In the Matter of the Arbitration between
LOCAL 345 BROTHERHOOD OF UTILITY WORKERS OF NEW ENGLAND, INC.
-and-
NEW ENGLAND POWER SERVICE COMPANY

The Undersigned, duly designated at the Board of Arbitration in the above matter, and having duly heard the proofs and allegations of the above-named parties, make the following AWARD:

The Company should not be required to discontinue or modify its lower tier wage rates for Local 345 BUW employees. The two tier wage rates may be maintained.

Eric J. Schmertz, Chairman

DATED: May 13, 1998
STATE OF NEW YORK )
COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Chairman that I am the individual described in and who executed this instrument, which is my AWARD.
DATED: May, 1998

William F. Dowd, Concurring

DATED: May, 1998

May Rose Dickhaut, Dissenting
In the Matter of the Arbitration between
LOCAL 345 BROTHERHOOD OF UTILITY WORKERS OF NEW ENGLAND, INC.
-and-
NEW ENGLAND POWER SERVICE COMPANY

The stipulated issue is:
Should the Company be required to discontinue or modify its lower tier wage rates for Local 345 BUW employees or should the two tier wage rates be maintained?

A hearing was held on December 8, 1997 in Milford, Massachusetts 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 Arbitration Board consisted of Ms. Mary Rose Dickhaut, Union designee, Mr. William F. Dowd, Company designee, and the Undersigned as Chairman.

The Oath of the Arbitrators was waived; the parties filed post hearing briefs; and the Arbitration Board met in executive session on March 17, 1998.
The authority for this arbitration is found in a memorandum of agreement negotiated by the parties as part of the 1995 contract negotiations. It reads:

"A joint Union/Management Committee consisting of three management and three union representatives from the Local 345 will employ a mutual-gains bargaining approach to resolve issues associated with the two-tier wage system. In so doing, the parties agree to attempt to find solutions that will be mutually agreed upon by the Union and the Company. All participants in this joint effort will be trained in the methods and process of mutual-gains bargaining. A consultant may be used to aid the process. If agreement cannot be reached by 12/31/95, the issue will be submitted to arbitration. Increases in wage rates, if any, awarded by the arbitration decision shall be effective as of the date of the decision without any retroactivity. In reaching a decision, the Board of Arbitration shall consider the
market rates paid for comparable work, the Company's competitive position, the interests of the Company's rate payers and stockholders and issues associated with the potential deregulation of the Company's business."

The issue(s) of the two tier wage system was not resolved by "mutual-gains bargaining," and the dispute, as set forth in the stipulated issue was submitted to arbitration before this arbitration board.

The history of the two tier system, its original establishment as part of the 1980 collective negotiations, and its continuation through the subsequent successor contract negotiations of 1982, 1984, 1986, 1989, 1992 and 1995, are well-known to the parties and need not be generally recited herein, except where necessary in support of this Opinion.

At the arbitration hearing, as was reiterated in the briefs, the parties agreed that in addition to the specific factors set forth in the second paragraph of the foregoing memorandum, the Arbitration Board may consider other factors that it deems relevant.

In that latter regard the Union argues that the Board should change what has been used as the "market rates paid for comparable work "from a comparison with the rates paid workers at a variety and
mixture of employers in the Company's geographic area, to a narrower comparison with wage rates of similar or related classifications of other utility companies only.

Though the record indicates that the Company's wage rates are generally competitive with a general mix of employers in the geographic area, a comparison with wages paid by other utilities would, again generally, place the Company on the low side.

Also, as factors to be considered, the Union argues that a revocation of the two tier system would end a "divisiveness" between employees of both tiers; would accord to the lower tier employees a recognition that after many years of service (18 for some) their job experience and expertise had reached a level warranting wage parity with the upper tier; the de minimus expense to the Company of approximately $159,000 annually to elevate the 34 service clerks of the bargaining unit from the lower level to parity with 46 clerks of the same unit at the higher tier, and that that cost, even with indirect additional expenses, is certainly affordable considering the $1.6 billion the Company will receive from the planned sale of its generating plants; that other divisions or departments of the Company have eliminated two-tier systems; and that finally (in its brief) the Union asks the Board for "guidelines" under which, by mutual agreement the two-tier system could be ended by direct negotiations of the parties.
In my judgment, for an arbitrator to legislate a change in or an end to a two-tier wage system which was negotiated some 18 years ago and which has been retained through a number of subsequent contract negotiations (albeit with unsuccessful attempts by the Union to end it), the Arbitrator should find persuasive evidence of a significant change(s) in the circumstances on which the system was originally founded and/or on which it remained based over the years subsequently.

Based on the record before me I am not satisfied that there have been the requisite significant or sufficient changes in those circumstances which would support the Union's instant case. Indeed, a single significant change in circumstance which I find has occurred supports the Company's case for retention of the two-tier system.

I conclude that the "market" referred to in the memorandum is the "market" that the parties utilized when the system has agreed to in 1980 and which has remained the market throughout the succeeding eighteen years.

While a de novo case can be made out justifying a market limited to other utilities, the long-standing practice of an "area market," together with the unrefuted and current evidence that employees in this bargaining unit perform duties essentially the same as employees similarly classified (or relatedly classified) among a variety of employers in the area, leads to the conclusion that there
has been no significant change in the "market" to warrant what would be a radical change from the incumbent market to the different "market" the Union now seeks.

The Union concedes that if confined to the balance of the factors set forth in paragraph 2 of the memorandum, a decision supportive of the two-tier system would be expected. So there is no need for me to determine if any of them have significantly changed. Specifically, the concession notwithstanding, the record does not show new or changed circumstances which, if the two-tier system was eliminated, would be favorable to the "stockholders, rate payers, (to) the Company's competition position or (to) issues associated with...deregulation."

The Union's arguments that the lower tier employees have acquired the experience and skills justifying parity and the "de minimus" costs to the Company are respectively unsupported by probative evidence. And because of contrary evidence from the Company, is indeterminative, at best. While, of course, it is logical to conclude generally that veteran employees in the lower tier have acquired experience and skills comparable to those similarly classified on the higher tier, the evidence does not show especially which employees are involved, how long they have been employed, how their skills have been improved and how many have or have not acquired
"veteran" status. So, primarily as argument, this assertion remains speculative. (But, as an aside and as a "guideline," may be relevant to further negotiations on the issue).

To the Union's reference to the ending of two-tier systems at other divisions or departments, the Company's reply is both more telling and perhaps prophetic (i.e. for negotiations), and that is that in those instances the two-tier systems were ended through bilateral, quid pro quo bargaining. But a change by negotiations, with apparent offsetting bargaining exchanges, is not a precedent for an arbitral ordered change, nor, therefore, is it a significant change in and from the circumstances over the years since the system was installed.

That the cost of creating parity between the tiers may be insignificant is again relevant to negotiations, but not to this arbitration because it has not been adequately proved. To the Union's bare statistical assertion the Company replies, without refutation, that the costs cited by the Union are "only the tip of the iceberg"; that there are still a substantial number of other employees on lower tiers of two-tier systems not in this bargaining unit for and from whom there would be pressure for similar wage adjustments at substantial additional costs to the Company. In short, though neither
party offered adequate evidence on this point, the Union's argument falls short of meeting its burden of proof on such an important economic factor.

Similarly, the Union's argument that the $1.6 billion the Company will receive from the sale of its generating facilities would easily support the cost of eliminating the two-tier system, is also not supported by enough economic evidence of a probative nature. For again, in the face of the Company's reply, the Union's assertions fall short of meeting its burden. The Company explains, again without refutation, that the $1.6 billion will be used to "pay down debt" and to grant legislatively required rate reductions. It points out that with the sale of its generating plants, it will experience a sharp drop in income and that there will be no surplus remaining from the $1.6 billion sale. I am not satisfied with the economic evidence (if any) on these points by either side. That leaves the matter inconclusive at best and clearly not up to the evidentiary level of the kind of significant change I have required.

"Divisiveness" between employees of the two-tiers is not a new circumstance. The facts indicate that "divisiveness" was a concern in 1980 when the system was negotiated. The Union accepted the system for "new hires" (or the "unborn") in exchange for the Company's willingness to drop its application to incumbent employees. The Company states that at the time that compromise was reached, the
Union said that it "would take the flack" (from the new hires). So from the outset the possibility of "divisiveness" was well within the Union's contemplation, and therefore is not and has not been a "change" of significance.

However, from the record, I see one significant change that is favorable to the Company's position. It is the recent legislated (1997) deregulation and restructuring of the electric utility industry in Massachusetts. The Company states that the Massachusetts Department of Public Utilities ("DPU") requires the Company to justify the reasonableness of its wage rates by comparing them not only to other utilities but to non-utility employers in the geographic areas where the Company does business. For the Company to recover Union payroll adjustments in its rates it must demonstrate that any such payroll adjustments and wage rates are "reasonable." And that "reasonableness" requires a "minimization of unit-labor costs."

In point, the Company cited the DPU's disallowance of two million dollars in Union compensation expenses in 1995 because the Company had not shown that the compensation expenses for those wage rates were compared to positions paid by non-utility companies in the Company's service territory.

In short, the Company concludes that if it raised the wage levels of the lower tier employees to a competitive level of other
utilities only, and ignored the non-utility market in its geographic area, its applications for recovery of those new costs by rate adjustments would be rejected by the DPU.

This is not to say that I agree with that assertion and conclusion. Rather it is to say that it is a legitimate and bonafide factor and a new circumstance which at least supports the Company's claim for retention of the present two-tier system. As a factor unrefuted and unchallenged by the Union, it cannot be ignored by the Arbitration Board.

Finally, the Union asks for "mutually agreed to guidance" for a "negotiated end to the two-tier system." The Board did not reach or even consider any such approach because we lacked the authority to do so. But the Chairman believes that in this Opinion he has provided same observations that could be interpreted as "dicta guidance." In any event, it is my conclusion that further efforts to change or eliminate the two-tier system and the credible equitable arguments advanced by the Union are for bi-lateral negotiations between the parties, and not arbitration.

