BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WCEA-SPRING VALLEY SUPPORT STAFF**

and

**SCHOOL DISTRICT OF SPRING VALLEY**

Case 27
No. 55951
MA-10126

*(Stanaitis Grievance)*

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Appearances:

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by **Ms. Kathryn J. Prenn**, on behalf of Spring Valley School District.

**Mr. Steven J. Holzhausen**, Executive Director, West Central Education Association, on behalf of WCEA-Spring Valley Support Staff.

## ARBITRATION AWARD

The West Central Education Association, hereinafter the Association, and the Spring Valley School District, hereinafter the District, jointly requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and the District, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on March 16, 1998, in Spring Valley, Wisconsin. A stenographic transcript was not made of the hearing and the parties submitted post-hearing briefs in the matter by June 16, 1998. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

## ISSUES

The parties stipulated there are no procedural issues, but were unable to agree on a statement of the substantive issue and agreed the Arbitrator will frame the issue.

The District offers the following statement of the issues:

Did the District have just cause to suspend the Grievant, Sheran Stanaitis, for three days without pay? If not, what is the appropriate remedy?

The Union would state the issues as being:

Did the District violate the Collective Bargaining Agreement when it suspended the Grievant for three days without pay? If so, what should the remedy be?

Although both statements of the issue are substantively the same, the District's statement of the issue more accurately states the question to be decided.

## CONTRACT PROVISIONS

The following provisions of the parties' Collective Bargaining Agreement are cited:

X. GRIEVANCE PROCEDURE

. . .

d. The arbitrator shall schedule a hearing on the grievance and, after hearing such evidence as the parties desire to present, shall render a written decision. The arbitrator shall have no power to advise on salary adjustments, except as to the improper application thereof, nor to add to, subtract from, modify or amend any terms of the 'Agreement. A decision of the arbitrator shall, within the scope of his/her authority, be binding upon the parties.

. . .

XIII. DISCIPLINE

Any employee may be disciplined, demoted or dismissed by the Employer for just cause. Any employee who is suspended, demoted or dismissed shall be given written notice of the reasons for such action. A copy of such notice shall be made a part of the employee's personnel record. Any such action taken by the Employer during an employee's probationary period shall not be subject to the grievance procedure.

## BACKGROUND

The District operates its own transportation system and employs bus drivers who are represented by the Association. The Grievant, Sheran Stanaitis, has been employed by the District as a bus driver for approximately 16 years at the time of the incident in question.

On August 26, 1997, the Grievant was driving on the bus route that she had driven for the past nine years. On that morning, it was foggy and somewhere between approximately 7:15 and 7:30 a.m. the Grievant was proceeding east on 690th Avenue from County Highway "BB". The Grievant passed the Traynor home, and proceeded to the Hughes' house just down the road to the east where she picked up the two Hughes children, then turned into the Hughes' driveway, backed out onto the road, and then proceeding back down 690th to the west. The students are normally waiting at the end of the driveway and when the Grievant approached the Traynor home, she did not see their daughter, Erin, at the end of the driveway and proceeded on, however, one of the students on the bus, called out that Erin was halfway down the driveway. The Grievant eventually brought the bus to a halt, exactly how far from the Traynor home is in issue. The Grievant then backed the bus up to the Traynor home, where she picked up Erin Traynor, and then proceeded to school.

Erin's mother, Claudia Traynor, had been outside watching to see her daughter get on the bus, however, Erin had been delayed getting ready, and was only halfway down the driveway when the bus went by heading west. Upon seeing the bus go by, she turned around and walked back up the driveway to her home. The driveway is approximately 445 feet long. Erin's mother was still waiting for her outside, as she had locked herself out of the house, and she yelled to her husband who had been in the garage, to come in the house and unlock the door for her, which he proceeded to do. While Erin and her mother were waiting for her father to unlock the door, they heard the "beep, beep" sound of the bus' backup alarm. Mrs. Traynor testified that she and Erin heard that sound for approximately a minute to a minute and a half before she saw the strobe lights of the bus appear. Mrs. Traynor then told Erin to run and get on the bus, which she did.

Mrs. Traynor was upset that the bus had backed up a hill in the fog, which she felt endangered the safety of the students aboard the bus. Mrs. Traynor told her husband, Michael, who had just unlocked the door and come out of the house in time to see the strobe light from the bus on the road, what had happened. They discussed the matter and decided she should call the District's Transportation Supervisor, Ron Beckel, to report what she felt was an unsafe incident. Mr. Traynor, who is also a member and President of the District's Board of Education, drove to the end of 690th Avenue to the Honeycrest Farms, which is run by three of his brothers, two of which, Richard and Robert, normally work there at that time of day. Also at the farm was James Bever, who had just started working there the day before. Mr. Traynor was informed by Bever that he had been working in the feed lot when he saw the

bus go by heading west towards "BB", and a bit later saw the bus backing up past him, and that he thought it was strange that the bus would be backing up like that in the fog. Bever had earlier mentioned to Richard Traynor that he had seen the school bus backing up the hill in the fog. Michael Traynor asked Bever if he would sign a statement as to what he saw if he (Traynor) typed it up for him, and Bever said he would. The farm has two driveways that access 690th Avenue, one on the east that runs between two cement silos and one further to the west that loops around and comes back out onto 690th and also forks and goes straight out to County Highway"BB".

Mrs. Traynor called Beckel and reported the matter and her concern and Beckel responded that he would check on it and get back to her. Beckel subsequently spoke to the Grievant about it and also mentioned it to the District Administrator, Gene Rolands, who told Beckel that he should also get statements from students on the bus regarding the matter, preferably the older students. Beckel also asked Mrs. Traynor to submit a written statement. The following week, the high school principal interviewed four of the older children on the bus and took notes of their statements. The Traynors also typed a statement which Bevers signed. Beckel obtained several written statements from the Grievant in the meantime. Initially, the Grievant told Beckel she had backed the bus approximately ¼ of a mile. She subsequently amended her estimate to 1/8 of a mile.

