to be logic to that implementation and that performance by the Employer, there had to be a consideration for the penalty reduction. I conclude that that consideration was an agreement by Business Agent Smith that the dispute would go no further and not to arbitration. Support for this conclusion is found in the effort of the Employer to reduce the agreement to writing. Unrefuted is its testimony that its memorandum of August 22nd (Employer Exhibit #2), intended to be executed by both sides, was drafted virtually contemporaneously with the events of August 21st. It was not signed, asserts the Employer, because the Union President on August 29th in agreeing with the resolution of August 21st, said it was therefore "not necessary."

Because Jones and Smith had the authority to settle the dispute, none of the events of the meeting of August 29th changed the validly and enforceability of the August 21st understanding. The presence of Union
President Russo on August 29th, I conclude, was for the purpose of attempting to get the six day suspension reduced to a warning. That he may have said that he would arbitrate the six day suspensions unless the information about "witnesses" was forthcoming could not, in the face of an authorized settlement on August 21st, revoke that settlement or impose a new condition on it without mutual agreement.

Moreover, the evidence on the Union's alleged demand for information on "witnesses" who implicated the grievants is sharply contradictory and hence inconclusive. The Union’s claim that the reduction to six days was contingent on the Employer’s production of that information and the assertion that Russo would challenge the six day suspensions unless that information was forthcoming, are denied by the Employer. There is no bi-lateral written memoranda of any of those positions that could be construed as definitive or binding. The only writings that refer to the request for information are internal Union document on Union grievance forms. As they are either undated or dated after August 21st, they too cannot unilaterally change the bi-lateral "deal" of August 21st. Also, these were not sent to the Employer for any purpose, let alone confirmation, and are consequently self serving.

It seems to me that if the reduction of the suspension was conditioned on the submission to the Union of the names, statements of and other information about "witnesses," that arrangement would have been put into writing. Indeed, it is such a variation from the contractual grievance procedure and so important in the context of the seriousness of the change against the grievants, it should have been put in writing to be probative.

Assuming, however, that the Union did ask for the names and the information about "witnesses," the evidence does not show that it did so
at the meeting of August 21st. Rather, I think it was raised after August 21st, at the next meeting of August 29th as part of the effort to get the suspensions reduced to a warning. As such, I conclude it was a subsequent effort by the Union to impose new conditions after a "deal" had been made and completed on August 21st. Again, absent clear evidence of a mutual agreement on that condition, the August 21st settlement remained unimpeached. That Business Agent Smith, after the meeting of August 29th, and after President Russo had left, told Ms. Jones that the Union would give her three to four months to produce the statements of the "witnesses" was similarly ineffective to change the agreement of August 21st. Smith's testimony that to that statement, Jones replied "OK Kiddo" cannot be definitively and unambiguously interpreted, in the face of Jones' denial and in the absence of more probative evidence of an acceptance of that condition, as a change in what was settled on August 21st.

In short, I find that the Employer's implementation of a six day rather than two weeks suspension; and the text, albeit unsigned, of Employer's Exhibit 2, reflect the terms of a completed settlement reached by Jones and Smith on August 21, 1995. The events thereafter, the meeting of August 29th, the intervention of the Union's President, the demands for "witness" information and the Union's effort to reserve arbitration rights contingent on the production of that information, did not revoke, change or impeach the verbal settlement of August 21st. As the grievances were settled, they are no longer arbitrable.
The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above-named parties, makes the following Award:

The grievances of RAYMOND BROWN and CHARLES FIORE protesting their six day suspensions, are not arbitrable.

Eric J. Schmertz, Arbitrator

DATED: June 12, 1996
STATE OF NEW YORK )
COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:
Did the Home wrongfully fail or refuse to offer full-time work to the grievant? If so, what shall be the remedy?

A hearing was held on January 22, 1996 at which time the grievant, GARY DIEUDONNE and representatives of the above-named Union and Home appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator’s Oath was waived.

The pertinent contract clauses are as follows:
E. Promotions within the bargaining unit shall be upon the basis of skill, ability and qualifications. When these are reasonably equal, seniority shall prevail.

F. When positions become available, they shall be filled as follows:
1. Regularly employed part-time workers shall first be offered additional or full-time work in their classification, as such positions become available, in accordance with seniority.

The grievant is a part-time dietary aide. The Home by-passed him and appointed junior part-time dietary aides to full-time positions in that classification.
The Home did not offer a full-time dietary aide job to the grievant because of his poor attendance record which included 78 latenesses during the one-year period June 1994 to June 1995 and a large number of absences, usually on week-end days, with attendant disciplinary notations over the period April 1993 to November 1995. The Home deemed this record as rendering the grievant unreliable and hence unqualified for a full-time assignment. The Home asserts that to grant him a full-time job, considering his poor attendance record, would "severely harm the operation of the Home."

Contractually, the Home argues that a change from part-time to full-time employment is a "promotion" within the meaning of Section E of the contract, and that attendance is a relevant factor in assessing "qualifications" thereunder.

The Union's position is that only Section F(1) of the contract is relevant and applicable. It asserts that "seniority" is the only consideration in offering full-time employment to incumbent part-time employees; that the grievant enjoyed the requisite higher seniority and was in a part-time classification for which there was a full-time opening.

On an equitable basis, the grievant is not entitled to a full-time assignment. But on a contractual basis he is. It is well-settled that where a specific contract provision and equitable considerations are in conflict, the former is pre-eminent.

Here the Home had grounds to discipline the grievant for his poor attendance record. Indeed, his attendance appears to have been so unsatisfactory his discharge would have been warranted. But the Home did not discharge him. He remained employed and I find contractually eligible for a full-time assignment in his classification as a dietary aide.
The foregoing conclusion is based on my view that movement from a part-time dietary aide to a full-time dietary aide is not a "promotion" within the meaning of Section E of the contract. Traditionally, a "promotion" under a collective bargaining agreement is from a lesser classification to a higher classification. The dictionary definition is supportive. "Promotion" is defined as "advancement or raise in rank or responsibility" or "to raise to a more important or responsible job" (emphasis added).

Here the grievant would not have been raised or advanced in rank. He would have remained in his same classification -- dietary aide. He would not have assumed duties that were more responsible. He would have performed the same duties as before, albeit for a larger period of time, either daily or weekly. I am not persuaded that a lengthening of the same duties constitutes a "raise in responsibilities or importance."

Moreover, if Section E was intended to cover movements from part-time to full-time employment within the same classification, Section F(1) would be largely redundant and unnecessary. I am satisfied that Section F(1) was negotiated for a purpose different from Section E. It not only distinguishes movement to full-time from part-time from a "promotion," and not only gives priority for full-time appointments to part-time incumbents, but sets up a single qualification for that movement -- seniority. Obviously, "qualification" to perform the full-time job is not a factor under Section F(1) because the movement is within the job classification the employee already occupies. Presumably, therefore, he has demonstrated his ability or qualifications to perform the duties because he has done so as a part-timer. Here, if the Home considered his
attendance record as bearing in his qualifications, it could have and
should have asserted that position by disciplining him while he worked as
a dietary aide part-time. In short, it is not relevant under Section
F(1).

The grievant, still employed as a part-time dietary aide despite
his poor attendance record, enjoyed greater seniority that that of those
part-time dietary aides who were granted full-time jobs in that
classification. The grievant met the contractual qualification of Section
F(1), namely his greater seniority, and therefore was entitled to the
full-time opportunity before employees junior to him. Though entitled to
the full-time opening he remains subject to discipline for his poor
attendance record, and in my view, would be subject to discharge if that
record does not improve to a satisfactory level.

Recognizing this latter fact, I will not award the grievant any
back pay or other retroactive benefits along with my order granting him
the full-time appointment. My reason for not doing so is that I cannot
tell what his attendance record would have been had his application for
the full-time job been granted. In other words, I consider it quite
possible that even if he had been given the full-time job, his attendance
might well have remained unreliable and unsatisfactory. And therefore his
tenure in the full-time job may have been short-lived or marred by
absences and latenesses. Hence, to make him whole is too speculative and
hence inappropriate.

The Undersigned, duly designated as the Arbitrator, and having
duly heard the proofs and allegations of the above-named parties, makes
the following Award:
The Home wrongfully failed or refused to offer full-time work to the grievant, GARY DIEUDONNE.
He shall be offered full-time work as a dietary aide. There shall be no back pay or other retroactive benefits.

Eric J. Schmertz, Arbitrator

DATED: February 9, 1996

STATE OF NEW YORK  )
       ss:  
COUNTY OF NEW YORK  )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The parties did not stipulate an issue. Based on the record before me I deem the issue to be:

What shall be the financial basis for "other plans or arrangements that can provide benefits at comparable cost" for the bargaining unit employees of the Credit Union following the decision of Unisys not to continue administering the various benefit plans, and following the failure of the Credit Union and Local 470 I.U.E. to reach an agreement on such "other plans and arrangements."

A hearing was held on October 17, 1995 at which time representatives of the Sperry Association Federal Credit Union,
hereinafter referred to as the "Employer," and Local 470 I.U.E., hereinafter referred to as the "Union" appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record of the hearing was taken; and the Union and Employer filed post-hearing briefs.

Article 14 Section B of the Collective Bargaining Agreement reads:

1. The provisions for Group Life Insurance, Accident and Health Insurance and Hospitalization and Surgical Benefits, etc., and for the retirement pension plan shall be those in effect between the Sponsor and Local 470 for its Salaried Unit at the time of the execution of this agreement, as long as the Sponsor permits continued participation of Credit Union employees in the Sponsor's respective plans. Benefit accruals stop at age 70.

2. The term "Sponsor" refers to Unisys Corporation as the operator of its current facility at Lake Success, NY or such successor at the same location as undertakes full responsibility for all the obligations of a sponsor of a federal credit union and continues to administer its benefit plans in the same or comparable manner with respect to benefit plans covered by this Article.

3. In the event the Sponsor cannot or will not administer the benefit plans to provide coverage of employees under this contract, as heretofore, the
parties will meet to discuss the establishment of other plans or arrangements that can provide benefits at comparable cost to the employer. Failing agreement on such plans within 30 days of the initiation of negotiation, either party may submit the matter to final and binding arbitration in accordance with the procedures of the American Arbitration Association. The parties will use their best efforts to prevent any interruption of benefits.

The critical part of the dispute is narrow. It centers on the meaning of "comparable cost" in paragraph 3 above.

The Employer's position is that on the aggregate its payments to Unisys for administration of the various benefit plans for its fourteen or so bargaining unit employees, was 20% of payroll. It asserts that 20% of payroll is the definition of "comparable cost" for any new set of benefit plans, replacing the plans that Unisys decided to no longer administer.\(^1\)

The Union contends that 20% or 21% of payroll does not provide the employees with the benefits they enjoyed under the Unisys administration; that under protest, pending this arbitration, the bargaining unit employees have been required to pay significantly greater employee contributions to support the benefits; that based on "comparable cost" the Employer should be

\(^1\)Health Insurance; Pension; Life Insurance; 401(K) Plan; Dental and Long Term Disability; Cafeteria Plan.

\(^2\)The Employer is prepared to commit 21% to new benefit plans.
required to pay more than 20% or 21% because the cost of the benefits under the Unisys plans were higher; and that if required to pay those actual costs, the employees' contributions would be unnecessary and eliminated.

The Union asks for a variety of remedies, including *inter alia* an order directing the Employer to "pay the full amounts for all premiums," to "adopt or sponsor a defined benefit pension plan; to provide life insurance...equal to two times of annual salary; "to credit employees for premiums deducted from their pay checks since July 1, 1995"; "to sponsor or adopt a cafeteria plan"; "to adopt A 401(K) plan when such plan is legal"; "to provide long-term disability and dental coverage, when feasible...

I conclude that the exercise of my authority, at least at this point, under Article 14 Section B(3) of the contract is to rule on the meaning of "comparable cost"; to afford the parties thereafter an opportunity to negotiate and agree upon what plans and benefits can be established within the defined "comparable cost" and to make whatever reimbursements to employees for premiums paid or expenses incurred which otherwise would have been covered by the plan(s); and for me to retain jurisdiction over the entire case for, if necessary, rulings on the application and interpretation of my decision on "comparable cost" and to resolve substantive disputes over the plans to be established if the parties cannot agree.
In short, I believe that with a definition of "comparable cost" and with that disagreement resolved the parties can and should return to negotiations and should be able to reach substantive agreements.

In defining "comparable cost," I reject the Employer’s contention that it is an aggregate percentage of payroll. Each benefit plan has a particular cost for the benefits it provides. Therefore "comparable cost" should in my view be a series of costs, each connected to and identified with a particular plan and the benefits thereunder. Hence, the cost of health insurance; the cost of pensions; the cost of dental coverage, the cost of life insurance, etc. should be determined separately. Of course, the total thereof is the total cost available to the parties for negotiated allocation to whatever plans they establish and whatever levels of benefit attach to those plans. Again in short, the separate "comparable cost" determinations of each of the prior benefit plans will give the parties a cumulative financial figure with which they can deal for allocation.

Also, I reject the Union’s assertion that "comparable cost" is a guarantee of a continued level of benefits previously enjoyed under the Unisys administration. It is apparent to me that because the Unisys plans covered some 14,000 employees of Unisys as well as the 14 employees of the Employer involved in this case, a better deal on a level of benefits for those 14 was
obtained because of the overall large enrollments. So "comparable cost" does not include a guarantee of the same level of benefits as before for the fourteen or so bargaining unit employees in this case.

What then is "comparable cost"? It is well-settled that ordinary words should be given their ordinary and customary meaning. I consider "comparable cost" to be subject to that rule.

The dictionary defines "cost" as "an amount paid or required in payment for a purchase" (emphasis added). The definition of "comparable" is "similar or equivalent."³

Based on these definitions, I conclude that "comparable cost" is what was paid or required to be paid for the particular benefits at issue in this case, and that the amount is similar or equivalent what was paid to purchase that benefit under the Unisys administration.

It follows that with this definition, the Employer is wrong when he asserts that "comparable cost" is 20% of payroll unless that 20% has been the full payment of the Employer's share of the cost of the premiums for the particular benefits for the 14 covered employees. Put another way, only if the 20% plus the original employee's contribution is equal to the actual, full cost of the premiums, would that percentage equate to "comparable cost."

³The American Heritage Dictionary
But the record shows that 20% did not rise to that level, and that 20% was not enough to "purchase" the benefits. Instead, apparently, 20% of payroll was what the Employer paid to Unisys for the plans, but Unisys, either based on the 14,000 enrollees or on a per capita breakdown for the instant grievants, paid premiums to the insurance carrier(s) or to the benefit funds (if self insured) that cost more than 20% of payroll. The evidence adduced at the hearing revealed that the difference between 20% and the actual cost of the Employer's share of the premium(s) was subsidized, absorbed or otherwise covered by Unisys.

In other words, the cost to this Employer, which he measures at 20% was not the cost of paying for or purchasing the benefits for the 14 bargaining unit employees. The actual cost was more, and Unisys took care of the difference.

I find, therefore, that "comparable cost" within the meaning of Article 14 Section B(3) was not what it cost the Employer (i.e. the 20%) and, therefore, not the 20% of payroll that the Employer paid to Unisys but rather the amount that Unisys paid to the carrier(s) or to an insured fund (or to a self-insured plan) to purchase the various benefits.