Eric J. Schmertz, Chairman
IN THE MATTER OF THE ARBITRATION

between

LOCAL 100, TRANSPORT WORKERS UNION

and

NEW YORK BUS SERVICE

The issue is:

Did the Employer violate Sections 33 and 34 of the Collective Bargaining Agreement by inserting a letter of complaint in the personnel file of ANTHONY MORELLI? If so, what shall be the remedy?

The Union's grievance in this case is premature. Articles 33 of the contract comes into play when an employee has been discharged or suspended. That has not occurred in this case. The letter of complaint placed in Mr. Morelli's personnel file has not been acted upon by the Employer by the imposition of any discipline on Morelli. When and if the letter becomes a basis for discipline, whether a warning, suspension or discharge, then its probative value, its allegations and its evidentiary use may be triggered, and at that point it may be fully challenged by Morelli and the Union on his behalf.
For the foregoing reason, I do not find the Union's objection
to the placing of the letter in Morelli's file, to be a "grievance"
within the meaning of Section 34 of the contract. The mere placing of
the letter in the file, does not, in my view, give rise to a substantive
claim of a violation of the "meaning or application of the provisions of
(the) Agreement."

Rather, at this stage, with no action adverse to Morelli having
been taken by the Employer, the Employer has exercised a managerial
prerogative to put the letter in Morelli's file. The evidence indicates
that this is consistent with the Employer's practice to put all letters
from the public, complaining and complimentary in the files of the
employees involved. Also, the Employer explained that in this instance,
again pursuant to its practice, it notified Morelli about the letter and
offered him an opportunity to respond to it. I think that good labor
relations would suggest that if an employee is so notified, similar
notifications be given the Union, as the employee's bargaining
representative. And I would advise that that be done in the future. But
the instant omission from doing so, again in the absence of any action
against Morelli does not yet rise to the level of a contract breach or a
grievance.

However, I wish to make it clear, as I believe I did at the
hearing, that as the Impartial Chairman, I find that at present the
letter in Morelli's file is non-prejudicial to him, and of no probative
value nor is it evidence critical of him.

At present, the substance of the letter has not been validated
or substantiated, nor apparently, even investigated. I appreciate
Morelli's concern and the objections of the Union. But at this point and
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 Employer did not violate Sections 33 and 34 of the Collective Bargaining Agreement by inserting a letter of complaint in Anthony Morelli's personnel file.

DATED: March 27, 1998

STATE OF NEW YORK ss
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.
The issue is:

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

A hearing was held on February 27, 1998 at which time Mr. Gomez, 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.

Mr. Gomez, hereinafter referred to as the "grievant" was discharged for assaulting a fellow employee (Danny Roopchand). He denies the charge.¹

¹ Though not so unequivocally. When asked if he had physical contact with Roopchand, he replied "not that I remember."
The record persuades me that the grievant committed the offense; that forcefully he pushed employee Roopchand against a wall in the body shop during working hours; and that the attack was unprovoked. Also, I find that Roopchand suffered injury to his arm and neck for which he sought and obtained medical treatment.

I accept as accurate and credible the testimony of Roopchand and that of Richard Johnson, the Employer's assistant superintendent of maintenance. I find that in response to Roopchand's request that the grievant move his bus out of a bay in the body shop so that it could be replaced by Roopchand's bus, the grievant, angrily and violently thrust Roopchand into the shop wall and against a protruding pipe. I so conclude not just because of Roopchand's testimony, but from the testimony of Johnson to whom Roopchand reported the incident shortly after its occurrence and who saw and testified to Roopchand's injuries. Johnson stated that he saw abrasions on Roopchand's arm and redness and later swelling on his neck and face. Johnson also testified that he treated Roopchand by applying water to those injuries.

Not only is there no evidence in the record why Johnson would falsify that testimony, but the proximate time between the incident and Johnson's observations and treatment of Roopchand's injuries is probative evidence of the grievant's assault. That Roopchand may have returned to work for a while after the incident is not, in my view, evidence that the assault did not take place. At some point, before
his shift ended, the grievant left, stating that he was going to the doctor. The evidence indicates that with the passage of some time Roopchand's face swelled, prompting him, I believe to decide to get medical attention.

Johnson also testified, significantly, I conclude, that when he questioned the grievant following Roopchand's report to him, the grievant was "out of control," "yelling, screaming, slamming his hands on the wheel of a bus" and "gunning its engine." And that when asked if he "slammed" Roopchand against the wall, the grievant responded that he "was sick and tired of Danny (i.e. Gomez) running his mouth and telling him what to do and where to go" and that "that's why I pushed him." I deem this to be an admission of the assault by the grievant, and I accept as credible that testimony by Johnson.

That there may be some ambiguity in the written statement of Dr. Isaac Belizon regarding when he treated Roopchand is not sufficiently relevant to the credibility issue before me to cast doubt on the foregoing conclusions.

Nor is the evidence of other "assaults" in this employment setting, which the Union point to and rely on in asserting a defense, alternative to the grievant's denial, of uneven and disparate treatment of the grievant.

Two such incidents were pointed to in which the participants were not discharged. One between the aforesaid Johnson and the brother
of Anthony Simone, the vice president for maintenance. And the other
between persons named "Sperry" and "Stevenson." Both were at least 10
years ago. No details of these fights were presented in this record.
I cannot tell if they were initiated or provoked by either participant,
nor can I tell which was the "aggressor," if either. One, apparently
was between two managerial employees and therefore does not serve as a
precedent for bargaining unit disparate treatment. That leaves one
other, which cannot constitute "condonation" by the Employer or a
precedent for this case because the testimony is that it "was not
reported to management." And one incident standing alone, is hardly a
practice, policy or precedent.

Based on the record, I find not only that the grievant
assaulted Roopchand, but that the grievant was the aggressor. And that
a request to "move his bus" is not a provocation to justify a physical
response.

It is well settled that a physical altercation of this type,
under these facts, taking place on the Employer's property during
working hours, and especially where injury results, is grounds for
summary discharge.

I find no mitigating circumstances. The grievant is a short-
term employee. His continued "rage" after the incident places in fatal
question his stability and suitability to return to work in the body
shop.
Whether, if the grievant "purged" himself of his denial of
the assault and gave meaningful promises to conduct himself properly on
the job he could be returned to work for a final chance, is a matter
entirely within the sole discretion of the Employer. As those
circumstance were not part of this case, they are not matters for this
arbitration.

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 Rene Gomez was for

just cause.

Eric J. Schmertz
Impartial Chairman

DATED: March 27, 1998

STATE OF NEW YORK )
SS:
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.
The issues are:

1. Was there just cause for the discharge of RENE GOMEZ? If not, what shall be the remedy?

2. Did the Employer violate Sections 33 and 34 of the Collective Bargaining Agreement by inserting a letter of complaint in the personnel file of Anthony Morelli? If so, what shall be the remedy?

A hearing was held on February 27, 1998 at which time Mr. Gomez, 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 Gomez Grievance

Mr. Gomez, hereinafter referred to as the "grievant" was discharged for assaulting a fellow employee (Danny Roopchand). He denies the charge.¹

¹ Though not so unequivocally. When asked if he had physical contact with Roopchand, he replied "not that I remember."
The record persuades me that the grievant committed the offense; that forcefully he pushed employee Roopchand against a wall in the body shop during working hours; and that the attack was unprovoked. Also, I find that Roopchand suffered injury to his arm and neck for which he sought and obtained medical treatment.

I accept as accurate and credible the testimony of Roopchand and that of Richard Johnson, the Employer's assistant superintendent of maintenance. I find that in response to Roopchand's request that the grievant move his bus out of a bay in the body shop so that it could be replaced by Roopchand's bus, the grievant, angrily and violently thrust Roopchand into the shop wall and against a protruding pipe. I so conclude not just because of Roopchand's testimony, but from the testimony of Johnson to whom Roopchand reported the incident shortly after its occurrence and who saw and testified to Roopchand's injuries. Johnson stated that he saw abrasions on Roopchand's arm and redness and later swelling on his neck and face. Johnson also testified that he treated Roopchand by applying water to those injuries.

Not only is there no evidence in the record why Johnson would falsify that testimony, but the proximate time between the incident and Johnson's observations and treatment of Roopchand's injuries is probative evidence of the grievant's assault. That Roopchand may have returned to work for a while after the incident is not, in my view, evidence that the assault did not take place. At some point, before his shift ended, the grievant left, stating that he was going to the doctor. The evidence indicates that with the passage of some time Roopchand's face swelled, prompting him, I believe, to decide to get medical attention.
Johnson also testified, significantly, I conclude, that when he questioned the grievant following Roopchand’s report to him, the grievant was "out of control," "yelling, screaming, slamming his hands on the wheel of a bus" and "gunning its engine." And that when asked if he "slammed" Roopchand against the wall, the grievant responded that he "was sick and tired of Danny (i.e. Gomez) running his mouth and telling him what to do and where to go" and that "that's why I pushed him." I deem this to be an admission of the assault by the grievant, and I accept as credible that testimony by Johnson.

That there may be some ambiguity in the written statement of Dr. Isaac Belizon regarding when he treated Roopchand is not sufficiently relevant to the credibility issue before me to cast doubt on the foregoing conclusions.

Nor is the evidence of other "assaults" in this employment setting, which the Union point to and rely on in asserting a defense, alternative to the grievant's denial, of uneven and disparate treatment of the grievant.

