

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**WEST CENTRAL EDUCATION ASSOCIATION**

and

**SCHOOL DISTRICT OF RIVER FALLS**

Case 59  
No. 69001  
MA-14435

(R.J.A. Termination)

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**Appearances:**

**Nancy J. Kaczmarek**, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of the labor organization.

**Stephen L. Weld**, Weld, Riley, Prenz & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the municipal employer.

**ARBITRATION AWARD**

The West Central Education Association and the School District of River Falls are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising there under. The Association and the District jointly requested that the Wisconsin Employment Relations Commission assign Stuart D. Levitan, a member of its staff, to hear and decide a grievance concerning the interpretation and application of the terms of the agreement relating to discipline, namely the termination of bus driver R.J.A. Hearing in the matter was held in River Falls, Wisconsin on September 15, 2009, with a stenographic transcript being provided to the parties by October 9, 2009. The parties filed written briefs and replies, the last being received on December 2, 2009.

**ISSUE**

The parties stipulated to the following issue:

“Was the grievant discharged for just cause? If not, what shall be the remedy?”

**RELEVANT CONTRACTUAL LANGUAGE**

**Article X - DISCIPLINE**

Employees who have completed the probation period satisfactorily and are continued thereafter shall be entitled to all rights and protections granted by this Agreement retroactive to the original date of employment. Such employees may be disciplined or discharged for just cause.

Any employee may be disciplined or dismissed by the Employer for just cause. Any employee who is suspended 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.

Before any written complaint is placed in a bus driver's personnel file, the supervisor must provide the opportunity for a written rebuttal statement.

Complaints regarding a bus driver made to the supervisor shall be in writing by the person complaining and shall be promptly (within one week) called to the bus driver's attention if the complaint is to result in any discipline of the bus driver.

The supervisor has a responsibility to validate anonymous complaints.

**APPENDIX A**  
**Job Description**  
**BUS DRIVER**

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**Job Goal:**

To provide safe and efficient transportation ....

**Performance Responsibilities**

1. Obeys all traffic laws.

....

12. Reports all accidents and completes required reports. (emphasis in original).

....

**OTHER RELEVANT MATERIAL**

**TRANSPORTATION HANDBOOK, 2008-2009**

**Duties and Responsibilities of a River Falls School Bus Driver**

1. Safe driving procedures much be followed at all times ....  
  
...
15. All instances of bus damage must be reported to the bus supervisor on the day of the damage. If damage is caused by a student, get his/her name so that a bill may be sent to him/her.
16. All accidents, including minor accidents, must be reported to the supervisor immediately. When involved in a traffic accident, you must fill out an accident form in your first aid kit. Know where all forms are located. Be sure to get all necessary information from the other party at the scene. Use your radio to report your accident to the supervisor and receive any further instructions.

...

**TRANSPORTATION HANDBOOK, 2009-2010**

**Duties and Responsibilities of a River Falls School Bus Driver**

16. All accidents, including minor accidents *resulting in no apparent injury or damage to persons or vehicles*, must be reported to the supervisor immediately. When involved in a traffic accident, you must fill out an accident form in your first aid kit. Know where all forms are located. Be sure to get all necessary information from the other party at the scene. Use your radio to report your accident to the supervisor and receive any further instructions. (*emphasis added*).

...

**RELEVANT WISCONSIN STATUTES**

**346.69 Duty upon striking property on or adjacent to highway.** The operator of any vehicle involved in an accident resulting only in damage to fixtures or

other property legally upon or adjacent to a highway shall take reasonable steps to locate and notify the owner or person in charge of such property of such fact and of the operator's name and address and of the registration number of the vehicle the operator is driving and shall upon request and if available exhibit his or her operator's license and shall make report of such accident when and as required in s. 346.70.

#### EXCLUDED EVIDENCE

At hearing, the following employer exhibits were excluded after objection by the association:

7. Typed statement signed by Ron Weishaar, May 6, 2009.
8. Handwritten statement signed by Connor Williams, May 7, 2009.
9. Email from Chad Smurawa, May 11, 2009

#### BACKGROUND

The River Falls School District employs bus drivers to transport its 1900 students along 24 routes, including three for special needs students. Mrs. R.J.A., a veteran driver for the district, lost control of her 34-passenger special needs school bus with two young students on board on CTH M on May 6, 2009. For this incident, and her failure to properly report it, the district that afternoon suspended R.J.A. with pay. On May 28, the district notified her that the School Board would be asked to consider her termination. On June 17, following a hearing at which the grievant spoke and was represented by a WCEA Uniserv Director employed by the WEAC, the Board accepted its administrator's recommendation and terminated R.J.A.'s employment.

R.J.A. began as a substitute driver in September, 1988. She became a regular driver in September, 1989. As of 2009, she had been driving a route for special needs students for 11 years. Her three routes per day in 2009 totaled about 127 miles. Except as noted below, she has received positive evaluations throughout her tenure, indicating she met all the job requirements at the highest level on the scale. There are no written complaints in her personnel file, her commercial driver's license has never been revoked or subject to point violations, and until May, 2009, she had never been disciplined for a driving offense.

In June, 1996, R.J.A. sideswiped a car and did about \$575 in damages to the car mirror; in the opinion of the reporting police officer, the accident was caused by R.J.A.'s "inattentive driving." The officer did not issue a ticket to R.J.A., and the district did not discipline her for this accident.

For the 2004-2005 school year, her annual evaluation showed she met the job requirements throughout.

On April 20, 2006, Personnel Director Donna Hill wrote R.J.A. as follows:

Dear J\*:

On April 20, 2006, Transportation Supervisor Ron Weishaar reported an incident where a student was left on your bus at the conclusion of your route on April 19, 2006. Parents arrived at the bus garage after hours and were assisted in finding their child still on your bus. According to route protocol, the driver must "check for sleepy heads" prior to returning to the bus garage and then again before leaving the bus in the garage.

