In the Matter of the Arbitration between

Utility Workers Union of America, AFL-CIO, Brotherhood of Utility Workers Council, Local Unions Nos. 310, 317, 322, 329 and 330

and

Massachusetts Electric Company and Narragansett Electric Company

The Undersigned Arbitrators, having been designated in accordance with the Arbitration Agreements entered into by the above-named Parties, and dated May 12, 1999, and having duly heard the proofs and allegations of the Parties, Award as follows:

The Companies did not violate the Agreements dated May 12, 1999 by not paying line crews assigned to provide emergency storm assistance to Niagra Mohawk Company during the ice storm of February, 2002, the prevailing rates of pay of the Niagra Mohawk line employees.

Eric J. Schmertz
Chairman of Board of Arbitration

Thomas M. Hession
Company Member of Board of Arbitration
Concurring

George P. Fogarty
Union Member of Board of Arbitration
Dissenting

Dated: September 18, 2002
State of New York
County of New York

On this 18th day of September, 2002, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

PATRICIA A. SIMMONS
Notary Public, State of New York
No. 31-4953942
Qualified in New York County
Commission Expires July 31, 2005

Notary Public
My Commission expires: 7-31-05
Dated: September 5, 2002
State of MASS
County MIDDLESEX

On this 5th day of September, 2002, before me personally came and appeared Thomas M. Hession to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

ALDO BARRESI
Notary Public
Commonwealth of Massachusetts
My Commission Expires November 14, 2008

[Signature]
Notary Public
My Commission expires: 11/14/08

Dated: September 4, 2002
State of Massachusetts
County WORCESTER

On this 4th day of September, 2002, before me personally came and appeared George P. Fogarty to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

[Signature]
Notary Public
My Commission expires: 2-3-2006
September 12, 2002

Eric J. Schmertz, Esq.
c/o Dweck Law Firm
230 Park Avenue, Suite 416
New York, NY 10169

Re: National Grid companies and
BUW Council/UWUA, AFL-CIO, Locals 310, 317, 322, 329 and 330
Storm Assignment Payments (NY storm assignments)

Dear Mr. Schmertz:

Enclosed are three signed awards from the above-referenced arbitration. Once you have signed these copies, would you please return Tom Hession’s copy to my attention, one copy to George Fogarty and keep the remaining copy for your files.

Sincerely,

Raymond L. Reyes
Director of Labor Relations

Enc.
In the Matter of the Arbitration between
Utility Workers Union of America, AFL-CIO,
Brotherhood of Utility Workers Council, Local
Unions Nos. 310, 317, 322, 329 and 330
and
Massachusetts Electric Company and
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assistance to Niagra Mohawk Company during the ice storm of
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line employees.

Dated: September, 2002
State of New York
County of New York

On this day of September, 2002, before me personally came and appeared Eric J. Schmertz to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public
My Commission expires: 
On this 5th day of September, 2002, before me personally came and appeared Thomas M. Hession to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

ALDO BARRESI
Notary Public
Commonwealth of Massachusetts
My Commission Expires
November 14, 2008

On this 4th day of September, 2002, before me personally came and appeared George P. Fogarty to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

SallyAnn Tracy
Notary Public
My Commission expires: 2-3-2006
IN THE MATTER OF THE ARBITRATION
between
LOCAL 169, UNION OF NEEDLE TRADES, INDUSTRIAL AND TEXTILE EMPLOYEES AFL-CIO
-and-
Pearl Paint Company Inc.

The issue in dispute between the above-named Union and Company involves the application and interpretation of Section 14.3 of the collective bargaining agreement. That Section reads:

14.3 Upon the execution of this Agreement, all employees who have completed their probationary period shall receive a wage increase of at least fifty ($0.50) cents per hour or a minimum wage rate of $8.50, whichever is greater. All employees whose annual review or new hire-00 day review should have occurred between November 29, 2001 and the date of execution of this Agreement and who did not receive an increase during such period shall receive the increase provided for herein retroactive to the date that such employee should have received an increase.

By mutual agreement, no hearing was held, but the parties submitted their respective cases to me by briefs, affidavits, and exhibits.
It is undisputed that prior to unionization, the Company’s practice was to conduct wage reviews for its employees on the 90th day after hire of new employees and on the anniversary dates of hire for others. Based on those reviews, the Company decided if wage increases would be granted.

The Union began an organizational campaign in August 2001; filed a petition seeking certification with the NLRB on October 29, 2001; and following a NLRB election on November 29, 2001 was certified as the bargaining agent of the unit employees. The parties commenced collective bargaining negotiations on April 1, 2002 and reached agreement on a contract effective June 2, 2002. Section 14.3, as recited above was included in that contract.

It is universally well settled that the arbitrator is bound by the contract. And if the relevant contract term is clear and unambiguous, it pre-empts assertions of equity or fairness that may be contrary.

I conclude that that is what is present in this case. The Union’s case is based on equity and fairness and the Company’s on the contract language.

