BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WHITEHEAD SPECIALTIES, INCORPORATED	Case 1 No. 50968 A-5225
and	
TEAMSTERS LOCAL NO. 579	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. Kenneth R. Loebel, appearing for the Union.

Melli, Walker, Pease & Ruhly, S. C., Attorneys at Law, by Mr. James K. Pease, Jr., appearing for the Company.

ARBITRATION AWARD

Teamsters Local No. 579, herein the Union, and Whitehead Specialties, Incorporated, herein the Company, jointly requested the Wisconsin Employment Relations Commission to designate the undersigned as the arbitrator to hear and decide a dispute between the parties. The undersigned was so designated. Hearing was held in Monroe, Wisconsin, on May 24, 1994. A transcript of the hearing was received on June 16, 1994. The parties completed the filing of post-hearing briefs on June 28, 1994.

ISSUES:

The parties stipulated to the following issues:

> Did the termination of the grievant on January 31, 1994, violate the labor agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE XVII

DISCHARGE AND SUSPENSION

> Section 1. No employee shall be discharged or suspended without just cause. Any employee who has been discharged or suspended shall, upon request, be granted an interview with a representative of the Employer.

BACKGROUND:

The Company is a trucking company located in Monroe, Wisconsin. The Company employs approximately 40 drivers and serves customers in Minnesota, Iowa, Oklahoma, the states east of the Mississippi River and Ontario, Canada.

The grievant, Joseph Karalis, began his employment with the Company on May 21, 1991, as a truck driver. Karalis received a copy of the Company's rules and regulations at that time. The following were included in that

document and also appear in the relevant collective bargaining agreement between the Company and Union:

> On Road Rules
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> 1. Call in daily is required Monday through Saturday (between 7:00 a.m. and 5:00 p.m., Monday through Friday and between 8:00 a.m. and noon on Saturday) and notify office after every load before returning to Monroe.
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> . . .
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> 4. Driver is required to drive and take time off duty according to D.O.T. Regulations.
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> Care and upkeep of Company vehicles
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> 9. No unit is allowed to be taken to employee's resident or any other place other than authorized by dispatcher. Any expenses occurred (sic) from not returning unit to terminal will be charged to the employee including but not limited to, parking tickets, service call to start, extra fuel used and any expenses caused from possible accident. Using equipment other than authorized by employer is considered theft. Employer reserves the right to dismiss any employee for using equipment other than where dispatched as theft.
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> . . .

On February 6, 1992, the grievant was issued a Notice of Disqualification-Termination for failing to take an eight hour break as required by DOT rules. The grievant grieved his termination on the basis of inconsistent enforcement of the rules by the Company. The parties reached the following settlement of the grievance:

> The Company agrees to reinstate Joe Karalis per the attached settlement agreement. The Company agrees to enforce all contractual rules and regulations, along with all F.M.C.S. D.O.T. regulations uniformly and consistently upon all employees covered by the collective bargaining agreement.

The aforesaid settlement agreement was entitled "Last Chance Agreement" and read as follows:

> This Last Chance Agreement is entered into between Whitehead Specialties, Inc. referred to herein as the Employer, Joseph Karalis, referred to herein as the Employee, and Teamsters Local No. 579, referred to

herein as the Union.

WHEREAS, the Employee was discharged on February 6, 1992, for violation of rules of the DOT and of the Employer.

AND WHEREAS, the Union filed a grievance with the Employer demanding that the Employer reinstate the Employee with back pay.

NOW THEREFORE, in consideration of the premises and obligations of the parties hereunder and to settle the dispute between the parties, the parties agree to the following:

1. The Employee agrees that he violated the rules of the DOT and of the Employer, and further agrees not to do so again.

2. The Employer agrees to reinstate the Employee, without back pay of any kind, effective February 14, 1992.

3. The Employer and the Union agree that if the Employee again violates a DOT rule or a rule of the Employer, the Employee will be subject to immediate discharge.