On the morning of September 4, 1997, Rolands and Beckel met with the Grievant and the local Association President, Shane Lucking, to discuss the matter, and obtained the Grievant's side of the story. At that meeting, Rolands asked the Grievant where she had stopped the bus and why she felt it was safe to back up and pick up Erin Traynor the morning of August 26th. The Grievant responded that she had stopped just over the crest of the hill and she did not think there was any safety problem, since she could see all the way back to the Jorgensen's house, at least a mile away. Rolands asked her if she wasn't concerned that a car was coming and she responded that she could see the dust of any car approaching. 690th Avenue is a gravel road. Rolands indicated that he was going to go out to the site and investigate for himself, and the Grievant suggested that he do it in a school bus so that he could get the same perspective that she had the morning in question. Rolands took the Grievant's advice and he and Beckel took a school bus out to the site. When Rolands viewed the area, he noticed that there were a number of "dips" in the road, to the east of the Traynors' and Hughes' homes. Rolands also noted that one could not see over the top of the hill just west of the Traynors' home, before one was very far down that hill. Rolands then returned to school and met with the Grievant again the afternoon of September 4th, at which time he asked her again why she was not concerned about cars coming because of the dips in the road, and she again responded that she felt it was safe to back up because she could see clearly for a mile all the way back to Jorgensen's.

On September 5, 1997, Roland issued the Grievant the following suspension letter, suspending her for three days without pay:

> Dear Sherie:
> This letter is to confirm our conference on Thursday, September 4, 1997 with reference to your backing the bus along the gravel road on Tuesday morning, August 26, 1997. As stated in the conference, your actions caused a great deal of concern by placing the students on the bus in danger. To back up over the crest of a hill some 1/8 to 1/4 mile on a foggy morning is unacceptable. I cannot accept nor tolerate this action. Therefore, as stated in our conversation at 2:15 p.m. yesterday, you are hereby placed on an unpaid suspension for a period of three days. Additionally, Mr. Bechel is directed to monitor your driving very closely and should another incident occur, which is related to your driving ability and judgment, I will be recommending termination of your employment to the Board of Education.
>
> As always, should you have any questions or comments, please feel free to contact me at once.
>
> Sincerely,
>
> Gene W. Roland /s/
> Gene W. Roland
> District Administrator

The parties dispute what occurred the morning of August 26, 1997. The Grievant asserts that when she heard someone call out that Erin was coming down the driveway, she took her foot off the accelerator, and asked whoever had said that to repeat it, and when they did, she brought the bus to a halt just west of the crest of the hill west of the Traynor home on 690th Avenue, that she then put the bus in reverse after checking her side mirrors and rearview mirrors to see that no cars were coming from the east, and put on her flashers. When the bus is put in reverse, the bus' backup lights and beeping alarm are automatically engaged. In addition, there is a strobe light continuously flashing on the top of the bus. The Grievant testified that she then backed up the bus to the Traynor home and picked up Erin, and that when she was backing up, she could see Erin on the porch of the Traynor home, so that the fog was not interfering with her ability to see. The Grievant also testified that she had just shortly before turned around at the Hughes' home just east of the Traynors, and had not seen any vehicles coming from the east at that time.

The testimony of the District's witnesses differs from the Grievant's version in a number of areas. Mrs. Traynor estimated that the bus had gone past the house, and had been gone long enough for her daughter to walk back up the driveway and get on the porch of the home and play with kittens before she and her daughter heard the sound of the bus' backup alarm, which she estimated from the sound to be as far west as the Honeycrest Farm. She estimated that they heard the beeping alarm for approximately a minute to a minute and a half before the bus appeared on the road approximately even with the telephone post, which is the first that the bus would be visible from their vantage point. Both Mr. and Mrs. Traynor recalled that the fog was thick and that while they could see the bus as a "yellow blob" at the end of the driveway, they could not make out the lettering on the side of the bus, which was visible on a clear day. Bevers testified that he saw the bus go by while he was working in the feed lot to the west of the cement silos at Honeycrest Farm, and that some moments later he again saw the bus, this time backing up the road to the east. Bevers testified that he did not pay that much attention to the bus other than to think it strange that it was backing up in the fog, but he did not feel it was his concern as he did not live in the District and his children did not attend the District schools. Bevers did mention it to Richard Traynor when he finished his chores outside and went back in the barn. The students' versions vary somewhat as to the distance that the Grievant stopped from the top of the hill. One student estimated that it was approximately one hundred feet from the farm, or one hundred and ten feet from the silos, or ten feet from the crest of the hill. Several other students estimated that the bus was halfway down the hill, even with the farm and silos.

The onsite inspection showed that the crest of the hill west of Traynors' driveway blocks the view to the east if you are much further than thirty paces (ninety feet) west of the telephone pole mentioned by Mrs. Traynor, and that when one proceeds east of that hill crest, there are approximately three more dips in the road to the east which make it impossible to see a vehicle when it is in the lower part of the dip from that vantage point. Although from the crest of the hill one can see the red barn approximately one mile to the east on the right hand side of the road, and the Jorgensen home approximately .2 of a mile west of the red barn on the left hand side of the road, and can see the Traynor home and the Hughes' homes on the right hand side of the road, one cannot see a vehicle when the vehicle would be in the low point of those dips. That is also true at the Hughes' driveway where the bus turns around, i.e., one cannot see a vehicle coming from the east if it is in one of those dips and one cannot see over the crest of the hill to the west.

The Grievant served her three-day suspension, which she grieved, and her grievance was heard before the Board of Education on October 30, 1997, and denied. The parties proceeded to arbitration on their dispute before the undersigned.

