

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 WISCONSIN COUNCIL 40, LOCAL 140B, :  
 AFSCME, AFL-CIO : Case 31  
 : No. 42089  
 and : MA-5564  
 :  
 PHILLIPS SCHOOL DISTRICT :  
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Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.  
Willett & Klein, S.C., by Mr. Stephen D. Willett, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the District respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration. The parties jointly requested the undersigned, a member of the Wisconsin Employment Relations Commission staff to hear the instant dispute. Hearing was held on May 30, 1989 in Phillips, Wisconsin. No stenographic transcript was made. The parties concluded their briefing schedule on July 7, 1989. Based upon the record herein, and the arguments of the parties, the undersigned issues the following Award.

ISSUES:

At hearing the parties stipulated to the following issues:

- 1) Was there just cause to discipline the Grievant, L\_\_ F\_\_?
- 2) If so was discharge too severe a penalty?
- 3) If discharge is too severe or there was no just cause, what is the appropriate remedy?

RELEVANT CONTRACTUAL LANGUAGE:

ARTICLE 3 - MANAGEMENT RIGHTS

The Board possesses the sole right to operate the school system and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited by enumeration to the following:

- . . .
- B. To establish reasonable work rules;
- . . .
- D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;

ARTICLE 25 - PROGRESSIVE DISCIPLINE

The Employer agrees to the principle of progressive discipline for just cause. The following is the normal sequence for discipline:

1. Oral reprimand;
2. Written reprimand;
3. Suspension without pay;
4. Discharge.

. . .

But for serious infractions of regulations and/or standards of job performance, disciplinary action up to and including immediate discharge may be exercised.

Offenses over two (2) years old will be stricken from the record for the purpose of exercising dismissal.

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BACKGROUND

The Grievant, L\_\_ F\_\_, has been employed as a regular bus driver for approximately two years after having initially worked as a substitute bus driver. F\_\_ drove three bus runs per day. He made morning and early afternoon runs delivering elementary, middle school and high school students who lived along a certain route to their respective schools. He also drove a late bus route comprised primarily of high school students who stayed to participate in extra-curricular activities. In late February or early March of 1989, problems with F\_\_'s morning and early afternoon bus routes were brought to High School Principal Joan Burgin's attention by the parent of one of the student bus riders, D\_\_ S\_\_. After a preliminary investigation, Burgin referred the matter to Richard Weghorn, the District Administrator. After interviewing several student riders, Weghorn terminated F\_\_'s employment immediately because of sexually inappropriate verbal remarks which F\_\_ is alleged to have made to students while on the bus.

SYNOPSIS OF TESTIMONY:

Both the Union and District called upon numerous witnesses in support of their respective cases. A brief synopsis of the testimony adduced at hearing follows.

Two sisters, M\_\_ and B\_\_ S\_\_ testified on behalf of the District. M\_\_, a seventeen-year-old, testified that she only rode the morning bus and usually took the later bus rather than the early afternoon bus home. According to M\_\_, T\_\_ U\_\_, a fellow seventeen-year-old, asked F\_\_ what he had planned for the weekend. F\_\_ replied "I could take you out and show you a good time". On cross-examination, however, in response to the question of whether F\_\_ could have said or replied "I'm going to have a good time for the weekend", M\_\_ conceded that "it's possible", but nevertheless insisted that she perceived his comments to be of a sexual nature.

She also testified that F\_\_ and the teenagers used profanity. She maintained that F\_\_ said "Hell", "Shit" and "Damn", (everything but the "F-word"), but that these remarks were not a part of normal conversation. M\_\_ further stated that F\_\_ made some comments about "looks" pointing to instances where F\_\_ allegedly said "We're going to hit the bumps in the road hard, watch or hold onto your bumps (referring to the teenage girls' breasts)". M\_\_ claimed that F\_\_ tried to be a friend to the teenagers, that he failed to supervise the students on the bus about half of the time, and that there was general rowdiness all of the time with the teenagers doing a lot of swearing.