This interpretation is not only supported by dictionary definition and by ordinary logic, but by the history of the negotiations of Article 14 Section B of the contract. I accept as accurate the Union's testimony that at no time until this dispute arose, did the Employer disclose that its contribution was 20% of payroll and that there was subsidization from Unisys. Absent such disclosure at negotiations, and considering the unusual nature of that financial arrangement between the Employer and Unisys I think
it fully reasonable that the Union believed that the Employer was paying the full amount of the premium(s) less the employees' then contributions. So, I find no basis to apply the principle of estoppel to the Union's claim herein.

The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

1. The Employer's position that "comparable cost" equates to 20% or 21% of payable, is rejected.
2. The Union's claim that "comparable cost" equates to a guarantee of the same benefits enjoyed under the Unisys administered benefit plans, is rejected.
3. The term "comparable cost" in Article 4 Section B(3) of the contract is the full amount of the premium(s) paid by Unisys to the carriers or a benefit fund for each benefit plan for and covering the instant bargaining unit employees just prior to its discontinuance of its administration. By "full amount" I mean the total payment for the purchase of each plan and its benefits for those employees, less, of course, the employee contributions, if any, then in place.
4. Based on the record it appears that a calculation of the above sums of payment will be in excess of 20% or 21% of the payroll of the bargaining unit employees of the Employer, whether calculated on a benefit-by-benefit plan basis, or cumulatively.
The making of the precise calculations, I leave to the parties.

5. With the foregoing definition of "comparable cost," I direct the parties to resume negotiations on what types of benefit plans they wish to establish, the level of benefits of those plans, and whether any employee is entitled to any reimbursements.

6. I shall retain jurisdiction to resolve disagreements over the application, interpretation and implementation of this AWARD.

Eric J. Schmertz, Arbitrator

DATED: January 15, 1996

STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss:

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
IN THE MATTER OF THE ARBITRATION

between

LOCAL 100, TRANSPORT WORKERS UNION OF AMERICA

and

WHITE PLAINS BUS COMPANY

The stipulated issue is:

Was there just cause for the discharge of CAROL LAWSON? If not, what shall be the remedy?

A hearing was held on September 18, 1996 at which time Ms. Lawson, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant was discharged on August 9, 1996 for what the Company characterizes as three incidents of insubordination. Those alleged incidents occurred on January 17th, March 7th and August 2/3, 1996.

On January 17th a snow storm was in progress. The Elmsford and White Plains schools serviced by the Company closed early. The grievant's regular work assignment was to transport school children to and from certain Elmsford schools and to and from one White Plains kindergarten. On a normal day she would complete her work assignment at about 3:45 P.M. On January 17th, because of the snow storm and the early closing, she completed her regular assignment sometime shortly after 11:00 A.M.
Soon after 11:00 A.M., Dispatcher, Robert Tramontino instructed the grievant to pick up school children at a certain middle school in White Plains because additional buses were needed to handle the early closing of the White Plains schools. That proposed assignment was not part of the grievant's regular work schedule.

The Company asserts that the grievant refused to comply with that assignment. It states that she told the dispatcher that she "had enough for the day" and was "going home." In response to the dispatcher's explanation that the Company "had its back to the wall" and needed more buses to handle the early White Plains school closings, the grievant stated that she "had been up and down Payne Street hill and had enough." When asked directly if she was "refusing the assignment," the Company states that the grievant replied "yes." The dispatcher then removed her from service.

The grievant's position is that she had no obligation to take on an extra assignment beyond her regular "pick." She also claims that the roads were icy and dangerous, especially Payne hill, and that she was not required to expose herself to any further risks.

On March 17th, the Company asserts that the grievant loudly and angrily directed disrespectful, obscene and insulting language at Head Dispatcher, Joseph Costable in the presence of other supervisory and bargaining unit employees. And that when asked by Costable to "calm down" the grievant became increasingly loud, again directing profane and insulting language at Costable, and called him "a fucking ass hole." This incident apparently arose from frustration the grievant experienced when
unable to "gas up" her bus. A van, driven by another employee had been parked at and blocked the gas tank and was left there by its driver, unattended. The grievant asserts that the van driver has regularly received preferential treatment; that to leave the van so parked violated Company rules; and that her anger was therefore justified. However, she denies that she directed disrespectful and/or profane language at Costable, asserting instead that her outbursts was about the circumstances generally and were directed at no one in particular.

On August 2nd, Safety Supervisor, Richard Lente, filling in for Costable, had an encounter with the grievant regarding the assignment of a particular bus. He instructed her to ascertain whether certain repairs on that bus (Bus #258) had been made and whether it was clean. Lente asserts that the grievant first refused to check on the repairs; said that she would not take that bus because it smelled; and that the assignment of that bus to her was "bullshit."

Ultimately, the grievant made her run with Bus #258, but the charge against her for that particular day was that she was disrespectful and insulting to supervision and defiant.

The events of August 2nd are, in the Company's view, melded into the events of the very next day, August 3rd, heightening the allegation of insubordination and triggering the grievant's dismissal.

On August 3rd, she was assigned Bus #623. She asked for Bus #620 and that request was granted. However, she then rejected Bus #620 claiming that it "smelled of chicken." She asked for Bus #88 but was told that it was not available because it was not owned by the Company. Lente told her to "do the charter with Bus #620." Lente claims that the grievant then "gave him the finger." That particular act was reported by Lente to higher management and precipitated the grievant's discharge.
The grievant asserts that she did nothing of an insulting nature on August 2nd. And that on August 3rd, she denies "the finger" accusation, asserting in her testimony at the hearing that she "does not know what giving the finger means."

I find no reason in record why three different supervisors would falsify their testimony. Therefore, I accept their versions of the three events as accurate. I also conclude that Costable knows the difference between obscenities that are "shop talk" or common place in a work office and those that are directed specifically at a supervisory employee and hence are insulting, abusive and insubordinate. I find that on March 7th the grievant's conduct was directed offensively at Costable; that her language of vilification was directed at and about him. That it may have been prompted by the improper manner that the van and its operator blocked the gas tanks is only an explanation but it is not an acceptable excuse for the grievant's intemperate and abusive outbursts against the dispatcher.

I do not believe the grievant when she asserts her innocence over what "giving the finger" means. Realistically, in this modern working environment, adults know of this gesture and its meaning. Therefore, I reject as untrue her denial of the account and accept as truthful the supervisors' report.

The grievant is wrong in her defense that she was not obligated to carry out the extra assignment to pick up children at the White Plains school during the snow storm of January 7th. That it was not part of her regular work assignment is immaterial. If there is any arbitral rule that
is universally well-settled it is that employees must carry out orders of management, even if they think those orders are wrong or, as here, outside of a regular work schedule. The rule is "to comply and then grieve." The grievance and arbitration provisions of the contract are the remedy for and are fully capable of redressing an order or directive that is improper. The only exceptions to that rule are not applicable here. If the order is illegal or realistically dangerous beyond an employee's recognized duties, it may be declined. But here, the directive to get children at the White Plains schools was certainly lawful. It was not dangerous to the "life or limb" of the grievant beyond her job duties because driving in the snow is an anticipated part of a school bus driver's job. And, more significantly, there is no evidence that the snow storm had progressed to a dangerous level. Indeed, the early closings of the schools was to preclude that possibility. Moreover, her explanation that she had been up and down Payne hill all day is irrelevant because the unrefuted evidence is that the routes to and from the White Plains middle school did not include travelling on Payne hill.

In short, the grievant's conduct on those three occasions, and certainly cumulatively, rose to a level of impermissible defiance and hence was insubordinate.

Nonetheless, though insubordination is an offense justifying summary dismissal without the application of prior progressive discipline, I have decided to use this case for instructional purposes for the grievant and for all other employees as may be appropriate. In order for it to have that broad based instructional effect, I shall give the grievant one final chance to behave properly.
I do so in small part because of the grievant’s seniority but primarily because (and hence its instructional purpose) I believe it possible that the grievant does not know or understand what type of conduct is expected of her and what the relationship should be between herself and supervision. Put another way, I discern that the grievant erroneously thinks that an adversarial, confrontational and abusive attitude in her dealings with supervisors is normal to a traditional employee/employer relationship. If that is their belief, as evidenced by the circumstances of this case, she is not only manifestly wrong but on those erroneous premises she has placed her job security in jeopardy.

Bargaining unit employees are entitled to the respect of and civility from supervisory employees. And clearly the reverse is equally true. Additionally, and also universally well-settled, the employee has a duty to obey supervisory and managerial instructions. Absent a requirement of obedience, essential discipline and managerial authority to direct an employer’s mission are undermined, resulting ultimately, in "industrial anarchy." Therefore any improper orders to or improper treatment of bargaining unit employees may and must be referred to the grievance procedure of the contract which is designed for and fully capable of redressing any such wrongs.

I agree with the Company’s assertion that she did not "get it" when efforts were made to impress the grievant with the unacceptable nature of her conduct. A glaring example of "not getting it" is her refusal to carry out the assignment on January 7th to pick up children at the White Plains middle school. Her argument in this proceeding that she is not obligated to do any work outside her regular route, is so wrong as
a matter of arbitral law and so incongruous with what is required in an employee/employer relationship, that it supports the conclusion not simply that she was defiant and insubordinate, but arguable, that she did not know the rule of conduct involved. For these reasons, and again for instructional purposes (as the relatively new Impartial Chairman under this Collective Bargaining relationship), I shall give her one more chance, not only to become aware of what the Company has been telling her but now of what the Impartial Chairman is also telling her. If she heeds my admonition and performs her work properly and successfully, this last chance will have succeeded and she will stay at work. If, however, she commits any further disciplinary offenses, I would consider that and those to be grounds for summary dismissal and would so rule in any subsequent proceedings before me.

Finally, let the instant enunciation of the foregoing rules regarding insubordination be notice to all employees who may harbor the same or similar erroneous views of the grievant. Let it be known that those views and attitudes are wrong and if employed (i.e. a confrontational and/or disrespectful attitude in dealing with supervision), a penalty of discharge will be upheld.

The Undersigned, Impartial Chairman under the Collective Bargaining Agreement between the above-named parties, and having duly heard the proofs and allegations of said parties makes the following AWARD:
The discharge of CAROL LAWSON is reduced to a disciplinary suspension. One month from the day of this Award she shall be offered reinstatement by the Company. Said reinstatement, if accepted by the grievant, shall be without any back pay. She is sternly warned that if she commits any future disciplinary offenses, a penalty of discharge, if imposed on her by the Company, will be upheld.

Eric J. Schmertz, Impartial Chairman

DATED: October 16, 1996

STATE OF NEW YORK )
COUNTY OF NEW YORK )

ss:

I, Eric J. Schmertz do hereby affirm upon my Oath as Impartial Chairman that I am the individual described in and who executed this instrument, which is my AWARD.
IN THE MATTER OF THE ARBITRATION

between

COMMUNICATIONS WORKERS OF AMERICA

-and-

BELLSOUTH TELECOMMUNICATIONS, INC.

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The stipulated issue is:

Whether the Company violated the collective bargaining agreement relating to vacation treatment for part-time employees being reclassified to full time?

A hearing was held on April 4, 1997 in Birmingham, Alabama, at which time representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator’s Oath was waived; a stenographic record was taken; and the parties filed post-hearing briefs.
More specifically, this matter involves fifteen computer attendants who on August 27, 1995 were reclassified from regular part-time status to regular full-time status.

Vacation entitlement is measured beginning on January 1st of a given year. From January 1, 1995 to August 27, 1995 it is undisputed that the grievants properly accrued vacation pay and entitlement computed on their part-time employment of 15 hours of work per week. (The full-time work week is 37.5 hours).

After August 27, 1995, in accordance with a Company Agreement Interpretation and practice, the Company made no change in the treatment of the grievants for vacations, continuing for the balance of the year the accrual of vacation entitlements on a part-time basis.

The Union contends that when the grievants became full-time employees they were entitled to the calculation of vacation benefits on the basis of a full 37.5 hours of work each week. And that if that was done, the grievants would have enjoyed, for whatever vacation time remained to them increased vacation entitlements, based on the full-time calculations.

The Union relies entirely on certain contract provisions which it asserts lead to a conclusion that the grievance should be granted.
First, inversely, the Union points out that there is no provision in the contract which allows the Company to deny full-time vacation benefits to employees re-classified full-time.

Next, it cites Article 5, Section 5.06, which, in substance, quantifies the amount of vacation pay and entitlement based on seniority, without other limitations. From that the Union argues that when the grievants achieved full-time seniority, they were entitled to full-time vacation pay and entitlements.

The Union cites Article 2, Section 2.01, and particularly Paragraphs B. 2, 3 and 4, thereof. It asserts that because part-time employees shall receive

"The rate of pay and amount of increase. . .prorated by relating his/her hours of work to the normal work week."

and that

"A part-time employee shall receive progression increases at the same intervals as full-time employees."

the parties recognized contractually that pay increases for part-timers became effective "at the same intervals as a full-time employee." And that the same should apply to increased vacation benefits when a part-time employee becomes full-time. In other words,
because there is no hiatus between the date of a pay increase and its effectiveness, there should be no hiatus in the application of full-time vacation benefits after an employee becomes full-time. Indeed, the Union asserts that vacation pay is a form of wages, and should be treated similarly.

B-4 provides for a review of part-time employees on April 1 and October 1 of each year (for pay adjustments). The Union contends that for the Company not to grant vacation benefit adjustments on and after August 27th for those prior part-timers who became full-time on that date is violative of the principle of adjusting benefits to coincide with negotiated improvements and those contractual review dates.

The Union cites Article 1, Section 1.25, Paragraph C which provides in pertinent part:

Part-time employees and full-time employees. . .who are subsequently reclassified to part-time will accrue seniority on a pro-rated basis as such proration shall be determined by the number of hours worked per week as a percent of 37.5 hours. . ."
From that the Union argues that if seniority is "prorated upon reclassification," then vacation benefits should similarly be prorated based on full-time status, on and after an employee changes from part-time to full-time.

The Union's theory is similar with its citation of the contractual language for holiday pay. It cites Article 4, Section 4.03 which in substance provides that:

"The holiday allowance paid shall be prorated based on the relationship of the individual part-time employee's 'part-time equivalent work week' to the normal work week of a comparable full-time employee. . . ."

From this, the Union submits that if holiday allowances are prorated, the same should be true for vacation benefits. And that if a part-timers' holiday pay is prorated without any calendar cut-off dates, it is contractually logical, if not mandated that full-time vacation benefits become effective for the percentage of the vacation year remaining on and after a part-timer becomes full-time.
In short, the Union asserts that because pay benefits, seniority benefits and holiday benefits, among others, are acquired by employees on the date they achieve the requisite seniority or when contractually effective, without any calendar hiatus, the same should obtain to vacation benefits. And that therefore, when the grievants achieved full-time status and seniority, the full-time vacation benefits should attach prospectively without any delays for any or all of the employee's remaining vacation time.

The Company asserts that none of the foregoing contract provisions relate to or cover the instant circumstance - namely the reclassification of part-timers to full-time.

It points out that there is no express contract provision or language that addresses this fact situation, and that it was not raised by either side in contract negotiations. The Company concludes therefore that there was no "meeting of the minds" and that it remains, therefore, a managerial right to be dealt with by the Company unilaterally, provided the arrangements the Company promulgates are fair and reasonable.