Due to your negligence we are placing you on suspension with pay for one day (April 20, 2006) and suspension without pay for five days effective immediately. Any future incidents will be subject to further disciplinary action including but not limited to additional suspension without pay or termination. This is consistent with board Policy GDPD-R which states that "incompetence or negligence in performance of duties" is cause for dismissal.

A copy of this letter will be placed in your personnel file.

For 2005-2006, R.J.A.s' evaluation showed she did not meet the job requirements in two areas: Quality of Work (Satisfactory) and Initiative (Attendance). In all other areas, Weishaar recorded that she met the job requirements. She met all job requirements in 2006-2007, with Weishaar adding, "Works well with special needs students and their parents." She was off the 2007-2008 school year due to an injury. In October, 2008, R.J.A. backed into a mailbox while on a route, for which she was not disciplined. During her employment, there have been two instances of children in wheelchairs being injured while on, or being raised onto, R.J.A.'s bus. Neither incident resulted in discipline.

The critical incident began about 12:30 p.m. on May 6, 2009, as R.J.A. was driving her short bus on County Trunk Highway M, in the Town of Kinnickinnic, just east of River Falls. She was driving east at about the posted speed limit of 55 mph, slowing to 50 mph on the uphill curve. But as she approached the crest of a hill, R.J.A. veered across the double center line for 190 feet before going off the north shoulder of the west-bound lane. She drove off-road for 193 feet, at one point taking a gash of about 30 feet out of the private yard abutting the roadway. R.J.A. then steered to the right and shot across the center-line again, going off the south shoulder of the east-bound lane. She then steered excessively to the left, causing the bus to spin and rotate down the roadway with so much deflection that the tire rims gouged the roadway. The bus also nicked a roadside mail box before coming to a rest facing west. After she came to a stop, R.J.A. noticed there was a car in the driveway at 1056 E. CTH M; she did not notice that Connor Williams was inside the car, or that his father, Jerry, was standing nearby.

R.J.A. made sure the children (ages about four and five) were safe and then, without exiting the bus, drove to a nearby street. After she again made sure the two youngsters were all right, R.J.A. walked around the bus twice before resuming her route, picking up three more students, then dropping them off at school. R.J.A. did not inform any school personnel of the incident when she dropped off the children.

There were four eye-witnesses, most notably Jerry Williams, whose son Connor was in a car in the driveway in R.J.A.'s path, at 1056 E. CTH M. There were also two unidentified construction workers, working on a house a little further down the road. R.J.A. noticed the car in the driveway R.J.A. did not talk to any of the witnesses, and she did not attempt to identify and contact the owner of the property where she had damaged the roadside vegetation.<sup>1</sup> As she continued her route, R.J.A. had access to a two-way radio by which she could speak directly with Transportation Supervisor Ron Weishaar or Assistant Supervisor Joanne Maier. At no time as she continued her route did R.J.A. attempt to do so. After completing her route, R.J.A. returned to the garage.

While R.J.A. was finishing her route, Jerry Williams called Weishaar to report the incident in excited and urgent terms. Weishaar did not attempt to contact R.J.A. on the two-way radio. Instead, Weishaar, accompanied by bus driver Bob Maier drove to the scene, actually passing R.J.A. on the way at about a quarter to one. She waved, and he waved back. Weishaar then viewed the scene with a still-excited Jerry Mitchell, whom he saw adjust the black mailbox, which had been knocked off-kilter. Weishaar noticed a dent in the mailbox that he latter determined lined up with black scratch just above the bumper on the bus. Weishaar saw what appeared to be skid marks in the roadway. Weishaar also talked with two construction workers who became aware of the incident while they were working on a nearby house.

R.J.A. was at the garage when Weishaar and Maier returned, visually inspecting the outside of her bus. In Weishaar's absence, she had not spoken to his assistant, Joanne Maier, about the incident. Weishaar and R.J.A. looked at each other, then she started walking toward her car when Weishaar had Bob Maier tell her he wanted to talk to her.

R.J.A. came over to Weishaar, who was still in his car; he asked what had happened, and she told him, explaining that she had swerved to avoid a dog. The two continued the conversation in Weishaar's office, where, pursuant to protocol, Weishaar directed R.J.A. to undergo a drug-and-alcohol test at a clinic in Hudson, Wisconsin, about 30 miles away. Weishaar did not believe the R.J.A. was under the influence of either drugs or alcohol, and did not offer to have R.J.A. driven to the clinic. At 2:05, a DOT controlled substance test on R.J.A. proved negative for marijuana, cocaine, amphetamines, opiates and phencyclidine.

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<sup>1</sup> As noted above, Sec. 346.69, Wis. Stats., Duty upon striking property on or adjacent to highway, mandates that the operator of a vehicle that damages fixtures or property adjacent to a highway "shall take reasonable steps to locate and notify the owner or person in charge of such property" about what had happened.

While R.J.A. was taking the drug test, Weishaar and district business manager Chad Smurawa returned to the scene, where they talked with Jerry Williams again, and the two construction workers. Weishaar took a series of photographs; several show fresh tire tracks from a school bus torn into the lawn adjacent to the road, a deep divot extending about 30 feet, and several show tire tracks on, and gouges into, the roadway. Weishaar took another series of photographs at a later time. Weishaar did not see a loose dog on or around the highway.