B\_\_ confirmed her sister's description of the rowdiness on the bus. Like M\_\_, she was basically present on the morning bus run but took the later bus home where F\_\_ did not make this type of remark. According to B\_\_, F\_\_ said "T\_\_'s butt makes up for her tits". B\_\_ maintained that F\_\_ swore once in a while, using such words as "ass". B\_\_ further testified that she heard F\_\_ tell J.J. H\_\_, another teenage girl, that "he was watching her tits fly as he went over the bump". B\_\_ also claimed that she heard F\_\_ tell J\_\_ and K\_\_ S\_\_, a brother and sister who were fighting, "I've heard of brotherly love but incest doesn't cut it".

On cross-examination, B\_\_ also conceded that the bus is noisy and rowdy and that she sits in the back. Nevertheless she maintained that she could hear F\_\_'s remarks from where she was seated.

Three children from another family also testified on behalf of the District, eighteen-year-old T\_\_ U\_\_, her fourteen-year-old brother A\_\_, and her six-year-old brother J\_\_.

T\_\_ testified that on a Friday, F\_\_ told her "Oh, I could take you out and show you a good time!". She further stated that as the bus would approach bumps in the road, F\_\_ would accelerate so that the teenage girls "would have to hold onto our chests". According to T\_\_, F\_\_ would say "Watch those babies bounce!" referring to the girls' breasts.

T\_\_ testified with respect to other remarks which she attributed to F\_\_. She claimed that he said "Even the dog would not sleep with E\_\_ (F\_\_'s son) because the dog didn't trust him" implying that his son would have sex with the dog. T\_\_ further alleged that F\_\_ said "In his younger years, he used to like to lay back and get the good end, but since he's old he finds it more stimulating to do the pleasing". She claimed that the context for many of his remarks was totally sexual. She asserted that he called people "Shitheads" and "Asses". She thought that he used the F-word but doesn't recall the context in which it was used. T\_\_ re-asserted the contention that F\_\_ remarked "her tits may be small but her ass makes up for it". She further confirmed the remark about brotherly love and incest.

On cross-examination, she denied having made an initial comment about "not having breasts". She admitted that she is usually on the bus only 10 or 15 minutes in the morning and further admitted that when one of the teenage boys, K\_\_ R\_\_, was on the bus that F\_\_ and K\_\_ would joke back and forth.

A\_\_, T\_\_'s brother testified that F\_\_ called two middle-school students, J\_\_ R\_\_ and K\_\_ S\_\_ "shit-heads". He also testified that F\_\_ had commented that K\_\_ S\_\_'s "chest bounces". According to A\_\_, F\_\_, in referring to T\_\_, said "She might not have a chest but her voice makes up for it". A\_\_ also claimed that on one occasion, F\_\_, upon observing neighbor dogs chasing the kids as they ran to meet the bus, commented "The dogs are trying to get it on with her (referring to T\_\_)". A\_\_ maintained that he also heard F\_\_ yell "F\_\_\_\_!" but did not know in what context this was said because he wasn't paying attention. He also confirmed the "incest/brotherly love" remark.

J\_\_ claimed that F\_\_ used swear words such as "dumb asses, shit-heads and bastards". He stated that F\_\_ said T\_\_ had a flat chest.

M\_\_ U\_\_, mother of the children testified as to being upset by these remarks. She did, on cross-examination, admit that F\_\_ had complained about A\_\_'s behavior on the bus to her and her husband and that they had disciplined A\_\_ for his behavior.

D\_\_ F\_\_, a fifteen-year-old freshman who was not a regular bus rider testified to one incident. According to F\_\_, she went home with a girlfriend, D\_\_ G\_\_, on the early afternoon bus. F\_\_ claims that she, D\_\_ and J\_\_ S\_\_ were the last one on the bus when someone asked F\_\_ whether he had any friends. F\_\_ claims that F\_\_ responded "Not the kind you're thinking of, the kind that give you 'b\_\_\_\_ jobs'". J\_\_ S\_\_, when asked at hearing did not recall this remark or provide corroboration. D\_\_ G\_\_ was not called to testify.

J\_\_ S\_\_, a sixteen-year-old, and her thirteen-year-old brother K\_\_ also testified. J\_\_ confirmed that F\_\_ said, in reference to T\_\_ "she did not have much tits but her ass made up for it". According to J\_\_, F\_\_ said "the bumps make them (referring to breasts) bounce". K\_\_ testified that F\_\_ told T\_\_, "You don't have any tits but your ass makes up for it". He stated that when he and J\_\_ R\_\_ were fooling around F\_\_ stopped the bus and called them "shit-heads". According to K\_\_, he, "told us that he was going to wear us like a dirty rag!". He claimed that F\_\_ told him "Incest just doesn't cut it!". K\_\_ conceded that F\_\_ made him ride in the front of the bus because of his misbehavior.