The Company contends that its arrangement under these circumstances is logical, fair, and reasonable as well as supported by uncontested past practice.
More specifically, the Company has interpreted its contract obligations regarding vacation benefits for part-timers reclassified to full-time on essentially an equitable basis. If the affected employee was reclassified on a before July 1st (i.e. before the expiration of 6 months of the vacation year) he was accorded vacation benefits of whatever remained of his vacation time on a full-time employee basis. But if the reclassification took place after July 1st, (i.e. within the last 6 months of the vacation year) the affected employee would continue to receive vacation benefits on a part-time basis.

The Company views the July 1st cutoff date as fair and reasonable, especially in the absence of any contract language providing otherwise. It argues that it is manifestly fair to accord full-time vacation benefits to employees who have worked at least 2/3 of the vacation year as full-timers, and to deny it to those who (like the grievants in this case) remained part-timers for more than 2/3 of the vacation year.

The Company argues that what the Union seeks would lead to inequities and unfair results. It points out that if a part-timer is reclassified full-time in December, and had not yet taken any vacation time, his full vacation entitlement, generated by the single month he was in full-time status would be at the full-time rate. And that would be an unfair “windfall.” Similarly, the Company claims that
under the Union's theory, if, in the reverse, full-timers are reclassified to part-time, their vacation entitlements should be cut appropriately. Not only has the Company not done so and does not plan to do so, but explains that that would be unfair to the employee. So, concludes the Company, the fair, equitable and more easily administered procedure was to adopt and implement the "one-half" year formula, with the July 1st cut-off date, for part-timers becoming full-time, and to leave the reverse unaffected.

Finally, the Company relies on past practice. It cited examples of some situations where it applied the "half-year" formula without objection from the affected employee(s) or the Union. This past practice, the Company asserts, is evidence of the reasonableness of its exercise of managerial rights in this regard and the fairness of the formula applied, and that the Arbitrator should not legislate a different arrangement. A change, concludes the Company is for collective bargaining not arbitration.
The stipulated issue is:

Did the grievant, Bruce Montgomery, have the minimum qualifications required under the provisions of Section 1 of Article XXVIII of the contract to be upgraded to the Cell Leader R-21 position in March 1996?

If the Arbitrator determines that the grievant did have the minimum qualifications required for such upgrading, did the Company violate Article XXVIII when it upgraded John Withers pursuant to the March 1996 posting rather than the grievant? If so, what shall the remedy be?

A hearing was held on May 15, 1997 in Somerset, Kentucky at which time the grievant and representatives of the above-named Union
and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator’s Oath was waived, a stenographic record was taken and both the Union and the Company filed a post-hearing brief.

The pertinent part of Section 1 of Article XXVIII provides:

1. Standard for filing open jobs and upgrading. The Company will, to the extent practical, give first consideration for job openings and upgrading to present employees when employees with the necessary qualifications are available. In upgrading employees to higher rated jobs, the Company will take into consideration as an important factor the relative length of seniority of the employees who it finds are qualified for such upgrading..."

The Company determined that the grievant was not qualified and that, therefore, his greater seniority than that of John Withers was irrelevant.

To be minimally qualified for the Cell Leaders job, the Company had three requirements. First, that the applicant be a qualified press operator. Second, that the applicant have had experience operating multiple presses as a press operator. And third that the applicant have a record of top or near top productivity on his press, gauged against his peers.
The Company asserts that the grievant met only the first requirement. It acknowledges that he is a qualified press operator. (exclusively on Press #3).

But it asserts he had not operated any of the other presses as a press operator, and that his productivity on Press #3 was at the bottom or near the bottom of the productivity of his peer operators.

Standing alone, the three requirements by the Company are relevant to the Cell Leader job, reasonable as threshold qualifications and if required of all applicants, non-discriminatory.

Qualification as a press operator is obvious and undisputed. Experience on more than one press is justified by the fact that the Leader will be expected to provide trouble-shooting assistance to other press operators and to assign work in the production of glass products. And a top level of productivity is not an unreasonable or irrelevant requirement of a job that does or will carry with it "leadership duties." The job posting describes the Cell Leader as "an employee who has been officially assigned by the Operators Manager, to direct the activities of, and be responsible for the work of a definite group of employees, who in turn have been instructed by the Plant Manager to accept this team leader's direction."¹

However, no matter how reasonable and relevant those three requirements may be standing alone, they become unreasonable or inapplicable if not adequately noticed as part of the job.

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¹Because it plans to do so as soon as the Cell Leaders are all in place, the fact that it has not yet implemented the leadership role of the Cell Leader does not negate the requirement of the leadership ability.
requirements, or if inconsistent with the job posting, or if, as a threshold standard, an applicant does not know of the requirement because it has not been communicated to him in time to give him a reasonable opportunity to meet it.

In this case, and limited to the particular facts herein, I find that the Company erred when it determined that the grievant did not have experience operating multiple presses. And that it waived or ineffectively set forth as a qualification, the requirement of "top" or "near top" productivity.

The posting for the Cell Leader job in question is itself an important and determinative piece of evidence in deciding job requirements for upgrading. It serves to notify potential bidders of the minimum qualifications required. In pertinent part, the fifth paragraph thereof reads:

Potential applicants should have at least 5 to 10 years of familiarity with Pressing Operations on a number of different presses coupled with a recent assignment in the press area (3 years). (Emphasis added)

There is no dispute that the grievant met the foregoing longevity requirements.
But, the Company’s requirement that to be minimally qualified an applicant must have worked on multiple presses as a qualified press operator, exceeds, is more demanding than and hence inconsistent with the requirements set forth in the posting.

The posting requires only “familiarization” with pressing operations. Defined by the dictionary, “familiarization” is:

“Having a fair knowledge of something.”
“To be acquainted or conversant with…” (American Heritage Dictionary)
(Random House Dictionary of the English language).

Based on my authorized observation of the pressing operation together with the grievant’s acknowledged experience as a qualified operator on Press #3, and his undisputed earlier experience on several of the other presses as a shift attendant filling in for press operators when they are out, I conclude that the grievant met the requirement of “familiarization” within the meaning of that term and the posting. Indeed, unrefuted in the record is evidence not only of the grievant’s overall “fill-in” activity on several presses but that for many weeks he filled in on Press #7 and ran it alone as the de facto operator while the regular operator was out. That is enough, I conclude, to meet a minimum qualification.
For, in determining minimum qualifications, I hold that the Company is bound by the language of its posting, particularly in the absence of an explicit requirement of multi-press experience in the press operator classification. Accordingly, I deem the grievant sufficiently familiar with press operations to be minimally qualified.

The third requirement "top or near top" productivity was inadequately and ineffectively applied to this particular upgrading. It is not part of the posting, either expressly or impliedly. So, in that regard the applicants were not informed of that threshold standard. More significant to my mind is the apparent fact that in no other way was the grievant notified of this requirement before full implementation of the bidding and selection process. Nor, because of the lack of notice thereof, given a chance to improve his productivity or take steps to comply with the standard. Indeed, the record shows that the first time the grievant knew or was told of that requirement was not until his bid had been rejected. In fact, the record indicates that on earlier similar bids, when his substantive qualifications were not considered because of his then lesser seniority, he was not told or otherwise notified about the "top or near top" productivity requirement and therefore could not anticipate
it as a requirement for later bids, including the instant bid. Again, as I have previously said, standing alone I would find the productivity requirement a bonafide standard in determining minimum qualifications for a Cell Leader. But here, in the absence of adequate and timely notice to the grievant, leaving him unable to explain or improve his productivity in anticipation of making the bid; in the absence of its listing in the posting and in view of what appears to be its ex post facto application by the Company, I find it unfair and unreasonable to make it a minimum qualification.

Again resorting to the dictionary, the word "minimum" is defined as:

"the least quantity or amount possible." (emphasis added)

Applying this definition to the critical contract term "minimum qualifications," together with the foregoing findings, I conclude that though the grievant may not have been fully qualified, or even well qualified, he was minimally qualified.

That being so, I find no reason why the grievant's greater seniority should not have been the determining factor in making the upgrading selection in accordance with Article XXVIII.
The Undersigned, duly designated as the Arbitrator, and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

The grievant, Bruce Montgomery had the minimum qualifications effectively required under the provisions of Section 1 of Article XXVIII of the contract to be upgraded to the Cell Leader R-21 position in March 1996.

The Company violated Article XXVIII when it upgraded John Withers pursuant to the March 1996 posting rather than the grievant. The Company is directed to upgrade the grievant to the position of Cell Leader R-21 and make him whole.

Of course, the foregoing is without prejudice to the Company’s right to take appropriate action if the grievant fails to perform the job satisfactorily.

Eric J. Schmertz, Arbitrator

DATED: AUGUST 28, 1997

STATE OF NEW YORK )

ss:  ss:

COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
AMERICAN ARBITRATION ASSOCIATION,
ADMINISTRATOR

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IN THE MATTER OF THE ARBITRATION

Between

UNITED FEDERATION OF TEACHERS,

-and-

LUTHERAN MEDICAL CENTER,

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In accordance with the Collective Bargaining Agreement (hereinafter the "Agreement" or the "CBA") between the above-referenced Union and Employer, the Undersigned was designated as the Arbitrator to hear and decide a dispute relating to the Union's claim that clinical nurse specialists and pediatric nurse practitioners should be included in the bargaining unit.

The Union poses the issue and requested remedy as follows:

**Issue**

Did Lutheran Medical Center (hereinafter "Employer" or "Lutheran") violate Articles 1 to 10, 13 to 16, and 18 to 20 of the
CBA when it refused to include in the bargaining unit the job titles clinical nurse specialists (hereinafter "CNSs") and pediatrician nurse practitioners (hereinafter "PNPs")?¹

Remedy

A finding that Articles 1 through 10, 13 through 16 and Articles 18 through 20 have been violated, and further, the issuance of a directive ordering inclusion in the bargaining unit of Registered Nurses (hereinafter "RNs") hired to work as CNSs and PNPs.

The Employer poses the issue and requested remedy as follows:

Issue

Is the Employer in violation of the CBA by its refusal to include in the bargaining unit defined by the CBA the following classifications of employees, CNSs and PNPs?²

Remedy

A finding that the grievance is untimely and not arbitrable, or not arbitrable because the issue is within the exclusive jurisdiction of the National Labor Relations Board. But if arbitrable, deny the grievance on the merits.

¹ The Union, in its brief, alleges that the issue before the arbitrator in this matter is whether "the titles of CNSs and Nurse Practitioner (hereinafter "NPs") are included within the bargaining unit." For purposes of this Decision and based on the record, PNP's and NP's are treated as synonymous.

² The Employer alleges in its brief that "ultimately, the issue before the Arbitrator is not one of recognition or coverage, but rather whether the work of CNSs and PNPs changed in or about 1990, so as to infringe upon the work of covered Employees." I conclude that this argument relates to the issue of "timeliness."
Hearings

Hearings were held at the offices of the American Arbitration Association on December 8, 1993; February 1, February 2, November 22, 1994; January 24, October 10, December 4, 1995; and June 20, 1996. At all times representatives of the parties appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. Lutheran was represented by Joseph F. Seminara, Esq. and Carl A. Schwarz, Jr., Esq. The Union was represented by Mr. Lawrence D'Addona. The Arbitrator's Oath was waived. All witnesses were sworn; a stenographic record was taken. The parties filed post-hearing briefs dated January 15, 1997. The Employer filed a reply post-hearing brief on or about March 4, 1997. The Union did not file a reply post-hearing Brief. Due to the length and substance of the record, the parties waived the time limits under the rules of the American Arbitration Association for rendition of the Award and Opinion.

Background

Bargaining History

In 1979 the United Federation of Teachers (hereinafter "UFT" or "Union") became the sole bargaining agent for the professional nurses employed by Lutheran by defeating New York State Nurses Association in an NLRB directed certification election. The first CBA the UFT and Lutheran executed was effective from 1980-1983. The next
CBA was effective from 1983-1986. Between 1986 and 1988, yet another CBA was negotiated. In 1988, a new CBA became effective until 1990. For the period 1990-1992, the parties executed another CBA. Finally, in 1992, both Lutheran and the Union entered into the current contract which governs this dispute.

During these years and these six distinguishable contract negotiations, three other new job classifications were added to the bargaining unit by means of collective bargaining. These classifications include mental health clinicians, alcoholism nurse therapists, and assistant nurse epidemiologists. It is undisputed that at no time were the classifications PNPs or CNSs part of that addition.

The Grievance Procedure

The record indicates that on September 24, 1992, the Union wrote a letter to Ms. Sally Eaton, Vice President of Nursing of Lutheran Medical Center, requesting a conference discussing the referenced grievance (Step 2 request). In this letter, the Union alleged that Lutheran Medical Center had hired Registered Nurses (RNs) to work as Clinical Nurse Specialists (CNSs) and Nurse Practitioners (NPs) - excluding these job titles from the bargaining unit. The Union also accused the Employer of violating Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16, 18, 19 & 20 of the CBA.
On November 18, 1992 the Union wrote to Mr. Miles Kucker, the Vice President of Human Resources of Lutheran Medical Center, again requesting a conference to discuss the referenced grievance (Step 3 request).

On January 29, 1993 the Employer responded, explicitly denying the Union's grievance.

On March 5, 1993 the Union demanded arbitration. The Demand stated that the dispute concerned the "Employer's hiring of RNs to work as CNSs and NPs (The NP is the successor classification to the PNP title) performing bargaining unit work, yet excluded them from the bargaining unit, in violation of Articles 1-10, 13-16 and 18-20." The remedy sought by the Demand is "a finding that Articles 1-10, 13-16 and 18-20 have been violated and, further, a directive ordering included in the bargaining unit, those Registered Nurses hired to work as Clinical Nurse Specialists and Nurse Practitioners performing bargaining unit work."

**Pertinent Contract Provisions**

**ARTICLE 1**

**SCOPE OF AGREEMENT**

Covered Employees. This agreement covers employees in the following unit:

INCLUDED: All full-time, regular part-time and regularly scheduled per diem registered professional nurses employed by the Employer at its Hospital and Family Health Care facilities located in Brooklyn, New York, including Staff
Nurses, Discharge Planning Nurses, Public Health Nurses, Family Practice Nurses, Instructors (Nurse Clinicians), Utilization Review Nurses, Nurse Anesthetists, Mental Health Clinicians. Alcoholism Nurse Therapists, Assistant Nurse Epidemiologists. Assistant Nursing Care Coordinators, and Head Nurses as set forth in the letter to the Union on that Matter.

EXCLUDED: Vice President-Nursing Services, Assistant Director of Nursing, Directors of Nursing, Staffing Coordinators, Director of Nursing Education, Utilization Review Coordinator, Discharge Planning Coordinators, Nursing Care Coordinators and all other employees, office clerical employees, guards and supervisors as defined in the Act. Employees in the unit (including nurses working pursuant to a Registered Nurse Permit) are hereafter referred to as “Registered Nurses.”

Recognition. Employer recognizes the Union as the exclusive collective bargaining representative of every Registered Nurse covered by this agreement.

ARTICLE 19 -- GRIEVANCE PROCEDURE

1. Grievances. Except as otherwise provided in this agreement, every grievance the Union (and the Registered Nurses it represents) may have arising from application or interpretation of this agreement or otherwise will be adjusted as stated below. A grievance which affects a substantial number or class of Registered Nurses, or on behalf of the Union, in which the Employer’s representative in Step One lacks authority to settle may initially be presented at Step Two by the Union’s representative, provided that such grievance must be filed within the time period set forth in Step One of the grievance procedure as set forth herein.