Between the NLRB ordered election and the conclusion of negotiations, the periodic wage reviews were “frozen” and no wage increases were granted. Therefore, new hires who had completed their 90th day and others who reached the anniversaries of their hires,
were not reviewed and not granted wage increases. Apparently several employees fell into that category.

It is the Union’s assertion that had the Union not engaged in a successful organizational language, all those employees would have been reviewed and granted wage increases. And not to do so under Section 14.3 of the contract is unfair, inequitable and violative of that Section’s intent. The Union interprets Section 14.3, and particularly the part that refers to reviews that “should have occurred...” as applying to those employees who were denied reviews and wage increases during the “freeze” of wage reviews, including those whose regular reviews would have preceded November 29, 2001.

As equitable as the Union’s interpretations may be, with the arguable “unfairness” to those employees caught the freeze before November 29th, I do not find Section 14.3 susceptible to the Union’s interpretation.

First, I must conclude that Section 14.3 is clear and unambiguous. It specifically specifies a time period or “cut-off” period for the granting of wage increases. Clearly, it replaces the Company’s prior unilateral practice with a negotiated, collective bargained wage provision.
A reading of Section 14.3 compels only one interpretation. Applicable to this case, it provides for wage increases in lieu of the old wage reviews for employees:

"Whose annual review or new hire-90 day review should have occurred between, November 29, 2001 and the date of the execution of the Agreement..." (emphasis added)

Clearly the parties picked and negotiated a specific date and specific period to apply to those who did not get reviews, namely the period beginning November 29, 2001 and ending with the contract execution. The Union’s interpretation of “review(s) (that) should have occurred...” fails to account for the rest of that sentence which sets a start date of November 29, 2001. A full reading of that initial sentence precludes any application to those employees who did not get reviews prior to November 29, 2001, even if but for the “freeze,” they would have been scheduled for such reviews.

If Section 14.3 produced inequitable or unfair consequences for some employees who may have been passed over for wage increase considerations while others whose review dates fell after November 29th received increases, it is a reflection of the bargain reached by the parties in negotiations, and it is to that bargain that the arbitrator is bound.
No matter why the parties picked November 29th as the start date, in my view they knew or should have known that some employees fell into a group that would have been reviewed prior to November 29th. Yet, for reasons known or best known to the negotiators, November 29th was agreed to. Clearly they could have included a date or language which would have covered those scheduled for reviews earlier. But they did not. The arbitrator cannot make a clear contract provision more retroactive than did the parties themselves.

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

The Company did not violate Section 14.3 of the collective bargaining agreement by not granting retroactive wage increases to those employees whose wage reviews would have occurred prior to November 29, 2001.

Eric J. Schmertz, Arbitrator

DATED: October 4, 2002

STATE OF NEW YORK  )
COUNTY OF NEW YORK  )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The parties were not able to stipulate a jointly agreed to issue.

The Union stated the issue as:

Did the District violate its agreements with the Union when it penalized employees for a negotiated productivity gain (15 minutes/180 work days) by reducing overtime rates of pay throughout the 260 days work year. If so, what shall be the remedy?

The District sees the issue as:

Did the District violate the collective bargaining agreement by calculating unit employees' regular rate of pay by dividing twelve-month employees' daily rate of pay by seven point seven five and attendance aides' daily rate of pay by seven point two five in lieu of seven point five and seven respectively. If so, what shall be the remedy?

A hearing was held on September 19, 2002 at the District offices, at which time representatives of the above-named Union and District appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine
and cross-examine witnesses. A stenographic record was taken. The Arbitrator’s Oath was waived. The parties filed post-hearing briefs.

It is clear to me that the dispute involves the methodology of calculating the hourly rate of pay for over-time work.

And it is further clear to me that the issue is narrowed to the meaning and intent of the proposal of mediator Karen R. Kenney regarding a 15 minute extension of the regular work day as the quid pro quo for an annualized salary increase for regular work time.

The authority of an Arbitrator is limited to interpreting and applying terms of a collective bargaining agreement that the parties have negotiated when the interpretation or application is in dispute.

The Arbitrator’s authority does not extend to the legislation of terms of conditions which have been omitted from the contract because there was no bargaining on such conditions of employment or where, because of a “mutual mistake” there was no meeting of the minds. Indeed the arbitration clause of this contract expressly so limits the Arbitrator.

Here, in my view, the dispute is not over contract language or terms negotiated by the parties, but rather over a
mediator’s proposal which the parties accepted and incorporated in and as part of their contract by the Memorandum of Agreement of October 1, 2001, subject to the preparation of a formal agreement which was not completed because of their dispute.

More specifically, the question is whether the mediators’ proposal that:

“Effective January 1, 2002 unit employees will have their work day extended by fifteen (15) minutes on days in which teachers are in attendance;”

had an effect on and was intended to apply to overtime work.

The Union contends that the mediator’s proposal was, as it states, limited to the regular work day and though it called for 15 additional minutes of work for the otherwise regular salary (including a wage increase) it did not change the calculation of an hourly rate for overtime work. In short, the Union asserts that the formula for the hourly overtime rate should not include the extra 15 minutes of the regular work day. For to do so is to reduce the overtime hourly rate and reduce the unit employees overtime pay accordingly.