## POSITIONS OF THE PARTIES

### District

The District asserts that it had just cause to suspend the Grievant for three days. According to the District, the key facts are not in dispute. It was foggy along the bus route on the morning of August 26, 1997. The Grievant admitted this fact, although she attempted to hedge on how foggy it was that morning. Second, the Grievant stopped the bus, put it in reverse, and backed the bus up for a distance of 1/8 to 1/4 of a mile in the driving lane for oncoming traffic. The Grievant admitted doing so, and the trip back to the Traynor driveway included backing the bus up over the crest of the hill. Third, the *Wisconsin Commercial Driver's Manual* which is distributed and reviewed by bus drivers as part of their license issuance and renewal procedure, provides that:

> **Backing a School Bus**
>
> Never back a school bus unless it is absolutely necessary, and then only if it is safe. The bus's size and design severely limit the driver's ability to see. Many school bus accidents occur while backing.
>
> If you must back, know what is behind the bus. Ask a responsible student to move to the back seat of the bus and act as a guide. If no responsible student is available, the driver should walk around the bus before backing.

The Grievant admitted she was familiar with the manual and stated that "we are all aware that backing up the bus is dangerous at best."

The District also asserts that the Grievant's testimony is not credible. In both her statements of August 29th and September 4, 1997, and in her interview with the District Administrator, the Grievant stated "I can see clearly behind me for an entire mile." Photographs submitted by the District demonstrated that a van travelling east from the crest of the hill drops into a dip in the road and disappears from sight .3 miles from the crest of the hill. (Joint Exhibit 12). Another photo demonstrates that a van would travel another .3 miles in the dip before again coming into the view of the vehicle parked at the top of the hill. (Joint Exhibit 13). The District notes that the height of the van used in the photographs is greater than the height of an auto. Thus, even if it had been clear on the morning of August 26th, and the bus had been parked at the crest of the hill, it would have been impossible for the Grievant to be able to see traffic "for an entire mile". Second, the Grievant asserted that she stopped the bus "just over the crest of the hill". In her interview with the District Administrator, the Grievant stated that she stopped the bus near the crest of the hill or just over the crest of the hill. The testimony of several eyewitnesses is to the contrary. James Bever, an employe of

Honeycrest Farms, testified that while he was working in the barnyard that morning, he saw a school bus go by heading west, and then go by again heading east in reverse. The bus had gone west past the end of the barn and was blocked from his view before it returned headed east in reverse. Bever testified he was surprised to see the bus backing up in the fog. The incident made a sufficient impression on Bever that he reported the incident to his boss, Dick Traynor, that same morning. Dick Traynor testified that Bever reported to him that same morning that he had seen a school bus backing up in the fog and that Bever told him he thought the bus must have gone clear to the stop sign before backing up, although he could not be sure as the barn blocked his view of the bus. The District's investigation of the matter also included interviews with several of the older students who had been on the bus at the time of the incident and who testified at the arbitration hearing. Their testimony is summarized as follows:

> Jake Haselman: The bus stopped at the driveway to the dairy barn.
>
> Kaelyn Traynor: The bus stopped slightly past the silos.
>
> Caleb Clark: The bus was all the way over the top of the hill. The bus was too far down the hill for the bus to be seen. The hill was higher than the bus out the back door.
>
> Philip Hughes: The bus was by the barn. The bus stopped between the silos and the barn.

The distance from the crest of the hill to the middle of the barnyard is 695 feet, while the distance from the middle of the barnyard to the driveway by the barn is another 225 feet. Based on those distances, and the accounts of the five eyewitnesses, the Grievant's statements on this point are not credible. The Grievant has also attempted to minimize how foggy it was on the morning of August 26th. In her interview on September 4th, the Grievant stated it was "somewhat foggy" and during the hearing before the Board, she stated there was very little fog and that she could see Traynor's house from the end of their driveway (a distance of 445 feet). At the arbitration hearing, there was so little fog that the Grievant testified she could even see Erin Traynor on the front porch of the house playing with kittens. The Grievant's testimony is contrary to that of the other witnesses. Claudia Traynor testified that it was very foggy that morning, and that the black lettering on the side of the bus, which is visible on a clear day, was not visible on that morning. Mike Traynor testified that it was foggy that morning and likewise could not see the letters on the side of the bus from his house that morning. James Bever testified it was foggy. Dick Traynor testified that it was still foggy between 7:30 and 8:00 a.m. that morning. Student Caleb Clark testified that the fog was very dense and even. Philip Hughes testified that the fog was fairly dense and pretty even. Jake Haselman testified it was pretty foggy, and that he could only see halfway up the Traynors' driveway when the

bus was parked at the end of the driveway. Even the Grievant's initial statement that it was "somewhat foggy" is not credible in the face of the others' testimony. Finally, at the arbitration hearing, the Grievant asserted she had "never done anything that stupid" implying that she has a clean record. In fact, in the spring of 1993 at the end of her afternoon route, the Grievant parked her bus in the bus garage and failed to inspect the bus prior to departing. As a result, a first-grade student who had fallen asleep on the bus was left alone on the bus in the empty bus garage.

Next, the District asserts that the suspension is supported by the record. While there is no dispute that the standard to be applied to the disciplinary action is the just cause standard, not all arbitrators have felt bound to a mechanical application of the "Daugherty Standards", but have believed that a proper analysis of just cause can be conducted utilizing the basic standards of fairness. SCHOOL DISTRICT OF JANESVILLE (Arbitrator Baron, 1992). The District also cites arbitration awards wherein the arbitrators applied an analysis to the just cause standard addressing two elements, (1) whether the employer has demonstrated the existence of conduct by the grievant in which it has as a disciplinary interest, and (2), whether the discipline imposed reasonably reflects that disciplinary interest.