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3 A Registered Nurse who feels himself/herself aggrieved by a direction to perform a certain task shall not refuse to perform the task but shall perform the same and then submit his/her protest as a grievance, provided that a Registered Nurse shall not be required to perform a task which would present an immediate danger to the health or safety of the Registered Nurses.
2. **Informal Discussions.** A Registered Nurse who has a grievance will present the claim promptly to the Registered Nurse’s supervisor. The Registered Nurse and the supervisor will discuss and attempt to resolve this complaint.

3. **Procedure and Time Limits:** Step One. If the grievance is not adjusted by informal discussion as provided for in paragraph 2, the Union may serve a written notice of grievance on the applicable clinical Director, or designees, within ten (10) days after occurrence of the facts on which the grievance is based. If no such notice is served in the time specified, the grievance will be barred. Within ten (10) working days thereafter, or within five (5) days following any conference between the local representative and the Clinical Director or designees, the answer of the Clinical Director shall be given to the local representative.

4. **Procedure and Time Limits:** Step Two: If the grievance on the Hospital’s Vice President for Nursing, or designees, within ten (10) working days after the answer at Step One. If no such notice is served in the time specified, the compliant will be barred. Within ten (10) working days thereafter, or within five (5) days following any conference between the general or local representative and the Vice President for Nursing or designee, the answer of the Vice President for Nursing shall be given in writing to the general or local representative.

5. **Procedure and Time Limits:** Step Three. If the grievance is not adjusted in Step Two, the Union may, within five (5) working days after the answer in Step Two, appeal the grievance to Step Three by written notice served on the vice-president for Human Resources, or designees. If no such notice is served within the time specified, the complaint will be barred. Within five (5) working days thereafter, the answer of the Hospital shall be given in writing to the Union.
6. **Procedure and Time Limits**: Step Four. If the grievance is not adjusted in Step Three and involves the application or interpretation of this Agreement, such grievance may be submitted to arbitration by the Union in accordance with this Section. The Employer and the Union will select the arbitrator, by mutual agreement, from lists submitted to them by the American Arbitration Association, under the Voluntary Labor Arbitration rules. The arbitrator’s decision will be final and binding on the parties. If the grievance is not submitted to arbitration under this paragraph within fifteen (15) days after the Employer’s answer in Step Three, it will be barred. The fees and expenses of any arbitration will be shared equally by the parties. The arbitration shall be handled in accordance with the then-existing rules of the American Arbitration Association.

7. **Arbitrator’s Power: Limitation**. The arbitrator shall not have any power to add to or subtract from or otherwise amend this agreement.

8. **Time Limits and Miscellaneous**. All time limits herein specified shall be deemed to be exclusive of Saturdays, Sundays and holidays. The time limits specified in this Section shall be deemed to be substantive provisions and failure to comply with such time limits or any of them shall be a complete bar to any action by reason of such grievance. Failure on the part of the Employer to answer a grievance at any step shall not be deemed acquiescence thereto and the Union may proceed to the next step.

9. **Attendance at Arbitration Hearing**. With appropriate notice and where not inconsistent with effective and efficient operations, the Hospital will release a Registered Nurse for attendance at an arbitration hearing as a witness or participating grievant.
Contentions of the Union

**CNSs and PNPs are Registered Nurses, Covered by the Agreement**

The Union argues that CNSs and PNPs are RNs and therefore automatically covered by the language of the Recognition Clause. More specifically, the Union contends that the two titles at issue are properly included in the bargaining unit based upon the National Labor Relations Board (hereinafter “NLRB”) certification and the recognition clause which certifies the Union as representing all “Registered Nurses.”

**CNSs and PNPs perform the same duties as staff nurses**

The Union asserts that CNSs and PNPs perform the same duties as RNs. Essentially these duties include patient care and necessitate extensive patient interaction. So, on the basis of job duties, alone, the CNSs and PNPs must be included in the bargaining unit.

**CNSs and PNPs are not Supervisors**

The Union rejects the notion that CNSs and PNPs are “supervisors” as defined by the National Labor Relations Act (hereinafter NLRA) or by case law. The Union argues that CNSs and PNPs include professional nurses who function as such, notwithstanding their Employer designated titles. The Union contends that the titles in question do not exercise “managerial judgment” as supervisors within the
health care industry. Rather, the Union argues, they exercise judgment as professional nurses vis-a-vis patient care as distinguished from exercising judgment within the traditional supervisory context. To support this contention the Union relies on the following: Section 2(11) of the NLRA which defines a supervisor; NLRB v. Security Guard Service, Inc. 384 F.2d 143, 145 (1967); NLRB v. Hillview Health Care Center, 113 LRRM 2336 (1983); Mt. Airy Psychiatric Center, 253 NLRB 139 (1981); Waverly-Cedar Falls Health Care Center, Inc. 983 F.2d 626 (CA8) (1991); Presbyterian Medical Center, 218 NLRB 1266 (1975); St. Mary's Hospital Inc., 220 NLRB 496 (1975); Newton-Wellesley Hospital, 219 NLRB 699 (1975); Trustees of Nobel Hospital, 218 NLRB 11015 441 (1975); Wing Memorial Hospital Assoc., 217 NLRB 1015 (1975); Passavant Health Center, 284 NLRB No. 62, 125 LRRM 1274 (1987); NLRB v. Brown and Share Mfg. Co., 1169 F.2d 331 (CA 1 1948); Beverly Manor Convalescent Centers v. Steelworkers, 264 NLRB 128. The Union also relies on the decision in Res-Care, Inc., 261 NLRB 22 to support the contention that nurses are not supervisors when exercising discretion in the best interest of the patient as opposed to the employer's best interest. The Union contends that professional registered nurses (both CNSs and PNPs)
traditionally assign work and direct personnel in the health care setting, whether it be a hospital or a home health care setting. These professional nurses, according to the Union, also coordinate patient care, engage in hands-on patient care, instruct their colleagues and act as resource persons for their colleagues for the improvement of patient care. 

(Arbitrator’s emphasis)

Additionally, the Union argues that to whatever degree the two titles exercise "independent judgment" in the area of patient care, they nonetheless do not exercise the type of judgment set forth in Section 2(11) of the NLRA. Namely, they lack the authority to recommend that bargaining unit employees be hired, transferred, suspended or otherwise disciplined, laid off or recalled, promoted or otherwise rewarded or to adjust grievances or represent the Employer within the grievance process. Other areas of the two titles' authority, the Union argues, relate to routine and clerical type matters. In short, the Union contends that PNPs and CNSs do not exercise any meaningful authority in areas which do not touch upon or otherwise relate to patient care.
CNSs do not meet any of the Secondary Indicia and that this Absence Weighs in favor of a Finding of Non-Supervisory Status

The Union points out that the CNS’s job description does not list any activity which per se constitute the indicia of supervisory status.

The Union contends that “various secondary indicia regarding supervisory status” of CNSs under the NLRA cited by the Employer has not been substantiated by the evidence.

It dismisses the emphasis the Employer has placed on the fact that the CNSs attend management meetings. The Union argues that the main purpose of the CNSs' attendance at these meetings is to deal with issues of clinical patient care where only professional nursing judgments are utilized. To support this contention the Union relies on Brookhaven Memorial Hospital, 29 RC 6854, issued by the Regional Director Blyer on June 29, 1988.

Contentions of the Employer

The Union has the Burden of Proof

The Employer asserts that the Union has the burden of proving that the Agreement should be interpreted to include the classifications of CNSs and PNPs. The Employer argues that the Union has failed to satisfy this burden.
CNSs and PNPs Perform Functions which are Significantly Different From those Performed by Employees in the Bargaining Unit

It is the Employer's position that CNSs and PNPs have consistently performed work that is not the same as work performed by employees in the bargaining unit. The Employer also contends that the Union has failed to show that the work performed by the CNSs and PNPs is exclusively bargaining unit work covered by the CBA. The Employer explains that in the health care setting, all levels of health care providers often perform the same tasks while performing their specific separate functions.

PNPs do not have a Community of Interest with RNs and should not be Included in the Bargaining Unit

The Employer asserts that PNPs do not have a sufficient community of interest with RNs covered by the Agreement to be properly included in the bargaining unit. More specifically, the Employer contends that there is no interchange between PNPs and bargaining unit RNs, and that there are important differences between the skills and functions of the PNPs and bargaining unit RNs.

In addition to being responsible for providing primary care to patients, PNPs are also responsible for insuring compliance with hospital protocols and for authorizing RNs
to dispense controlled substances. The Employer also submits that in carrying out their responsibilities, PNPs work under the supervision of the Director of Pediatrics and not the Department of Nursing. The Employer asserts that bargaining unit RNs do not have similar professional qualifications as PNPs. In addition, the RNs and the PNPs, the Employer contends, have disparate conditions of employment as PNPs typically: (1) work independently only seeing patients by appointments as a physician would; and (2) direct RNs much in the same way as do physicians. To support this contention the Employer relies on the following cases: *Safeway Stores*, 250 NLRB 918 (1981); *Compact Video Services*, 284 NLRB 117 (1987); *Gitano Distribution Center*, 308 NLRB 1172.

**The Plain Language of the CBA's Recognition Clause should Govern this Dispute**

The Employer contends that the plain meaning of the Agreement should govern. More specifically, the Employer submits that the bargaining unit, as defined in the Agreement (in the coverage and recognition sections) does not include the CNS or the PNP classifications. Instead, the Employer argues, recognition is limited only to RNs covered by the Agreement.
To support this contention the employer relies on the fact that 1) explicitly excluded from Article 1 of the Agreement is "all other employees not expressly included"; (Emphasis added) 2) expressly included by Article 1 is only "Registered Nurses covered by this Agreement"; and 3) the Arbitrator, pursuant to Article 19, does not have the power to "add to or subtract from or otherwise amend the Agreement." Accordingly, the Employer argues, the plain meaning of the Agreement should govern - PNPs and CNSs are not and have not been RNs covered by the Agreement and therefore should not be deemed bargaining unit nurses. To support this argument the Employer relies on the following case law: Armstrong Rubber Co., 87 LA 146 (Bankson, 1986); General Tel. Co. 86 LA 293 (Ipavac 1985) and Hamady Brothers Food Mkt, 82 LA 81 (Silver 1983).

CNSs and PNPs have Historically not been part of the Bargaining Unit

The Employer submits that by a long-established practice the parties have excluded CNSs and PNPs from the bargaining unit. At no time in the history of Union representation of RNs at Lutheran were CNSs and PNPs represented by the Union though these classifications have existed for many years.
CNSs historically have not been included in the Bargaining Unit

The Employer argues that the CNS job classification and functions that the Union hopes now to include in the bargaining unit existed in 1978 - before the first collective bargaining agreement was entered into. The Employer also contends that the exclusion of these job classifications and functions has been continuous and open to the Union. In fact, in the past, the Employer posted job openings for CNSs as a non-Union position. At least three employees, previously members of the Union, resigned their Union membership to take the CNSs position.

The exclusion continued from the first collective bargaining agreement through succeeding negotiations and contracts for about 15 years. The Employer points out that at none of these successive contract negotiations did the Union claim bargaining unit coverage. For that reason alone, argues the Employer, the Union is now estopped from asserting a claim that it failed to make for a decade and one-half.

PNPs historically have not been included in the bargaining Unit

The PNP's title first appeared in 1990. From that date forward, the Employer makes the same "practice" and
"bargaining history" argument that it makes regarding the CNSs - namely their open and continuous "exclusion from the bargaining unit."

Also, in support of the exclusion argument the Employer submits that PNPs must meet requirements of the new Department of Education regulations promulgated pursuant to the amended Nurse Practice Act. According to the Employer, the PNPs were hired to perform the job function of Physician's Assistants. This work has never, according to the Employer, been performed by RNs in the bargaining as they are not trained to handle it and could not legally perform it.

**CNSs are Supervisors**

The Employer contends that CNSs are "supervisors" and "managerial employees" as defined by the NLRA. Accordingly, it argues, CNSs must be excluded from coverage under the Agreement. The testimony of the CNSs shows they have the authority to exercise "supervisory" power. The Employer asserts that the functions of a "supervisor" clearly are performed by the CNSs including, but not limited to, 1) participating in the hiring/firing process; 2) evaluating employees job performance; 3) interviewing prospective job candidates; 4) scheduling of employees' vacation, holiday
and personal time; 5) creating protocols and procedures for the Employer; 6) directing the selection, purchase, and installation of new equipment; 7) participating in the selection of budgeting procedures; 8) attending management meetings exclusive to management and supervisory employees; and 9) overseeing general policies of the hospital including personnel policies, bargaining tactics and strike plans. To support this contention, the Employer relies on Section 2(11) of the National Labor Relations Act, 29 USCA 141 et. Seq. ("the Act"), which defines supervisors; Ohio Power Co. v. NLRB, 176 F. 2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); NLRB v. Health Care & Retirement Corp., 128 L. Ed. 2d 586 (1994); NLRB v. Bell Aerospace Co., 416 US 264, 85 LRRM 2945 (1974); General Dynamics Corp., Convair Aerospace Division, 213 NLRB 851, 857, 87 LRRM 1705 (1974); NLRB v. Yeshiva University, 444 US 672, 103 LRRM 2526 (1980).

In short, the Employer submits, based on the entire record, and especially the testimony of the nine CNSs who were subpoenaed by the Union as witnesses, that CNSs have the authority, using independent judgment, to exercise one or more of the twelve activities of a "supervisor" in a non-
routine manner, and additionally demonstrate elements of both clinical and administrative supervision.

The Union’s grievance is untimely

The Employer argues in its brief that the Arbitrator should dismiss the Union’s grievance on the grounds of “unreasonable delay” in pursuing the grievance and its failure to comply with the time limits of the grievance procedure.

The Employer deems this case to be an attempt by the Union to “change” the structure of the bargaining unit; to “accrete” to it the classifications CNS, PNP; or to “clarify” the scope of the unit. It submits that Congress gave the NLRB exclusive jurisdiction over such petitions, and such matters are beyond the arbitrators limited authority to “interpret” the Agreement.

The Relief Requested by the Union should be sought through Collective Bargaining

According to the Employer, the Union has added three other new job classifications to the bargaining unit through the collective bargaining process. The Employer believes that the CNS and PNP classifications, if they are to be added to the Agreement, must be accomplished through collective bargaining, not by arbitration.
OPINION

Issue

The parties were unable to agree upon a precisely worded issue. Based on the entire record before me, including the voluminous documentary evidence introduced in the course of the hearings, and the extensive testimony consisting of over 824 transcript pages and 47 exhibits, two post-hearing briefs, and one reply brief, I deem the issue in this case to be:

Is the Employer in violation of any of the provisions in the collective bargaining agreement by not including in the bargaining unit the employees classified as PNPs and CNSs? If so, what shall be the remedy?

Timeliness and NLRB Jurisdiction

At the outset, let me address two matters - the Employer’s claim that the Union’s grievance(s) is not contractually arbitrable and the Employer’s assertion that the issues in this case fall within the exclusive jurisdiction of the NLRB.