The District interprets the mediator’s proposal differently. It contends that is has not changed the mathematical formula for calculating an hourly rate for overtime. Rather, it asserts that it has continued to use the same mathematical formula, namely to divide the regular pay by the hours regularly worked, but including the extra 15 minutes,
in calculating an hourly rate of pay. And then, as before, used that hourly rate for overtime pay. It argues that the mediator's proposal for a 15 minute extension of the regular work day, as a productivity gain for a wage increase, makes compellingly logical that the hourly rate of pay for regular work would be adjusted downward and that accordingly the application of that adjusted hourly rate is properly applicable to payment for overtime work.

The record before me indicates that with the acceptance by the parties of various proposals by the mediator including inter alia the foregoing regular work day extension and certain specified wage increases, the parties did not bargain on, discuss or apparently even consider the effect or non-effect of the regular work day extension on the hourly overtime rate. And the contract contains no provision on how the overtime rates are to be fixed.

That being so, I conclude that the instant dispute not only does not involve the application or interpretation of contract terms negotiated by the parties, but is not as yet a justiciable issue. Yet, as a "wage" matter it is mandatory subject of collective bargaining.

As I see it, either position advanced respectively by the Union and the District is plausible and supportable. It is quite possible that the mediator intended to extend the regular work day by 15 minutes, but did not intend to extend that
productivity factor to the calculation of the over-time rate, or put another way, the over-time calculation was to remain as before, without the inclusion of the extra 15 minutes in the calculation. There is logic to this view inasmuch as the hourly rate of pay for the regular work day is not operational but rather theoretical because regular pay rates are based on annual salaries set forth in Appendix A of the contract.

But it is also, possible, in support of the District's position, that the consistent past practice of calculating the over-time hourly rate by using the length of the regular work day divided into weekly salary must perforce now include the extended regular work day by 15 minutes. That, asserts the District is a continuation of the unvaried past practice of fixing an hourly rate for overtime. And that as a "productivity gain" for a wage increase to disregard the extra 15 minutes in fixing the hourly rate for overtime would be to deprive the District of some of that "gain" and not give it full credit for the wage increase.

In my view and in the absence of specific contract language, to pick either position would not be to apply or interpret the contract but rather to legislate what I thought the mediator meant and intended. What is needed here in my judgment is a clarification by the mediator of whether her proposals on the work day and wages had an effect on the calculation of the over-time hourly rate. And failing any such clarification one
way or the other, the issue does not become a justiciable dispute until the parties have unsuccessfully bargained on it, or have first attempted to achieve a "meeting of the minds."

Nor am I persuaded that this matter is otherwise determined by the preamble of the contract which inter alia provides:

"All terms and conditions of employment not covered by this agreement shall continue to be subject to the District's direction and control and shall not be the subject of negotiation until the commencement of negotiation for a successor agreement..."

The instant dispute centers, in part at least, not on a term and condition not covered by the agreement, but rather on a disagreement on what term and condition not covered by the contract obtains in making that calculation. Put another way, either the District's view or the Union's view, albeit materially different, may be the term and condition not covered by the contract. A determination of which is first needed for invocation of the preamble. Also, as the dispute arose out of the negotiations for the successor contract, and as that dispute has precluded the finalization of the critical language of the successor contract, an exception to the District's managerial authority is present.

What is needed for a correct interpretation of the meaning and intent of the mediator's work day and wage proposals is a clarification by mediator Karen R. Kenney. Only she, not
Arbitrator can tell what was meant, and whether her proposals relate to calculating overtime hourly rates. Indeed, applying the “best evidence” rule, a classification by the mediator is the “best evidence” and certainly better than a legislated answer by the Arbitrator. My Award shall direct the parties to seek a clarification and shall provide a subsequent method for resolution of the dispute if necessary.

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 parties shall jointly seek a clarification from mediator Karen R. Kenney regarding the meaning and intent of her proposals on the length of the work day and wages on the calculation of the hourly rate of pay for overtime work by unit employees.

A clarification by Ms. Kenney that is responsive to the dispute shall be final and binding. If Ms. Kenney declines to provide a clarification or if her clarification does not resolve the dispute one way or another, the parties are directed to negotiate on the matter, having apparently not done so in their bargaining or in the mediation process. If they fail to agree then it becomes a justiciable issue.
Having selected arbitration for the instant case, they shall use the arbitration forum for resolution in that event.

Eric J. Schmertz, Arbitrator

DATED: December 11, 2002

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

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

Did the Company have proper cause for the discharge of RAYMOND ACCARDO? If so, what shall be the remedy?

Hearings were held in Hartford, Connecticut on December 27, 2001 and February 1, 2002 at which time Mr. Accords, 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. Each side filed a post-hearing brief.