The District asserts there can be no dispute that to back up a school bus under any circumstances is dangerous. The *Wisconsin Commercial Driver's Manual* states: "Never back a school bus unless it is absolutely necessary. . ." Shane Lucking, the Association President, who is also employed by the District as a bus driver, testified that backing up a school bus is a bad practice regardless of the weather, and that the greatest distance he has ever backed up a bus was one to two bus lengths. While the Grievant testified she thought it was "absolutely necessary" to back the bus up the road because Erin Traynor needed a ride to school, Claudia Traynor testified that Erin regularly misses the bus and that it has always been Erin's fault, and that she has never confronted the Grievant in that regard. Lucking was asked how he handled a situation in which he misses a student at a pickup. He testified that if it were his fault, he would find a turnaround and go back and pick up the student, but if it were the student's fault, the student would be out of luck. Most important, Lucking testified that it would not be "necessary" to back a bus up over a hill. Thus, the Grievant's reliance on "necessity" is not plausible, since it was not necessary to back up and pick up Erin, and even if it had been necessary to pick up Erin, the Grievant could have used the driveways at the farm to turn the bus around. There is no explanation as to why the Grievant did not use the driveway to turn around, rather than back the bus up in the fog, over the crest of a hill, for a distance of 1/8th to 1/4th of a mile.

The Grievant's assertion that she should not be disciplined because she was only exercising her judgment and because nothing happened, fails to recognize that employes are expected to exercise good judgment, not just judgment. The assertion that her actions were

safe because the road is not heavily traveled is to "play the odds", which is not acceptable under any circumstances. The facts demonstrate that on the morning of August 26, 1997, the Grievant placed herself and the students on the bus in jeopardy and at risk of serious injury. Those actions are inexcusable and warrant severe disciplinary action.

It appears that the seriousness of the situation has still not set in with the Grievant, lending further credence to the necessity for a more severe level of discipline. The District has a legitimate interest in ensuring that the level of discipline is sufficiently serious to ensure the Grievant will not exercise poor judgment in the future and place the students on her bus at risk. In applying the just cause standard, arbitrators have held that an arbitrator should not substitute his/her judgment for that of management unless the penalty is found to be excessive, unreasonable, or that management has abused its discretion. FRANZ FOOD PRODUCTS, 28 LA 543 (Bothwell, 1957). Numerous other arbitrators have held that in applying the just cause standard, management's decision as to appropriate discipline should not be set aside by the arbitrator unless the action was arbitrary, capricious, discriminatory or excessively severe in terms of all of all relevant circumstances. In this case, the penalty was clearly reasonable, warranted, and not arbitrary.

In its reply brief, the District asserts that the Association has attempted to place a "spin" on the facts and to cast doubt on the witnesses. In attempting to reconcile the Grievant's statement that she could see clearly for a mile with the photographic and onsite inspection evidence demonstrating that it was impossible to do so from the crest of a hill west of the Traynor driveway, the Association asserts that the Grievant was not considering the "blind spots" when she made that statement. The Grievant testified that she did not take the dip in the road into account when she decided to back up the bus. Her failure to do so is equally or more alarming than her initial statement that she could see for a mile on that foggy morning. The Association also attempts to place a "spin" on the Grievant's driving record in characterizing prior discipline as a letter of reprimand, when in fact it was a letter of suspension. That earlier incident is also related to the Grievant's judgmental skills. The assertion that the District witnesses who observed the bus on that morning never made an effort to determine whether the Grievant's story could possibly be true, ignores the fact that it is not the role of witnesses to investigate or determine disciplinary action. The assertion that because the Grievant is required to turn around at the driveway of the Hughes residence somehow provides a mandate for her to back her bus several hundred yards up the road over the crest of the hill in the lane of oncoming traffic in the fog is not persuasive, as backing the bus out of the driveway cannot be equated to the risk assumed by the Grievant when she made her decision to back the bus up the road. The attempt to downplay the risk the Grievant assumed by stating that the traffic on 690th Avenue at that time of day is for all practical purposes non-existent, ignores the fact that the Grievant knowingly chose to assume the risk which jeopardized the safety of the students on her bus and other potential drivers on the road

that morning. The Grievant, by her own admission, knew there was a safe turnaround within a quarter of a mile of where she said she stopped the bus. It defies belief to assert that she felt the better option was to back the bus up in the fog, rather than going to the safe turnaround.

The Association's implicit argument that somehow the complaint against the Grievant filed by the Traynors was the result of "politics", is not supported by the evidence. Mrs. Traynor, who is an accountant, testified that the Grievant is a client of hers and that she was aware that filing the complaint could cost her a client. Further, she testified that as recently as 1997, she had refused to sign a petition circulated by the parents seeking action against the Grievant. The fact that Mr. Traynor is a member of the Board of Education does not mean he must relinquish his rights as a parent to voice concerns about student safety.

Contrary to the assertion that Bever's testimony was confusing, he offered clear and unequivocal testimony as to what he saw and heard. He was an eyewitness and testified as to what he observed, and there is no evidence that Bever was somehow influenced by his contact with Mike Traynor. Despite the Association's attempts to discredit the student witnesses, the bottom line is that all of them testified the bus was over the top of the hill, that it was foggy, and that the bus backed up the hill in the oncoming lane of traffic that morning. While the Association chastises the District for not interviewing more of the students to get a clear picture of what actually happened, if what actually happened is something other than what the District's investigation revealed, why has not the Association been able to come up with a single eyewitness, other than the Grievant, who was able to refute the testimony of the District's eyewitnesses? While the Association faults the District for not interviewing students until September 2nd, the incident occurred on the morning of August 26th, and the written complaint of the Traynors was dated Friday, August 29th, and Monday, September 1st, was Labor Day. Thus, September 2nd was the first school day following receipt of the complaint. The District concludes that the Grievant's continued refusal to acknowledge her poor judgment on that morning in assuming an unacceptable risk, warrants the suspension imposed and the sustaining of that discipline.