D\_\_ S\_\_, J\_\_ and K\_\_'s mother, also testified that she felt F\_\_'s actions were serious and that she does not habitually call the school to complain. She conceded, on cross-examination, that F\_\_ had complained to her that "her kids had potty months". She also admitted that F\_\_ had complained about K\_\_'s behavior.

J\_\_ R\_\_ testified that he felt he got along well with F\_\_. He claimed that when F\_\_ picked up a fellow student, K\_\_ S\_\_, he remarked "they sure do bounce, don't they". According to J\_\_, F\_\_, in further comments about K\_\_, stated "he would not mind having him sitting on her face". R\_\_ claimed that he heard either from A\_\_ U\_\_ or independently that F\_\_ said "T\_\_'s mouth made up for her ass". R\_\_ stated that F\_\_ said "damn", "ass" and "f\_\_\_\_\_". R\_\_ claimed that it was uncommon that the bus was really rowdy. He further stated that F\_\_ remarked to K\_\_ P\_\_ "J\_\_ S\_\_ would be a good "f \_ \_ \_!".

A\_\_ C\_\_, a seven-year-old, also testified that F\_\_ had said "Shit", "Ass-hole", "Bitch", and "Crap", especially if someone pulled out in front of him, but that he did not use these words in addressing the students. According to A\_\_, F\_\_ did not curse at the kids.

B\_\_ C\_\_, A\_\_'s mother, testified that she took him off the bus in October because she did not feel that F\_\_ was adequately supervising the students. She did, however, admit that A\_\_ had had some misbehavior problems on the bus which F\_\_ had discussed with her.

The Union presented a number of students who testified about the goings-on on the morning and early bus routes.

S\_\_ Z\_\_, an eleven-year-old, who was usually the first one on the bus and the last one off said he heard F\_\_ use swear words and that he sometimes swore at other students but that "shit" was about it. S\_\_ testified that he usually sits in front or in the middle of the bus. He testified that he never heard F\_\_ use the "F-word". The only reference to sex that S\_\_ recalled was F\_\_'s remark that "K\_\_ shakes all over".

Two sisters, E\_\_ and M\_\_ F\_\_ testified. They are fourteen and ten years old. They are also some of the first students to be picked up and the last ones to be dropped off. M\_\_ said that she heard F\_\_'s use of the "F-word once or twice". While she did testify that it was noisy, she said that F\_\_ sometimes made references to girls' behinds or backsides and to boobs. M\_\_ stated that fellow students asked if she was "for him or against him" (referring to F\_\_). She also testified that these kids did not like F\_\_.

E\_\_, M\_\_'s sister, testified that she usually rode in the front of the bus on the early afternoon bus route. She testified that she never heard F\_\_ utter any curse words or make any references that were sexual. She said that the high-schoolers were always making these types of statements especially M\_\_ A\_\_ and J\_\_ R\_\_. E\_\_ maintained that students are being pressured by other students and have boasted that they are getting paid to testify. She said she felt that her sister, M\_\_, may have been pressured by other students to testify in a certain manner.

C\_\_ K\_\_ and M\_\_ A\_\_, two teenage boys also testified. C\_\_ said he usually rode in the back with B\_\_ S\_\_ or sat by himself. He maintained that F\_\_ never made these remarks. K\_\_ confirmed that A\_\_

U\_\_ gave him a page from a smutty paperback, that he read it, and handed it back to A\_\_. According to K\_\_, it is the teenage boys, M\_\_ A\_\_, K\_\_ P\_\_, and K\_\_ R\_\_ who were responsible for making remarks of a sexual nature.

M\_\_, an eighteen-year-old testified that he did not ride often but when did he would sit close to F\_\_ and talk to him. M\_\_ considered F\_\_ a friend. He testified that the use of foul language by the students in the back of the bus was common. He strenuously asserted that he never heard F\_\_ make any remarks of a sexual nature. He does, however, admit to having conversations where he talked about the physical attributes of various teenage girls. M\_\_ maintained that it was he who made the statement about T\_\_ U\_\_, not F\_\_. He testified that he said, "She has no tits but her ass makes up for it."