At 2:57 that afternoon, Weishaar called R.J.A. at home and left the following message on her answering machine:

Hi J\*, J\*, this is Ron calling. J\*, um, this is a lot deeper than what we expect here, ah. Ah you know I had to tell the central office in case they got called, and there were so many witnesses. Anyway, now they need an investigation and all this kind of stuff, so I do need to, you know, put you on, on uh, what do they call it, paid leave until the investigation is done. Um, I did call St. Croix County, they want the cops to interview you and interview the witnesses, but they're not going to do that; they said they don't do it as long as there was no damage done, that you know has to go in to insurance company. So, anyway, um, I'll be keep in touch with ya, I don't know, we got to set something up so that you and I and Chad, you can just write up a little statement. It would be good if you wrote it up even tonight so that you don't forget anything, the details and stuff. And then, uh, we'll get together sometime and we got to get this all, you know, straightened out obviously. Um. So, I don't know what we're going to do as long as the police department won't do it. I'd like, you know, an unbiased opinion and that's what they want, you know, obviously I'm a little biased towards you so, you know, they don't, you know, they want to make sure that, that it's, uh, you know, everything is the up and up. So, anyway, Joy, I don't know what time we can meet, but maybe give us a call when you get it. I'm doing a CDL right now so I'll see you, ah, maybe later on this afternoon or tomorrow. Thank you much. Bye.

Weishaar has been Transportation Supervisor for about 35 years, and hired R.J.A. On the tape, Weishaar appears friendly to R.J.A., and sounds like he does not want her to be in trouble.

As directed, R.J.A. wrote a statement regarding the incident, as follows:

On Wednesday, May 6 at around 12:56 P.M. the bus was headed east on M. Was close to where curve sign says 50. Saw a dog in my lane on right side of road. No cars behind me or coming from the east. S(w)erved to miss the dog. Heard some weird clunking noise coming from inside the bus. H\* yelled BUS DRIVER! Glanced quickly in rear view mirror to see what was wrong. (She had lost her golf ball) Looked back at road but had slightly over shot the road on drivers side. The wheels on the left side of the bus were on the dirt. Braked to

slow down more and steered to go back on the right side of the road. Anit(sic)-Lock brakes locked. Skidded across road. Ended up facing back to town. No car coming either way. Asked H\* (age 5) and Z\* (age 4¾) if they were Ok. Both smiled at me and said they were fine, and asked why? Told them just making sure. Drove to Meadows Dr. Turned around at Westgate P. Stopped. Made sure the Kids were really fine and not afraid. H\* wanted her golf ball back and Z\* wanted to do it again. Had to tell Z\* no. Got out walked around bus twice to make sure the bus was fine and to calm down. Got H\* her golf ball back and put it in her back pack. Proceeded to pick up J\* since everything looked fine and the children were Ok with what had happened.

Also on May 6, District Director of Personnel Donna Hill wrote the following report:

On May 6<sup>th</sup>, 2009, at 4:40 pm a meeting was held with R.J.A. (bus driver), Chris Carley (union representative), Donna Hill (Personnel Director), Ron W. (Transportation Supervisor) and Chad Smurawa (Finance Director). The purpose of this meeting was to ask Joy to explain, from her perspective, what happened regarding the bus incident that took place earlier that day.

J\* reported that she was driving out on highway M and close to where it turns to a 50 mph zone when a little dog ran out in front of her. She went to swerve and then heard a clunk, clunk. One of the students on the bus stated that he dropped his golf ball. While swerving she was afraid the bus would tip over and therefore swerved in the other direction and the bus turned around facing the opposite direction. She asked if the students were OK and drove down to an area near a subdivision where she felt it was safe to stop and walked around to inspect the bus. She asked the kids again if they were OK. She then turned around to go back in the direction of the incident and proceeded to do the rest of her route.

She said she did not report it to Ron because no other cars were involved and the kids weren't upset. Since everyone is fine and nothing happened to the bus she feels this does not warrant further discipline.

It was explained to her that we are very happy everyone was alright but that this was a very serious incident and were also concerned regarding what might have happened. She and Chris stated that they make these types of decisions every day. Chris stated the natural reaction when you see a dog is to swerve.

She was given a letter from Donna Hill, Director of Personnel, stating she was being suspended with pay pending further investigation. She agreed that she crossed the center line and went off the road multiple times (two times according to her) as stated in the letter she received.



She was informed that we will be investigating the incident further and be in touch regarding either her return to work or further disciplinary action.

She asked when she could start driving again and was told she would be on paid leave until such time as we finished our investigation and decided how to proceed. She again stated, as did Chris Carley, that since St. Croix county police said that she didn't break any laws that there should be no further disciplinary action. Not sure how they knew that information but they did. They were further informed that the RFPD was investigating and they asked why. They were told that this was part of the ongoing investigation and we could potential (sic) be looking at negligent driving. She was also told that we are waiting for the drug and alcohol test results.

Following the meeting I asked both Ron and Chad to write down what they had been told by witnesses and their impression of what they had seen at the site of the accident. Ron stated that "You don't want him to write down the comment the caller made" (some profanity involved) and I stated that I absolutely did want him to document that information while it was still fresh in his mind.

The letter which Hill referred to, above, read as follows:

Dear J\*:

On May 6, 2009, Transportation Supervisor Ron Weishaar reported an incident involving the bus you were operating. At that time, there were two students on the bus and multiple witnesses reported that the bus crossed the center line and went off the side of the road multiple times.

We are placing you on suspension with pay effective immediately pending further investigation of this incident.

A copy of this letter will be placed in your personnel file.

The following day, with R.J.A. on paid suspension, another driver drove her route and reported the bus was shaking. Weishaar had the bearings checked, and when the vibrations continued, replaced two tires, at a cost of about \$1,000 for tires and rims. Also, a situation developed with a buzzer going off during certain maneuvers, which it was not known to have done prior to May 6.