**Association**

The Association takes the position that the District did not have cause to suspend the Grievant for three days without pay. The Grievant has been employed as a bus driver for the District for 16 years, the last nine of which has been driving the same route as on the morning of August 26, 1997. The Grievant testified that on that day she drove east on 690th Avenue, made her pickup at the Hughes driveway, turned around, and proceeded back west to the Traynors' driveway. She looked for the Traynor child, but did not see her, and continued on without stopping, traveling at approximately 25 miles per hour. As she passed the Traynor driveway, a number of students said Erin Traynor was halfway up the driveway. The Grievant

began to slow down and asked the students what they had said, and when they repeated it, the Grievant brought the bus to a stop just over the crest of the hill, slightly more than 1/10th of a mile from the Traynor driveway. The Grievant assessed her options at that point and decided that under the circumstances, it was safe to back up to the Traynor driveway to pick up the child. As the bus was placed in reverse, the backup warning beeper was activated and the backup lights came on. The strobe light on top of the bus was operating and the Grievant backed up the bus toward the Traynor driveway at a speed of approximately five miles per hour. As she neared the driveway, the Grievant activated the red warning lights. The Grievant testified that she had a clear view of almost a mile behind her, and that after picking up the Traynor child, she continued on her route. The written complaint filed by the Traynors claimed that the Grievant had backed the bus up from the corner of County Highway "BB" and 690th Avenue and maintained that it was unsafe to back the bus up for that distance due to the foggy conditions, the presence of the hill, and the volume of traffic on that road.

This case boils down to a question of credibility. The Grievant is more credible than the District's witnesses because she had a vested interest in paying extremely close attention to what she was doing that morning and was not preoccupied with other things at the time, as were the District's witnesses. The testimony of the District's witnesses is inconsistent and contradictory because they have been asked to recall events that they did not consider particularly important at the time and there was no reason for them to be particularly observant of them. The Grievant has been a bus driver for 16 years and there is nothing in her personnel record indicating that she has ever driven unsafely. Her version of the events has remained consistent throughout the investigation and the grievance process. She has steadfastly maintained that her actions were consistent with her understanding of District policy and that in her judgment, backing up the bus under the circumstances was a safe procedure. The District attacks her credibility by pointing to an incident that occurred in May of 1993. While the Grievant does not deny the incident and the letter of reprimand, she finds it difficult to see how it has any connection with her driving ability. Further, it is the only documented mistake she has made in over 16 years of driving. The attempt to use an incident totally unrelated to the judgment skills needed to drive a bus in order to establish a pattern of behavior regarding those judgment skills is a "stretch". That attempt shows a lack of credibility, especially since the connection the District now asserts was never established prior to arbitration.

While the District has attempted to make an issue of alleged inconsistency in the Grievant's statements regarding how far she backed up, the Grievant has never denied that she backed up from slightly over the crest of the hill to the Traynors' driveway. In her initial statement, the Grievant estimated the distance from the crest of the hill to the Traynor driveway to be approximately 1/4th of a mile; however, upon further reflection, she realized that estimate was incorrect and modified it to 1/8th of a mile. This was nothing more than an attempt to more accurately reflect the situation. While testimony establishes that it was foggy

that morning, the Grievant testified she could see clearly from the crest of the hill for an entire mile. Joint Exhibit 15, a photograph taken from the crest of the hill looking east establishes that it is possible to see approximately one mile from the crest of the hill. While the District refuses to believe that the Grievant could have done so that morning, and the Traynors testified it was too foggy to see the bus on the road from their home, approximately 450 feet, none of the District's witnesses made an effort to determine whether the Grievant's story could be true. Only fellow bus driver Shane Lucking made that effort. Lucking has been driving that same route since September of 1997 and testified that on the morning of January 20th, 1998, conditions were similar to that of the morning of August 26th, i.e., there was heavy fog. Due to his involvement in the grievance as Association President, Lucking paid close attention to the effect of the fog on his ability to see the various landmarks on 690th Avenue. From the road, he could only make out the silhouette of the Traynor house in the fog, however, Lucking stated that he could see clearly to the Jorgensen driveway. It has been established that the distance from the crest of the hill where the Grievant stopped the bus to that barn is approximately one mile. Thus, confirming the Grievant's veracity on this point, and his testimony is especially important as it is offered by another bus driver faced with the same conditions as those faced by the Grievant on the morning of August 26th. In its final attack on the Grievant's credibility, the District relies on the photographs which establish that vehicles can "disappear" from view at certain points along 690th Avenue. The District attempts to discredit the Grievant by tying these "blind spots" to the statement that she could see the road clearly for a mile behind her. However, the fact that there are blind spots at certain points along the way is not inconsistent with the Grievant's statement that she could see clearly for a mile. The Grievant's version of events that occurred the morning of August 26th is plausible on its face and is verified by the testimony of the only other witness that experienced similar conditions on the same route, i.e. Lucking. The Grievant relied on judgment gained from 16 years of driving experience and a spotless driving record, and concluded that it was safe to back the bus up under the circumstances.

The Association asserts that there is no District policy regarding safe driving practices other than the *Wisconsin Commercial Driver's Manual*. That manual does not define the phrase "absolutely necessary" with regard to backing up a bus, however, the manner in which the District has set up the bus route the Grievant was driving that day provides some guidance on this point. The Hughes' driveway is the turnaround point for that portion of the Grievant's bus route and lies at the bottom of a hill, which Joint Exhibits 12 and 13 establish is a blind spot. During the onsite inspection of the route at the arbitration hearing, it was noted that from the entrance to the Hughes' driveway it is impossible to see the Traynor house to the west and that the road to the east takes a severe dip. Thus, this turnaround has blind spots both to the east and west that could hide a vehicle for a much shorter period of time than a blind spot depicted in Joint Exhibits 12 through 15, upon which the District relies. While it makes a point of noting how the van disappeared from sight for .4 miles, the District requires its bus drivers to back up and turn around at a spot that is at least as dangerous as the situation