4. The Union and the Employee further agree to withdraw the grievance herein with prejudice.

On Wednesday, January 26, 1994, 1/ the grievant asked the Company's Traffic Manager, Dennis Stoneback, if there were any loads which would allow him to be back in Monroe for the Super Bowl. Stoneback said there were such loads and the grievant picked up a load in Monroe and started for the East Coast. On Thursday, January 27, the grievant unloaded in Fremont, Ohio, and also reloaded for a delivery to Snow Hill, Maryland. He unloaded in Snow Hill in the morning of Friday, January 28. The grievant originally had been scheduled to pick up a load in Richmond, Virginia. However, on the way to Snow Hill, the floor of the trailer got wet due to bad weather. The grievant notified Stoneback of the condition of his trailer. Stoneback contacted the customer in Richmond, who decided not to ship in the wet trailer. Stoneback then arranged for an alternate load for the grievant in Newark, New Jersey. The grievant arrived in Newark on Saturday, January 29, to pick up the load, which load was scheduled to be delivered in Corunna, Indiana, on Monday, January 31. After his trailer was loaded, the grievant called the customer in Corunna, who said it would like to have the load delivered as soon as possible. The grievant made one unsuccessful attempt to call Stoneback to inform him that the delivery to Corunna would be made before Monday. The grievant did not attempt to call Les Rasmussen, the Company's Safety Director who also helps with the dispatching, nor did he send a message to the Company office on his computer.

On the way to Corunna, the grievant called Rea Magnet Company, a regular customer of the Company, in LaFayette, Indiana, to see if it had a load which he could take to Monroe. He was informed by a shipping department employe that there would be a load available for him. The grievant delivered his load in Corunna at about 2:00 a.m. on Sunday, January 30. He then proceeded to Rea Magnet Company in LaFayette and after picking up a load there, he drove to Monroe where he arrived at about 11:30 a.m. on Sunday, January 30.

When the grievant reported to the Company at about 9:00 a.m. on Monday, January 31, he was called into the office where he met with Les Rasmussen and Dennis Stoneback for a couple of minutes. After a brief discussion about the pickup at the Rea Magnet Company, the grievant was given the Notice of Disqualification, which was a notice of termination of his employment. Said notice contained the following statements:

> Driver violated rule #1 of On Road Rules. Did not call in after unloading in Corunna, In. Was not dispatched to pickup at Rea Magnet, Lafayette, In. Loaded load on a dry van and loads are to be loaded on reefers at Rea Magnet. The load was to be picked up on Monday 1-31-94 by another driver that was specifically sent with a reefer to Indiana. Jeopardize our hauling for Advance Transformer, who is consignee of . Driver violated last chance agreement #3. Immediate discharge.

The grievant filed a grievance over his discharge, which grievance became the basis of the instant proceeding.

1/ Unless otherwise specified, all other dates herein refer to 1994.

The Company received a letter, dated January 19, from the Superintendent of Distribution at Rea Magnet Company requesting the Company to dispatch reefers, i.e., refrigerated trailers, to their plant whenever possible for loads going to Advance Transformer, their customer in Platteville, Wisconsin, in cold weather. The grievant was not aware of said request.

In September of 1993, the grievant had requested to be off duty on Saturday and Sunday, September 18 and 19, 1993, because the drivers were having a picnic on Saturday and Sunday was the grievant's birthday. About 11:00 p.m. on September 18, 1993, Rasmussen telephoned the grievant and asked if he could pick up a load in Iowa. The grievant said that he did not have the hours to go pick up the load. Rasmussen said he would see what he could do. About an hour or an hour and a half later, Rasmussen again called the grievant and said he could not find anyone to pick up the load and could the grievant pick up the load as a favor to Rasmussen. The grievant told Rasmussen that as long as it was understood that he had no hours and if he could get some sleep first, then he would go get the load. Rasmussen said that was all right. The grievant did pick up the load and upon his return to Monroe was told by Rasmussen's wife to not log the trip.

In November of 1993, the grievant was returning to Monroe with a partial load which he had picked up in Williamsport, Pennsylvania. He called Moore Business Forms in Fremont, Ohio, and was informed that he could make a pick up there, which he did. Subsequently, while returning to Monroe, the grievant called Stoneback and told him that he had picked up a load on his own. Stoneback said that the grievant would be receiving a good check that week. Neither Stoneback nor any other representative of the Company ever told the grievant that it was wrong for him to contact a customer and to arrange a pickup without either being dispatched by, or receiving prior approval from, a Company representative. Stoneback's reference to a good check was based on the fact that the driver gets a percentage of the payment for a load and, therefore, a larger load means a larger payment to the driver for that load.