On May 28, District Administrator Tom Westerhaus wrote R.J.A. as follows:

Dear R\*:

You are hereby put on notice that the Board of Education will be asked to consider your discharge. The reasons for such consideration include the following:

1. On May 6, 2009, while driving a school bus carrying two children eastbound on County Highway M between Meadows Drive and Liberty Road, you did drive the school bus off of the road, and do a 180<sup>o</sup> turn in the road.
2. You failed to report the above-described incident.
3. The Board will also be asked to consider your driving and disciplinary record including a five-day suspension for leaving a child on the bus in the bus garage on April 20,2006.

Please be advised that you have a right to a hearing with the Board of Education. If you desire a hearing, please make such a request within seven (7) days of the date of this letter.

The hearing will be held in closed session unless you request that it be open to the public. You have the right to be represented by counsel of your choice at that session. You further have the right to call witnesses and submit evidence relevant to the subject of the discharge. You have the right to cross-examine and rebut any testimony which might be unfavorable to you.

Very truly yours,  
Tom Westerhaus  
District Administrator

The River Falls Board of Education convened a special meeting on June 17 to consider discharging R.J.A.. At R.J.A.'s request, testimony about the matter was given in open session. Following a hearing of about 90 minutes, the board went into executive session for slightly under half an hour. During that time, the board voted to terminate R.J.A., which decision it then affirmed in open session, 5-0.

On September 2, 2009, accredited accident reconstructionist Jeffery J. Pettis submitted a report to the district in which he opined that R.J.A.'s operation of her bus on May 6 constituted inattentive driving which had created a hazard to oncoming traffic; that swerving to avoid a dog and then taking her eyes off the road was inappropriate; that R.J.A. had a statutory duty to report the damage to property adjacent to the highway which she did not fulfill, and that the front tires of the bus were potentially damaged to the point of being unsafe.

Since 1993, the district has scheduled at least 21 sessions relating to issues of interest to drivers, including tornado drills, accident reporting, sexual harassment, winter driving safety, medical needs for special needs students, managing difficult behavior, student discipline, bee stings, federal mandates, diabetic reactions, asthma attacks, driving safety techniques, and, on one occasion, defensive driving.

This was not the first instance of a district bus driver operating a vehicle in a dangerous manner or committing a moving violation. It is the first instance in the record of a driver being disciplined for such conduct.

In 2005, driver L.M.P., a five-year employee, was driving a route when she hit the rear of a car waiting to turn, pushing the car into the vehicle in front of it. The two other drivers were conveyed to hospital by ambulance, and some of the children on board the bus asked to see a doctor. The bus was out for repairs the remainder of the school year. The police ticketed L.M.P. driving too fast for conditions. The district did not impose any discipline on L.M.P..

On September 3, 2009, the River Falls *Journal* published a feature under the headline, "There's something about D\* ...," which catalogued some incidents from the 37-year career of bus driver DN. It began as follows:

School bus driver DN's boss, Ron Weishaar, has worked with her for 37 years. These are some of his best-of-D\* highlights:

...

- On another occasion I got a call that there was a River Falls bus backing down I-94 with red lights on. I asked D\* about this, and she said that she had stopped to pick up a two-by-four board that had nails in it.
- D\* has been known to pick up hitchhikers with her bus. She has also been known to drop off swimmers at the wrong school and drive away with their suits to go shopping. I had to call the Eau Claire police and have them find her bus and send it back to the school

...

Weishaar testified that D.N. did not divulge to him that she had backed down the highway until he explicitly asked her about it. The district did not discipline D.N. for backing her bus down the interstate, failing to so inform the district, for picking up hitchhikers, or for dropping swimmers off at the wrong school and driving away.

There have also been two instances in which the district's drivers were involved in fatalities, neither of which resulted in discipline. In one instance, Weishaar's son was driving a bus when a driver coming from the opposite direction fell asleep at the wheel and crossed the center line. The younger Weishaar went as far to the shoulder as he could, and positioned the bus to best absorb the unavoidable impact, which resulted in the other driver's death. State and St. Croix County officials investigated and did not charge the younger Weishaar with any driving offense. In the other instance, a child who had exited the bus and been greeted by his mother suddenly ran into the path of the bus, apparently to retrieve some papers, when the driver was pulling over to the side of the road to address an incident on the bus. Again, county law enforcement officials determined the driver was not to blame for the tragedy, and no discipline was imposed.

On June 18, the WCEA submitted a Petition for Grievance Arbitration, in which the district concurred. At the parties' request, the WERC provided a panel of five staff arbitrators, from which they mutually selected the undersigned to serve as the impartial arbitrator.

### **POSITIONS OF THE PARTIES**

In support of its position that the grievance should be sustained, the association asserts and avers as follows:

The District has the burden of proving just cause for terminating R.J.A.'s employment. Given the employee's long tenure and positive record, the standard of proof should be more than "a preponderance of evidence," and should be "clear and convincing evidence." Given her age, a lesser standard does not provide adequate protection for her significant property and liberty rights.

In assessing just cause, the arbitrator should impose his own idea of the appropriate discipline when discipline is in fact warranted. The arbitrator should not give controlling weight to the employer's decision, but instead review the factual elements of the case *de novo*.

Arbitrators will in many cases reject management's actions where it fails to fulfill some procedural requirement specified in the agreement. Here, the employer did not provide R.J.A. with the reasons for her discharge, a notice required by the collective bargaining agreement. The lack of adequate and specific notice as to the basis for the discipline effected the association's ability to prepare and present a defense at arbitration.

Also, the district did not conduct a thorough and objective investigation. Instead, it rushed to judgment and bypassed several key pieces of evidence. Transportation Director Weishaar failed to secure a written complaint from Jerry Williams, as required by Article X of the collective bargaining agreement. He failed to conduct even a preliminary interview with eye-witness Connor

Williams. Instead, he relied on circumstantial, photographic, evidence, part of his slap-dash investigation. He did not even issue a written report or an abstract of his findings.