The grievant, a meat cutter with about seven years of service was discharged for violating the following position of the Associate Purchase Policy:

"You may purchase reduced merchandise only after it has been put on display for our customers. Reduced merchandise may not be set aside for purchase later in the workday."
Violation of this guideline may result in immediate termination of employment."

The Union does not challenge the Employer's right to promulgate that Policy nor its general purpose. Rather, it asserts that the grievant did not violate it, either in letter or in spirit. And that in any event, discharge is also without cause because the grievant did not improperly benefit from the transaction nor did the Company suffer any monetary loss.

As to the facts, the grievant took possession of a basket of cheese which had been reduced in price to $1 an item and destined for sale in a specific display location for products so reduced in price. Such display, for sale to the general public, is the customary and prescribed procedure prior to the point when the product would go “out of code” and be required to be discarded.

The evidence is clear and undisputed that the grievant took possession of the basket of cheese before it was placed in the particular sale location for reduced sale to the public.

It is disputed how and exactly when he took possession, but in any event it was before it would have been physically available to and offered to the general public.

It is undisputed that the grievant properly knew that the cheese was to be reduced in price (or potentially so reduced) and told the assistant deli manager Christy Sorrentino to
the effect that "if it was reduced in price, he'd take it off her hands." He is not charged with any participation in or improper complicity in the decision to reduce the price.

The Employer claims that the grievant took possession of the cheese by retrieving it from the back room of the deli department when it was located on a counter top. (Though the Employer reasons that it was "being held" for him there, that particular charge was not advanced on an evidentiary basis against the grievant in this case).

The grievant and the Union on his behalf assert that the grievant got the basket of cheese in a "hand-off" from Sorrentino in the corridor leading out of the deli location, as she was on her way to place it in the floor display area for reduced sale to the public.

On this fact, the Union argues that the intent and provisions of the Policy had been met -- namely that the product had been reduced in price by Sorrentino and effectively or at least constructively available for reduced sale. And, as it was "on its way" to the reduced display area, the grievant had the right to buy it, as a legitimate customer. The Union argues that it is immaterial that the product did not actually arrive at the special sales location, and that as long as the grievant paid the reduced price, he was not benefited, the Employer received
monetarily what it would have received at and from the sale display location and that the grievant's discharge is based on a overly technical distinction of no substantive value.

Indeed, in support of this argument the Union hypothesizes that had the grievant followed Sorrentino to the sale location, he could have properly taken the product immediately upon its placement therein, paid for it at the register and no violation whatsoever would have been charged.

The Union sees no difference, or at least no disciplinary distinction between what it claims happened and the latter scenario.¹

Provided the Employer's Policy is reasonable, adequately job related and even handedly administered, I find that the Policy is enforceable specifically. And if so, the different versions of how the grievant got the product would be immaterial. For the uncontested fact is that it never got to the reduced sale location for display and thereby never made available or effectively offered to the public for reduced sale.

Either way, the grievant took possession before the public had a chance to know it was on sale and to buy it. That being so, I reject the Union's contention that the grievant had acquired "public" or "customer" status. And it is not material

¹As this hypothetical is not factually before me, I make no determination on that circumstance.
if, as the grievant claims, he was "off the clock" then. In short, his "interception" of the normal and prescribed transfer of the cheese from the deli department to the floor display counter was not only premature but frustrated the Employer's policy to offer the product first to the general public.

Whether any such "interception" should be a disciplinary offense turns on the reasonableness and propriety of the Policy and its implementation.

I find the Associate Purchase Policy to be reasonable and properly job related. The Employer is a supermarket. Its mission is to make available and sell food products (and other items) to the general public. Obviously, except as set forth procedurally in other sections of the Policy, there is no priority of the right to buy between the public and employees at regular prices. But, for goods near the point of "going out of code" and to be sold at a reduced price, the general buying public enjoys, specifically under the Policy, a first offer priority over employees. I cannot find this priority to be unreasonable. If the Employer wishes to give preference to the general customers, that is a managerial prerogative consistent with its public business and the Union has no present contractual right to challenge that priority or its wisdom. Nor therefore are the matters of non-financial benefit to the employee or non-
financial loss to the Employer exceptions to enforcement of the Policy.

Also, though there is no such charge in this case, the Policy has the legitimate objective of preventing employees from "rigging" price reductions and setting the product aside for the purpose of buying it at the reduced price, before any offer can be made to the general public. Thereby effectuating a definite and improper benefit for the employer(s) involved, at the expense of denying the general public the opportunity to buy at the reduced price.²

For these adequate reasons, the Policy is strictly enforceable, requires full application, and may not be "short-circuited." The Union's argument of "compliance" with the spirit and purpose of the Policy falters on this point, because the grievant got possession of the cheese short of full application and implementation of the Policy.

The remaining question is whether discharge is the penalty that should have been imposed in this case, or whether contractually, progressive discipline of a lesser penalty is first required.