K\_\_ R\_\_, seventeen, a regular bus rider, also testified. He takes the morning and early afternoon bus and sits in the middle or in the back. He stated emphatically that he never heard F\_\_ make lewd or obscene remarks while on the bus. He never heard F\_\_ say anything of a sexual nature. He stated that he never heard F\_\_ use the "F-word". K\_\_ observed that lots of the high school boys would make reference to the girls in sexual terms. He maintained that it was not uncommon for the high school student to use obscene language. According to K\_\_, when he and D\_\_ K\_\_, another student, confronted J\_\_ S\_\_ about her allegations against F\_\_, S\_\_ told him "I've already said it once so there's no way I can get out of it now". K\_\_, on cross-examination, admitted that he was a friend of F\_\_'s son, E\_\_.

D\_\_ K\_\_, an eighteen-year-old who rode the late bus also testified. She was adamant in both her support for F\_\_ and her contention that she neither heard profanity or sexual innuendo from F\_\_. According to D\_\_, when she and K\_\_ R\_\_, approached J\_\_ S\_\_ whom she considered to be a friend, D\_\_ said "she didn't think it was true" (referring to F\_\_'s alleged sexual remarks) and asked (J\_\_) "what's going on; why are you saying these things?". J\_\_ replied "they made me say it". K\_\_ then asked "what did they make your say?" to which J\_\_ just shook her head and walked away. D\_\_ claimed that students were being pressured by District Administrator Richard Weghorn.

At least two other students, C\_\_ E\_\_ and L\_\_ S\_\_ observed that students were pressuring other students to testify in a certain way. C\_\_ L\_\_, another sixteen-year-old observed that after the first three girls testified they came back to the area where the other witnesses were waiting and told everyone what was said at the hearing. L\_\_ S\_\_ claimed that some students bragged that they were being paid \$16.50 to testify.

Other students, two teenage girls and two teenage boys, who often rode the late bus, all testified that F\_\_ had never made lewd statements or sexual remarks. The strongest language that F\_\_ used, according to these students, was to day "damn-it" on one occasion.

The Grievant, L\_\_ F\_\_ also testified on his own behalf. He denied having made the sexual remarks which were attributed to him generally and specifically with a few notable exceptions. He admitted to using profanity when a car passed him on a double yellow line yelling "stupid ass-hole". He admitted that he might have called K\_\_ S\_\_ and J\_\_ R\_\_ "shit-heads".

He categorically denied making references to boobs and bumps claiming he heard this from the boys as he went over bumps. He denied ever telling T\_\_ U\_\_ that he would take her out for a good time. He emphatically denied the statement about his "younger years". He testified that he has a son named E\_\_ but that they don't even have a dog. He denied making the statement attributed to him by J\_\_ R\_\_. F\_\_ did not recall making a statement about "brotherly love" or "incest", but he did acknowledged asking the S\_\_ children why they were so disruptive.

F\_\_ denied making any remarks about "a b\_\_\_\_\_ job".

According to F\_\_, A\_\_ U\_\_ was showing a page from a smutty novel and reading it to the younger children. He confiscated the page and spoke to M\_\_ U\_\_ about this incident as well as A\_\_'s repeated misbehavior. He stated he now believes that he was wrong in taking his disciplinary problems with the U\_\_ and the S\_\_ children directly to their parents but should have followed school procedures for writing up students and taken these problems to the appropriate school principals.

F\_\_ stated that it has been a traumatic experience for him and his son, E\_\_, who is a student at the high school. He testified that E\_\_ had received unsigned hate letters stating "Ha! Ha! We got your dad fired!".

#### POSITION OF THE PARTIES:

##### Employer

The District argues that it has the authority to determine what is, in

fact, a serious infraction of the standards of performance. It must assure the physical and mental well being of its students. The District argues that it must prove the seriousness of F\_\_'s infraction by a "clear and satisfactory preponderance of the evidence". Although F\_\_ denies language or conduct of an improper nature, it is clear beyond any doubt that language and comments occurred. While discharge may be too harsh a penalty for "non-directed" vulgarity such as "shit, hell, or damn", the use of these words on a repeated basis is serious for child passengers and should support a discharge.