Two such incidents were pointed to in which the participants were not discharged. One between the aforesaid Johnson and the brother of Anthony Simone, the vice president for maintenance. And the other between persons named "Sperry" and "Stevenson." Both were at least 10 years ago. No details of these fights were presented in this record. I cannot tell if they were initiated or provoked by either participant, nor can I tell which was the "aggressor," if either. One, apparently was between two managerial employees and therefore does not serve as a
precedent for *bargaining unit* disparate treatment. That leaves one other, which cannot constitute "condonation" by the Employer or a precedent for this case because the testimony is that it "was not reported to management." And one incident standing alone, is hardly a practice, policy or precedent.

Based on the record, I find not only that the grievant assaulted Roopchand, but that the grievant was the aggressor. And that a request to "move his bus" is not a provocation to justify a physical response.

It is well settled that a physical altercation of this type, under these facts, taking place on the Employer's property during working hours, and especially where injury results, is grounds for summary discharge.

I find no mitigating circumstances. The grievant is a short-term employee. His continued "rage" after the incident places in fatal question his stability and suitability to return to work in the body shop.

Whether, if the grievant "purged" himself of his denial of the assault and gave meaningful promises to conduct himself properly on the job he could be returned to work for a final chance, is a matter entirely within the sole discretion of the Employer. As those circumstance were not part of this case, they are not matters for this arbitration.

**Issue #2**

The Union's grievance in this case is premature. Articles 33 of the contract comes into play when an employee has been discharged or suspended. That has not occurred in this case. The letter of complaint
placed in Mr. Morelli's personnel file has not been acted upon by the Employer by the imposition of any discipline on Morelli. When and if the letter becomes a basis for discipline, whether a warning, suspension or discharge, then its probative value, its allegations and its evidentiary use may be triggered, and at that point it may be fully challenged by Morelli and the Union on his behalf.

For the foregoing reason, I do not find the Union's objection to the placing of the letter in Morelli's file, to be a "grievance" within the meaning of Section 34 of the contract. The mere placing of the letter in the file, does not, in my view, give rise to a substantive claim of a violation of the "meaning or application of the provisions of (the) Agreement."

Rather, at this stage, with no action adverse to Morelli having been taken by the Employer, the Employer has exercised a managerial prerogative to put the letter in Morelli's file. The evidence indicates that this is consistent with the Employer's practice to put all letters from the public, complaining and complimentary in the files of the employees involved. Also, the Employer explained that in this instance, again pursuant to its practice, it notified Morelli about the letter and offered him an opportunity to respond to it. I think that good labor relations would suggest that if an employee is so notified, similar notifications be given the Union, as the employee's bargaining representative. And I would advise that that be done in the future. But the instant omission from doing so, again in the absence of any action against Morelli does not yet rise to the level of a contract breach or a grievance.
However, I wish to make it clear, as I believe I did at the hearing, that as the Impartial Chairman, I find that at present the letter in Morelli's file is non-prejudicial to him, and of no probative value nor is it evidence critical of him.

At present, the substance of the letter has not been validated or substantiated, nor apparently, even investigated. I appreciate Morelli's concern and the objections of the Union. But at this point and at this stage, this Impartial Chairman will attach no worth to the letter and no inferences adverse to Morelli will or should be drawn.

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:

1. The discharge of Rene Gomez was for just cause.

2. The Employer did not violate Sections 33 and 34 of the Collective Bargaining Agreement by inserting a letter of complaint in Anthony Morelli's personnel file.

Eric J. Schmertz
Impartial Chairman

DATED: March 9, 1998

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.
IMPARTIAL CHAIRMAN, LOCAL 100 TWUA -and-
NEW YORK BUS SERVICE

IN THE MATTER OF THE ARBITRATION

between

LOCAL 100 TRANSPORT WORKERS UNION
OF AMERICA

-and-

NEW YORK BUS SERVICE

The stipulated issue is:
Did the Employer have just cause to
discharge ROSA CONDE? If not, what
shall be the remedy?

A hearing was held on April 9, 1999 at which time Ms.
Conde, hereinafter referred to as the “grievant” and
representatives of the above-named Employer and 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.

Having duly heard the proofs and allegations of the
Union and the Employer, the Undersigned, Impartial Chairman under
the collective bargaining agreement between said parties, makes
the following AWARD:

1. The grievant shall be reinstated to
   her job as a Cleaner, as of
   Wednesday, April 14, 1999;

2. Said reinstatement shall be without
   back pay. The period of time from
   her discharge to her reinstatement
   shall be a suspension;
3. Attached hereto and made a part hereof is a diagram of the storage areas on the Employer’s property. The two storage areas, in which buses are cleaned, are identified as Area A and Area B; If one of the three cleaners assigned to Area A is absent, the grievant, who is regularly assigned to Area B, shall be permitted to work in Area A;

4. If there is a permanent vacancy among the Area A cleaners, the grievant will be transferred to Area A, and regularly assigned there. A new hire will be assigned to Area B.

DATED: April 21, 1999

STATE OF NEW YORK )
COUNTY OF NEW YORK )

ss: 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.
The stipulated issue is:

Did the Company violate paragraphs 18 and 19 of the Collective Bargaining Agreement by refusing to permit LESTER GAYLE and PAUL THOMPSON to operate express buses from March 1, 1999 until their reemployment by the Company? If so, what shall be the remedy?

A hearing was held on June 18, 1999 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. The parties filed post-hearing memoranda.

Gayle and Thompson, hereinafter referred to as the "grievants" or as "Gayle" or "Thompson" were Board of Education school bus drivers who were "decertified" in December 1998 as school bus drivers and suspended from further Board of Education

1 GAYLE was reemployed April 24th and THOMPSON was reemployed June 11th. Both as express bus operators.
work by the Board’s office of Pupil Transportation. In accordance with the collective bargaining agreement the Company held first level hearings on December 18th and 22nd for each grievant respectively on their suspensions by the Board of Education.

It is the Company’s position that following that first level hearing, both grievants were suspended by the Company from all Company work pending the outcome of an investigation by the Board of Education of charges against them.

In February 1999, a "pick" commenced for express bus work to begin March 1st. The grievants tried to exercise their seniority in this "pick" but were denied the opportunity by the Company on the grounds that they were "suspended" and ineligible for any work with the Company. The Union grieved that denial.

The Company asserts that that grievance is not arbitrable because it is barred by the time limits of the grievance procedure, namely that:

"All requests and appeals for a second level hearing must be submitted by the Union in writing....within ten regular working days after the date of the decision at level one or the decision at level one shall be deemed accepted..." (emphasis added)

The Company points out that the level one hearings on the grievants’ suspensions took place on December 18th and 22nd respectively, with the Company’s decisions on both submitted to
the Union in writing on each of those dates; that the Union did not thereafter appeal the decisions to level two. And that after ten regular working days elapsed the level one decision was final. The next action of the Union was its grievance dated March 8, 1999 protesting the Company’s denial of the grievants’ “pick” applications. That grievance, asserts the Company, was a challenge to the grievants’ suspensions. And as their “suspended” status precluded their right to “pick,” the denial of the “pick” is not arbitrable because over two months elapsed between the level one decisions and the grievance.

The Union’s position is that the Company did not suspend the grievants from all its work, but only from Board of Education driving and that limited suspension was not challenged after the level one meeting, making an appeal to level two unnecessary. But, the Company’s denial of the grievants’ pick of express bus driving constituted a new and separate grievance that was filed within the prescribed time limits. It argues that the rights of the grievants to participate in the “pick” did not accrue until February and that the time for the filing of the instant grievance did not commence until their “pick” efforts were denied.

Obviously, both the arbitrability issue and the merits of this case turn on what the grievants’ status was in February, when the “pick” commenced. If they were, in fact, suspended by the Company from all Company work, the denial of the “pick” based
on their suspended status, mooted the grievance. It was no longer
challengeable because the time limits for appeal from the
suspension decision had expired.

However, if they were only suspended by the Company
from operating Board of Education school buses, they were not and
should not have been precluded from bidding on other Company work,
specifically here, driving express buses. And, if so, the Union’s
grievance on their behalf was timely.

It is appropriate at this point to make clear what is
not decided in this case. I do not decide whether the Company may
suspend an employee from all its work solely because of that
employee’s decertification by the Board of Education or whether
any such full suspension is automatic. I do not decide whether
the “reasons” the Board of Education gave for its suspensions of
the grievants would constitute per se just cause for the
grievants’ suspensions from all Company work, nor can make any
evidentiary determinations on those allegations in the absence in
this case of direct evidence and testimony on them. What I do
decide is narrow. It is whether the grievants were or were not in
suspended status from all Company work at the time they tried to
“pick” express runs.

The Company asserts that its decision to suspend the
grievants from all Company work was clear and unambiguous. I am
not so persuaded.

It may well be that the Company intended to suspend the
grievants from all its work pending the investigation, but I am
not persuaded that it conveyed that decision clearly and
unambiguously to the Union or the grievants. As a suspension is
disciplinary in nature, the Company has the burden not only of
proving just cause but, in this case, proving the unambiguousness
of its decision and the clarity of its communication to the Union
and the grievants.

The testimony at the hearing about what took place at the
level one hearing was contradictory and offsetting. No
official minutes of the hearings were submitted. The better
evidence is the Company’s written decisions following the
hearings. And I find those writings to be ambiguous.

The Thompson Hearing Notice and Results read, in pertinent part, that the hearing was to be held:

“regarding the suspension of your certification by the Office of Pupil Transportation” (emphasis added).

And was signed by Mike Biondi, the Company’s Vice President.

The Company’s decision (i.e. Results) stated, again in pertinent part, that:

“...the Office of Pupil Transportation was temporarily suspending Thompson’s certification as a school bus driver pending an investigation...”

and that:

“Based on this action by the office of Pupil Transportation NYBS was also
suspending Paul Thompson” (emphasis added) and that:
“...depending on the outcome of the Board’s investigation a determination would then be made regarding Thompson’s position with NYBS” (emphasis added)

A reasonable interpretation of the foregoing, in my judgement, is that the hearing related and was limited to Thompson’s suspension by the Board of Education from Board of Education driving; that the Company was affirming the decision of the Board of Education by “also” (i.e. “similarly”) suspending him from Board of Education driving; that the investigation conducted by the Board of Education related to Thompson’s conduct as a school bus driver. And that, therefore, the reference to his “position” with NYBS to be determined after the investigation was to the “position” of school bus driver.