I reject the Union's argument that progressive discipline is required before summary dismissal. Specific contrast provisions or Policy statements preempt general

²The Employer submitted evidence of some practices and cases of this type of abuse.
language. Here the penalty of "termination" is specified as a penalty for violations of the Policy. That specific condition trumps the general statement that the Employer utilize "progressive discipline." It means, of course that for this violation of the Policy the Employer may utilize progressive discipline but is not required to do so. Rather, it may also, at its discretion, impose termination for the first offense. That too, for the reasons stated, cannot be judged unreasonable, nor may the Arbitrator or the Union substitute their judgements otherwise.

However, it is universally well settled that employees similarly situated, who commit similar or related offenses, must be penalized even handedly, if not equally. Here, it is apparent that the Employer determined that Sorrentino also violated the Policy, by playing some role in the arrangement that permitted the grievant to get the basket of cheese. I need not determine precisely her role because she was disciplined for what she did, and that discipline, a one-day suspension, is unrebutted evidence of her misconduct in the transaction for which the grievant was discharged. (So far as this record is concerned, that penalty and its relation to the transaction has not been challenged or overturned).
To my mind, for the grievant to be discharged for violation of the Policy and for Sorrentino to be suspended one day for violating the Policy is too wide a discrepancy and too disparate to meet the test of evenhandedness. If, the grievant was more culpable than Sorrentino, then in my view evenhandedness requires a penalty proportionate to their respective roles. Especially so when both violated the Policy and "termination" is a specifically mandated penalty.

On that basis, the grievant’s discharge is too severe a penalty when juxtaposed against Sorrentino’s one-day suspension. Particularly so also when there is no charge against the grievant of "rigging the price" or "reserving the product."

The Employer cites a line of arbitration cases in which discharge was uniformly upheld for violations of the Policy, including cases where the product was of minimum or even insignificant value. But for the disparate penalties in this case between the grievant and Sorrentino, a fact not present in the cases cited, I might well have accepted those decisions as persuasive precedent. But this case, I find, is distinguishable from those cited.

For this particular reason, I shall set aside the grievant’s discharge and shall direct his reinstatement.
The parties have stipulated that with that determination I am not to yet determine what other penalty or remedy should be applied to the grievant. So I shall leave the question of penalty/remedy to the parties to negotiate. At the request of the parties I shall retain jurisdiction to decide remedy/penalty if the parties fail to reach agreement.

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

The discharge of RAYMOND ACCARDO is reversed. He shall be reinstated.

The parties shall negotiate the remedy/penalty to be applied to ACCARDO.

The Arbitrator shall retain jurisdiction to make these determinations if the parties are unable to do so.

Eric J. Schmertz, Arbitrator

DATED: March 29, 2002

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

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

between

LOCAL 100, TRANSPORT WORKERS UNION
OF AMERICA

-and-

WHITE PLAINS BUS CO. INC.

The stipulated issue is:

Was there just cause for the discharges of CHARLENE PHILLIP and LUCILLE CARVER? If not, what shall be the remedy?

A hearing was held on June 17, 2002, at the offices of the Company at which time Mrs. Phillip and Mrs. Carver, hereinafter referred to as the "grievants" appeared, together with representatives of the above-named Union and Company.

All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The Arbitrator's Oath was waived.

Mrs. Phillip is a driver of a van. Mrs. Carver is the monitor on that van. They have worked together on the same van or assignment for about a year.
On the day of the incident leading to their discharge they were transporting a small group of pre-school children to a pre-school program at the Greenburgh District #7 School. They left a three-year-old boy on the van when the other children were dropped off. They then parked the van in the School parking lot and left it unattended. The three-year-old boy was left in the van but discovered after about 15 minutes by other Company employees at that location. He was then transported directly to the pre-school program location.

It is clear and expressly stated in Company policy, known I am persuaded by the grievants, that both the driver and the monitor are responsible for the safe and proper transport of children in their care, and that both knew or should have known of the Company's well-publicized and absolute policy requiring a careful check of buses and vans to ensure that no child is left unattended. And that the policy is and has been enforced by penalty of discharge rigidly and without exception, even as with the grievants, when an employee's prior record is unblemished.

The grievants do not dispute the fact that they left the three-year-old boy on the van when they left it parked in the School's parking lot. Phillip erroneously thought that Carver, as the monitor, had checked all seats and believed that all the children had been properly
disembarked at the School. Also, erroneous was their agreed to procedure to leave the checking of the children to Carver, while Phillip watched out for traffic. The Company policy, unquestionably gives responsibility to both. So in that respect Phillip was derelict. Of course, the child was not purposefully left on the van. But I conclude that Carver checked inadequately, if not negligently and Phillip failed to do so at all. So both grievants are equally culpable and responsible.

In prior decisions I have upheld as proper, the Company's absolute policy to discharge employees who, regardless of reason and explanation, leave children on a bus/van unattended. I held in the FRANK BENEDETTO and ETTA DANIELS cases that a failure to follow the Company's explicit and clearly relevant policy was a breach of the employees' "fiduciary" duty of care for the children they transport.