for which the Grievant was disciplined. The District has thus determined that at least at that point on 690th Avenue, it is "absolutely necessary" to back up the bus in spite of the blind spots. This does not make backing up a bus under the circumstances inherently dangerous. At hearing, the District responded that it was the responsibility of the bus driver to inform the transportation supervisor of potentially unsafe situations on any route. However, the Grievant responded that she did not realize the turnaround point was unsafe, as she had nothing to compare it to until she was suspended for her actions the morning of August 26th. The point being, that neither the blind spots at the turnaround, nor the blind spot east of the Traynor driveway are inherently dangerous, due to the lack of traffic on 690th Avenue at that time of the morning. The Grievant testified that in nine years of driving that road, she saw a total of two vehicles, while Lucking testified that in the six months he had driven the route, he had seen a total of one or two vehicles on the morning route. The only contradictory testimony comes from the Traynors who state that vehicles come up and down the road on a frequent basis. However, Mr. Traynor testified that he leaves most mornings before the school bus arrives and Mrs. Traynor hasn't actually seen vehicles go by, but is sure she has heard them. The Association concludes in this regard, that the situation faced by drivers on their routes are unique, and that the lack of a specific policy or rule promulgated by the District regarding the backing up of a bus or other driving procedures, allows drivers to have flexibility to exercise their judgment based on their driving experience, weather conditions, traffic patterns, etc. Problems only arise in this regard when the District attempts to second-guess its drivers and apply a specific policy after the fact, as in this case. In response to a legitimately-expressed concern, the District attempted to pass judgment after the fact on a situation that called for a decision at the time based on the unique circumstances of the situation. Such a response has a chilling effect on the drivers' willingness to exercise independent judgment in the future.

Next, the Association asserts that the testimony of the District's witnesses is inconsistent and contradictory. In her complaint letter, Mrs. Traynor stated that her and her daughter "saw in the distance the bus backing up our road, in the fog, up a hill, a quarter of a mile." She then goes on to state that the Grievant "backed up the bus from County road BB to our house. . ." That letter clearly indicates the statements were made as a result of direct observation, however, in her testimony, Mrs. Traynor indicates that the statements were based solely on the statements made to her by the Hughes child, a student who was on the bus at the time. On cross-examination, Mrs. Traynor admitted that she did not really see the bus back up the hill, but only heard the backup warning beeper on the bus before she actually saw it come into view. Mrs. Traynor's account of the length of time she heard the backup warning beeper is inconsistent, not only between her written complaint and oral testimony, but also with the distance the bus could possibly have traveled during the time she claimed to have heard the beeper. In her letter, Mrs. Traynor states that her daughter was three-quarters of the way up the driveway when the bus went past and that she then walked back to the house and played with the kittens for several minutes, and that it was at that point that she first heard the backup

beeper on the bus and that "after another minute or so" she was able to see the bus. Mrs. Traynor testified that when she saw the bus, she estimated hearing the beeper for a minute and a half. Under the most conservative calculations, it would have taken the Traynor girl approximately two minutes to walk the 300 feet back to the house and adding the three minutes for playing with the kittens, five minutes would have elapsed before Mrs. Traynor said she heard the bus. That cannot possibly be accurate, traveling at 25 miles per hour, the bus would have reached the intersection of County Highway "BB" in only 36 seconds. Even if the Grievant waited 30 seconds before backing up, it would only have been slightly more than a minute before the backup warning beeper would have started and the Traynor girl would not even have been back to the house in that amount of time. The only part of Mrs. Traynor's testimony that seems somewhat accurate is the time she estimated it took for the bus to back from the crest of the hill back to her driveway. At five miles per hour, the bus would have taken 72 seconds to travel the distance between those two points (.1 mile).

As to Mr. Traynor, he currently is the School Board President and the father of the student the Grievant returned to pick up. He testified he first observed the bus as it was backing down the hill toward their driveway, so his testimony sheds little light on the question of where the Grievant began backing up the bus. However, certain aspects of his testimony are disturbing. Even though he did not directly observe the actions described in the letter of complaint, he signed the letter anyway. He indicated that he did this not only out of concern for the safety of the children on the bus, but because he ran for the Board on a "pro-safety" platform. The Association finds it troubling that someone in Mr. Traynor's position would sign a letter not based on direct observation, but which could have a detrimental impact on a District employe, based upon Board politics. More alarming, however, is the admitted solicitation of a witness against the Grievant and assistance in preparing that witness' testimony. Traynor admitted that he prepared the written statement by James Bever, an eyewitness to the events of the morning of August 26th. Traynor emphasized certain words in that statement in an apparent attempt to put a "spin" on the document, an inappropriate role for the Board president. Finally, Mr. Traynor offered unsolicited testimony regarding the lack of a vendetta against the Grievant, even though the Grievant did not raise such an issue at any time in the hearing. Thus, caution should be used in considering the testimony of Mr. Traynor.

With regard to James Bever, Bever testified that he was in the middle of the barnyard when he observed the bus go by. From that vantage point, he would have a clear view of the bus from the top of the hill, but he would not have had a direct line of sight to the intersection with Highway "BB". Bever is the only witness other than the Hughes girl, that stated that the bus may have gone all the way to the intersection. While he thought the incident was sufficiently unusual to tell his boss, Richard Traynor, he did not think it important enough to report to the District until approached by Michael Traynor. Bever's testimony was

inconsistent not only with his own testimony, but with that of the others. He stated that a few minutes passed before he saw the bus backing up the hill, which conflicts with his written statement that only about a minute went by when he saw the bus again. At one point, he stated he did not watch the bus back up the hill, but later stated that he watched it back up for about one hundred yards. While he recalled seeing the strobe light on top of the bus, he does not remember hearing the bus' backup warning beeper. That would seem highly unusual in light of Mrs. Traynor's testimony that she could hear the beeper from her home, located over the crest of the hill. It is not possible from his testimony to tell exactly what Bever did see and hear. A more plausible explanation would be that he was working in the barnyard when the bus came over the crest of the hill, and that when it began to back up and the warning beeper came on, he heard the beeper and looked up and watched the bus for a few seconds until it disappeared over the crest of the hill. It is clear that Bever's testimony was influenced by his contact with Michael Traynor. The testimony of Richard Traynor, the brother of Michael Traynor, could only confirm that it was foggy on the morning of August 26th.