4 The facts indicate that the PNP title has now been survived by the NP title. As stated earlier for the purposes of this Decision and Award, both titles are being dealt with synonymously.
I dismiss the Employer's contention that because of the Union's failure to comply with the contractual time limits of the grievance procedures of the contract and because of the general contractual law of laches, the Union's case is not justiceable on the merits. I dismiss those contentions, not on contractual grounds, but on well-settled principles of arbitral law. It is true that a defense of non-arbitrability may be raised for the first time when procedurally applicable - at the time of the arbitration hearing even if not asserted during the grievance procedure. But that is not the situation here.

Here the Employer did not definitively raise that defense (i.e. the application of the time limits and the principle of laches) until after the hearings but for the first time in its brief. To be effectively considered by the arbitrator, a defense of non-arbitrability and/or laches must be pleaded, at the latest, during the adversarial aspects of the case, namely during the hearing. Only that way can the responding party deal with it on an evidentiary basis and be given the opportunity to rebut or explain any delays in processing the grievance. In short, non-arbitrability like any defense on the merits, is an issue subject to the evidentiary, adversarial and due process phase of the dispute, namely the hearing.

Only impliedly at best, but obviously inconclusively, did the Employer possibly touch on non-arbitrability at the hearing. It
asked the witnesses occupying the disputed titles when they began performing duties which the Union alleged fell within the bargaining unit tasks of RNs. From this it may have planned to point out later, as it did in its brief, that the merits of the Union's assertions notwithstanding, the employees involved and the Union knew or should have known the alleged facts of this case long before the grievances were filed, but failed to file within the prescribed time limits.

However, non-arbitrability must be pleaded affirmatively and particularly. It cannot be left to implication or later argument on facts left undeveloped and unconnected to contractual time limits or the principle of laches. Like the statute of limitations, the issue must be joined and perfected clearly and unequivocally where it can be dealt with in the proper evidentiary manner — at the hearing.

The Employer's questions of the witnesses could be interpreted as intended to raise the issue of timeliness, but they are just as susceptible to other intentions, like simply a testing of the witnesses testimony on whether those duties were in fact performed. I assume that is why the Employer, in its brief, asks the Arbitrator to determine if and when the job duties of CNSs and PNPs "changed" to include bargaining unit work.

But that is not enough to put the non-arbitrability or laches defense to the due process test. Therefore, I reject and
dismiss the Employer's threshold claim that the Union's case is not arbitrable.

I also dismiss the Employer's procedural argument that I do not have jurisdiction over the merits of this case because they belong exclusively to the NLRB. The Employer interprets this case as one in which what the Union seeks, and the remedy the Union requests, are in the nature of "unit determination," a change in, clarification of or an "accretion" to the existing bargaining unit. And that any such petition(s) is within the exclusive jurisdiction of the NLRB, and therefore not within the arbitrator's jurisdiction or authority.

With that interpretation of the authority of the NLRB, I agree. But I do not see this case as one of "unit determination" or a change in, clarification of or an "accretion" to the unit. Rather, I see this case, and my authority as the arbitrator, as strictly a matter of contract interpretation and the application of relevant labor law to that interpretation. Put another way, I hold that it is fully within my jurisdiction to interpret the contract, and more specifically, the Recognition Clause thereof, to include or not include the disputed classifications involved in this case. And, as "external law" was introduced into this case by both parties, to apply relevant case law in making or supporting that interpretation. As such, I view this case, albeit lengthy, contentious, and closely litigated, as a "garden variety" contract interpretation with proper
and authoritative consideration of controlling law. That is the role and responsibility of the arbitrator, and as such it neither usurps, nor encroaches on nor substitutes the arbitrator's judgment or power for that of the NLRB.

In sum, the Employer's view of the arbitrator's role and the possible effect of his decision are not this Arbitrator's view of what is before him.

Accordingly, without prejudice to the rights of the parties under the NLRA and/or before the NLRB, the Employer's contention that this case belongs exclusively with the NLRB, is rejected. This arbitration decision should not be construed as ousting the NLRB from jurisdiction. Therefore, any NLRB jurisdiction over the subject matter of this case is expressly reserved to the NLRB.

I make the same response to the Employer's alternative argument that what the Union seeks is a change in the Recognition Clause requiring bilateral bargaining. Obviously, my authority in this case to interpret the contract and particularly the Recognition Clause as written, and/or to subject it to an interpretive analysis based on applicable case law, does not mean that the arbitrator is changing or in any way adding to the present inclusiveness of the Recognition Clause. Such an exercise of arbitral authority is within the arbitrator's jurisdiction and is not a change in the collective bargaining agreement requiring bilateral bargaining.
Interpretation of the Recognition Clause

The Recognition Clause is ambiguous. And the ambiguity is not resolved favorably to the Union. Under Recognition the clause reads

"Employer recognizes the Union as the exclusive collective bargaining representative of every Registered Nurse covered by this Agreement."

This phrase is susceptible to two logical but opposing interpretations. It could mean that when negotiated (and there is no evidence that the foregoing language has changed since the first contract) it covered all employees who are RNs whether or not they then had or subsequently were given specialist titles, like CNS or PNP. Or, with equal logic it could mean that coverage extended only to RNs limited to the RN title.

The words "...covered by this agreement" add to the ambiguity. RNs "covered by this agreement" could mean and be limited to those set forth in the "INCLUDED" paragraph of the Clause. The titles "included" do not include CNSs or PNPs. So the general recognition language of RNs is modified by the definition of those included, thereby logically excluding CNSs and PNPs. On the other hand, if CNSs and PNPs (who are also RNs professionally) are to be
excluded because they are supervisory or managerial, why are they not listed among the titles "EXCLUDED"? Are they excluded by the general exclusionary reference to "supervisors defined in the Act"? To ask those questions is to answer them - the Recognition Clause is ambiguous.

**Clarification of the Ambiguity**

The traditional arbitral approach in resolving ambiguities, is well settled. The Arbitrator looks to the practice of the parties under the ambiguous language and/or the negotiation history of that language, and gains therefrom a clarification of what the parties intended the Clause to mean and therefore what it means.

Here, there is both relevant past practice and negotiation history. Both are consistent and determinative.

In 1978 CNSs became employees. There is no dispute that they were not covered by the first collective bargaining agreement. There is no dispute that any demand for their coverage was made by the Union then or during the several contract negotiations that followed over the years until the present either in negotiations, by grievance or by petition to the NLRB. There is no evidence that at some significant point the work of the CNSs changed from what it was and has been over the years.
So, in short, the practice and the negotiation history show that by the conduct of the parties, the title CNS was not included in the unit and was not intended to be so included.

The same is true with regard to PNPs. Since the establishment of that title(s) in 1990 there have been two contract negotiations. During neither was the Recognition Clause amended to include PNPs, nor was any demand made for their coverage. The non-Union status of both PNPs and CNSs was "open and notorious."

However, three additions to the bargaining unit were negotiated during the period of the six contract negotiations - mental health clinician, alcoholism nurse therapists and assistant nurse epidemiologists. So the parties knew how to add titles if they wished to do so. That the two disputed titles remained non-Union and outside the unit for the several years involved is persuasive evidence that the parties jointly agreed or intended that they were not to be included in the unit, with the attendant recognition that the work they did was not unit work.

This has been especially true for the CNSs. For example, nurses, like Ms. Suzette Collins, prior to becoming CNSs, were bargaining unit RNSs represented by the UFT. She applied for a CNS position at Lutheran in 1981. After she became a CNS at Lutheran and since 1981, Union dues were no longer deducted from her pay check. Other CNSs like Ms. Mary Ann Aquino, also followed suit. For example,
when Ms. Aquino became a CNS in 1987, she no longer remained in the unit, as she immediately ceased paying Union dues. The Union never solicited Ms. Aquino to become a Union member once she became a CNS. Yet another CNS, Doreen Fadel, also terminated her Union membership when she became a CNS. More specifically, before Ms. Fadel became a CNS, she was a bargaining unit RN. On or about 1988, Ms. Fadel noticed a posting for a non-Union job as a CNS. She applied and was promoted to the new job. With the new position, the Union never questioned that Union dues were no longer deducted from her pay checks. Again, in 1992, Ms. Fadel applied for yet another CNS position. This position was also unequivocally considered non-Union as Union dues were never taken from her salary. Ms. Stals, another nurse, applied for a CNS position which was posted as a non-Union job. Once Ms. Stals accepted the CNS position, she discontinued paying Union dues. Since 1980, when Ms. Stals accepted the position as a CNS, the Union never questioned her status as a non-Union employee.

The evidence relating to PNPs is certainly not contrary. The Union called no PNP (or NP) to testify. (It appears that the PNP title is presently unfilled). Hence, in evidentiary respects, the Union’s allegations regarding PNPs are unsupported by enough probative evidence to meet the Union’s burden of proof, both on the merits of its case for and on the jurisdiction question of unit coverage of that classification.
Accordingly, on the basis of clear past practice and negotiation history, the Union has failed to show that the "ambiguous" Recognition Clause" covers the disputed titles in this case.

**The CNSs are Supervisors**

**The Law**

On the law and on the merits, the facts show that the CNSs meet at least the minimum standards of "supervisory status" in the health care industry. I have read all the cases cited by the parties. All case citations notwithstanding, *National Labor Relations Board v. Health Care & Retirement Corp.*, 146 LRRM 2321 (1994), is the current leading United States Supreme Court Case that squarely governs this dispute. More specifically, it is this very case which is fatal to the Union's theories. The Union relies upon case law where the test for determining "supervisory status" has become inapplicable in light of the highest court of the land's decision.

In *National Labor Relations Board v. Health Care & Retirement Corporation of America*, 146 LRRM 2321 (1994), the United States Supreme Court determined that the National Labor Relations Board's ("NLRB") interpretation of the third prong of the three part test for determining a supervisor is
invalid. It is the NLRB’s interpretation of this third prong upon which the Union bases its case.

The first prong of the test specifies that an employee is a supervisor, thus unable to be a bargaining unit member, if the employee is able to engage in one of the following 12 activities enumerated by the National Labor Relations Act, 29 U.S.C. 152(3): “Any individual having authority, in the interest of the employer, 1) to hire, 2) transfer, 3) suspend, 4) lay off, 5) recall, 6) promote, 7) discharge, 8) assign, 9) reward, or 10) discipline other employees, or 11) responsibly to direct them, or to 12) adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

The NLRB’s interpretation of the third prong of the “supervisory test” the Supreme Court found invalid. It is this part of the test upon which the Union rests its case -- namely whether or not the employee is acting in the “interest of the employer.” Under the NLRB’s definition of “interest of the employer,” a nurse would not be considered a supervisor if the nurse was “supervising” in connection with patient care. However, the United States Supreme Court
disagreed with the NLRB and held "Patient care is the business of a nursing home [hospital], and it follows that attending to the needs of the nursing home [hospital] patients, who are the employer's customers, is in the interest of the employer. . .We thus see no basis for the Board's blanket assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer." Id. The cases on which the Union relies in its brief including but not limited to NLRB v. Hillview Health Care Ctr., 113 LRRM (BNA) 2336 (1983) and Waverly-Cedar Falls Health Care Ctr., Inc., 933 F.2d 626 (8th Cir. 1991) turn on the NLRB's definition of "interest of the Employer." Accordingly, the rationale underlying the Union's cases is now inapposite.

The Merits

Each of the nine CNSs below are supervisors, as defined by the NLRA, as each has clearly testified to performing, with the required "independent judgment" at least one of the twelve requisite supervisory functions, enumerated, (supra) and that these activities are in the "interest of the Employer" as now defined.
1. **Gloria Gayle is a supervisor as she has the authority, by way of recommendation, to hire, discharge, promote, suspend, and discipline employees.**

Ms. Gayle testified that she participates, by way of recommendation, in the hiring, firing, suspension, promotion, and discipline of Lutheran's employees. Ms. Gayle also attends Nursing Practice Council meetings - bargaining unit nurses are not invited to attend these meetings. The matters discussed at these meetings include issues regarding equipment and the implementation of new policies. With the burden of proof on the Union to establish that Ms. Gayle is not a supervisor, there is no counter-veiling persuasive evidence which would put her or her duties within the bargaining unit coverage.
2. **Lorraine Zawistowski is a supervisor as she has the authority, by way of recommendation, to discipline, discharge, and direct employees**

Ms. Zawistowski testified that she observes and evaluates new employees regarding their clinical skills, administrative skills, their ability to take reports, and communications skills. Ms. Zawistowski has evaluated numerous employees including sitting down with said employee at the end of shifts and reviewing deficient performance areas. She has given written and verbal warnings to employees and makes these evaluations on a daily basis. Ms. Zawistowski’s recommendations have played a significant role in the firing and disciplining of employees. In addition, Ms. Zawistowski has scheduled vacation time and holiday time for Lutheran employees. Accordingly, Ms. Zawistowski has met the supervisory test.

3. **Ms. Lisa Woody is a supervisor as she has the authority to hire and direct employees**
Ms. Woody testified that she has the authority to hire and supervises employees on behalf of Lutheran. Ms. Woody cites many specific instances where she demonstrated said authority. Ms. Woody also schedules vacation, holiday, and personal time for workers. In fact, some workers call her personally if they are sick and cannot come to work for the day. Ms. Woody formulates guidelines, creates job descriptions, attends various management conferences where issues related to the bargaining unit are discussed.

4. **Maureen Liberth is a supervisor as she has the authority to hire, discipline, discharge, and promote employees**

Ms. Liberth participates in the interview process for RNs. In addition she also is involved in the disciplinary process, including terminations and has given oral written warnings. Ms. Liberth is involved with the promotion process, overseeing the installation of new systems, and goal setting for specific days. Ms. Liberth participates
in various management committees, including the Nursing Practice Council and the Obstetrics Quality Improvement Committee. Bargaining unit workers do not attend these meetings as Lutheran policies and procedures are discussed. Ms. Liberth also attends other meetings - the Perinatal Task Force, the OB/GYN Leadership committee and ad hoc committees. Issues discussed at the Leadership committee include issues such as strike contingency plans and collective bargaining proposals.

5. Suzette Collins is a supervisor as she has the authority to discipline and direct employees

Ms. Collins is the Chairperson of the Skin Care Sub-committee of the Clinical Council, which includes representatives from Lutheran’s purchasing Department. Through the Committee she trials different products and determines which products should be purchased by Lutheran. In at least one instance, regarding the use and purchase of special mattresses, her decision to purchase
new equipment was based upon Lutheran’s desire to maximize patient care. Ms. Collins has the authority to discipline employees of Lutheran. Specifically, Ms. Collins’ job description allows her to write warning notes. In addition, Ms. Collins writes procedures and protocols for Lutheran employees to follow.

6. Elaine Meyerson is a supervisor as she has the authority to direct and discipline employees. Ms. Meyerson writes the protocols and procedures that are to be followed regarding patients in her specialty and supervises the bargaining unit nurses in the implementation of those procedures. Ms. Meyerson is a member of many Lutheran management committees including the Leadership Committee, the Task Force on Education, and the Quality Assurance Committee. In addition, Ms. Meyerson evaluates RNs regularly. When she finds deficiencies, she will counsel the involved employees and if necessary initiate disciplinary action.
7. **Mary Ann Aquino is a supervisor as she has the authority to direct and discipline employees**

Ms. Aquino attends weekly management meetings, one of which deals with the creation of "clinical pathways" which are crucial to Lutheran's implementation of cost saving practices. Ms. Aquino testified that she formulates the care plan for orthopedic patients and supervises other nurses in the rendering of that care. Specifically, whether care has been given and the quality of that care. If her instructions are not followed, she can instruct the Nursing Care Coordinator to have the nurse in question sent for further in-service training. Ms. Aquino has an office as she also functions in an inter-departmental capacity. For example Ms. Aquino monitors resident physicians - this responsibility is clearly not performed by bargaining unit employees.