Substantively, I find no significant difference in the seriousness of the instant offense from the failures of Benedetto and Daniels. In all three cases a young child (here the youngest at three years of age) was left precariously unattended. The potential for the most serious consequences and damages were present in each case.
Accordingly, I have no choice but to follow my prior decisions and uphold the absolute application of the Company’s policy, as properly promulgated and wholly relevant, indeed essential to the Company’s mission and business.

Similarly, as with Daniels specifically and Benedetto by observation, I make the same recommendation in the instant case. The mitigating circumstances with the grievants are significantly similar to those with Benedetto and Daniels. Both grievants are remorseful about what happened and apologize. Both make no excuses for their lapse in attention. Both concede the facts and both have had unblemished prior records. Indeed the Company unhesitatingly characterizes them as otherwise good employees.

Therefore, with the Company’s policy sustained and the discharges upheld, I recommend that the Company give the grievants a “last chance.” I recommend they be restored to duty without back pay, and assigned to driver and monitor work if and as it becomes available in areas and at school districts apart and different from Greensburgh District #7.¹

¹ They cannot be restored to Greenburgh under any circumstance because that District has “decertified” them.
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:

There was just cause for the discharges of CHARLENE PHILLIP and LUCILLE CARVER.

[Signature]
Eric J. Schmertz
Impartial Chairman

DATED: June 24, 2002

STATE OF NEW YORK  )
ss:                              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.

[Signature]
The stipulated issue is:

Was there just cause for the discharges of CHARLENE PHILLIP and LUCILLE CARVER? If not, what shall be the remedy?

A hearing was held on June 17, 2002, at the offices of the Company at which time Mrs. Phillip and Mrs. Carver, hereinafter referred to as the "grievants" appeared, together with representatives of the above-named Union and Company.

All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

Mrs. Phillip is a driver of a van. Mrs. Carver is the monitor on that van. They have worked together on the same van or assignment for about a year.
On the day of the incident leading to their discharge they were transporting a small group of pre-school children to a pre-school program at the Greenburgh District #7 School. They left a three-year-old boy on the van when the other children were dropped off. They then parked the van in the School parking lot and left it unattended. The three-year-old boy was left in the van but discovered after about 15 minutes by other Company employees at that location. He was then transported directly to the pre-school program location.

It is clear and expressly stated in Company policy, known I am persuaded by the grievants, that both the driver and the monitor are responsible for the safe and proper transport of children in their care, and that both knew or should have known of the Company’s well-publicized and absolute policy requiring a careful check of buses and vans to ensure that no child is left unattended. And that the policy is and has been enforced by penalty of discharge rigidly and without exception, even as with the grievants, when an employee’s prior record is unblemished.

The grievants do not dispute the fact that they left the three-year-old boy on the van when they left it parked in the School’s parking lot. Phillip erroneously thought that Carver, as the monitor, had checked all seats and believed that all the children had been properly
disembarked at the School. Also, erroneous was their agreed to procedure to leave the checking of the children to Carver, while Phillip watched out for traffic. The Company policy, unquestionably gives responsibility to both. So in that respect Phillip was derelict. Of course, the child was not purposefully left on the van. But I conclude that Carver checked inadequately, if not negligently and Phillip failed to do so at all. So both grievants are equally culpable and responsible.

In prior decisions I have upheld as proper, the Company's absolute policy to discharge employees who, regardless of reason and explanation, leave children on a bus/van unattended. I held in the FRANK BENEDETTO and ETTA DANIELS cases that a failure to follow the Company's explicit and clearly relevant policy was a breach of the employees' "fiduciary" duty of care for the children they transport.

Substantively, I find no significant difference in the seriousness of the instant offense from the failures of Benedetto and Daniels. In all three cases a young child (here the youngest at three years of age) was left precariously unattended. The potential for the most serious consequences and damages were present in each case.
Accordingly, I have no choice but to follow my prior decisions and uphold the absolute application of the Company's policy, as properly promulgated and wholly relevant, indeed essential to the Company's mission and business.

Similarly, as with Daniels specifically and Benedetto by observation, I make the same recommendation in the instant case. The mitigating circumstances with the grievants are significantly similar to those with Benedetto and Daniels. Both grievants are remorseful about what happened and apologize. Both make no excuses for their lapse in attention. Both concede the facts and both have had unblemished prior records. Indeed the Company unhesitatingly characterizes them as otherwise good employees.

Therefore, with the Company's policy sustained and the discharges upheld, I recommend that the Company give the grievants a "last chance." I recommend they be restored to duty without back pay, and assigned to driver and monitor work if and as it becomes available in areas and at school districts apart and different from Greensburgh District #7.¹

¹ They cannot be restored to Greenburgh under any circumstance because that District has "decertified" them.
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:

There was just cause for the discharges of CHARLENE PHILLIP and LUCILLE CARVER.

Eric J. Schmertz
Impartial Chairman

DATED: June 24, 2002

STATE OF NEW YORK )
COUNTY OF NEW YORK )

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

between

LOCAL 100, TRANSPORT WORKERS UNION
OF AMERICA

-and-

WHITE PLAINS BUS CO. INC.