The district introduced evidence of past incidents which were not disciplinary and not part of R.J.A.'s personnel file. The District did not rely on exhibits 1 through 4 in deciding to terminate R.J.A., and thus the arbitrator should not consider them as part of R.J.A.'s past record.

The record does not demonstrate that the district had just cause for termination. The district failed to call as a witness Jerry Williams, the only citizen who complained about R.J.A.'s driving, or his son Connor, who directly observed the May 6 incident. Nor did the district call two construction workers who had been nearby. An adverse inference is created by the employer's failure to call these witnesses, such that the arbitrator should summarily find the district lacked just cause given the conspicuous absence of key witnesses, the lack of eyewitness testimony, and the employer's undue reliance on circumstantial evidence.

R.J.A.'s version of events – that she swerved to avoid a dog, and then was momentarily distracted by the unusual nature of the cry for attention from one of the students – is reasonable and credible. A reasonably attentive driver could have been momentarily distracted by such an incident.

In contrast, the opinion testimony by the accident reconstruction expert is not necessarily conclusive or reliable, and thus should not be provided much weight. The reconstruction was conducted several months after the incident, and the expert also did not interview any witnesses or even R.J.A..

The testimony from Transportation Director Weishaar should also be discredited, because it is inconsistent, speculative and subject to exaggeration.

Despite his purported heightened level of concern, he did not even radio R.J.A., nor arrange for her transportation when he directed her to be tested for alcohol and drugs. Given he never debriefed R.J.A. or the children who were on the bus, his words of concern for their welfare seems hollow. And despite his stated concern about negative public perception, he paid no mind to prominently displaying the district's lax standard of safety in the September 3, 2009 newspaper article about another driver backing a bus down a major interstate and committing other safety infractions.

The record evidence does not show that R.J.A. was culpable of gross negligence. At worst, she was guilty of nothing more than inattentive driving, which was a reasonable reaction given the occurrences of that moment.

R.J.A. did not have a duty to report the incident. The district's 2008-2009 Transportation Handbook, Rule and Responsibility 16, declares that drivers have a duty to report accidents to their supervisors. "Accident" is never defined, making this rule impermissibly vague. It is also unenforceable, because it does not state the consequence for failure to report an accident. The district itself has referred to this as an incident. It certainly was not a reportable accident, and R.J.A. had no duty to report it.

Assuming, *arguendo*, that the arbitrator finds R.J.A. was culpable, the penalty of discharge is too severe. This incident does not meet the level of seriousness to justify R.J.A.'s immediate termination. Termination is out of step with the basic tenants of progressive discipline. R.J.A. was not provided adequate driving training, especially in defensive driving.

R.J.A. was subject to unequal treatment relative to discipline. Just cause requires that discipline be imposed in a consistent fashion, but the district did not treat R.J.A. equally given the lax way it tolerated some of her colleagues' serious performance issues. In 2005, driver L.M.P., a five-year veteran driver, hit the back of a vehicle, pushing it into another car. The two other drivers were taken by ambulance to the hospital, and some of the students on board needed medical care. L.M.P. was cited and fined for driving too fast for conditions, and the bus was so damaged it was out of service for the rest of the school year. Yet the district imposed no discipline on L.M.P..

Another driver, DN, backed down I-94, in violation of the state's commercial driving manual, to pick up a 2-x-4 with nails in it. Yet the district did not discipline DN for his incident, nor for her practice of picking up hitchhikers. Given this unequal treatment, the district did not have just cause to discharge R.J.A. for the incident of May 6.

R.J.A. was not provided adequate warning. The five-day unpaid and one-day paid suspension the district imposed on R.J.A. in April 2006 for leaving a sleeping child unattended – her first documented offense in 18 years of driving at that time -- has nothing to do with driving ability or the incident of May 6. It is not credible for the district to attempt to bolster its case by linking the two incidents.

Seniority is an important consideration in assessing discipline, and the arbitrator should also take R.J.A.'s 21 years of service into account.

As remedy, the arbitrator should reinstate R.J.A. to her former position, with full back wages and benefits, including retirement benefits, with interest. All records and documents pertinent to her termination should also be expunged from her personnel file.

In support of its position that the grievance should be denied, the district asserts and avers as follows:

Discharge is appropriate based on the seriousness of the incident, the grievant's record, as well as the failure to report. She was given forewarning of the possible disciplinary consequences of her conduct, by virtue of the disciplinary notice she received for the April, 2006 incident. Further, the transportation handbook identified dishonesty and bus accidents are grounds for immediate termination. The rule requiring employees to notify the district of any incidents involving safety concerns is reasonably related to the orderly, efficient and safe operation of the enterprise. To discover whether R.J.A. in fact disobeyed the rule, the district interviewed witnesses and took photos of the scene. The investigation was conducted fairly and objectively, in that R.J.A. was placed on paid leave, asked to provide a statement, and given the opportunity to explain the incident and her failure to report it. She was also given the opportunity of a hearing before the board. The district obtained substantial evidence proving R.J.A. was guilty of the offense, basing its conclusions on witness statements and physical evidence. The district has applied its rules without discrimination; it is not aware of a similar event ever occurring in the district, and the incidents involving LP and DN are not comparable because neither employee had received a prior five-day suspension, neither employee failed to report the incident, and there were no issues of fact and credibility in their cases. The degree of discipline was reasonably related to the seriousness of the offense and R.J.A.'s past record, in that her actions put the children, herself, and other drivers at risk.

The findings of the accident reconstruction expert confirm the district's decision to terminate R.J.A.. The expert documented that the bus traveled about 190 feet left of the center line before crossing onto the shoulder and traveling about 193 off-road before re-entering the road and engaging in an excessive and improper steer causing the bus to pitch into a jaw and spin. The expert found no evidence of a dog, no evidence of Harvey the Rabbit, and no evidence of swerving or braking to avoid either. He found no evidence that evasive action had been taken (meaning R.J.A. lied), and no evidence that the brakes locked (as R.J.A. claimed). The expert also testified that R.J.A. had a duty to report property damage to the land on the north side of the road.