8. **Doreen Fadel is a supervisor as she has the authority to direct and discipline employees**
At the beginning of each day, Ms. Fadel attends a meeting with the Surgical Residents and the Director of Surgery where they discuss the planning of care for the patients for the day. Subsequent to that meeting she directs the x-ray department to perform whatever x-rays are needed for the day, and follows up to ensure that these tasks are completed. Ms. Fadel has the authority to discipline and speak to the offending employee. If a persistent problem exists, she requests the matter be investigated. She also reports patient care deficiencies to the Chief of Surgery.

9. Catherine Stals is a supervisor as she has the authority to layoff, adjust grievances and direct employees.

Ms. Stals is a member of the Special Care Committee and conducts quality assurance studies for continuous quality improvement of the critical care rendered by Lutheran. She, along with the directors of the various departments, and the Vice President and
Assistant Vice President of Nursing Services, is a member of the nursing Management Committee. At these committee meetings management issues, such as layoffs, pending strikes, collective bargaining negotiation matters, budgets, reorganization and restructuring, the image of the hospital and Lutheran's search for a new Chief Executive Officer are among the agenda. Unlike other RNs, Ms. Stals has an office, writes orders for patients, and creates her own daily schedule. In addition, Ms. Stals also updates and maintains Protocols and procedures and determines which bargaining unit nurse should carry out those policies and procedures. Specifically, Ms. Stals created the curriculum for the certification training and administers a test at the end of the training.

I find the foregoing testimony persuasive and legally relevant. In the absence of persuasive rebuttal evidence, and as these were witnesses "called" by the Union, I must find their testimony to be credible and conclusive.
The PNPs have no Community of Interest with the RNs

The Union has presented no witnesses concerning the PNPs or the duties they perform. The only witnesses who testified in regard to PNPs were Martha Maakestad and Patricia Ruiz. These witnesses were presented by the Employer.

Though the Employer has submitted that any ruling regarding PNPs is beyond the arbitrator’s authority and exclusively for the NLRB, the Employer nonetheless has offered testimony and evidence designed to show that there has never been a community of interest between the PNPs and the RNs. In fact, the Employer contends that both groups possess significantly different skills and functions. The testimony is unrefuted by the Union and is highlighted in the chart below:

\[ \text{supra.} \]
<table>
<thead>
<tr>
<th><strong>PNPs duties</strong></th>
<th><strong>RNs duties</strong></th>
<th><strong>Record citation</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Perform and direct work as Pediatric Residents and Physicians Assistants</td>
<td>Cannot legally perform work of Pediatric Residents and Physicians Assistants</td>
<td>R at 703, 704, 767</td>
</tr>
<tr>
<td>Provide primary care, perform physicals, make diagnosis, develop treatment plans, and independently implement them.</td>
<td>Bargaining unit nurses do not perform these functions</td>
<td>R at 766-767</td>
</tr>
<tr>
<td>PNP develop their own work schedule, are not supervised daily</td>
<td>Are supervised on a daily basis</td>
<td>R at 786</td>
</tr>
<tr>
<td>Work with physicians as colleagues through the use of formal collaborative agreements, as required by New York State (this agreement governs the terms and conditions of practice and is incompatible with the concept of a collective bargaining agreement)</td>
<td>RNs cannot perform this work</td>
<td>R at 708, 709, 711-713</td>
</tr>
<tr>
<td>PNPs have not been promoted from RN classification</td>
<td>RNs cannot be promoted to the PNP classification</td>
<td>R at 783</td>
</tr>
<tr>
<td><strong>PNPs duties</strong></td>
<td><strong>RNs duties</strong></td>
<td><strong>Record citation</strong></td>
</tr>
<tr>
<td>-----------------</td>
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<td>-------------------</td>
</tr>
<tr>
<td>PNP s can prescribe pharmaceuticals and must have advanced training in an accredited program in pharmacology and must be able to write a prescription</td>
<td>This qualification is not required</td>
<td>R at 763/764</td>
</tr>
<tr>
<td>Must possess a Masters degree or pass a certified test</td>
<td>This qualification is not required</td>
<td>R at 763/764</td>
</tr>
<tr>
<td>Works independently seeing patients by appointments, may conduct a physical exam, interprets test results, can diagnose health problems, and maintains an ongoing relationship with the patient</td>
<td>These duties cannot be independently performed</td>
<td>R at 766, 767, 769</td>
</tr>
<tr>
<td>Compensation is based on market factors, training, and education; higher compensated than RNs; maintains individual liability insurance</td>
<td>Compensation determined by collective bargaining; covered under general group insurance policy</td>
<td>R at 707, 783-85</td>
</tr>
</tbody>
</table>

These factors point to the conclusion that PNP s and RNs do not have the same community of interest. Both groups possess different training, compensation, duties, insurance, certifications,
and responsibilities. Accordingly, PNPs are not bargaining unit employees within the meaning of the relevant law.

Finally, a relevant observation, albeit not technically a matter of contract interpretation, but consistent with the legal theory that employees should be free to exercise their rights to join or refrain from joining a union. I find no evidence in the record which would indicate that the employees in the disputed titles who testified wish to be included in the bargaining unit. The thrust of their testimony is otherwise.
The Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

The Employer did not violate the collective bargaining agreement by not including Clinical Nurse Specialists and Pediatric Nurse Practitioners (a/k/a Nurse Practitioners) in the bargaining unit.

Eric J. Schmertz, Arbitrator

DATED: May 30, 1997

STATE OF NEW YORK )

COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:

Was there just cause for the discharge of SAM HARDY?
If not, what shall be the remedy?

A hearing was held on September 9, 1997 at which time

Mr. Hardy, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant, a bus driver was discharged on July 1, 1997 following his involvement in a minor accident on June 26, 1997. The grievant's report of that accident in the Transportation Loss Incident Report reads:

Both vehicles were stopped in traffic.
I reached down in my bag to get a tissue
and did not realize bus started rolling.
Tapped car in rear. No damage to either vehicle. Driver of car said he heard something pop in his neck. Supervisor arriv(ed) at 9:10. Knocked on door of car and driver got out of car and stretched and walked around like nothing wrong. Also refus(ed) ambulance when police arrived.

At the time of the hearing, the driver of the car had made no claim on nor commenced any action against the Employer or the grievant.

It is the Union's position that the grievant was disciplined for this incident and not for his overall driving or prior accident record; that the June 26th incident or accident was a "non-event" and too insignificant to justify a discharge; that even if the grievant's prior accident record is considered, that record should be discounted if not expunged because several years elapsed between the grievant's last discipline or accident and the June 26th, 1997 accident, and that, therefore, the latter does not qualify as a "trigger" for the extreme penalty of dismissal.

The Employer asserts that the grievant was discharged for his overall accident record, and that the June 26th accident was the "triggering" incident following an extensive prior "chargeable" accident record and the imposition of "progressive discipline." The Employer argues that the grievant's full record falls within the rulings of several of my prior decisions in cumulative accident cases, particularly the decisions involving Ronald Arnold, Elizabeth Gomez, Clarence Stevenson and Clarence Hall.
The Union is wrong when it argues that this case is limited to the June 26th accident. The written report of the internal hearing of July 1, 1997 states what that hearing (a formal step in the grievance procedure) dealt with. It reads, in pertinent part:

"We discussed this last accident of 6/26/97 and other numerous rear-end and chargeable accidents...” (emphasis added)

Clearly, therefore, the grievant’s entire accident record, not just the June 26th accident, was the subject of and basis for the discharge.

The grievant’s prior accident record is extensive and either undisputed or, at this point, unchallengeable. He was suspended five times for “chargeable” accidents -- a three-day suspension in September 1995; a two-day suspension in March 1987; a five-day suspension in March 1987; a two-day suspension in May 1987; and a one-week suspension in January 1993. None of these suspensions were grieved or otherwise challenged by the grievant or the Union. (One, in May 1987 was a mandatory “statutory” penalty that was unappealable for an “unreported moving violation.” But it also included an “accident,” which was and is undisputed.) So, non-grieved, unchallenged or otherwise undisputed, the “chargeable” accidents, for which four of the five suspensions were exclusively or in part imposed, are no longer contestable in this arbitration. By count, and prior to his last suspension in January 1993, the grievant, hired in December 1984, was involved in five rear-end accidents for which he was held chargeable; and other types of accidents with his bus for which he was deemed responsible.
So, there is no question that the grievant was subjected to discipline on a "progressive" basis, prior to the instant final penalty of discharge.

Clearly, the June 26th accident, standing alone, was not serious enough to warrant the grievant's discharge. But it does not stand alone. It must be viewed against the backdrop of his prior accident record, and considered in accordance with my many arbitral rulings in cases involving cumulative accident records.

I am constrained to hold, as I have repeatedly held in prior cases, that the severity of an accident that "triggers" a discharge is immaterial if that accident is a continuation or further evidence of a "propensity" for accidents or accident proneness.

Consistently I have held that:

"this Employer has a fiduciary duty to the riding public it transports...and may...take every reasonable step to insure the safety of its buses and the safe operation of those buses by its drivers.

Indeed it has a duty to do so...This Employer may follow and take preventive measures to insure not only the safety of its equipment but safe driving by its drivers. Bluntly, I do not find nor would I require this Employer to wait until there is a major accident before
it takes steps to remove from its employ a driver where record shows a propensity for accidents, driving violations and other infractions of operating rules and procedures. (emphasis added)

Was the June 26th accident a further example of the grievant’s “propensity for accidents” or “accident-proneness?” Sadly, I must conclude that it was. First, on June 26th, he committed two acts of negligence. For whatever reason, he took his foot off the brake, or lessened the pressure on the brake while stopped behind a car, on a road that must have been on a decline. In doing so, by his own admission, he took his eyes off the road and off the car ahead to “reach down for a tissue.” Second, is an admission he made in his testimony at the arbitration hearing. He stated that he “stopped close” to the car ahead. I must conclude, because a short roll of his bus made contact with the car, that he had stopped too close to the car. Again, standing alone and under the facts of the event, these driving errors are relatively insignificant considering the fact that his bus was empty; that no apparent injuries or material damage resulted. But when viewed against the grievant’s entire record and within the frame of the Company’s “fiduciary” duty to insure safety, and unless mitigated or excused, they are evidence of a continued propensity for accidents and as another incident of unsafe driving.
The only factor of possible mitigation and possible distinction from prior cases, is the Union's claim that about four years elapsed between the grievant's last accident or discipline for an accident in 1993, and this "triggering" accident in 1997. Or that because for four years, the grievant assertively drove accident free, he should be deemed "rehabilitated" from that prior record and excused, if not from all penalty, but from the extreme penalty of discharge.

I need not consider the merits or the equities of this argument because it is based on factual error. He was not accident-free following the 1993 suspension.

A review of the grievant's employment record discloses that the December 1992 accident (triggering his one-week suspension in January 1993) was not his last accident, either "rear-end" or otherwise changeable, prior to the instant accident of June 26, 1997. His record, which is undisputed and unchallenged in this proceeding shows that in May 1995 his "MIR struck the rear of a stopped auto," and that in November 1996 "while exiting a ramp, (his bus) #1645, ran into the rear of a stopped auto."

So, his "propensity" continued after the last suspension in 1993 by similar types of accidents in 1995 and 1996. And the 1996 accident was only eight months earlier than the final accident of June 26, 1997.

Considering my consistent rulings in prior cases, I cannot credit the grievant with a factor of mitigation merely because the final accident was minor. Nor, because of his further "rear end" accidents in 1995 and 1996 can I consider any argument of "rehabilitation" subsequent to his suspension in 1993 or the claim that his prior record is "stale."
In short, following a one-week suspension in January 1993, it appears, undisputedly, that he was unable or unwilling to avoid "rear-end" accidents. His record remained unimproved and chronic. As such it represents a continuing risk of a further and more serious accident(s) if he is retained in his job. I regret this conclusion, considering the grievant's almost thirteen years of service. But if the Employer chooses not to run the risk any further, the Arbitrator cannot require it to do so.

The undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties, and having duly heard the proofs and allegations of said parties, makes the following AWARD:

The discharge of SAM HARDY was for just cause.

Eric J. Schmertz
Impartial Chairman

DATED: September 25, 1997
STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss:

I, Eric J. Schmertz do hereby affirm upon my Oath as Impartial Chairman that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:

Is the grievance of Doreen Dunkley arbitrable?

If so, was her discharge for just cause?

A hearing was held at the offices of the Employer on April 14, 1997 at which time Ms. Dunkley appeared. Representatives of the above-named Union and Employer also appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

I find the grievance non-arbitrable.

The Employer has a contract with the County of Westchester to provide school bus transportation.
Under the Collective Bargaining Agreement between the Union and the Employer, specifically Sections 15e and 15h, a bus driver/employee who has been decertified by the County is subject to discharge by the Employer. And if the Employer is unable to persuade the County to revoke the decertification, the affected employee’s discharge is not subject to arbitral review. The Arbitrator’s authority is limited to determining whether the employee has been decertified and was discharged for that reason, and whether the Employer attempted to get the County to reverse or lift the decertification.

In the instant case, it is undisputed that Dunkley was decertified; was discharged for that reason; and the Employer attempted but failed to persuade the County to reverse or revoke the decertification.

The Union argues that the contractual proscription on arbitral review of the discharge relates only to an effort to get the affected employee restored to the County work he or she performed before decertification. But, that restoration of the affected employee to other work, and hence a review of the propriety of the discharge with regard to assignment of work not under
contract with the County, is arbitrable. And it is that review, with a requested remedy that the grievant be restored to employment on work other than under the Employer's contract with the County, that the Union seeks in this proceeding.

The Union's theory is rejected. First, the contract is unequivocal and unconditional. It prohibits arbitration of an employee's discharge for decertification. It does not provide, even impliedly for an arbitral review of the propriety of the discharge for other Employer work. Indeed, as there is no contractual right to other work if an employee is decertified, there is no companion right to challenge the discharge on the grounds that there may be other work the employee could perform. To allow an arbitral challenge to a discharge for decertification, when the contract explicitly forecloses such a challenge is to make the discharge "conditional" and related to certain specific work (i.e. County work). Such a dilution of the otherwise unconditional contractual prohibition on review of a discharge for decertification, cannot be sustained under the contract language, under the finality status of any discharge, or logically.

Accordingly, the grievance of Doreen Dunkley is dismissed because it is not arbitrable.

The Undersigned, Impartial Chairman under the Collective Bargaining Agreement between the above-named Union and Employer, and
having duly heard the proofs and allegations of said parties, makes the following AWARD:

The discharge of Doreen Dunkley is not arbitrable.

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DATED: May 1, 1997

STATE OF NEW YORK  )
 ss:
COUNTY OF NEW YORK  )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration between

LOCAL 100, TRANSPORT WORKERS UNION OF AMERICA

-and-

WHITE PLAINS BUS CO., INC.