The stipulated issue is:

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

A hearing was held on August 21, 2002, at the offices of the Company at which time Ms. Medina 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 facts in this case are sufficiently similar to those of the prior cases of Charlene Phillip, Lucille Carver, Frank Benedetto and Etta Daniels to compel a similar decision and similar recommendation.

Ms. Medina, hereinafter referred to as the “grievant” admits that she failed to check her bus at the end of her morning
run on Friday, June 14, 2002 and consequently left a sleeping child on the bus in the Company’s parking lot. The child, unattended got off the bus, went into the dispatch office and was there found and identified and delivered to his school.

With that admission of a manifest violation of an unequivocal and well-noticed Company rule that driver’s must check their buses for sleeping children and following having done so, post at the rear of the bus a sign attending to that examination, the burden shift to, the grievant and the Union on her behalf to advance any circumstances which would mitigate the established policy of the penalty of discharge for the offense.

The grievant has not met that burden. She asserts that she was ill, suffering from a headache and hence neglected to make the required check of her bus. She admits that she has a second job elsewhere (housecleaning) following her morning run, but did not go to it that day because she felt too ill.

The Company disputes her explanation. It asserts that upon her interview and during the grievance Hearing Deposition, she never claimed that she was ill, but rather stated that she left the bus hurriedly because she was late for her second job.

The aforesaid different versions are at least offsetting and hence not probatively established by the grievant. Indeed,
she claims that she worked a later run that day as well as Monday and Tuesday of the following week, before being taken out of service on Tuesday.

The Company disputes this as well, asserting that she was taken out of service forthwith on Friday, June 14th, the day of the violation.

Again, with the burden of explanation shifted to the grievant, the claim that she worked subsequently was not probatively established, and moreover that claim at least as to a later run on Friday, is obviously inconsistent with her claim of illness. That she did not have a monitor on her bus did not relieve her of the duty to check for sleeping children. So, that explanation must be rejected.

Therefore for all the reasons set forth in my prior decisions, previously cited, and because of the enforceability of the Company’s unconditional rule and its fiduciary duty to the children it transports in support of the propriety of that rule, I have no choice but to rule in this case what I have ruled previously — namely to uphold the grievant’s discharge.

However, some different mitigating circumstances, comparable to those recited in the earlier cases, are present in this case too.
The grievant's prior work record is not seriously blemished to disqualify her from a recommendation that she be re-employed, but at a different school district than White Plains (where she has been decertified). Also, significantly, as in prior matters, the grievant is remorseful and genuinely sorry for her negligence. I am satisfied that she was and remains mindful and properly concerned about the dangers inherent in what happened in this case, and I believe that if re-employed she will diligently follow the prescribed rules rigidly and without exception.

Accordingly, without prejudice to the validity and continued enforceability of the Company's rule, and without precedent for any future matters, it is recommended that the Company consider, in its sole discretion, to re-employ the grievant without back pay in a school district in which she is not decertified.

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 MARIANITA MEDINA was for just cause.

Eric J. Schmertz
Impartial Chairman

DATED: September 3, 2002

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.
There are two issues in dispute. The above-named parties stipulated the wording of the first issue, but could not agree on a wording of the second.

The first stipulated issue is:

Whether the Company violated the collective bargaining agreement by unilaterally changing pay hours posted for the UCP/YAI pick? If so what shall be the remedy?

The second issue is the Union's grievance that the Company violated the collective bargaining agreement by denying UCP/YAI drivers the opportunity to bid on mid-day school bus runs.

A hearing was held on August 29, 2002, at the Marriott Courtyard in Tarrytown, New York at which time representatives of the Union and Company appeared together with the employees involved in the two grievances.
The UCP/YAI runs are confined to passengers who are disabled. Wheel chairs and other mechanical equipment are utilized by many of the passengers. They are taken to and from activities sponsored by organizations handling developmental disabilities (Cerebral Palsy and Young Adults Institute). For obvious reasons, the buses have a compliment of monitors to assist with the passengers.

The Company's contract to transport UCP/YAI passengers began about three years ago. The schedule of runs was posted by the Company with start and finishing hours, both for morning runs and afternoon runs. The drivers were paid the contractual hourly rate times the number of posted hours. Depending on those prescribed hours, the drivers were paid for a low of 30 hours to a high of 40 hours.

Recently the Company re-assessed the hours accorded the UCP/YAI runs, because it concluded, upon observations, that many of those buses were returning early, having completed their assignments in less time than was allotted. But the drivers were paid for the full-time allotment.
Consequently, the Company recently announced a reduction of the allotted times, thereby reducing the hours for which the drivers were to be paid.\(^1\)

The effect of the new schedules would be to reduce the paid hours of the drivers from a low of 28.75 to a high of 37.50. By example, the Union points out that Route 9 was cut from 30 to 27.50 hours; Route 11 from 47.5 to 33.75 hours; and Route 7 from 36.25 to 28.75 hours. And the pay of the drivers would be reduced accordingly.