Whether it is termed an accident or an incident, when a bus leaves the road twice, damages property, re-enters the road without stopping or checking traffic, spins, and ends up facing the wrong direction, there is a serious and reportable event.

In further support of its position, the association responds as follows:

It is the employer and not the grievant who is on trial in this proceeding, and the district's almost willful refusal to examine R.J.A.'s performance in a balance manner kept it from obtaining substantial evidence of her guilt. The district did not weigh the entire record before terminating R.J.A..

The record evidence demonstrates that the district does not have substantial evidence of property damage as a result of the incident. The district has not produced any photographic evidence or documentation of the alleged damage to the bus, other than Weishaar's casual testimony. Nor has there been any photographic evidence or other documentation of damage to the Williams' mailbox, and Williams was not called to testify.

R.J.A.'s consistency demonstrates her truthfulness and credibility, contrary to the district's assertions to the contrary, and common sense supports her account that she swerved to avoid a dog in the roadway. R.J.A. was the only direct witness to the events who testified, and in the lack of corroborating testimony otherwise, her account should be found credible.

The district's claim that a long-standing, trust-worthy employee suddenly became dishonest, deceptive and deceitful should be viewed with skepticism. The district's brazen attempt to damage R.J.A.'s reputation by calling her a liar or implying she has a drinking problem or mental illness should be discredited. R.J.A. has earned the benefit of the doubt through her consistently positive evaluations, dependability and loyalty.

The district's decision to terminate R.J.A. was excessive, unreasonable and an abuse of management discretion, given that it has overlooked, or even openly touted, the serious safety issues of another driver who backed her bus down a major interstate highway and never reported that fact to Weishaar. Astonishingly, the district recently showcased this unsafe and improper driving in a newspaper feature, along with the fact that this driver picked up hitchhikers, along with other infractions. The district cannot have it both ways of citing safety concerns and a failure to report as grounds for terminating R.J.A., while allowing another employee to go without discipline for egregious safety and reporting violations. In light of the lack of discipline imposed on other drivers, the district's termination of R.J.A. is excessive and an abuse of management's discretion. The grievance should be sustained and R.J.A. returned to work with back pay and interest.

In response, the district posits further as follows:

Contrary to the association's assertion, the grievant was given clear and specific notice as to the basis for the board's decision to terminate, as reflected in its letter of May 28, 2009. As to the investigation, there was no need to call



witnesses to verify what was not in dispute, namely that the grievant drove the buss off the north and south sides of the road and ended up facing west while on an eastbound route. Everyone agrees this happened.

Despite the association's description of the investigation as "slapdash," the recommendation to discharge was made by three individuals and confirmed by the school board, and its conclusions about the nature and extent of the off-road experience later confirmed by an accident reconstruction specialist.

The association errs in contending that a finding of "gross negligence" is required for a finding of just cause for discharge. In deciding to discharge R.J.A., the district considered her breach of the duty of care – her inattentive driving that resulted in a dramatic off-road event – as well as her prior disciplinary record and her failure to report this incident. Even as supported by the very case the association cites, a finding of "gross negligence" is not necessary to support the discharge.

Whether termed an "accident" or an "incident," the event of May 6 was something the grievant had a duty to report.

The association's examples of other disciplinary cases do not mirror R.J.A.'s, in that no other incident involved a driver with a prior five-day suspension who also failed to notify a supervisor of a driving incident. The district based its decision to discharge on these three factors – the seriousness of the incident, R.J.A.'s failure to report it, and her prior record.

The association's remedy of reinstatement, back pay and interest shows a lack of any recognition that the grievant was culpable and should be disciplined. Apparently, the association doesn't even think R.J.A. should receive a written warning, but in fact should be rewarded with a paid vacation for driving off the road and nearly rolling over. Neither the grievant nor the association acknowledge that a significant event occurred, in which her inattentive driving put children at risk and had nearly disastrous consequences. The district cannot trust the grievant's driving, and should not be asked to wait and see if she has another lapse in judgment. The grievant cannot be trusted to make the judgments needed to transport students safely, and the decision to discharge her was appropriate.

### **DISCUSSION**

The central question in this case is whether an employer's lax attitude toward discipline prevents it from terminating an employee who commits an offense which, by itself, would give just cause for discharge. When a school district has failed to discipline one bus driver for ticketed, unsafe driving that resulted in injuries and substantial damage, and failed to discipline

another driver for illegal and dangerous driving that did not result in injuries or a ticket, but which she did not report, can it fire a more veteran driver for a single, unreported incident of terrible, almost tragic, loss of control which does not result in injury or substantial damagers?

The critical components to just cause are not mysterious. Just cause requires that an employee knows that certain behavior is not acceptable, and the potential punishment for violations; that the employer establish that the employee engaged in such behavior; and that the discipline imposed was commensurate with the seriousness of the offense, the overall record of the employee, and the discipline imposed for prior similar instances.

I agree with the association that the district has the burden of establishing just cause for R.J.A.'s discharge, as all employers do for all discipline. I also agree that, given R.J.A.'s tenure and the severity of the discipline, the evidence in support of the discipline must be clear and convincing. While the employer may not rely on *events* that occurred following the discipline to support the discipline, it may offer at arbitration *evidence* it collected about the event after the imposition of discipline, as the district has done here with the testimony and report of its expert witness.