In short, in the absence of more probative, clarifying evidence and testimony about the substance of and discussions at the level one hearing, I conclude that based on the Hearing Notice and the Results of the level one decision, the Union and Thompson had reasonable grounds to believe that the Company’s suspension of Thompson tracked that of the Board of Education and was limited to Board of Education driving.

I conclude similarly with regard to the Gayle hearing. The stated subject of that hearing related to the Gayles conduct as a school bus driver (i.e. “duties and obligations regarding passing a note to a 12 year old girl”).
In the Results, the Company (Thomas J. Sharkey) stated that:

"...the matter is out of our hands and was passed up to a higher level at the Board of Education." (emphasis added)

And it went on to state:

"We informed Gayle that we are suspending him from NYSB pending completion of an investigation."

Again, a reasonable interpretation of the foregoing is that the hearing was confined as a "matter" to Gayles' conduct as a school bus driver; that his suspension was ordered by "a higher level at the Board of Education" and that his "suspension from NYBS" was in that context, namely an affirmation of the action of the Board of Education, necessitated, as in Thompson's case for contractual validity, by Section 33 of the collective bargaining agreement.

Accordingly, I conclude that Gayle and Thompson retained the contractual right under Paragraphs 18 and 19 of the contract to bid on express runs for the "pick" commencing March 1, 1999 and that the Company's refusal to permit them to do so was violative of the contract.
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 violated Paragraphs 18 and 19 of the collective bargaining agreement by refusing to permit LESTER GAYLE and PAUL THOMPSON to operate express buses from March 1, 1999 until their reemployment on April 24th and June 1, 1999 respectively. They shall be made whole for the time lost.

Eric J. Schmertz, Impartial Chairman

DATED: September 3, 1999

STATE OF NEW YORK )
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.
The stipulated issue is:

Did the Company violate paragraphs 18 and 19 of the Collective Bargaining Agreement by refusing to permit LESTER GAYLE and PAUL THOMPSON to operate express buses from March 1, 1999 until their reemployment by the Company?1 If so, what shall be the remedy?

A hearing was held on June 18, 1999 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. The parties filed post-hearing memoranda.

Gayle and Thompson, hereinafter referred to as the “grievants” or as “Gayle” or “Thompson” were Board of Education school bus drivers who were “decertified” in December 1998 as school bus drivers and suspended from further Board of Education

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1 GAYLE was reemployed April 24th and THOMPSON was reemployed June 11th. Both as express bus operators.
work by the Board’s office of Pupil Transportation. In accordance with the collective bargaining agreement the Company held first level hearings on December 18th and 22nd for each grievant respectively on their suspensions by the Board of Education.

It is the Company’s position that following that first level hearing, both grievants were suspended by the Company from all Company work pending the outcome of an investigation by the Board of Education of charges against them.

In February 1999, a “pick” commenced for express bus work to begin March 1st. The grievants tried to exercise their seniority in this “pick” but were denied the opportunity by the Company on the grounds that they were “suspended” and ineligible for any work with the Company. The Union grieved that denial.

The Company asserts that that grievance is not arbitrable because it is barred by the time limits of the grievance procedure, namely that:

“All requests and appeals for a second level hearing must be submitted by the Union in writing...within ten regular working days after the date of the decision at level one or the decision at level one shall be deemed accepted...” (emphasis added)

The Company points out that the level one hearings on the grievants’ suspensions took place on December 18th and 22nd respectively, with the Company’s decisions on both submitted to
the Union in writing on each of those dates; that the Union did not thereafter appeal the decisions to level two. And that after ten regular working days elapsed the level one decision was final. The next action of the Union was its grievance dated March 8, 1999 protesting the Company’s denial of the grievants’ “pick” applications. That grievance, asserts the Company, was a challenge to the grievants’ suspensions. And as their “suspended” status precluded their right to “pick,” the denial of the “pick” is not arbitrable because over two months elapsed between the level one decisions and the grievance.

The Union’s position is that the Company did not suspend the grievants from all its work, but only from Board of Education driving and that that limited suspension was not challenged after the level one meeting, making an appeal to level two unnecessary. But, the Company’s denial of the grievants’ pick of express bus driving constituted a new and separate grievance that was filed within the prescribed time limits. It argues that the rights of the grievants to participate in the “pick” did not accrue until February and that the time for the filing of the instant grievance did not commence until their “pick” efforts were denied.

Obviously, both the arbitrability issue and the merits of this case turn on what the grievants’ status was in February, when the “pick” commenced. If they were, in fact, suspended by the Company from all Company work, the denial of the “pick” based
on their suspended status, mooted the grievance. It was no longer challengeable because the time limits for appeal from the suspension decision had expired.

However, if they were only suspended by the Company from operating Board of Education school buses, they were not and should not have been precluded from bidding on other Company work, specifically here, driving express buses. And, if so, the Union's grievance on their behalf was timely.

It is appropriate at this point to make clear what is not decided in this case. I do not decide whether the Company may suspend an employee from all its work solely because of that employee’s decertification by the Board of Education or whether any such full suspension is automatic. I do not decide whether the "reasons" the Board of Education gave for its suspensions of the grievants would constitute per se just cause for the grievants' suspensions from all Company work, nor can make any evidentiary determinations on those allegations in the absence in this case of direct evidence and testimony on them. What I do decide is narrow. It is whether the grievants were or were not in suspended status from all Company work at the time they tried to "pick" express runs.

The Company asserts that its decision to suspend the grievants from all Company work was clear and unambiguous. I am not so persuaded.

It may well be that the Company intended to suspend the grievants from all its work pending the investigation, but I am not persuaded that it conveyed that decision clearly and
unambiguously to the Union or the grievants. As a suspension is disciplinary in nature, the Company has the burden not only of proving just cause but, in this case, proving the unambiguousness of its decision and the clarity of its communication to the Union and the grievants.

The testimony at the hearing about what took place at the level one hearing was contradictory and offsetting. No official minutes of the hearings were submitted. The better evidence is the Company’s written decisions following the hearings. And I find those writings to be ambiguous.

The Thompson Hearing Notice and Results read, in pertinent part, that the hearing was to be held:

"regarding the suspension of your certification by the Office of Pupil Transportation" (emphasis added).

And was signed by Mike Biondi, the Company’s Vice President.

The Company’s decision (i.e. Results) stated, again in pertinent part, that:

"...the Office of Pupil Transportation was temporarily suspending Thompson’s certification as a school bus driver pending an investigation..."

and that:

"Based on this action by the office of Pupil Transportation NYBS was also
suspending Paul Thompson” (emphasis added) and that:
“...depending on the outcome of the Board’s investigation a determination would then be made regarding Thompson’s position with NYBS” (emphasis added)

A reasonable interpretation of the foregoing, in my judgement, is that the hearing related and was limited to Thompson’s suspension by the Board of Education from Board of Education driving; that the Company was affirming the decision of the Board of Education by “also” (i.e. “similarly”) suspending him from Board of Education driving; that the investigation conducted by the Board of Education related to Thompson's conduct as a school bus driver. And that, therefore, the reference to his “position” with NYBS to be determined after the investigation was to the “position” of school bus driver.

In short, in the absence of more probative, clarifying evidence and testimony about the substance of and discussions at the level one hearing, I conclude that based on the Hearing Notice and the Results of the level one decision, the Union and Thompson had reasonable grounds to believe that the Company’s suspension of Thompson tracked that of the Board of Education and was limited to Board of Education driving.

I conclude similarly with regard to the Gayle hearing. The stated subject of that hearing related to the Gayles conduct as a school bus driver (i.e. “duties and obligations regarding passing a note to a 12 year old girl”).
In the Results, the Company (Thomas J. Sharkey) stated that:

"...the matter is out of our hands and was passed up to a higher level at the Board of Education." (emphasis added)

And it went on to state:

"We informed Gayle that we are suspending him from NYSB pending completion of an investigation."

Again, a reasonable interpretation of the foregoing is that the hearing was confined as a "matter" to Gayles' conduct as a school bus driver; that his suspension was ordered by "a higher level at the Board of Education" and that his "suspension from NYBS" was in that context, namely an affirmation of the action of the Board of Education, necessitated, as in Thompson's case for contractual validity, by Section 33 of the collective bargaining agreement.

Accordingly, I conclude that Gayle and Thompson retained the contractual right under Paragraphs 18 and 19 of the contract to bid on express runs for the "pick" commencing March 1, 1999 and that the Company's refusal to permit them to do so was violative of the contract.
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 violated Paragraphs 18 and 19 of the collective bargaining agreement by refusing to permit LESTER GAYLE and PAUL THOMPSON to operate express buses from March 1, 1999 until their reemployment on April 24th and June 1, 1999 respectively. They shall be made whole for the time lost.

Eric J. Schmertz, Impartial Chairman

DATED: September 3, 1999
STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss:
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.

Eric J. Schmertz, Impartial Chairman
The above-named parties did not stipulate an issue. Based on the record before me and my arbitral authority I deem the issue in dispute to be:

Whether the Company is contractually obligated to make a one-time, non-recurring, lump sum payment to each employee equal to 2% of the employee's hourly wage rate in effect on November 1, 1997, multiplied by two thousand and eighty-eight (2,088), which the Transit Authority and Queens Private Lines granted to their employees in December 1997?

Hearings were held on July 20 and August 12, 1998 at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. Each side filed a post-hearing brief.