The Association finds the testimony of the students to be extremely conflicting. Three of the students put the bus approximately half to three quarters of the way down the hill, somewhere between the cement silos to the east and the driveway of the barn to the west. One student stated the bus was only ten feet from the top of the hill, while another student, Sarah Hughes, told Mrs. Traynor that the bus backed up all the way from County Highway "BB". The Association wonders why the District did not interview more students to get a clearer picture of the true story. The Association concludes that taken as a whole, the testimony of the District witnesses presents a very confusing picture of what occurred the morning of August 26th.

The Grievant was the only individual involved in the events who had a vested interest in the outcome of her actions, i.e. returning to pick up the Traynor child. It is reasonable to believe that when the Grievant stopped the bus and made the decision to back up, she assessed all of her options after checking forward, backward and to each side. As the decision to back up safely was an extremely important one, she had to be keenly aware of her surroundings. Thus, she was the most likely to have a strong recollection of where the bus was at the time she began to back up. Converesly, the other witnesses were not aware at the time that anything important was occurring and when the bus stopped, the students probably noted where they were by glancing up and fixing their vision on the first thing that came into view. For most students, the natural inclination would have been to look straight ahead out the front window of the bus. That would be the image fixed in their heads and could explain why at least three of the students remember seeing the barn and silos. Joint Exhibit 16 is the photograph of the view of the front window of the bus from approximately the point the Grievant said she stopped the bus and the silos and barn are prominently in view. The Association also notes that the students were not asked to recall the events of August 26th until September 2nd, a full week after the incident took place. It is well known that the ability to

recall details of events decrease with the passage of time, and that memories are subject to numerous influences that can have a dramatic impact on a witness' recollection of events. Thus, the Grievant has the more credible recollection of what occurred on the morning of August 26, 1997.

With regard to remedy, the Association proposes that the suspension be lifted and the Grievant be made whole for lost wages and benefits. In the event the Arbitrator rules in favor of the District, the Association urges the Arbitrator to consider reducing the severity of the penalty based upon the Grievant's spotless driving record over 16 years. Also, the evidence in the record, especially the lack of traffic on 690th Avenue at the time of day, demonstrates that the District has overstated the potential danger to the students on the bus that day. Thus, the District's action is too severe.

In its reply brief, the Association disputes the District's assertion that the Grievant admitted backing the bus up a distance of 1/8th to 1/4th of a mile. The Grievant originally claimed she backed up approximately 1/4th of a mile and later amended that statement and testified at hearing that it was only 1/10th to 1/8th of a mile and she has been extremely consistent about that distance. On another point, while the Grievant agreed that backing up a bus can be dangerous, obviously the parties disagree as to how dangerous this action was under the circumstances. The only written policy regarding the maneuver is the portion of the *Wisconsin Commercial Driver's Manual* cited by both parties. Neither of the criteria mentioned in the manual are defined in any way, leaving their interpretation up to the District, through policy or training, or the bus driver through judgment and driving experience. The Grievant testified she could see clearly behind her for almost a mile, that she had just been down the road in the direction she was backing up, that she had not observed any traffic, that her 16 years of driving experience told her there would not be any traffic, and that all of the safety features on the bus were operational. Thus, in the Grievant's judgment, it was safe to back up. It was only after making that determination that she made the decision to back up. While her action was possibly not "absolutely" necessary, the District uses the advantages of seven months of hindsight that the Grievant did not have. Her decision had to be made on the spot, and she testified she assessed her options, and after careful consideration, chose to back up. In her judgment, the action was both safe and absolutely necessary and the District has not provided any reliable evidence to the contrary. The attempt to misrepresent the Grievant's statement that she could see clearly behind her for a mile should not be given credence. She was obviously aware of the "dips" in the road having driven the same route for over nine years. Her statement was in reference to the question about the weather conditions (fog) that morning. With regard to the District's witnesses, both adult witnesses (Mrs. Traynor and James Bever) testified that the bus backed up all the way from the corner of 690th Avenue and County Highway "BB". This conflicts with the testimony of all of the student witnesses. The District seems to downplay the testimony of Mrs. Traynor, only mentioning her testimony where the issue of the density of the fog is addressed. It is clear from the evidence that the

Traynors did not see the bus clearly from their home or at what point it started to back up. Their complaint letter is based upon the statements of a student who lives next door, and that student was not even interviewed. It is also clear that they had contact with James Bever, to the point of drafting his letter to the District and emphasizing certain words. The student testimony is inconsistent and unreliable. While they testified as to what they saw when the bus stopped, they provided no reference, and more importantly, could not testify about what the Grievant saw before she backed up the bus. Discipline based upon such thin testimony should not be upheld.

The District's attempt to attack the Grievant's credibility through an incident occurring over five years prior should not be permitted. There is no evidence that the incident had anything to do with the Grievant's driving record or her truthfulness, and that incident was not even mentioned prior to the arbitration hearing. Thus, it should be completely ignored. The Grievant is aware of the need to ensure the safety of the children and she has accomplished this without incident over 16 years. She made her decision on the morning of August 26th after carefully considering her options and based upon her driving experience, and the District has not proved that her actions were unsafe. While it may be unsafe to back up the bus, it is a maneuver that occurs every day at the turnaround points, and the turnaround point on 690th Avenue is more unsafe than the action the Grievant took on August 26th. The Association concludes that if the actions of the Grievant were safe, as it contends, then the District must have based its disciplinary action on the ill-defined "absolutely necessary" phrase in the manual. While the Grievant may have had other options, there is nothing in the record to indicate that the action she took was inappropriate. The Association concludes that the District has not met the cause standard in the parties' Agreement, and therefore the suspension of the Grievant for three days without pay should be reversed. If a penalty is to be applied at all, given the driving record of the Grievant, such a severe penalty is not warranted, even if the "absolutely necessary" standard is applied.

## DISCUSSION

The parties' Agreement requires that the District have just cause to suspend an employe without pay. In making that determination, it is necessary to determine whether the employe engaged in the improper conduct for which he/she has been disciplined and, if so, whether the level of discipline imposed is reasonably related to the employer's interest in discouraging or preventing such conduct.