I disagree with the association's assertion that the R.J.A. wasn't given proper notice of the charges against her. The grievant was directly told the day it happened, May 6, that she was suspended with pay so the district could investigate the incident. On May 28, District Administrator Westerhaus notified R.J.A. in writing that the Board was being asked to consider her discharge for the incident and her failure to report it. That's three weeks during which R.J.A. knew the matter was under investigation. The Board hearing was June 17, almost another three weeks later. Six weeks from notice of investigation to hearing gave the grievant and association sufficient notice to prepare and present a defense.

I also disagree with the association that I should "impose" my "own idea of the appropriate discipline." My role as arbitrator is not to declare what I believe the proper discipline should have been; my responsibility is to determine whether the employer violated the terms of the collective bargaining agreement by the discipline *it* imposed. I do have the authority to modify that discipline, but *only* after making a determination that the employer acted without just cause for discharge.

I disagree with the association's contention that just cause necessarily requires progressive discipline. Some workplace offenses are so egregious that they do not require progressive discipline, but justify immediate termination. Although most such situations also involve intentional misconduct such as theft or workplace violence, the offense does not have to constitute misconduct to justify termination for a first offense. A single incident of poor performance in a critical area can provide just cause for immediate termination.

The association raises legitimate criticisms of the district's investigation into the incident and its presentation of the case. The District certainly should have interviewed all eye-witnesses it could identify, and I was surprised that neither the Williams' nor the construction

workers were called at hearing. The association errs, however, in asserting that an eye-witness was needed, either to file a complaint or testify under oath that it happened.

The association contends the district violated provisions in Article X by not securing a written complaint from Jerry Williams. Had the district relied exclusively on Williams for information about the accident, its failure to secure a written complaint would be significant. However, the district actually proceeded on a complaint from Weishaar, based on his observations at the scene. Weishaar's assumption of responsibility as complainant meant the district didn't need a citizen complaint (or, as it happened, testimony).

Part of the purpose of Article X is to protect drivers from anonymous, unsubstantiated complaints, giving them timely notice of the allegation and the right to respond. Through Weishaar's initial discussion with R.J.A., his phone call, the meeting, and Hill's letter, all on May 6, plus the letter from Westerhaus on May 28, the district obviated any need for a written complaint from Williams or any other eye-witness.

The association further wants me to find a negative inference in the district's failure to call any eye-witnesses. I don't know what negative conclusion I could draw from their absence. To do so would mean I believed the district didn't call these witnesses in order to conceal some adverse evidence. I don't know what that adverse evidence could be. The contemporaneous photographs, Weishaar's testimony, and the expert testimony by the reconstruction analyst all establish the physical reality of R.J.A. losing control of her bus. The only disputed fact is whether she did so after swerving to avoid a dog, or just because of inattentive driving. Since swerving her 17,000-pound bus to avoid a small dog would not absolve R.J.A. for the loss of control, the presence or absence of a dog is irrelevant. I don't know what other necessary facts those witnesses could provide. Eye-witness testimony is not necessary to administer the collective bargaining agreement in this instance.

Certainly, any school bus driver knows that inattentive or unsafe driving subjects them to discipline. It really doesn't matter why R.J.A. lost control of her bus; whether she swerved to avoid a dog and then was distracted by the urgent cry of H., or whether she simply drifted off the road due to her inattention is essentially a secondary issue. What matters is the physical reality – that R.J.A. crossed a double yellow line on a county highway near the crest of a hill, proceeded against traffic for 190 feet, went off the north side of the road for 193 feet, ripping out a long and deep swath of grass, swung back into traffic, crossed the yellow line again, went off the south side of the road, nicked a mailbox, then spun around and went down the road sideways, leaving gouges in the road, and the bus turned 154<sup>0</sup> from the direction it had originally been facing.

That was R.J.A.'s driving offense. What followed was an ongoing occurrence of bad judgment.

As the bus came to a rest, and R.J.A. checked on the children, she was aware of the car in the driveway, and probably should have been aware of Jerry Williams standing nearby.

R.J.A. should have known that anyone who had seen what had just happened would be concerned. After moving her car safely out of the road, R.J.A. should have taken some step to communicate with Williams and other witnesses that she was fully in control of her vehicle and able to continue. The fact that R.J.A. drove off without speaking to witnesses is the initial indication she did not understand the severity of what had just happened.

That R.J.A. continued and finished her route without calling in shows further bad judgment. She had just taken her bus through a doubly death-defying drive, which she should have known would put a lot of strain on the vehicle. After taking a moment to compose herself and check on the two students, R.J.A. proceeded to finish her route – without ever informing her supervisor what had just happened or contacting the residents whose property she damaged.

In justifying R.J.A.'s failure to report the incident, the association compares this situation to fishtailing on ice, or hydroplaning in the rain, suggesting it would be silly and burdensome to expect every driver to report every incident where something a little scary or untoward happened. This is a bad comparison, trying to draw equivalence between things that happen not infrequently with something that should never happen at all. This was way more than the normal winter experience of briefly fishtailing or hydroplaning; this was a death-defying loss of control, crossing the double yellow line twice, twice going off the road.

Despite R.J.A.'s testimony and the association's argument, this was a reportable accident on three accounts. First, R.J.A. had the statutory duty to report the damage she did to the landscape and mailbox. While Williams apparently could fix the mailbox with relative ease, the damage to the vegetation was more serious, taking time and money to repair. R.J.A. explained that she didn't think she had gone any further off the road than the shoulder, and hadn't done any such damage. But this attempt to justify her failure to report, as required under law, is a two-edged sword; if she truly didn't know she had gone off the road and taken a 30-foot-long divot out of the vegetation, and hit the mailbox, then her situational awareness was so seriously deficient as to call into question her fitness to drive.