The Union asserts that such a unilateral act by the Company would be a breach of Section 32 of the contract which reads:

**Rights and Benefits**

The Employer agrees that all rights, benefits, privileges and condition enjoyed by their employees prior to the effective date of this Agreement and not covered by this Agreement, shall be extended throughout the terms of this Agreement.

The Union contends that the originally posted hours were and are a "benefit, and right" within the meaning of the foregoing.

\(^1\) The parties have agreed that the new hours would not be implemented pending the Award in this case.
The Company asserts that Section 32 is inapplicable because, as a change in hours subsequent to the effective date of the contract, those hours do not qualify as "conditions enjoyed...prior to the effective date of the Agreement" (emphasis added).

The Company's principal defense is that its action, based on an accurate re-assessment and calculation of the number of hours required to complete the assignments, is a managerial right under Section 29 of the contract. Specifically, the Company's:

"...sole jurisdiction over the management and operation of its business..." and its "...right to maintain efficiency..."

It points out that the new, reduced pay hours are for the new regularly scheduled assignments, but if the drivers must work additional time to complete those assignments (because, for example, traffic, difficulties loading and unloading, tardy passengers etc.) they will be paid for the extra time.

In short, argues the Company, its contractual obligation is to pay drivers only for time actually worked, and that the new schedules meet that requirement.
With regard to issue #1, I conclude that neither Section 32 nor Section 29 are dispositive. I do not conclude that the old schedule of hours is a "benefit or right or privilege" that is "not covered by the Agreement." Rather, I find it to be an integral, albeit implicit part of the hourly pay schedule of Section 5 of the contract, and so known to both sides.

And for that reason, Section 29 (Management Rights) is not applicable because the rights thereunder are not unrestricted but rather "subject to the provisions of this Agreement."

I accept the Company's assertion that the Union asked for a separate pick for the UCP/YAI runs. And that in making that pick, a driver accepted a 52-week schedule as compared to a 40-week schedule for drivers of school buses. But I do not find, and the Company does not allege, that those negotiations for a separate pick included any bilateral negotiation of a reduction in the number of posted hours for the UCP/YAI runs. Indeed, I conclude that though the Union sought a separate pick, it believed and had reason to believe that the hourly rates of pay for bus drivers under Section 5 would not only continue but would continue to be applicable for the hours of the UCP/YAI runs as then posted. Certainly it did not agree otherwise.
Had the Union then been told of a reassessment of the time required for those runs and that reductions were contemplated it would have been put on notice of the impact on wages. As wage rates are a mandatory subject of collective bargaining, the Union would have had the lawful right to seek compensatory adjustment in the hourly rate or to demand negotiations on that matter. This is not to say that if such negotiations took place the Union was entitled to an upward rate adjustment but rather it was contractually and lawfully entitled to seek it. But, a unilateral reduction in the scheduled hours when the wage rates were negotiated as applicable to the original hours posted, constitutes at least a constructive change and/or diminution in the wages of the affected drivers and hence is violative of Section 5.

Put another way, I see a breach in the prescribed wage rates and probably a breach of the a duty to negotiate on the mandatory subject of wages, when a unilateral change in posted hours upon which those rates were expected contractually to apply, caused a unilateral reduction in pay.

Accordingly, the Company is enjoined from installing the new hourly schedule for UCP/YAI drivers, and is directed to
restore the original posted hourly schedule. Of course, the parties are always free to negotiate changes bilaterally.

As to the 2nd grievance, despite the negotiation of a separate pick for UCP/YAI runs or assignments, I do not find that those negotiations included any bilateral agreement to bar UCP/YAI drivers from exercising their seniority to bid on mid-day school bus runs.

I find that Section 17B of the contract was neither amended or waived. That Section in pertinent part reads:

"All runs and extra work shall be assigned based upon relative seniority, subject to availability" (emphasis added).

The foregoing contract language makes no distinction between school bus runs, other runs and/or UCP/YAI runs. The "work" of the Company encompasses them all and the reference to "all runs" in 17B is unconditionally inclusive.

There is no argument that UCP/YAI drivers are not qualified to drive school buses. There is no question that they have the available time in mid-day, after or between UCP/YAI runs or that, except for their separate pick arrangement, they are otherwise ineligible. And, as stated, I find nothing in the agreement to set up a separate pick (other than the 52-week vs. 40
week work schedule) that precludes the exercise of their seniority rights to bid for mid-day school runs. Whether the mid-day school bus work is a "run," "pick" or "assignment," Section 17B is fully applicable and controlling.

Accordingly, the Company may not bar the UCP/YAI drivers from exercising their seniority for selection on mid-day school bus runs.

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 Company would violate the collective bargaining agreement by changing the pay hours of the UCP/YAI pick.

The Company is directed to retain the hours as originally posted, unless there is bilateral agreement otherwise.
2. The Company is in violation of or would violate the collective bargaining agreement by barring UCP/YAI drivers from exercising their seniority to be assigned to mid-day school bus runs.

Eric J. Schmertz
Impartial Chairman

DATED: September 17, 2002

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.