The District argues that the discharge should be sustained for three primary reasons: 1) The language or comments of F\_\_ were ongoing over a period of time. Tens of witnesses could make reference to F\_\_'s foul language. This, it asserts, is not an isolated instance which could be over-looked; 2) The foul language was directed at individuals: "asshole, bitch, f\_\_\_\_er, shithead, etc." A teacher (professional) was suspended 4 days for the isolated incident of calling a student a "son of a bitch". Lac du Flambeau School District No. 1 (24663-A 11-30-87). It shows that severe discipline is appropriate for an isolated incident; In the present case there is an ongoing pattern which is even more serious by the nature of the comments. The only appropriate way to protect the children is to discharge the bus driver; and 3) The comments by F\_\_ were sexually oriented, and thus doubly improper. Young children, even high school children, simply cannot be exposed to comments made regarding or insinuating "b\_\_\_\_ jobs", "sitting on his face", "watching these babies (breasts) bounce", "sleeping with dogs", and so on.

In the event that F\_\_ feels these comments were all in fun and were made to high school boys who could take it, the District argues this is a shallow and improper approach to a very serious problem. It is unlikely that the high school boys are old enough to decipher the comments. But the comments were made in the presence of very small boys and girls who took the comments home. Is this, the District asserts, what parents and children should have to put up with?

Arguing that there is no excuse for F\_\_'s conduct, the District asserts that it was just short of criminal and clearly satisfied any burden that the District may have had in this matter.

#### Union

The Union argues that the students themselves are split over their recollections of the remarks which were allegedly made. It points out that those students seated in the rear of the bus generally heard more of the remarks in question than those who usually sat towards the middle or front of the bus. It notes that there were vast inconsistencies in what students did or did not hear. It argues that certain sexually explicit remarks attributed to F\_\_ were clearly made by the students themselves.

It argues that there was not just cause for the discharge because it is virtually impossible to determine which remarks were attributable to the students themselves and which, if any, were made by F\_\_. It is also unclear as to the context in which the remarks were made.

By way of example, it cites the "no tits" remark. Several of the students testified that F\_\_ made comments to the effect that a certain girl "had no tits, but her ass made up for it". However, testimony from Union witnesses R\_\_ and A\_\_ both attribute this statement to A\_\_.

Curiously, in spite of the fact that the bus was often unruly, those generally sitting towards the back tended to report hearing much more of the disputed remarks than those in the front. T\_\_ U\_\_ testified that she heard many comments from the rear of the bus which weren't heard by those seated closer to F\_\_. She was also quite sure that she had heard these comments from F\_\_. Why didn't K\_\_ R\_\_, who sat towards the middle, or E\_\_ F\_\_, who sat towards the front, hear these remarks? T\_\_'s testimony is further suspect because of her "concern" about the effects of the Grievant's alleged comments on her six-year-old brother. Why is she not concerned about the undisputed fact that the students themselves typically engaged heavily in such discourse? Her fourteen-year-old brother was one of the ringleaders in these activities. His denials, despite several accounts by other students, add to the U\_\_ credibility problems.

The Union also notes that F\_\_ vehemently challenges the interpretation of much of what is alleged and, indeed, whether certain comments were made by him at all. D\_\_ F\_\_'s testimony concerning an alleged reference to "b\_\_\_\_ jobs" made by F\_\_ to J\_\_ S\_\_ were denied by both F\_\_ and district witness S\_\_. It stresses that innocent comments about dogs running to "get on" the bus could easily have been misconstrued to "the dogs want to get it on" with the students.

There is also considerable evidence that much of the witness testimony was unduly influenced by peer pressure. Several witnesses verified this. D\_\_ K\_\_ and K\_\_ R\_\_ both testified that J\_\_ S\_\_ stated, "They made me say it" in reference to her allegations in this case. Peer pressuring of students was verified by Union witnesses M\_\_ and E\_\_ F\_\_, C\_\_ K\_\_, C\_\_ E\_\_, and others.