The "lump sum" payment referred to in the issue was granted by the New York City Transit Authority and the Queens Private Lines to their employees in December 1997. The Union asserts that a similar payment is due grievants in this case.
The relevant and pertinent contract provisions of the collective bargaining agreement between the parties are set forth in a Memorandum of Agreement dated February 5, 1996 and read:

1. WAGES.

A. The base hourly wage for all express bus operators shall be as follows:
   i. From December 1, 1995 through September 30, 1997 - $19.01 per hour;
   ii. From October 1, 1997 through November 30, 2000, the hourly rate shall be increased by the amount of the average percentage increase in the wages of the bus operators employed by the TWU "Queens Private Lines" (i.e., Queens Surface, Triboro Coach Lines and Jamaica Bus.).

B. The base hourly wage for all school bus operators shall be as follows:
   i. From December 1, 1995 through August 31, 1996 - $18.42 per hour;
   ii. From September 1, 1996 through November 30, 2000, the base hourly wage shall be subject to and limited by the percentage increase in the hourly rate of pay paid by the New York City Transit Authority within such period of time to its bus operators.
C. The base hourly wage for all MIU operators shall be as follows:
   i. From December 1, 1995 through August 31, 1996 - $19.01 per hour;
   ii. From September 1, 1996 through November 30, 2000, the base hourly wage shall maintain parity with the base hourly wage of bus operators employed by the New York City Transit Authority.

D. The rates of pay covering categories of work set forth in paragraph 7 of the 1992 Agreement shall be increased by the same percentage as the wages of the express bus operators are increased.

E. The base hourly wage of maintenance employees shall be increased by the same percentage as the express bus operators.

The issue for determination is obviously whether the “lump sum” granted by the Transit Authority and the Queens Private Lines constitutes a “percentage increase in wages” or a “percentage increase in the hourly rated pay,” respectively for express bus operators and school bus operators within the meaning of the foregoing Memorandum of Agreement; and whether respectively for MIU operators, maintenance employees and those set forth in paragraph 7, the lump sum” payment is material to “maintain(ing) parity with the base hourly wage rate of Transit Authority operators, or an “increase in the percentage of wages” within the meaning of Sections D and E of the Memorandum.
I conclude that the "lump sum" payment, albeit compensation for services performed, does not qualify for payment to the grievants in this case under the foregoing contractual conditions and limitations.

If there is one fundamental and universally settled principle of arbitration law, it is that the Arbitrator, whose authority stems from and is confined to the terms of the collective bargaining agreement, and who is prohibited from changing, or modifying contract terms or legislating new terms, has an absolute fidelity to the contract as negotiated by the parties.

More specifically, where the language of the contract is clear and unambiguous, the Arbitrator is obliged to enforce it as written, even if the consequences of doing so may be inequitable, unfair or even harsh. He must see it as the "bargain" entered into by the parties, and not substitute for that bargain a different meaning or interpretation that he may think is more appropriate or even better for the labor-management relationship.

I have followed this principle for the 40 years I have been arbitrating.¹

¹Some 30 years ago I was confronted with a major, similar case where the contract and the equities were in opposition. I upheld the right of the Ballantine Brewery to go out of business, and, in the most difficult part of the decision, enforced the contract provision that stripped Ballantine employees (some with lengthy seniority) of their accumulated non-contributory pensions. The contract expressly and unequivocally provided that if an employer member of the multi-employer pension plan went out of business, all the pension credits of his employees would be credited to the benefit of the remaining employees of the remaining employers of the plan. I expressed profound personal disagreement with this contract provision and personal distress over my obligation to enforce the "bargain" the Brewery Workers Union and Ballantine negotiated (in exchange I was told for earlier, higher wage increases) I stated that I thought enforcement of the contract was unfair, inequitable and harsh, but that as the Arbitrator I had no authoritative choice to do otherwise. I observed (as I will in the instant case) that the remedy was through collective bargaining, not arbitration, and/or by
Here, the critical contract provisions are clear and unambiguous.

The language is susceptible to only one logical and legal interpretation. And that is that the reference to "the hourly rate increase(e) by...average percentage increase in wages," "percentage increase in the hourly rate of pay," "parity with the base hourly rate" and "increase(s) by the same percentage" (emphasis added) all refer to the hourly rates of pay of the categories of employees covered. Indeed, each foregoing phrase follows an explicit, fixed amount of an hourly wage rate for the preceding period of time (i.e. $19.01 per hour for express bus operators for December 1995 through September 30, 1997; $18.42 per hour for school bus operators for December 1, 1995 through August 31, 1996; $19.01 per hour for MIU Operators for December 1, 1995 through August 31, 1996; and parity for paragraph 7 employees and maintenance employees with the express bus operators.)

Clearly therefore, wage increases subsequent to October 1, 1997 for express bus operators and after September 1, 1996 for school bus and MIU operators (and any corresponding parity for maintenance and paragraph 7 employees) were contemplated to be and limited to those granted by the Transit Authority and the Queens Private Lines that increased base hourly rates, or base hourly wages, or were a percentage increase in base hourly rate of their employees.

(continued)

(A consequence of that decision was the passage by Congress of the ERISA legislation), Commentators at the time uniformly agreed that I had no choice but to decide the case as I did.
There can be no serious dispute over the clear meaning of increased "base hourly wage" or "base hourly rate of pay." They mean, of course, the dollars and cents paid employees for each regular hour of work. That meaning is both a matter of common usage by the general public and professional usage and understanding by labor relations practitioners. An increase in the base hourly rate or a percentage increase in the base hourly rate, per force, raises the base hourly rate to a new, and permanently higher level.

A "lump sum" compensation payment is also well understood. It is additional compensation and meets the definition of "wages," but does not increase a base hourly rate. The payment by the Transit Authority and the Queens Private Lines was not and will not be reflected in the hourly wage rate of their employees. No present, retroactive, or future increase in their base hourly rate resulted.

Therefore, an amount of money paid as a "lump sum" and money paid that increases the base hourly rates are manifestly different. In short, the "lump sum" or single, non-recurring payment by the Transit Authority and the Queens Private Lines was not an increase in the hourly base rate or hourly wage rate of their employees, and therefore not an increase that qualifies for payment under the contract to the grievants in this case. (Indeed there is evidence in the record that at one set of negotiations the Company expressly informed the Union that the present contract language was negotiated to “protect” the Company against payment of “bonuses,” or compensation not reflected in a percentage increase in base rates). Confined to the contract as negotiated and written by the parties, a different interpretation by the Arbitrator would be beyond his authority. Considering the compelling differences, the parties should
have and would have negotiated other language if they intended base hourly rate and lump sum to be synonymous.

This is not to say that the Impartial Chairman does not have some personal views about this case. Bluntly, he is sympathetic to and appreciates the reasons why the Union and the employees believe they are entitled to the payment. Historically there has been wage parity with the Transit and Queens Private Lines employees. At one time the Company's employees even enjoyed wages greater than parity. The grievants are the only private line employees who were not paid the lump sum. Apparently other employers with similar contract language paid it either for equitable reasons or other pragmatic considerations. For the grievants not to receive it, puts them now behind others similarly situated in gross earnings. The contract language can be alternatively interpreted as an intention to maintain parity with Transit and the Queens Private Lines regardless of the nature or form of the increase in compensation. And the amount of the lump sum if granted the grievants, with some acknowledged reimbursement from the Department of Transportation of the City of New York, and tax deductions, would not be that onerous, especially if spread over an extended period without interest.

But, I restate the well-settled rule. The case advanced by the Union is applicable and relevant when the dispositive contract language is unclear and ambiguous. Then, past practice, negotiation history, alternative language interpretations and equitable considerations are material to how the unclear or ambiguous contract language is to be clarified. But these arguments are of no probative value or use when, as here, the contract language is clear, unambiguous
and so well understood as written. So, my personal feelings about the equities of this case notwithstanding and no matter the otherwise impressiveness of the Union's equitable arguments or varied interpretation of the contract, the clear language of the contract, supportive of the Company's position, may not be impeached. The Union's cause of action is for collective bargaining, not arbitration.

Finally, the Impartial Chairman takes arbitral notice of the fact that the City of New York (D.O.T.) would reimburse the Company in the amount of about $180,000 if the Company granted the lump sum increase to the express bus personnel. And the City would not object if that $180,000 was apportioned among all the grievants.

Therefore, I recommend that the Union and the Company negotiate together and with the City of New York to try to agree on a methodology under which the $180,000 could be obtained from the City for distribution to the grievants, equally, pro rata or otherwise. The Impartial Chairman is willing to participate in those negotiations and discussions if the parties and the City agree. If such an arrangement could be worked out that is acceptable to the Union, the Company and the City, roughly about one-half of what would have been the total lump sum payment would be distributable to eligible employees.
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 is not contractually obligated to make the one-time non-recurring lump sum payment to each employee that the Transit Authority and the Queens Private Lines granted to their employees in December 1997.

Eric J. Schmertz
Impartial Chairman

DATED: January 12, 1999

STATE OF NEW YORK )
ss:
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.
The stipulated issue is:

What shall be the disposition of the Union's grievance dated April 27, 1999?

A hearing was held on October 5, 1999, at which time representatives of the above-named Union and Association appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The Union's grievance of April 27, 1999 reads, in pertinent part:

"The Union claims that travel time is payable to employees working on the N.Y. City portion of a move to or from N.Y. City on the one hand, and Westchester, Nassau or Suffolk on the other hand.

The Association claims that travel time is not payable to employees working on the N.Y. City portion of a move to or from N.Y. City on the one hand, and Westchester, Nassau or Suffolk on the other hand.