There is also a health-and-safety reason why R.J.A. was required to notify the district about the incident. This maneuver put a great deal of strain on the vehicle. R.J.A.'s brief visual inspection was not sufficient to determine if it had done any structural damage to the bus. For driver and student safety, the bus should have been thoroughly inspected by a qualified mechanic. By concealing the incident, R.J.A. would have deprived the district of the ability to inspect the bus before it was driven again. Indeed, it turned out that two tires and rims had to be replaced. R.J.A.'s failure to report would have put herself, her riders, and any other drivers and passengers potentially at risk.

Finally, and perhaps most importantly, R.J.A. had to report because there were students involved. R.J.A. obviously enjoys driving special needs students, and clearly cares for them. However, she is not a child psychologist. She may have perceived, and believed, that H\* and Z\* were not troubled by the incident, but that was not her determination to make.

R.J.A. does not know how a special needs child internalizes a traumatic event such as this. When a school bus driver subjects a young child to such a maneuver as R.J.A. subjected H\* and Z\*, the parents of those children have the absolute right to know of the incident. The children's teachers also had the need to know of such unanticipated stress placed on their students.

The transportation handbook declares that "(a)ll accidents, including minor accidents, must be reported to the supervisor immediately," further directing drivers to "(u)se your radio to report your accident to the supervisor and receive any further instructions." The fact that the district modified this provision after this incident to clarify that even accidents "resulting in no apparent injury or damage to persons or vehicles" does not mean that this accident was not reportable. For the reasons explained immediately above, it was.

R.J.A. took no affirmative steps to notify Weishaar what had happened, and there is no evidence in the record that she attempted or even planned to. She did not alert any of the students' teachers what had happened. She did not use her radio to report to Weishaar. R.J.A. testified she would have left a message with Weishaar's assistant if Weishaar hadn't arrived, but when he arrived at the garage, she did nothing to approach him. In fact, Weishaar had to direct Bob Maier to tell R.J.A. he wanted to talk to her.

Further, there is an internal inconsistency in R.J.A.'s testimony. If she didn't believe the event was something she needed to report immediately or even fairly promptly by radio, why would she think she should report it in person after the end of her route?

R.J.A.'s violation of safe driving standards was so egregious, and her lack of situational awareness so clear, that it is understandable why the district would not want to entrust its students into her care. The way R.J.A. drove could easily have lead to the kind of tragedy that scars a community for years. Were I considering this discipline by itself, I would have no trouble denying the grievance and sustaining the discharge.

But I do not consider this discipline in an historical vacuum, but in light of the examples of L.M.P. and D.N., each of whom also committed driving violations, but without discipline in either case. Can the district have a zero tolerance policy for bad driving such as this after taking no action at all against these other two drivers (and even publicizing one of them for her driving misdeeds)? As noted above, consistent discipline for similar misconduct is an essential component of just cause.

In 2005, L.M.P. was ticketed for driving too fast for conditions after she ran into the back of a car waiting to turn and pushed that vehicle into another, sending the other two drivers to the hospital, and causing substantial damage to her bus. Yet despite L.M.P.'s clear violation of her duties as a driver and responsibilities under the Handbook, the district did not discipline her. I don't know why the district did not do so, I only know that it did not.

The district seeks to differentiate the events, noting that L.M.P. did not have prior discipline as R.J.A. did, and that she hadn't acted to cover it up. But those points, while true, go to the severity of discipline, not its very existence. It's not that L.M.P. wasn't *fired* for her bad driving, as R.J.A. was, it's that she wasn't even disciplined at all. Also, since I do not find R.J.A.'s 2006 discipline to be relevant to her discharge, the fact that L.M.P. had no similar discipline does not help the district draw a distinction between the two situations.

Nor did the district discipline D.N. for driving her bus backwards down I-94 to pick up a piece of wood with nails in it – even though D.N. did not divulge that damaging fact until Weishaar asked if it had happened. Although the specifics such as time of day, or duration of the incident, are not in the record, I can take arbitral notice of the fact that driving a school bus backwards down an interstate highway is inherently dangerous and against the law. The district also tolerated D.N. occasionally picking up hitchhikers. In fact, 20 years afterwards, it publicized these events as part of a genial human interest newspaper feature on D.N. While these events apparently happened sometime in the past, they occurred under the same Transportation Supervisor.

On the basis of contemporaneous photographs taken by Weishaar, and the testimony of Weishaar and Pettis, the record establishes beyond any doubt that R.J.A. negligently and dangerously drove her school bus in the manner alleged. The record also establishes that, despite several opportunities, R.J.A. took no steps to notify Weishaar or the owners of property she had damaged about the accident. The record further establishes that on at least two occasions during the time that Weishaar has been Transportation Supervisor, the district has failed to discipline drivers who committed moving violations, including causing an accident which resulted in injury and substantial damages and driving in a dangerous and illegal manner and seeking to conceal that fact. The district also declined to discipline R.J.A. herself for sideswiping a car and damaging its mirror or for backing into a mailbox.

Therefore, I find that the River Falls School District had just cause to discipline R.J.A. for the events of May 6, 2009, but due to its failure to discipline L.M.P. or DN for the events described herein, it did not have just cause to discharge her.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

### **AWARD**

That the grievance is sustained in part and denied in part. R.J.A.'s discharge is modified to an unpaid suspension, lasting from May 28, 2009 to the end of the 2009-2010 school year, with the following conditions:

1. Prior to resuming her duties in the 2010-2011 school year, R.J.A. must take and pass, at her own expense, the knowledge and skills tests for a Commercial Drivers License. The district shall provide an appropriate vehicle in the same manner that it does for other employees and applicants who take the CDL skills test;
2. If R.J.A. is convicted of any moving violation, either on or off duty, the district may discharge her, at its discretion;
3. I shall retain jurisdiction, until relieved by the parties, to address any disputes that arise in the implementation of this award.

Dated at Madison, Wisconsin, this 2<sup>nd</sup> day of March, 2010.

Stuart D. Levitan /s/

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Stuart D. Levitan, Arbitrator