If it is, in fact, determined by the arbitrator that certain of the disputed remarks attributed to the grievant were accurate, the Union believes that they are insufficient to sustain a discharge. Discharge, it maintains, is the capital punishment of labor relations. The labor agreement provides, in Article 25, that the progressive disciplinary sequence shall be as follows:

1. Oral Reprimand
2. Written Reprimand
3. Suspension Without Pay
4. Discharge

The Union believes that, in light of the reasonable (and considerable) doubt raised by the conflicting and disparate testimonies of the witnesses, and the fact that the type of conversation attributed to F\_\_ was quite common among the students, the District should have either issued a warning or, at most, given the Grievant a short suspension without pay. According to the Union, the lexicon of our society, and the sexual landscape of our verbiage are such that most of us from grammar school on are regularly exposed to off-color language and remarks. While it may be deemed inappropriate in certain work settings, in others it wouldn't raise an eyebrow. Books, movies, and even television often expose children to much the same types of material that the Grievant is being discharged for exposing them to. If these incidents occurred, they were not major and should not have been dealt with so harshly.

In sum, the Union requests that the grievance be sustained and that F\_\_ be made whole for all lost wages and benefits. If the arbitrator determines that some discipline is appropriate, it should be a warning or a suspension.

#### DISCUSSION:

In reviewing the testimony set forth above, this Arbitrator must make credibility conclusions which will ultimately determine whether the District has met its burden of proof sufficient to sustain its discharge of F\_\_. Moreover, there is no question in the mind of the undersigned that these allegations

or even a quarter of these allegations as testified to by the District's witnesses, if proven or found credible, would be sufficient to sustain the District's actions in this matter. Sexual innuendo and profanity, especially when used around children of any age, is serious conduct and warrants a serious response from the District. To do less, as the District so aptly points out, would leave the students in jeopardy.

Nevertheless, the District must convince the undersigned that F\_\_\_, not the students, engaged in the misconduct to which certain of these students have testified.

In reviewing the testimony of many of the District witnesses, it is clear that these students have a motive to deviate from the truth, to "get" the grievant, if you will. F\_\_\_ had complained to the parents of A\_\_\_ U\_\_\_, J\_\_\_ and K\_\_\_ S\_\_\_, and J\_\_\_ R\_\_\_ about their misbehavior on the bus. He told M\_\_\_ U\_\_\_ about A\_\_\_'s showing the younger children the page from the smutty novel.

It is significant that T\_\_\_ U\_\_\_ did not come forward independently with her allegations as to the statements F\_\_\_ is alleged to have made but only came forward after her younger brother, A\_\_\_, raised the issue with her father. T\_\_\_'s testimony, which was particularly damaging, was just not credible in many respects. By her own admission, she was on the bus a very short time and usually sat in the back of the bus. The alleged "good time" remark could have been made as she was exiting the bus. However, it is inconceivable that F\_\_\_ would have made the comment about "his younger years" as she was exiting or entering or speaking over the voices of the other students so that only she heard it from the back of the bus. This statement is simply too long. T\_\_\_ did not give any description or context for F\_\_\_'s "younger years" remark and it is difficult to believe that this remark was made out the blue in no particular context.

Another witness whom this Arbitrator cannot credit is J\_\_\_ R\_\_\_. His testimony if believed, would also be very damaging. R\_\_\_ was a behavior problem for F\_\_\_, was placed up front due to his misbehavior, and had been verbally dressed down along with K\_\_\_ S\_\_\_ by F\_\_\_. Nonetheless, J\_\_\_ maintained that "he got along real good" with F\_\_\_.

Genuine doubt as to whether F\_\_\_ made many of the incriminating statements exists when the testimony of the S\_\_\_ sisters, the S\_\_\_ siblings, K\_\_\_ R\_\_\_, M\_\_\_ A\_\_\_ and C\_\_\_ K\_\_\_ is considered.

C\_\_\_ testified that he usually rode in the back sitting with B\_\_\_ S\_\_\_ or by himself. He states that M\_\_\_, K\_\_\_ and K\_\_\_ P\_\_\_ made statements of a sexual nature, but not F\_\_\_. B\_\_\_, on the other hand, who was presumably sitting next to him or near him heard F\_\_\_ make the remark about "T\_\_\_'s butt". M\_\_\_ maintains that it was he who made this remark. K\_\_\_, who also testified that he rides in the middle or the back of the bus, asserted that he never heard lewd or obscene remarks from F\_\_\_ while he was on the bus.