The Joint Board is deadlocked on this issue."
More specifically, the parties seek an interpretation of Article 12 H of the collective bargaining agreement, which reads:

Commercial moving between points within Nassau, Suffolk and Westchester Counties, between New York City and Nassau, Suffolk, and Westchester Counties, and between Nassau, Suffolk and Westchester Counties, shall be at Metropolitan District rates for time consumed on actual moves and no travel time will be paid, except for Chauffeurs who will be paid portal to portal. Travel time will be paid for normal pick-ups and deliveries. Disputes shall be referred to the Joint Board. Commercial work within the Metropolitan District by Employers located outside said area shall be at Metropolitan District rates, straight time for travelling to and from the job. On commercial work within Suffolk County under this paragraph meal and bed money shall be furnished when applicable. Travel time of one half hour shall be paid each way to and from all commercial work within New York City, both straight time and overtime.

It is undisputed that the "move" involved under the facts in this case was a "commercial move" within the definition set forth in C6 of the Definitions section of the contract.

The move was from New York City to Westchester County, over approximately a two-week period. The Union’s claim is on behalf of the employee helpers on that particular job.

However, both sides made clear that they seek a "declaratory judgement" on the interpretation of Article 12 H,
applied not only to the particular facts in this case, but to other similar circumstances.

For "declaratory judgement" purposes, I deem the issue to be whether on a commercial move from New York City to Westchester, Nassau or Suffolk Counties, (or visa versa) the helpers on the job are entitled or not entitled to travel time (i.e., travel pay)

I conclude that the answer lies within the four corners of Article 12 H.; that despite the differing interpretations of the parties, that Article is clear and unambiguous.

The Union relies, primarily on the last sentence, which reads:

"Travel time of one half hour shall be paid each way to and from all commercial work within New York City, both straight time and overtime."

The Union's reliance is misplaced. The foregoing last sentence must be read as part of and in conjunction with the language of Article 12 H that precedes it. A reading of the prior language makes clear, in my view, that commercial moving between New York City and the Counties of Westchester, Nassau and Suffolk precludes the payment of travel time; and that the last sentence expressly provides for the payment of travel time for commercial moves within New York City or in other words a move that originate and finishes within New York City. Under no other interpretation would Article 12 H make sense.
The answer to the issue and facts of this case is explicitly found in the first sentence of Article 12 H. It provides unambiguously and unconditionally that commercial moves from New York City to Westchester, Nassau and Suffolk Counties or from those Counties to New York City will be paid at the Metropolitan District rates.

"...for time consumed on actual moves and no travel time will be paid, except for chauffeurs who will be paid portal to portal..." (emphasis added)

This explicit language clearly denies the payment of travel time to helpers on commercial moves of the type and under the facts stipulated in this case.

The exception, namely the next sentence, provides for travel time for work that is not a commercial move, but rather a "pick up and delivery." The work in the instant case and for purposes of the declaratory judgement, was stipulated as "commercial work" within the contract definition thereof, and not "pick up and delivery."

What then does the last sentence mean?

Obviously, to my mind, it cannot be interpreted to negate or even conflict with the foregoing explicit prohibition on the payment of travel time, but rather must apply to a different circumstance. In other words, contract language that may appear to be in conflict should be reconciled, if possible, for the obvious reason that the negotiating parties would not have intended to write conflicting or mutually contrary contract
language. But rather that the contract provisions in question were both intended to apply and to be enforceable. And to do so, they must relate to different conditions or circumstances.

That is exactly the case here, in my judgement. A reconciliation is logical, apparent and sensible.

The last sentence applies, manifestly in my view, to commercial moves that originate and finish within New York City. The language of that sentence says so. It provides for the payment of travel time (i.e. one half hour each way) "...to and from all commercial work within New York City..." (emphasis added)

The work "within" means that the work, both its beginning, ending, and in between, is located and confined to New York City.

Indeed, the dictionary definition of "within" supports this conclusion. "Within" is defined as:

"enclosed or confined";
"to be found inside";
"enclosure or containment."

Webster 3rd New International & Dictionary

Therefore, payment of travel time for a commercial move is authorized and required by the last sentence of Article 12 H for moves that take place in their entirety in New York City. And not to commercial moves either way between New York City and Westchester, Nassau and Suffolk Counties.
With the foregoing interpretation and application of Article 12 H as clear and unambiguous, I need not deal with the negotiation history of that Article or practices, if any, thereunder.

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 Union's grievance of April 27, 1999, is denied.

Eric J. Schmertz, Arbitrator

DATED: November 1, 1999
STATE OF NEW YORK 
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.
The stipulated issue is:

"Did the Company have just cause to terminate FRANK WOOD on February 3, 1999 for falsification of Company records? If not, what shall the remedy be?"

Hearings were held on June 25, July 9 and July 13, 1999, at which time Mr. Wood, 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. A stenographic record of the hearings was taken and both side filed a post-hearing brief.

The grievant is accused of falsifying a work report. More specifically, the Company charges him with reporting and certifying the performance and completion of preventative maintenance checks on hoist #340279, when in fact, he and his assigned partner did none of the assigned work.
The Company asserts that his falsification was a willful violation of Rule #13 of its General Rules. Said rule reads:

"Recording another person's badge, altering or mutilating a badge, falsifying any job ticket, data collection entry, or Company record, or giving false information to anyone whose duty it is to make such records..." (emphasis added)

The Introduction to the General Rules, including Rule #13 states:

"The following practices are strictly forbidden,"

and concludes with the statement:

"violation...is proper cause for disciplinary action, including dismissal."

The Company asserts that it has consistently imposed the disciplinary penalty of summary dismissal for violations of Rule #13.

Though the grievant denies the charge, claiming he and his partner performed the work as assigned on January 30th, the weight of the credible evidence points otherwise and supports the Company's allegation that the work has not done by the grievant, either on January 30th or on any subsequent date.

Company supervisory witnesses testified in detail about the condition of the hoist upon investigation of their suspicions that the report the grievant and his partner was untrue. That
testimony specified that some of the assigned work could not be done without the disabling of the elective brake by an electrician, and that the brake had not been disabled; that the drum and wire rope had not been cleaned and lubricated; that the load block and trolley wheels showed no evidence of new grease; that the gear cases had not been removed or the oil changed, and that the metal bumper remained loose and held with tape.

Also, the unrefuted testimony disclosed that congestion on the floor area around the hoist was unchanged and that performance of the work with that congestion remaining, or at least without rearrangement it, was impossible.

Finally, the testimony included that of a bargaining unit electrician who would have deactivated the electrical equipment on the hoist, if the work was done. His testimony was that electrical work was not done on that hoist.

There is no evidence whatsoever that any of these witnesses, including the bargaining unit electrician who had been subpoenaed, bore any animus toward the grievant or for any reason would bear false witness against him.

I find the foregoing testimony to be accurate and convincing, and therefore persuasive contradiction of the grievant's denials.

A photograph was produced showing the grievant and his partner on the hoist (apparently in an effort to show that they were on the job) turned out to be immaterial. Claiming that it
was taken on January 30th (when the work was to be performed) the evidence in the record shows, to my satisfaction, that it was taken on a subsequent day, probably the following Monday. As an after event, the photograph proves nothing of probative value regarding what was done or not done on January 30th when the work was supposed to be done and when the grievant certified that he had done it.

Indeed, the evidence established that the preventative maintenance check on that hoist was not done until the next scheduled maintenance cycle, some weeks later.

That the Company left the preventative maintenance work on the hoist until the next cycle was a managerial decision which may or may not have had an effect on the use or safety of the hoist. But it does not excuse the grievant's untruthful report nor does it constitute a waiver of the rule prohibiting falsification of records. The issue in this case is not whether the grievant's failure to perform the work created a safety hazard, (arguably excusing his falsification because the Company tolerated the condition for weeks), but rather and simply whether the grievant committed a record falsification. For here, the falsification was a direct claim by the grievant for credit and pay for work not done. That, in and of itself is misconduct within the meaning and purpose of Rule #13.

As I have concluded that the evidence shows that neither the grievant nor his partner did any work in the hoist,
and knew that they did not, there can be no factual basis for the grievant's claim that he thought his partner did some work that later turned out not to have been done.

The grievant's express and written certification that he performed work he did not do, is a falsification of Company records within the proscription of Rule #13. The Company has met its burden of establishing the grievant's offense by the requisite standard of clear and convincing evidence.

As to the penalty of discharge, the Union argues that the grievant's 26 years of service and "unblemished" record should be taken into consideration, and that if the charge is upheld the penalty should be less than dismissal.

Though this arbitrator may personally think that suspension and monetary reimbursement of pay for work not performed may have been an adequate penalty for an employee with 26 years of service, it is not within the arbitrator's authority to reduce the penalty of discharge if the penalty is for just cause and not arbitrary or unreasonable. In other words, where the penalty of discharge is historically and contractually applicable and is not excessive for the offense committed, the arbitrator should not substitute his personal views on what he thinks would have been adequate, for the Company's right to discipline more severely.

Here, there is an unchallenged rule prohibiting falsification of records. The rule has no exceptions, including
length of service. It cannot be judged unreasonable or arbitrary if willful falsification is proved. Most significantly, the rule, well known and well disseminated to the employees and the Union, has been consistently applied to cases similar to this one and the penalty of discharge has been consistently imposed, regardless of the affected employee's longevity.

With that history, I cannot find that the type of record falsification in this case, its willful nature, the clear and convincing weight of the evidence in support of the charge, and the consistent practice of enforcing a rule against falsification of records with the penalty of dismissal, compels any modification of the penalty in this case.

Accordingly, the discharge of the grievant was for just cause and is upheld.

With the foregoing decision, which not only upholds the discharge, but perhaps more importantly upheld the Company's right to impose summary dismissal for record falsification, this arbitrator wishes to do something he does rarely, but from time-to-time where circumstances warrant. And that is to make a recommendation. My recommendation in no way changes the Award in this case and is offered for the discretionary consideration of the Company, without prejudice to the Award and without prejudice to or precedent for any future like matter.