The District alleges that the Grievant backed the school bus over the crest of a hill between 1/8th and 1/4th of a mile on a foggy morning on 690th Avenue. The Grievant testified that she did not back the bus that far, i.e., the bus was just over the crest of the hill west of the Traynors' driveway, and that she could see the road behind her for a mile, except for the dips in the road. The District produced seven witnesses – Michael and Claudia Traynor, four

students who were on the Grievant's bus the morning of August 26, 1997, and James Bever, a worker at the farm at the west end of 690th Avenue operated by Michael Traynor's brothers.

Claudia Traynor testified that after the bus went by their driveway headed west, it was gone for two to three minutes, and then she heard the back-up beeper on the bus to 1 to 1 ½ minutes before she could see the bus. She testified that the bus came back into view when it came even with the line fence, which is on the crest of the hill west of the driveway. Ms. Traynor conceded that she could not see how far west the bus had actually gone before the Grievant stopped and backed up, and that she had relied on what she was told by Sarah Hughes, a student who was on the bus and a neighbor, in filing their written complaint. She also conceded that the girl had said the bus had "almost gone to the corner". Mr. Traynor testified that he did not see the bus until it was somewhat east of the line fence, i.e., closer to their driveway.

The testimony of the four students on the bus is not as inconsistent as the Association asserts. Three of the students placed the bus' stopping point near the Honeycrest Farms barn. Jake Haselman testified the bus stopped at the farm's first driveway, which is just about even with the cement silos. The cement silos and the barn are separated by a feed lot. Philip Hughes testified the bus stopped between the cement silos and the barn, i.e., about even with the feed lot. Kaelyn Traynor testified the bus stopped slightly past the silos, west of the barn. The fourth student who testified, Caleb Clark, indicated the bus stopped "some" before the farm. While he attempted to give specific distances – 100 feet before the barn, 110 feet from the silos and approximately 10 feet from the top of the hill, those distances are not consistent with one another. However, he did state that the bus was too far over the crest of the hill to be able to be seen from the other (east) side of the hill. Given the difficulty in approximating distances, especially when one is not at the scene when doing so, more credence is placed on siting the bus in relation to landmarks, such as the barn or silos, than to estimates of distances.

The Association is likely correct when it asserts that the students were not paying particularly close attention to the exact location of the bus when it stopped, as it was not of particular importance to them at the time. Nevertheless, their testimony places the bus closer to the Honeycrest Farm, i.e., considerably farther west than just past the crest of the hill west of Traynors, where the Grievant claims she stopped. Further, all of them testified it was foggy that morning.

As to Bever's testimony, he testified that August 26, 1997 was only his second day working at Honeycrest Farms, that he was outside the barn feeding the cattle when he noticed the bus go by to the west and that it disappeared from his sight as it passed the barn and then a few moments later, it came by backing east up the road, and that he watched it for a few seconds, but not until it went over the hill. The Arbitrator places more credence in Bever's own words than on the statement prepared for him by the Traynors. Beyond that, however,

there is no evidence that Bever's testimony was somehow tainted by the Traynors. Further, he was not aware of the Traynors' complaint when he mentioned the matter to Richard Traynor that morning.

The Grievant testified she was aware of the CDL manual, and that it is dangerous to back up a bus, but that she felt it was necessary to do so at times, such as in this case. The evidence in that regard, however, is to the contrary. The Grievant's initial estimate of how far she backed up the bus was 1/4th of a mile (1,320 feet), and she later amended that estimate to 1/8th of a mile (660 feet). District Exhibit 3, a drawing showing distances from various sites on 690th Avenue, shows that it is 428 feet from the Traynor's driveway to the crest of the hill west of there, and 695 feet from the crest of that hill to the silos at Honeycrest Farm. Thus, even at 1/8th of a mile, the bus was approximately 230 feet past the crest of the hill and within approximately 460 feet of the farm. The Association's President, Shane Lucking, also a bus driver for the District, testified he would only back up a bus if it was necessary, and would not back over a hill. He also testified that the farthest he has ever backed up a bus is one or two bus lengths. That the Grievant could see a point one mile east of the crest of the hill does not alter the fact that she could not see immediately over the crest of the hill west of the Traynor's driveway, or that she would not be able to see vehicles that could be in the dips in the road between the two points. It also disregards the fact that the much safer alternative of turning the bus around at Honeycrest Farms was available, even if it meant driving the bus a little farther west. The alleged lack of traffic on that road is also an unreliable basis for assuming the risk, as it only takes one vehicle at the wrong time to create an accident situation, and does not warrant the risk, given the safer alternative. The Grievant's claim that it was "necessary" to back up the bus in this instance is therefore not persuasive, given the much safer alternative of turning the bus around, even assuming the need to pick up the Traynor child that morning.

The Association correctly notes that one cannot see into the dips in the road east of the Hughes' driveway, where the bus regularly turns around on the route. That, however, is a calculated decision the District has made, and for which it has concluded that a degree of risk is necessary and acceptable and for which it assumes liability. Further, the risk of the bus backing out of the Hughes' driveway is not commensurate with the risk involved in backing up the bus over a blind hill for approximately 660 feet in the fog.

The action of the Grievant in backing up the bus in the fog the morning of August 26, 1997, placed the students on the bus and herself unnecessarily at risk of injury. The District is not required to rely on happenstance or the good fortune that nothing happened. The Grievant unnecessarily exposed the students to a risk of harm and the District to liability. The imposition of a three-day unpaid suspension is not so severe as to be unreasonable under these circumstances. That being the case, the Arbitrator will not substitute his judgment for that of the District as to whether a lesser penalty would have served as well. Therefore, it is

concluded that the District had just cause to impose a three-day unpaid suspension upon the Grievant.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

**AWARD**

The grievance is denied.

Dated at Madison, Wisconsin this 4th day of December, 1998.

David E. Shaw /s/
David E. Shaw, Arbitrator

DES/gjc
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