Even more troubling to the undersigned was testimony from K\_\_\_ R\_\_\_, E\_\_\_ F\_\_\_, C\_\_\_ E\_\_\_ and L\_\_\_ S\_\_\_ that students were pressuring other students to testify in a certain way; that the first three girls to testify went to the room where the witnesses were sequestered and discussed their testimony with the others who were waiting; and that students allegedly bragged about being paid to testify.

Moreover, other evidence adduced such as the alleged "b\_\_\_\_\_ job" remark remains uncorroborated.

After an in-depth analysis of the testimony adduced from the high school and older middle school students, this Arbitrator must conclude that much, if not all of what they have testified to, must be discarded as not worthy of belief. An employe's continued employment should not rest upon the whims of students who have a motive for revenge, who rode primarily in the back of a noisy, rowdy bus, or who have made uncorroborated statements.



On the other hand, there were witnesses who sat toward the front, who were not "trouble-makers" and who, due to their age, would be more likely to tell the truth, without the peer pressure and the choosing of sides to which it appears the high-school and middle-school students were subject.

A\_\_ C\_\_, age seven, testified F\_\_ said "Shit", "Asshole", "Bitch" and "Crap". S\_\_ Z\_\_, age eleven, a student who was usually on the bus and for the longest time and who sat up front or in the middle, confirmed that F\_\_ used swear words and sometimes swore at other students using the word "shit". S\_\_ recalls F\_\_ saying that "K\_\_ shakes all over". M\_\_ F\_\_, age ten, another long rider who sat towards the front, testified that she heard F\_\_ use the "F-word once or twice" and that he sometimes made reference to "girls' behinds, backsides and boobs". This Arbitrator was impressed by the demeanor of these three witnesses and finds the testimony of S\_\_ and M\_\_, who were presented by the Union as witnesses, to be particularly helpful. They were there on the bus for the major portion of the route, sitting in front, and in a position where they might differentiate between remarks made by F\_\_ versus those of the other high school students.

F\_\_, himself admits using profanity, yelling "stupid ass-hole" when a car passed him on the yellow line. He also admitted that he might have called K\_\_ S\_\_ and J\_\_ R\_\_ "shit-heads". These admissions confirm A\_\_'s and S\_\_'s testimony. The undersigned cannot and does not credit F\_\_'s denials where his testimony conflicts with that presented by M\_\_, S\_\_ and A\_\_. There is no reason for these three to lie or deviate from the truth. There is clearly a reason for F\_\_ to do so. Accordingly, the undersigned finds that F\_\_ used inappropriate profanity on numerous occasions in the presence of young children, that he called two students "shit-heads", and that he sometimes made sexual references to girls' "behinds, backsides and boobs". This conduct cannot be condoned.

However, it must be viewed in light of Article 25, the parties contractually agreed-to language. Article 25 provides for a normal sequence of progressive discipline except in the case of the most serious infractions. It is undisputed that the District did not take any preliminary disciplinary steps, such as warning or suspending F\_\_ prior to discharging him. It is also clear that the nature of the conduct in which he engaged is correctable.

The undersigned does not accept the Union's contention that F\_\_'s language somehow comports with the lexicon of our society. Nevertheless, in light of her conclusions as to what the District actually proved that F\_\_ did say, this arbitrator believes that the District's action of discharging F\_\_ was too severe under the circumstances. While this arbitrator does not normally substitute her judgment for that of the employer in discipline cases, it is evident that the District in making its initial determination to discharge F\_\_ was relying upon evidence which was much stronger than that ultimately found by this arbitrator without the benefit of the entire picture including the Union's witnesses. Had it had access to this entire picture, its determination may very well have been different.

However, even if the District's decision were the same, it is the opinion of the undersigned that F\_\_ should have received at least one opportunity to correct his behavior. The District is entitled, however, to expect F\_\_ to conduct himself differently from the teenage students on the bus, especially because there are young children present and he is the sole figure of authority.

In light of the foregoing, and the record as a whole, it is my

AWARD

1. That there was just cause to discipline L\_\_ F\_\_.
2. That discharge is too severe a penalty under the circumstances.

3. That there is just cause sufficient to warrant a suspension for thirty (30) working days without pay.

4. That the District is ordered to reinstate F\_\_ and make him whole for any unpaid wages lost over and above the thirty (30) working days of his suspension.

Dated at Madison, Wisconsin this 24th day of August, 1989.

By

Mary Jo Schiavoni, Arbitrator