Apparently, some, if not all, of the Company's drivers know that it is all right to check with Moore Business Forms on their own initiative for a pick up if they are going through Fremont, Ohio, because that company sends out loads on an irregular basis.

POSITION OF THE UNION:

When the grievant was reinstated under the last chance agreement in February of 1992, the settlement of the grievance also contained obligations to which the Company had agreed, namely, "to enforce all contractual rules and regulations along with all F.M.C.S. DOT regulations uniformly and consistently upon all employees covered by the collective bargaining agreement." The Company would now seek to have the arbitrator ignore those obligations and to permit the Company to again selectively enforce its rules as to the grievant, notwithstanding that it knowingly engaged in the violation of both DOT and Company rules.

The Union believes it is clear that, because the grievant had initiated grievances on two prior occasions, both of which resulted in the Union obtaining his reinstatement, the Company's attitude towards the grievant and its treatment of him was far different due to his identification as being a member of the Union. There is not a shred of evidence in the record to support any claim by the Company that the grievant had ever indicated by word or deed that he felt he could do anything at work and get away with it because he was protected by the Union.

It is undisputed that in September of 1993, it was Rasmussen who asked

the grievant to violate the DOT rules, including the logging requirements, and to make a trip to Iowa. After such a flagrant disregard of the DOT rules and logging procedures by the Company itself, it is not surprising that the grievant thereafter felt that the Company would not expect him to have to observe the rules. Arbitrators have not hesitated to disturb penalties, assessed without clear and timely warning, where the employer over a period of time had condoned the violation of the rule.

If the Company had fully investigated the matter and afforded the grievant an opportunity to explain what led him to do what he did, prior to reaching the decision to terminate him, it is quite clear that the discharge penalty could not have been properly invoked. One of the key elements of the just cause standard is that the Employer must conduct a fair and impartial investigation before arriving at its decision to discharge an employe. In the instant case it is conceded by the Company that it made no attempt to hear from the grievant before it decided to discharge him.

The discharge of the grievant failed to meet the just cause standard and, therefore, the discharge violated the contract. The grievant should be reinstated and made whole for all wages and benefits which he lost as a result of the unjust discharge.

POSITION OF THE COMPANY:

The grievant's discharge was justified because he violated his last chance agreement. Specifically, the grievant violated the Company's rules by failing to notify the office that he had unloaded at Corunna. If he had done so, then he could have requested authorization to pick up the Rea Magnet load at the same time. The grievant made only one unsuccessful attempt to reach Stoneback on January 29. He could have attempted to contact Rasmussen, left a message on Rasmussen's answering machine, made another attempt to reach Stoneback, or, entered a message in his truck computer. Because the grievant made the pick up without contacting the Company, another driver, who had been dispatched by the Company to pick up the Rea Magnet load, had to wait in Indiana for a day until another load could be found for him. The Company incurred additional expenses due to the driver's layover.

The fact that the grievant may not have known about Rea Magnet's request for a refrigerated trailer is irrelevant, because he was never authorized by the Company to make the pick up. The fact that the Company did not lose Rea Magnet as a customer is also irrelevant because the grievant's actions raised the possibility that the customer could be lost.

After leaving New Jersey, the grievant drove straight through to Monroe without taking the breaks required by Company rules and DOT regulations.

The Company did investigate the violations before discharging the grievant. A review was made of a computer printout and phone usage document to verify that the grievant had not called the Company and had not been authorized to pick up the load at Rea Magnet. By reviewing a printout from the computer which tracked the grievant's truck, the Company was able to determine that the grievant had driven straight back to Monroe from New Jersey without taking the required break. After reviewing the violations, Company representatives decided to discharge the grievant.

The grievant's past record supports the decision to discharge him. He had been written up approximately 15 times for "logging" violations. The grievant was told on at least two occasions, once shortly after he was hired and again in early 1993, that he could not drive straight through on a trip without taking the required breaks. In May, 1993, the grievant was suspended without pay for an accident in Chicago. Although the grievant never received a traffic citation for the accident, the Company felt there was some form of liability on the part of the grievant. Finally, just prior to his departure on January 26, Rasmussen discussed with Karalis a telephone call which alleged that Karalis had been tailgating on a recent East Coast trip. Rasmussen told the grievant to be more careful. Also at that meeting, Rasmussen said that the grievant seemed to have a problem in getting his act straight at this time of the year and if he could figure it out, then maybe it could get resolved. The Union steward was present during the meeting.