The stipulated issue is:

Was there just cause for the discharge of Frank Benedetto? If not, what shall be the remedy?

A hearing was held on June 11, 1997 at which time Mr. Benedetto, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The charge against the grievant, a school bus driver, is that on April 30, 1997 he left a child on his van unattended.

The facts are essentially as follows:

While transporting children home from school the grievant overlooked a sleeping child; failed to drop that child off at the child's stop; and after arriving at his own home with the van,¹ left it and went

¹ He had permission to take the van to his home at the end of his run.
into his house without checking it for any child asleep. Within a few minutes he went back out to the van "to close the windows and lock it" and then discovered that the child, Christian Hanley, (hereinafter "Christian") had emerged from the bus on his own. Christian is 5 years old.

On February 1, 1997, the Company promulgated and published a memorandum dealing with this type of event. The memorandum reads:

TO: All Drivers & Monitors  
FROM: JMS  
RE: Leaving students on buses/van  
DATE: February 1, 1997

Over the past several years there have been a number of incidents in which school bus/van drivers have left students on unattended vehicles for extended periods of time. Many of these occurrences have been reported by the newspapers and broadcast media. In some cases the drivers and monitors have been charged with felony criminal acts including endangering the welfare of a minor, etc.
The most important service we supply our customers is the safe transportation of their students/children. In cases where a student is left on an unattended vehicle, we have failed miserably in protecting that student. And we can be charged with a criminal offense.

There have been numerous notices sent to you concerning the importance of checking your vehicle after each trip to ensure that there is no one left on board. We have also posted notices about this in the drivers' rooms.

Effective immediately, any driver and/or monitor who is/are found to have left a child on an unattended vehicle will be taken out of service immediately, and subsequently, if it is proved to be their fault, have their employment terminated.

The Company asserts that the grievant's failure to check his bus and to leave a 5 year old child undiscovered and unattended at the end of his run is in direct violation of the foregoing instructions, and for the reasons set forth in the memorandum, is grounds for the grievant's discharge.
The grievant and the Union on his behalf do not dispute the event. The grievant explains that he did not see the child on the van; relied on the children aboard to tell him of each of their presence so that he could make the appropriate drop-offs; that he by-passed Christian’s drop-off stop because he did not know nor was told by other students that Christian was aboard; that upon arriving at his own home, he left the van without checking it because his dog was outside, unleashed and possibly frightening to pedestrians on the sidewalk and wanted to get the dog back inside; and that he left his van for only a few minutes for that purpose before returning to it to find Christian outside with a neighbor. Thereafter, in response to a telephone call from the Company’s dispatcher asking about Christian (whose parents had called the Company when he didn’t arrive at home) the grievant drove Christian home.

The Union argues that the period that Christian was unattended was only a few minutes, not an “extended period of time” within the proscription of Paragraph 1 of the February 1, 1997 memorandum; and that because no damage or injury resulted, the penalty of discharge is too severe, if not unjustified.

It is well-settled that an employer may promulgate work rules that are relevant to the job involved, and may notice and impose penalties for violations of those rules, provided the penalty “fits the offense.” And if the requisite tests for a valid work rule and the penalty for its violations have been met, an arbitrator should not substitute his judgment for that of the employer regarding the imposition of the mandated discipline.
That applies here. This Company's notice of February 1, 1997 was properly disseminated among the employees. There is no evidence that the Company has not applied it consistently and even-handedly to those, if any, similarly situated. Considering the nature of the Company's business and especially its "fiduciary" duty and responsibility to transport young school children safely, the rule is reasonable, appropriate and clearly relevant to the job and responsibilities of a school bus driver. Also, for the same reasons, it cannot be said that the penalty of discharge for leaving a child unattended on a bus is inappropriate or unreasonable. It is a severe penalty, but relevant to the offense, consistent with the essential purpose of the rule, and certainly not arbitrary.

In short, the Company has established a valid, bonafide reason for the rule; has promulgated and noticed it properly; and has mandated a penalty, albeit a severe penalty, that reasonably "fits the offense."

Accordingly, this Arbitrator finds no basis to invalidate the rule or its mandated penalty. Both are upheld.

Do the facts fit within the rule? My answer is in the affirmative. First, I am not persuaded that the rule applies only in cases where children are left unattended "for extended periods of time." That phrase is in the first Paragraph, and is only descriptive of "incidents over the past several years."
The rule, itself, however, is found in the final sentence: Effective immediately, any driver and/or monitor who is/are found to have left a child on an unattended vehicle will be taken out of service immediately, and subsequently, if it is proved to be their fault, have their employment terminated. (emphasis added)

That sentence, enunciating the rule and the penalty applies to when a child is left on an unattended vehicle. It does not limit the unattendedness to any period of time. So in this case, the few minutes between when the driver left the bus to take his dog inside and his return to the bus "to lock up and close windows" was an "unattended" period within the meaning of the rule. Also, he did not state that his return to the van was to check it for sleeping children. I conclude that he believed all the children had been dropped off; that the bus was empty; and therefore probably would not have checked it for a sleeping child or found Christian asleep had not Christian emerged from the bus himself. So, irrespective of the amount of time involved, the grievant violated the rule and its critical purpose by not checking for sleeping children when he arrived at the end of his run and by not stating that he planned to do so after he secured his dog.

Moreover, I am not satisfied that Christian was left "unattended" only for a few minutes. I find that Christian was
"unattended," albeit constructively, from some point shortly after boarding the bus - to the end of the run. The grievant's negligence in that regard is obvious from his own testimony. He had only 8 students aboard. He did not square that number with the number of stops. He admits he made 7 stops to discharge the students, but knew or should have known he had 8 students aboard. Had he kept track of the stops, as I believe he should have, he would have realized that he had missed one stop -- that one of the 8 children had not been dropped off. More serious, I think is that instead of checking who was aboard and rechecking each child passenger as he approached each regular stop (or upon anticipating each next stop) he relied on the students themselves to tell him who was still aboard. He testified that he called out to the students, asked who was still aboard and that two girls replied that they were the only one's who remained. So, instead of checking, himself, he assumed that information was accurate, and did not even go to Christian's stop. Obviously, the two girls did not know Christian was still aboard and misinformed the grievant. The grievant should not have abdicated his responsibility to them. As a result, Christian slept on, and the grievant proceeded to the end of his run without checking further. I consider this not only negligent inattention but "constructive" unattendedness.

For the foregoing reasons, I find no basis to reverse the Company's action on the grievant's discharge.

Accordingly, the Company had just cause to discharge the grievant and his discharge is upheld.
As the parties know, without prejudice to the validity and continued enforceability of the Company's rule and without any precedent for any future matters, it is for the Company to consider, in its sole discretion, whether, because of the grievant's good prior record, his recognition of his mistake and his expressed remorse about it, he should be re-employed without back pay on a "last chance basis," to available work that does not include driving Christian.

The Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

There was just cause for the discharge
of Frank Benedetto.

DATED: June 25, 1997

STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss:

I, Eric J. Schmertz do hereby affirm upon my Oath as Impartial Chairman that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:

Was there just cause for the discharge of James Hardy? If not, what shall be the remedy?

A hearing was held at the Employer's offices on April 14, 1997 at which time Mr. Hardy, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant was employed for about three and one-half years as a van operator transporting handicapped passengers. During that period of time he was involved in eleven incidents which the Employer characterizes as operating accidents or errors for which he was responsible or at fault. Employer's Exhibit #1 lists them as follows, *inter alia*:

10/11/94: Wheelchair customer fell out of wheelchair;

11/23/94: Turned onto a one way street going the wrong way with passenger on board;
08/07/95: Customer wheelchair fell over while in transit (allegedly faulty seat belt);
08/29/95: Damage to vehicle...(grievant) previous driver;
11/27/95: Lift hit the wheelchair, knocking customer over;
02/07/96: Hit overhang at Cabrini Nursing Home;
04/25/96: Backed van into another vehicle three times;
06/96: Backed into car in parking space;
07/25/96: Made left turn...claims had green light...Big accident...(collided) with other motorist heading North. No injuries;
09/17/96: Backed into car...red paint from car on the van;
01/27/97: Damage to vehicle noticed:(grievant) prior driver.

Based on the foregoing record, the grievant was discharged on January 28, 1997. But, following intervention by the Union, the discharge was reduced to a four-day suspension; the grievant underwent "re-training"; and returned to active duty on February 7, 1997.

Subsequently, following a hearing he was again discharged on March 20, 1997. That discharge is the subject of this arbitration.

The Employer asserts that despite the four-day suspension and retraining, the grievant was seen by an Employer supervisor operating his van on the Bronx River Parkway on February 27, 1997 at excessive speeds and tailgating.

The Employer asserts that the grievant’s entire record of operating deficiencies, and especially his unsafe operation of the van after his suspension and re-training, amounts to an inability or
unwillingness to drive safely in accordance with prescribed operating rules and training. It is the view of the Employer that the grievant “does not get it” when it comes to safety rules and procedures and that it need not await a serious or fatal accident before removing him from its employ.

The Union attacks the foregoing enumerated eleven incidents as either not the grievant’s fault or of insufficient seriousness to warrant discharge. The grievant and the Union on his behalf deny that he was speeding or tailgating on February 27th.

The Union’s attack on the validity of the eleven enumerated incidents leading to his first discharge (mitigated to a four-day suspension) is misplaced. In view of the fact that by Union intervention, the discharge was reduced to a suspension, those incidents are no longer challengeable. The acceptance of a disciplinary penalty of a four-day suspension is an acceptance by the grievant and the Union of the bonafides of those charges and the appropriateness of a disciplinary suspension for them. In the instant case it is too late to try to impeach those charges, or some of them. As a matter of industrial relations and arbitral law, they now stand unrefutable.

Therefore, the narrow question is whether, against the backdrop of the four-day suspension and the re-training, the grievant committed the subsequent operating offenses of speeding and tailgating, and if so, whether those subsequent offenses should trigger the penalty of discharge.

Assuming he was speeding and tailgating, it is manifest to me that the penalty of discharge was proper. As such it was a proper final
step application of progressive discipline, considering his prior record and his recent accepted suspension for that record. Also, as I have repeatedly held, an excessive number of accidents or operating incidents, even if each is relatively minor, by a short-term employee, may be construed by the Employer as evidence of unsafe driving habits or a propensity to drive unsafely. And, as I have also frequently held, because the Employer has a "fiduciary" duty of care to the riding public, it may take preventative steps to remove from its employ drivers with accumulating unsafe records, without awaiting a serious or fatal accident.

So, the only remaining question is whether the grievant was speeding and tailgating. The Employer’s evidence against the grievant was presented by the testimony of the Employer’s safety supervisor. He testified that he was in his car on the Bronx River Parkway on the morning of February 27; that the grievant, driving a van with a passenger aboard was driving faster than the 50 mph speed limit; that at some point, the grievant got behind his (the Supervisor’s) car and tailgated him, closing to "a car length behind and gaining at about 50-55 mph, for 15-30 seconds." At a point, thereafter, the grievant speedily passed him and exited the parkway.

I find no reason in the record to disbelieve the safety supervisor. And, under the circumstances, I do not find it relevant to inquire into why or how the supervisor was on the parkway at that time, and thus able to observe the grievant. There is no evidence it was deliberate. But even if so, surveillance of a driver who has come off suspension and has undergone re-training, is not improper.
I must conclude, therefore, that the grievant failed to heed the import of his disciplinary suspension and failed, willfully or otherwise, to profit from the re-training. Standing alone, speeding and tailgating while on duty, with a passenger aboard is a serious offense. For it to happen immediately after a disciplinary suspension for operating deficiencies and after re-training, is cause for discharge. Especially so in the view of the Employer’s special responsibility to run a safe service with drivers who are safety minded.

The Undersigned, Impartial Chairman under the Collective Bargaining Agreement between the above-named parties, and having duly heard the proofs and allegations of said parties, makes the following AWARD:

The discharge of James Hardy was for just cause.

Eric J. Schmertz
Impartial Chairman

DATED: May 1, 1997
STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss:

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:

Are the grievances of Alicia Francia and Carmen Mateus arbitrable?

If so, was there just cause for their discharges?

A hearing was held at the offices of the Employer on April 14, 1997 at which time Ms. Francia and Ms. Mateus appeared. Representatives of the above-named Union and Employer also appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

I find both grievances non-arbitrable.

The Employer has a contract with the County of Westchester to provide school bus transportation.
Under the Collective Bargaining Agreement between the Union and the Employer, specifically Sections 15e and 15h, a bus driver/employee who has been decertified by the County is subject to discharge by the Employer. And if the Employer is unable to persuade the County to revoke the decertification, the affected employee's discharge is not subject to arbitral review. The Arbitrator's authority is limited to determining whether the employee has been decertified and was discharged for that reason, and whether the Employer attempted to get the County to revoke or lift the decertification.

In the instant case, it is undisputed that both Francia and Mateus were decertified; were discharged for that reason; and the Employer attempted but failed to persuade the County to reverse or revoke the decertification.

The Union argues that the contractual proscription on arbitral review of the discharge relates only to an effort to get the affected employee restored to the County work he or she performed before decertification. But, that restoration of the affected employee to other work, and hence a review of the propriety of the discharge with regard to assignment of work not under
contract with the County, is arbitrable. And it is that review, with
a requested remedy that the two grievants be restored to employment on
work other than under the Employer's contract with the County, that
the Union seeks in this proceeding.

The Union's theory is rejected. First, the contract is
unequivocal and unconditional. It prohibits arbitration of an
employee's discharge for decertification. It does not provide, even
implies for an arbitral review of the propriety of the discharge for
other Employer work. Indeed, as there is no contractual right to
other work if an employee is decertified, there is no companion right
to challenge the discharge on the grounds that there may be other work
the employee could perform. To allow an arbitral challenge to a
discharge for decertification, when the contract explicitly forecloses
such a challenge, is to make a discharge "conditional" and related to
certain specific work (i.e. County work). Such a dilution of the
otherwise unconditional contractual prohibition on review of a
discharge for decertification, cannot be sustained under the contract
language, under the finality status of any discharge, or logically.
Accordingly, the grievances of Alicia Francia and Carmen Mateus are dismissed because they are not arbitrable.

However, the Impartial Chairman wishes to make a recommendation to the Employer, for the Employer to accept or reject in its discretion.

Both grievants are of relative lengthy service - Francia since 1987 and Mateus since 1993. Their employment records, except for the incident which led to their decertification by the County, have been in the Employer's words, "pretty unblemished." They have been "good employees."

Therefore, I recommend that the Employer give both grievants another chance and reinstate them, without back pay, to available work for which they are qualified, but, of course, not work under County contracts or jurisdiction. The terms, conditions and procedures for any such reinstatement may be determined by the Employer alone.
The Undersigned, Impartial Chairman under the Collective Bargaining Agreement between the above-named Union and Employer, and having duly heard the proofs and allegations of said parties, makes the following AWARD:

The discharges of Alicia Francia and Carmen Mateus, are not arbitrable.

Set forth in the Opinion is a non-binding recommendation of the Impartial Chairman.

Eric J. Schmertz
Impartial Chairman

DATED: May 1, 1997

STATE OF NEW YORK   )
ss:                   
COUNTY OF NEW YORK  )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:

Was there just cause for the discharge of Renea Carlton? If not, what shall be the remedy?