The recommendation for the Company to consider is that because of the grievant's long service of 26 years, and his prior
record of non-discipline and satisfactory work, his discharge be reduced to a lengthy suspension, either for the period of time since his discharge or beyond for a further period to be fixed by the Company. And that thereafter he be restored to employment without any back pay. I would also include the deduction of some of money from his pay equal to what he was paid for the work he did not do. Any such suspension, implemented by the Company should be deemed a "final chance," and that a future rule violation by the grievant would be grounds for his immediate discharge.

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

The discharge of FRANK WOOD was for just cause and is upheld.

DATED: October 1, 1999

Eric J. Schmertz, Arbitrator

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

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.
AMERICAN ARBITRATION ASSOCIATION,
ADMINISTRATOR

IN THE MATTER OF THE ARBITRATION

Between

STATE VOCATIONAL FEDERATION OF
TEACHERS

-and-

STATE DEPARTMENT OF EDUCATION

OPINION AND AWARD

Case# 12 390 0022097

The stipulated issue is:

Is the grievance of MAUREEN BUECHLER arbitrable?

A hearing was at the offices of the American Arbitration
Association in East Hartford, Connecticut on October 29, 1997 at which
time Ms. Buechler, 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
administered. The parties filed post-hearing briefs and reply briefs.

Based on the record before me, and without any determination
on the merits, I find that the grievant's grievance meets the
contractual definition of a "grievance"; that its alleged contract
violations reasonably relate to certain specific provisions of the
contract within the parameters prescribed by the Steelworker Trilogy;¹ that the contract including the management rights clause does not bar the arbitrability of claimed violations of those provisions; and that the instant grievance is sufficiently different from the earlier grievance of Antoinette Maguire (which ultimately was held non-arbitrable following one arbitration, the vacating of its decision by the court and a second arbitration) to remove it from the application of the principles of res judicata, stare decisis and estoppel.

The pertinent parts of the grievant's grievance read:

Specific Contract Provision(s) violated:

Art. 21. S. 1A & 2; Art 7 Sect. 2 all subsections

Statement of Grievance:

Grievant force {sic} to provide coverage without remuneration due to inadequate employer preparation of substitute list.

Remedy Requested:

Cease and desist from future violations of this language. Coverage and viable substitute coverage list.

¹ Namely "ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation..." (i.e. the merits E.J.S.) (emphasis added) United Steelworkers of America v. American Manufacturing Co. 363 U.S. 564, 80 S. Ct 1343, 4 L. Ed. 2d 1403 (1960).
Article 21 of the Collective Bargaining Agreement defines a grievance as "a complaint that:

1) There has been a violation, misinterpretation or improper application of a specific provision(s) of the Agreement; or

2) An employee has been treated unfairly and/or inequitably by reason of an act or condition which is contrary to established policy or practice governing or affecting employees."

The contract sections alleged in the grievance to have been violated are "Articles 21, Sec. 1A and 2 and Article 7, Section 2 (all subsections)."

Clearly, the grievance on its face alleges contract violations that fit within the language of Section 1 (a)(1) and (2) of Article 21. Subject of course, to evidentiary proof, the grievance complains that the requirement that the grievant, a Department head, fill in for and perform the duties of an instructor in the PNEP program when the regular instructor was out due to illness, was "a violation, misinterpretation or improper application of a specific provision(s) of the Agreement," or...was "unfair or inequitable treatment by reason of an act or condition which is contrary to policy or practice governing affected employees."

It is for the merits of the case, not part of an arbitrability determination, to decide whether the Union and the grievant have proved the alleged violations. But, the allegations, based on the bare facts
of the grievance, set forth a claim which absent any other bar, is eligible for submission to arbitration under Section 6 of Article 21.

The same is true with regard to the citation of Article 7 Section 2. Apparently, the grievant and the Union are alleging that the instructional coverage required of the grievant violated the Class Coverage language of the contract. And that she did not fall within the category of employees or classifications that could be so assigned. Again, subject to proof in a hearing on the merits, I cannot conclude that an allegation of a violation of Article 7 Section 2 is so remote from or unrelated to the bare facts of the grievance as to hold that it cannot be argued substantively as part of the Union's case on the merits. Indeed, on its face, the grievance when compared with the bare factual allegations establishes a sufficient nexus between the allegations and that Article and Section of the contract to permit the allegation to be put to the evidentiary test of a hearing on the merits.2

Again of course, on the merits, the burden will be on the Union to show that the grievant's "forced" assignment violated the

2"An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage" (emphasis added) United Steelworkers of America v. Warrior & Gulf Navigation Co. 363 U.S. 574, 80 S. Ct. 1347 4 L. Ed. 2nd 1409 (1960).
various alternative methods of covering for an absent classroom or shop instructor.

Nor do I find a bar to the arbitration of the grievance by the language of the Board Prerogatories clause of the contract.

The Employer asserts that Article 2 vests it with the right to "assign" faculty and that that right was exercised in the grievant's case.

Clearly however, the right to "assign" faculty is not unrestricted. By its own express terms Article 2 vests the Employer with certain specified "rights, powers, functions and authority except as limited by this Agreement" (emphasis added). And the right to "assign" faculty (along with other specified actions) is conditioned with the proviso "provided such actions are not inconsistent with the specific terms of this Agreement" (emphasis added).

Here, the grievant and the Union assert that the Employer's action in "assigning" the grievant to instructional duties violated specified terms of the contract, namely portions of Article 21 and Article 7. That assertion, based on an arguable relatedness between it and the contract provisions claimed violated, falls within the contractual exceptions to exclusive and unchallengeable managerial authority, and makes permissible the referral of the allegations to the grievance procedure and to arbitration. And again, whether the
allegations are dismissed or upheld are matters for determinations on the merits and are not considered in deciding arbitrability.

However, the major thrust of the Employer's position in this case is that the instant grievance is not arbitrable because it was decided with finality by the arbitration, court action, and second arbitration of the grievance of Antoinette Maguire. The Employer asserts that substantively the instant grievance puts in dispute precisely the same issue that was decided in the Employer's favor in the Maguire grievance proceedings and that based on the principles of re-judicata, stare decisis and estoppel the instant grievance should be foreclosed from arbitration.

For purposes of arbitrability, and again without any reference to or determination of the merits, I find that the instant grievance is sufficiently different from the Maguire grievance to remove it from the application of res judicata, stare decisis and estoppel.

The grievants are different -- Ms. Buechler in the instant case, and Ms. Maguire in the prior one. Standing alone, and in the light of the universally recognized principle that a different plaintiff (i.e. grievant) is entitled to his or her "day in court," the theory of res judicata is inapposite. The more so, of course, if the cause(s) of action in a subsequent case is different from a prior case upon which the assertion of res judicata rests.
Here I find different causes of actions or, in arbitral terms, different theories of contract breach. The Maguire grievance, which also involved the involuntary assignment of a Department Head to cover an instructional vacancy, protested the lack of extra pay for that assignment.

The pertinent part of the stipulated issue in the Maguire case was:

"Did the Employer violate Article 6(3)(a)(3) or Article 7(2)(a)(1)(2) or (3) when it denied payment of contractual premiums to the grievant for service rendered during the clinical cycle in the period September 21, 1992 through November 5, 1992?..." (emphasis added)

The Maguire grievance sought as the remedy: "Paid {sic} for covering the following days in clerical..."

The instant grievance cites the lack of additional pay, but protests the assignment duty itself.

It seeks as a remedy:

"Cease and desist from future violations of this language. Coverage and viable substitute coverage list."

In short, the cease and desist remedy sought in the instant grievance makes clear that the grievance does not include a demand for payment for instructional services, a matter decided favorably to the Employer by the Maguire proceeding, but rather is limited to a challenge
to the assignment of a Department Head to cover for an absent instructor, an issue not probatively determined by the Maguire proceedings.

Therefore, with different causes of action, different contract violation theories, and different remedies sought, I find no basis, in judging threshold arbitrability, to apply the principle of stare decisis, notwithstanding the fact that the relevance of stare decisis is discretionary with and not mandatory on a subsequent arbitrator.

All the foregoing is not to say that the instant grievance is not substantively the same as the Maguire grievance, only superficially "recast" to pass arbitrability "muster" and therefore subject to one or more of the estoppel theories advanced by the Employer. Rather it is to say that that or those questions in this case and any such determination would require a look at the merits of the grievance, a procedure not within the scope of a threshold arbitrability decision. On that and those theories the Employer's rights are reserved for when and if the instant grievance is heard on the merits.

3For example, it would require a consideration of the merits to find, in support of the Employer's contention, that Article 7, held inapplicable by the prior Arbitrator to the Maguire cause of action was also inapplicable to the instant cause of action.
The Undersigned, duly designated as the Arbitrator and having been duly sworn and having duly heard the proofs and allegations of the above-named parties, makes the following AWARD:

Confined to a challenge to the assignment of the grievant to instructional duties in the PNEP program and to the remedy of a "cease and desist" order, the grievance of Maureen Buechler is arbitrable.

Eric J. Schmertz, Arbitrator

DATED: February 27, 1998

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:
Did the Company violate the collective bargaining agreement by failing to conduct hearings with the Union regarding the decertification of an employee by the County, resulting in his/her removal from paratransit service with a consequent reduction in pay hours? If so, what shall be the remedy?

A hearing was held on February 26, 1999 at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The arbitrator's Oath was waived.

The answer to the issue turns on whether there has been agreement on the integration or inclusion of one particular section of the contract between the Union and the White Plains Bus Company into the contract between the parties to this dispute.
There is no dispute that there is a integrated corporate structure between White Plains Bus and Suburban Paratransit. Additionally, and determinative for this case, I find that Section 15(H) of the White Plains collective agreement was, by agreement of the above parties, incorporated into and made an effective part of the collective agreement between the Union and Suburban Paratransit.