The grievant seemed to violate Company rules and work in a manner that benefitted only himself and not the Company. The rule violations which resulted in the grievant's discharge were simply the last links in a chain of violations stretching back to the beginning of his employment. His past record supports the Company's decision to terminate his employment.

The Company has consistently and uniformly applied its rules to all of its employes. At the hearing the grievant testified in generalities about other drivers who had made runs without taking breaks and had not been disciplined, but failed to provide any specific details. The testimony of Ron Wendling, another of the Company's drivers, showed that the drivers engage in rule violations of which the Company is not aware. In fact, the Company audits the logs of the drivers to make sure they are not driving in violation of Company rules or DOT regulations. The logs are compared to mileage sheets, fuel receipts and toll tickets. If a discrepancy is detected, then the driver is given a notice of violation. If a driver receives more than four violations in a month, then the driver is verbally warned. If it happens again, then the driver is again verbally warned. The third month of more than four violations results in discharge.

Stoneback has verbally reprimanded drivers who have failed to call and report their location. Although no driver has been discharged previously for failing to call in, no other driver has coupled a failure to call in with self-dispatching, as the grievant did.

The Company did not waive its right to discipline the grievant when it did not discipline him for a prior instance of self-dispatch. The drivers know that when they drive through Fremont, it is all right to pick up a load from Moore because that company sends out loads on an irregular basis, which makes it hard to dispatch. Rea Magnet had a set dispatch schedule and also required refrigerated trailers for some loads. Thus, the situations are totally different. The single incident involving Moore was not a sufficient basis for the grievant to conclude that he could self-dispatch whenever he wanted to do

so.

The Iowa incident was an isolated exception which occurred under very unusual circumstances when the scheduled driver quit and left the Company without an experienced driver to pick up a load for a very important customer. After that incident, the Company continued to enforce its rules against the grievant, as evidenced by his subsequent receipt of logging violations.

The grievant violated his last chance agreement. Therefore, the discharge should be upheld and the arbitrator should not substitute his judgment for that of the Company.

DISCUSSION:

The last chance agreement specified that if Karalis again violated a DOT rule or a rule of the Company, then he would be subject to immediate discharge.

The record is clear that Karalis did not notify any Company representative that he had unloaded at Corunna and was going to Lafayette to pick up a load at Rea Magnet. Karalis did make one telephone call to Stoneback's home in an attempt to advise Stoneback that he would be unloading at Corunna on Sunday, rather than on Monday. However, Karalis did not get either an answer or an answering machine on that attempt. He did not make any further efforts to contact any Company representative during his trip to Lafayette and then to Monroe, even though he was aware from his telephone calls to the Company offices earlier on the same date, that Leslie Rasmussen was handling the dispatch function on that Saturday rather than Stoneback. Karalis testified that he had called Rasmussen on weekends on previous occasions. He offered no explanation as to why he did not attempt to call Rasmussen when he was unsuccessful in contacting Stoneback on the afternoon of January 29 after he learned that he
could make the delivery in Corunna earlier than planned. Karalis also testified that once he had picked up the load at Rea Magnet, he did not think there was any need to contact the Company.

One of the Company rules reads: "Call in daily is required Monday through Saturday (between 7:00 a.m. and 5:00 p.m., Monday through Friday and between 8:00 a.m. and noon on Saturday) and notify office after every load before returning to Monroe." Karalis had received a copy of the Company rules and was aware of those rules. The Company correctly asserts that the foregoing rule requires the driver to notify the office, rather than to only attempt to notify the office. Karalis did not notify the office when he unloaded at Corunna. Thus, he violated that rule.

Standing alone, the last chance agreement would appear to permit the Company to immediately discharge Karalis for said rule violation. However, the last chance agreement was part of a settlement of Karalis' grievance contesting his discharge on February 6, 1992. In addition to the last chance agreement, that settlement included a statement which specified the Company's agreement to enforce the contractual rules and regulations uniformly and consistently. Since it is clear that Karalis violated a rule, then it becomes necessary to determine whether the Company has met its above-stated obligation.