A hearing was held on May 7, 1997 at which time Ms. Carlton, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant had been employed for about two and one-half years as a "monitor." Her job was to ride on a Company van transporting young, multi-handicapped children and to perform certain safety and monitoring duties attendant to those children and their transport. In the instant case, the children were being driven to a special program at the St. Agnes School under a transportation contract between the Company and Westchester County. Often a child is accompanied by a nurse's aide who is employed by the child's parents and has special duties of care for the particular child covered. In this case, the involved nurse's aide was caring for the child of a family named Rand.
During the trip, while on duty and while on the van, the grievant and the nurse’s aide engaged in an angry, loud, profane and highly charged argument.

The verbal confrontation between them was seen and overheard by the children and the van driver. Later, Mr. Rand, (the child’s father) called the Company, reported the argument and complained. In essence his complaint was that the emotional level of the argument, the obscene language used and the bitterness of the confrontation was improper, was upsetting to his child and was completely inconsistent with the grievant’s duties and responsibilities as a monitor.

Based on its investigation, the Company concluded that the confrontation was initiated by the grievant; that irrespective of the reasons behind it, it was manifestly in conflict with her duties; and because it was in front of the children and disturbing to them, discipline was justified.

And when, in the course of the subsequent grievance meetings the grievant continued her invective against certain management employees, was unapologetic, showed no remorse and stated that if again faced with a similar situation, would act the same way again, the Company concluded that there were no mitigating circumstances which would allow her to return to duty. So, she was discharged.

The grievant and the Union on her behalf do not deny the argument, its intensity or its profane nature. Rather, their defense is "provocation," a set of circumstances which explain and make understandable the grievant’s action and which, if properly considered, constituted mitigating factors.
I accept as essentially accurate the grievant’s version of what led to the argument with the nurse’s aide. There is no testimony to refute it. She testified that about a week before the incident she had a miscarriage. The record shows that some time earlier, she had had an abortion.

The grievant asserts that the nurse’s aide told the Rands (and possibly others) about the miscarriage and stated to them something to the effect that if the grievant “wanted a child, she shouldn’t have had an abortion.” This statement or something like it, the grievant viewed as derogatory,” none of the aide’s or the Rand’s business” and completely unrelated to the job of either the grievant or the aide. On the van the grievant confronted the aide about that or those remarks, and the argument and confrontation ensued.

The Union contends that the aide’s revelation to the Rands was so insensitive and such a breach of the grievant’s privacy as to explain the grievant’s anger and impulse to confront her about it, even though both were on duty in the van. That the grievant may have lost her temper and lost sight of where she was and particularly the presence of children is understandable and, considering the provocative nature of what the aide did, should have been viewed by the Company as a mitigating circumstance, and should be so viewed by the Arbitrator.

There were also mitigating factors, asserts the Union when, on the following Monday the grievant was discharged, following meetings with management. First it is claimed that when the grievant reported at 7:30 she was told she was “out of service,” and instructed to wait until Mr. Turner could see her. She waited until 9:00 or 9:30 for that meeting. She testified that her baby at home was in the care of a sitter who had
to leave for school by 9:30. So, when that time approached, fearful that her child might be left alone, she became angry and agitated again, and confronted management personnel belligerently, argumentatively and with profanities.

At one point, she learned that the Company had sent the police to her home, because the Company, I conclude honestly, believed that her baby was left alone. But she interpreted that as an effort by the Company to get her arrested for "neglect of a child." I am certain that the Company acted in good faith and did not try to "entrap" her in any criminal offense, but I conclude she made that erroneous misinterpretation.

The delay in the meeting; the worry about coverage for her baby; and thereafter the thought that the Company had sent the police to her home to entrap her, reignited and heightened her anger and loss of control and explains her subsequent intemperate conduct, claims the Union. Again, the Union argues subsequent "mitigating" factors which the Company should have recognized and which the Arbitrator should take into consideration.

But no real effort is made to explain away the grievant's unchanged position that she would act similarly in the future if again confronted with a similar set of circumstances. She stated that "if someone gets into her face, she'll get into that person's face," that she didn't have to "hold her tongue" because she didn't "even with her mother."
Rather, the grievant continued to explain, even in response to questioning by the Arbitrator, that she was entitled to respond as she did to the provocations, and entitled to so respond in any future similar event.

I think the grievant was provoked by what the nurse's aide revealed to the Rands and possibly to others; and by the unflattering, judgmental nature of the aide's remarks. I think she became angry, probably uncontrollably, and initiated the loud, screaming, profane confrontation with the aide.

That what she did is both explainable and understandable, and perhaps not an abnormal reaction to what obviously was a highly personal, if not confidential matter. But, in an industrial relations sense it is neither justified nor can it be condoned.

Both in the van, and waiting for the grievance process, the grievant must understand that personal matters cannot be allowed to overlap into and take over, even partially, the employment setting and the proper performance of one's job especially where handicapped children are passengers. Here the grievant allowed that to happen. And significantly, after a period of weeks when she could have rethought the matter, still believed and stated at the arbitration hearing that she did nothing wrong.

If the grievant is to be given another chance, it must be clear to her and she must know and acknowledge that like the well-settled requirement that an employee must carry out a managerial order and then
grieve if she considers the order improper or a violation of the contract, so too must an employee not permit personal or private matters (or even employment matters) to erupt or arise in the course of her employment to compromise or interfere with those employment duties or cause a disruption to the employer’s operations.

I recognize that the Company doubts that the grievant will be able to restrain herself from improperly allowing personal or other matters take over in the employment setting in the future.

That may be so, but perhaps not, considering the passage of time and reflection resulting from the discipline I will impose. Indeed, one of the purposes of discipline, short of discharge, is to effectuate rehabilitation.

Though a short-service employee, the grievant’s prior record is clear, (except for some absenteeism).

I am constrained to recognize that she was provoked to anger and irrational actions; that she is not excused from the disciplinary consequences of those actions; but that with the proper assurances and with surveillance, the grievant may be rehabilitatable.

Accordingly, I shall impose what the parties may think is an unusual remedy. But I liken it to a defendant “purging” himself of contempt.

I shall give the grievant another chance. I direct the grievant’s reinstatement one month from the date of this AWARD. She is to receive no back pay. The period of time from her discharge to her reinstatement shall be a disciplinary suspension for her misconduct.
However, her reinstatement in one month is conditioned upon her assurance to the Company that she now recognizes that personal matters may not be allowed to intrude into the employment setting to disrupt or interfere with job performance, and that she promises not to so act in the future. And that she recognizes the improprieties and unacceptable nature of her actions that led to this case. Finally for her to be reinstated, these acknowledgments and assurance must be satisfactory to the Company but not arbitrarily rejected by the Company. I shall expressly retain jurisdiction of this case for application and implementation of the foregoing.

Eric J. Schmertz
Impartial Chairman

DATED: May 16, 1997
STATE OF NEW YORK )
COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The issue is whether MANUEL GONZALEZ was improperly denied certain extra work assignments (weekend work on charters and camp transportation) when such work was assigned bus drivers with less seniority.

A hearing was held on December 10, 1996 at which time Mr. Gonzalez (hereinafter referred to as the "grievant") and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator’s Oath was waived. Counsel filed post-hearing memoranda.

The pertinent contract provision is Article 6 which in significant part reads:

All assignments for weekend work shall be posted and assigned by seniority and qualifications (emphasis added).

There is no dispute that the grievant enjoys sufficient seniority to claim the weekend work. The dispute centers on his "qualifications."
It is the Company’s position that the grievant, a satisfactory school bus driver, does not have an adequate command of the English language to handle the special communications requirements of charters and camp trips. The grievant’s native language is Spanish.

The Company explains that he can handle regular school bus runs because they are routine, repetitive, and are scheduled by the Company near to the Company’s headquarters so that assistance can be provided him speedily if needed.¹

But, asserts the Company, charters and camp trips are specialized, long distanced and not routine. And that the communications requirements of charters and camp trips demand more fluency in English than the grievant possesses.

The Union disputes the Company’s claims regarding the grievant’s limitations with the English language. It points out that he became a United States citizen in 1988, passing the citizenship test given in English. And that he passed the test in English for his New York State Commercial driver’s license.

The Union asserts that the grievant speaks English as he drives his regular school routes, speaks English on the radio to Company headquarters and reports problems by radio in English.

¹In this regard the Company points out that because of the grievant’s poor command of English and because as a consequence he was unable to handle some unruly students, the school districts of Elmsford and Lyndhurst rejected him as a driver of students in those districts. I note, however, that those situations occurred not only about three years ago, but before the Union became the certified representative on the property. So, as those disqualifications could not be protested or challenged at that time by the Union on the grievant’s behalf, I do not find a precedential value under the collective bargaining agreement that bears on the instant dispute.
The grievant's testimony at the hearing in this matter revealed, unquestionably, his difficulties with the English language. For much of his testimony he could not understand the questions put to him in English from counsel and from the arbitrator. For the most part he was unable to answer or respond to those questions in English. I am sure he was nervous testifying and that may have inhibited his ability to understand and respond in English. But that is relevant. Charters and camp trips may, more than routine and near-in school transportation, involve unusual and unpredictable circumstances which may well create tensions and nervousness with an attendant inability to give and get instructions or essentially deal with those circumstances in the English language.

The contractual Management Rights clause provides, inter alia:

The Union recognizes that the Employer shall have the sole jurisdiction over the management and operation of its business and direction of its working force...subject to the provision of this agreement.

Under the circumstances presented, I cannot conclude the Company's determination that the grievant lacked the language skills for the disputed weekend work to be arbitrary, discriminatory or even unreasonable. It's judgement that the grievant lacked the "qualifications" for that work was not an improper exercise of its managerial rights and not, therefore, a violation of Article 6 of the contract.

However, this is not to say that the grievant is permanently barred from charter or camp work. If he improves his command of the English language to a requisite level, he should be given a chance to exercise his seniority and claim that work.
I am prepared to review this situation eight months from the date of this AWARD. At that time the Union shall have the right to petition me for a hearing on the question of the grievant's then qualifications.

The Undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties, and having duly heard the proofs and allegations of said parties makes the following AWARD:

The Company's denial of the claims of MANUEL GONZALEZ for weekend work assignments of charter runs and camp trips, did not violate the collective bargaining agreement.

Eric J. Schmertz, Impartial Chairman

DATED: January 27, 1997

STATE OF NEW YORK )

COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Impartial Chairman that I am the individual described in and who executed this instrument, which is my AWARD.
IN THE MATTER OF THE ARBITRATION

between

LOCAL 1175, ASPHALT PLANT WORKERS -and-

WILLET'S POINT ASPHALT CORP.

The stipulated issue is:

Was there just cause for the discharge of Allen Del Vecchio, Jr.? If not, what shall be the remedy?

A hearing was held on December 4, 1997, at which time, Mr. Del Vecchio, Jr., hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant was hired in December 1996 in the shipping office. Thereafter, in February 1997, without objection from the
Union or the grievant he was transferred to the job Maintenance Man 
Helper (a/k/a "Welder-helper"). Indeed, it appears that the transfer 
was mutually agreed upon.

It is undisputed that employees in the classification 
maintenance man and maintenance man helper are required to perform a 
variety of duties "outside" in the Company's yard, including ascending 
heights on the asphalt production equipment, to perform maintenance, 
repairs, and operational work on the elevated bins.

The grievant has an acknowledged phobia of heights. He is 
psychologically unable to climb to the heights of the bins. He tried 
to do so once after he was transferred to the "outside" and "froze" in 
the attempt. Therefore, he was unable to perform maintenance, repair 
and operational assignments aloft.

It is the Company's contention that because the grievant is 
unable to perform those functions at and atop the bins, he cannot 
carry out the full duties of his job and that his discharge for that 
reason was warranted and justified.

It is undisputed that at least as early as when the grievant 
was transferred from shipping to the "outside" the Company was told of 
or knew of his height phobia, and that discussions of that problem 
were engaged in by the Company and the Union representatives. It is
also undisputed that the grievant’s work as a shipper and thereafter his performance on the ground as a maintenance man helper were satisfactory.

What is in dispute and is the determinative factor in this case is whether when transferred to the “outside” from shipping there was an agreement or understanding between the Union and the Company that because of his height phobia the grievant would not be required to climb aloft and would be assigned duties on the ground only.

The Union asserts that there was just such an agreement; that the Company’s discharge of the grievant was violative of that agreement; and that the Company hired a replacement for the grievant (an experienced asphalt worker who could climb the heights required) primarily to get rid of the grievant.

I find that in the absence of any objection or challenge to the grievant’s move from shipping to the “outside,” his discharge was justified unless there was the agreement alleged by the Union.

A significant component of the job of maintenance man helper is climbing aloft to maintain, repair and operate the asphalt bins and the grievant could not do that work. It is well-settled that an inability to perform a significant function of a job classification is grounds for removal from employment.

Based on the evidence before me, I am unable to conclude that an unequivocal agreement was reached between the Union and the
Company that the grievant was excused from climbing. Through testimony, the Company disputes the Union’s claim on this point, asserting instead that on several occasions it told the Union that it was concerned about the grievant’s inability to climb; that originally and throughout the grievant’s employment “outside” it told the Union that it “would see” how the grievant did and whether it could tolerate his limitation. The Company explained that it thought and said that the grievant might have been able to overcome his phobia. But, it asserts, the time and point came when it was apparent that he could not surmount his problem and that his limitation could no longer be accepted because work aloft was needed by an employee in the grievant’s classification.

The burden of establishing the agreement asserted by the Union, is on the Union. For it represents a change in the duties of a maintenance man helper and more significantly a change in the contractual obligation of the unionized “outside” work force to perform all tasks, including the climbing requirement.

As such, more definitive and conclusive evidence of any agreement changing the classification and the contractual obligation is needed than the disputed verbal testimony of the Union. For evidentiary purpose, the agreement, if there was one, should have been in written form (as a contract change) or, at least, the “verbal” discussions should have been much more probative and unequivocal.
Therefore, I am constrained to conclude that no precise agreement was reached under which the Company obligated itself to accept and tolerate the grievant's problem. Rather, I conclude that the Company only agreed to "see how the grievant performed" and reserved its rights if the grievant did not overcome his height phobia.

In short, I cannot find sufficient probative evidence to conclude that the Company waived any such reservation or unconditionally give up its managerial right to remove from its employ an employee who cannot perform a significant duty of his job classification.

Nor do I find, as the Union argues, that the Company hired a new employee for the bad faith purpose of discharging the grievant.

Rather, in my view and considering my finding that there is insufficient proof of agreement between the Union and the Company, the hiring of the new employee was because working aloft was needed and someone had to do what the grievant could not do. In other words, the grievant's deficiency dictated his replacement, and was not an arbitrarily pre-conceived plan to fire him.

This inexorable conclusion is personally regrettable because the grievant appears to me to be a well-intentioned, intelligent young man who tried to perform the required duties but was unable to do so because of a non-willful psychological phobia which he could not
overcome. If there is other full-time work that he can do to the Company's satisfaction, it is for the Company in its discretion to so determine, but beyond the authority of the arbitrator to order.

The Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

The discharge of Allen De Veccio, Jr.

was for just cause.

Eric J. Schmertz
Arbitration

DATED: December 19, 1997

STATE OF NEW YORK  )
 ss:  
COUNTY OF NEW YORK  )

I, Eric J. Schmertz do hereby affirm upon my Oath as Impartial Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.