That Section reads:

(H) In cases in which an employee is suspended by operation of a Decertification as defined in Section 15(E) of this Agreement, the Employer agrees to discuss the matter with the authorized representative(s) of the School District in an attempt to adjust the matter. If the Employer shall be unsuccessful in its efforts to adjust the matter such that the Decertification is rescinded, representatives of the Employer and the Union shall confer for the purpose of confirming that such Decertification has in fact occurred. The employee so decertified shall not be entitled, through the use of this Section 15, to further contest such decertification or his/her resulting dismissal.

The testimony and evidence shows that the full foregoing procedure was not followed. The Company did "discuss the matter with the authorized representative(s) of the School District in an attempt to adjust the matter such that the Decertification is rescinded." But, having been "unsuccessful in its efforts," the Company failed to follow the next step. It did not "confer" with the Union "for the purpose of confirming that such Decertification has in fact occurred." Consequently,
the “employee so decertified” did not have the opportunity or benefit of Union representation in that overlooked step in the process.

I am not persuaded that the parties agreed to this process for no reason. It is clearly a matter of due process, to which the affected employee and the Union on his/her behalf are entitled.

For the Company’s “short-circuiting” of the contractual process, some remedy is appropriate. The remedy I shall fashion and which I deem appropriate and reasonable shall be an Order directing the Company to follow the aforesaid process in its entirety in future Decertification cases and a monetary award to the Union, for and on behalf of affected employee(s).

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, make the following Award:

The Company is directed prospectively to fully comply with the aforesaid Article 15(H).

The Company shall pay to the Union, for and on behalf of affected employee(s) the sum of Two Thousand ($2,000) Dollars as consideration for its failure to do so in this case.
DATED: March 12, 1999

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

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.

Eric J. Schmertz, Impartial Chairman
The stipulated issue is:
Was there just cause for the discharge
of CLIVE WALLACE? If not, what shall
be the remedy?

A hearing was held on February 26, 1999 at the
Company’s offices at which time Mr. Wallace, 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, a school bus driver was discharged for
the offense of leaving a child unattended on the school bus he
drove. That the child was so left unattended (and presumably
asleep) when the grievant ended his run and/or departed from the
bus, is undisputed.

I have previously and consistently held that
considering a driver’s special duty to maintain the safety of the
school children he drives and because of the particular notice
the Company has given drivers regarding their responsibility to check buses for sleeping children and the absolute prohibition on leaving a child on a bus unattended, the penalty of summary dismissal is proper.

In that regard, my prior Award (In re: Frank Benedetto) is precedent. In that case, as in the instant case, Mr. Benedetto left a child unattended on his bus at the end of his run. In that case, in upholding Benedetto's discharge based on the Company's rule proscribing that offense, I stated:

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

"...it cannot be said that the penalty of discharge for leaving a child unattended on a bus is inappropriate or unreasonable."

However, as in the Benedetto case, the grievant has had a good record as a school bus driver over a respectable period of employment. I think, because of that good record, the Company should consider giving him another chance to maintain his employment. Therefore, without prejudice to the validity and continued enforceability of the Company's rule and without
precedent for any future matters, I recommend that the Company consider, in its sole discretion, the grievant’s reemployment without back pay on a “last chance basis.”

The Undersigned, Impartial Chairman under the collective bargaining agreement and having duly heard the proof and allegations of the above-named parties, make the following Award:

There was just cause for the discharge of CLIVE WALLACE.

Eric J. Schmertz, Impartial Chairman

DATED: March 11, 1999
STATE OF NEW YORK )
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.
The stipulated issue is:

Did the Company improperly deny vacation accruals to employees on disability leave? If so, what shall be the remedy?

A hearing was held on November 4, 1999 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.

The grievants in this case are employees on disability leaves of absence, who, as a vacation benefit, received pro-rata vacation pay only for time actively worked during the vacation year, and not for any time during that period that they were on a disability leave.

The Union asserts that they are entitled to the accrual of vacation time and vacation pay for the entire period including the time on disability leave.
The Company asserts that vacation accruals and vacation pay are conditioned on the periods of active service during the vacation year and that leaves of absence, during which an employee is not actively at work, are excluded from the calculation of vacation entitlement for that vacation year.

Both sides rely on Section 8 of the contract, and particularly the fifth paragraph thereof. With the pertinent part of the fifth paragraph underscored below, Section 8 reads:

8. VACATIONS

All employees covered by this Agreement hall be entitled to two (2) weeks vacation after six (6) months of service, except that those employees who are hired by mid-August of any year in which this Agreement is applicable (and who are on staff at the commencement of the school year) shall receive paid vacation as if they had been employed for a period of six (6) months. This vacation entitlement shall be paid at Christmas break and Summer break.

All employees with ten (10) years of service shall receive three (3) weeks' vacation, with payment for the third week of vacation entitlement made at Spring break.

All employees with twenty (20) years of service shall receive four (4) weeks' vacation, with payment for the fourth week of vacation entitlement made at Midwinter break.

Such vacation with pay shall be paid on the same basis as it was paid prior to the effective date of this Agreement.

Effective July 1, 1996, vacation with pay shall be based on employees' regularly picked/assigned runs (their "regular rate") in the week before the particular payments are due to be made.
The above schedule of vacation entitlement requires continuous employment. Rehires with breaks in employment shall have vacation entitlement calculated from the rehire date. Vacation must be taken in the school year in which it is earned; there shall be no carrying over of vacation weeks. There shall be no pay for accrued, unused vacation entitlement.

The Union interprets the underscored language of the fifth paragraph to mean that except for employees rehired, all other breaks in active employment, including, as in this case, disability leaves of absence, are periods of time during which vacation time is accrued.

The Company advances a different interpretation. It argues that the language "continuous employment" means "active" employment, thereby excluding leaves of absence. And that therefore the grievants did not accrue vacation time while on disability leave and were properly paid vacation time on a pro-rata basis for the time they were actively employed.

Frankly, I am inclined to interpret "continuous employment" as "active" employment.

Indeed, the fourth paragraph Section 8 supports this interpretation. For if vacation pay "shall be based on employees' regularly picked/assigned runs...in the week before the particular payments are due to be made," I fail to see how that calculation can be made for an employee on disability leave who has not been actually at work on a regular "pick" or "assigned run." Except, as was done in this case, on a pro-rata basis for the time and period actually worked.
But, I am not prepared to so hold definitively, based in the record in this case.

I can see how the two sentences can be construed to mean that the only "break" in employment excluded from vacation accrual is the "break" between prior employment and later "rehire." And that therefore "continues employment" included time on disability leave. On the other hand, I can see how the two sentences are differently related. "Continuous employment" or "active employment" is required of all employees for vacation accruals, but that "continuous employment" for an employee rehired, begins on the date of rehire. And that in either circumstance, active employment is the required condition for vacation accrual.

So, I deem the critical contract language ambiguous susceptible to different interpretations.

It is well settled that ambiguous contract language is clarified by practice under it and/or by its negotiation history. Unfortunately there is no probative evidence of either in this case. The "evidence" of past practice, if any, relates to non-bargaining unit employees, and hence is non-precedential. No evidence of the negotiation history of the Vacation clause of the contract was adduced.

That being so, resolution of the issue turns on "burden of proof." The "burden" is on the Union to show that the contract language supports its theory of this case. But it has not offered evidence that clarifies the ambiguity, so the inclusiveness of the Union's case remains. That means that the Union's burden of proof has not been met.
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 did not improperly deny vacation accruals to employees on disability leave.

Eric J./Schmertz, Impartial Chairman

DATED: November 19, 1999
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.
The stipulated issue is:
Was there just cause for the discharge
of ETTA DANIELS? If not, what shall
be the remedy?

A hearing was held on June 10, 1999 at which time Ms. Daniels, 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, a school van driver, was discharged for leaving a kindergarten student unattended on the van at the end of her run on April 29, 1999.

The determinative facts in this case are substantively the same as in the case of Frank Benedetto. Accordingly, my Award and Opinion in the Benedetto case is controlling precedent for the instant matter.
As in Benedetto, the grievant was negligent in not noticing the child’s presence in the van and by not taking the required steps, pursuant to an explicit Company rule, to check on the presence of each child. As in Benedetto, the grievant, who had only 18 children on her van and who knew each one of them because she had driven this school assignment for some time, failed to identify the presence of each child by observation as she called the roll; negligently and improperly relied on the word of another five-year-old student that Kayla Toni (the child left unattended) had gone home with her father, and wrongfully, based on that misinformation, failed to make the stop at which Kayla regularly left the bus. And at the end of her run, upon taking the van home, she again failed to check the van for a sleeping child and to place the required sign that she had done so at the back of the van.

Only when the dispatcher called the grievant at home to report that Kayla’s parents reported her missing did the grievant check the van and find the child.

For the foregoing negligent acts; for a clear violation of an explicit and well-publicized rule regarding the procedure to follow to ensure that no child is left on a bus or van; and because, again, explicitly and properly a violation of that rule is a dischargeable offense, the discharge upheld in the Benedetto case is equally appropriate and compelling in this case. Indeed, the “fiduciary” duty and responsibility of the Company and its
school bus (and van) drivers to transport school children safely, as expressed by me in the Benedetto case are equally applicable here and reiterated.

Accordingly, the Company had just cause to discharge the grievant and her dismissal is upheld.

However, the Impartial Chairman wishes to make a recommendation which is without prejudice to the validity and continued enforceability of the Company's rule, without precedent for any future matters and for the Company to consider in its sole discretion. Because of the grievant's twenty years of service with the Company, her expressed apologies for the incident involved in this case, and because she forthwith returned Kayla unharmed to her family, I recommend that the grievant be re-employed by the Company without back pay, beginning with next year's school year, driving a school van or bus on a different route (or for a different school district) on a "last chance basis."

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 ETTA DANIELS was for just case.

Eric J. Schmertz, Impartial Chairman
DATED: July 1, 1999

STATE OF NEW YORK  
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.