Another driver testified that when he failed to call the Company before returning to Monroe after making a delivery, he was told not to move his truck without authorization. The same driver said that he again returned to Monroe the next week without first calling the office after unloading and was not disciplined for failing to call. Stoneback testified that other drivers were talked to about returning to Monroe after unloading without first calling the Company. Such a verbal admonishment has been the only action taken by the Company for such a rule violation, except for the instant case. The

undersigned is not persuaded that those verbal admonishments constituted disciplinary actions. There is nothing in the record to show that the verbal admonishments have been recorded in any fashion. None of the witnesses characterized the admonishments as a form of discipline. In fact, Stoneback testified that a driver is usually talked to right away for failing to call and notify the Company of a delivery. The word "usually" implies that there have been occasions when the driver was not even talked to for failing to call. The undersigned is not persuaded that the Company would have discharged Karalis for failing to call and report that he was unloaded prior to returning to Monroe on January 30, if he had not also picked up a load at Rea Magnet. The record does not support a finding that the Company has consistently enforced its rule requiring drivers to notify the office after every load before returning to Monroe. Since the Company has not disciplined other drivers for violating said rule, its argument, that the discipline given to Karalis could be more severe, is without merit.

The termination notice makes it clear that Karalis was being discharged for picking up a load at Rea Magnet in Lafayette, as well as for failing to call in after unloading in Corunna.2/ On one previous occasion Karalis had picked up a load without having been dispatched by the Company or without receiving approval from the Company prior to making the pick up. In that instance, upon learning of the pick up by Karalis, the Company did not advise Karalis that such unauthorized pick ups were against Company rules and could result in discipline in the future. Karalis was never told that such a pick up was wrong. While the Company attempted to distinguish between the two pick ups because of the different shipping patterns of the two customers, no such distinction was ever explained to Karalis. In fact, it is clear that the Company has permitted its drivers to routinely check with one customer, Moore Business Forms, when they are going through Fremont, Ohio, to see if said customer has any product to be loaded. Karalis had picked up from that customer on his own in November of 1993. If the Company did not intend to give the impression that it was all right for drivers to do similar pick ups from other customers, then the Company should have made clear to its drivers any such distinctions between its customers.

As stated above, any Company policy, with respect to drivers picking up loads for which they have not been dispatched, is unclear, undefined, and,

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2/ The Company argues that Karalis also violated Company rules and DOT regulations by driving straight back to Monroe from New Jersey without taking a break. The Company asserts that it made such a determination through a review of the truck's computer printout which tracked the whereabouts of Karalis' truck. Indeed, the Company may have been able to reach such a conclusion without seeing the driver logs. However, the termination notice made no reference to such a violation. Thus, it would not be appropriate to allow the Company to allege such a violation supported its decision to discharge the grievant. Accordingly, no consideration is given to any alleged hours and/or logging violations.

apparently, unwritten. Thus, it was not appropriate for the Company to rely on an alleged violation of the alleged self-dispatching policy to discipline Karalis. Accordingly, it is concluded that discharge was not appropriate in this case and Karalis should be reinstated as a driver. However, the last chance agreement dated February 14, 1992, remains in effect. Further, because the incident was initiated by Karalis' failure to communicate with the Company after unloading in Corunna, such reinstatement is to be without back pay. If Karalis had contacted the Company upon learning that he would be able to unload early at Corunna, then he and the dispatcher could have discussed whether he should return to Monroe with an empty trailer or if he should lay over until the Company could find a load for him to bring back to Monroe. Also, if he had contacted the Company after contacting Rea Magnet, then the Company could have informed him that there was a driver already enroute to Rea Magnet to pick up the load.

The Company has the authority and the contractual right to require drivers to notify its office after making a delivery and before returning to Monroe, and further, to discipline drivers who fail to give such notification. However, any such discipline must be done in a consistent manner. Similarly, the Company has the right to establish rules and guidelines for the drivers to follow with respect to their efforts to find loads on their own. Those rules, if established, must be made known to the drivers before the rules can be made the basis for a disciplinary action.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the termination of the grievant, Joseph Karalis, on January 31, 1994, did violate the labor agreement; that the Company is directed to reinstate Joseph Karalis as a driver, but without back pay; and, that the last chance agreement, dated February 14, 1992, remains in effect following the reinstatement of Karalis.

Dated at Madison, Wisconsin, this 26th day of September, 1994.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator

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