BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

VAN DER VAART, INC.

and

DRIVERS, WAREHOUSE & DAIRY EMPLOYEES UNION, LOCAL NO. 75

Case 25
No. 52603
A-5368

Appearances:

Mr. John J. Brennan, Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Suite 202, 1555 North Rivercenter Drive, Milwaukee, Wisconsin 53212, on behalf of the Union.

Mr. James A. Jacquart, Vice President, Van Der Vaart Holding Company, 1436 South 15th Street, Sheboygan, Wisconsin 53081, on behalf of the Company.

ARBITRATION AWARD

According to the terms of the 1992-95 collective bargaining agreement and a Side Letter entered into by the parties on July 17, 1989, the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a dispute between them regarding whether the Company violated the Side Letter dated July 17, 1989 by its failure to maintain as many Union Truck Drivers at the Company as it employs non-union drivers at Sheboygan Concrete Corp. The Wisconsin Employment Relations Commission designated Sharon A. Gallagher to hear and resolve the dispute. A hearing was held on July 20, 1995, at Sheboygan, Wisconsin. No stenographic transcript of the proceedings was made. The parties agreed to waive the contractual timeline requirements in Article 7. The parties also agreed to submit their initial briefs for exchange by the Arbitrator, postmarked August 11, 1995. Due to mailing errors or delays the Arbitrator received the Company's brief on August 28, 1995 and the record was thereupon closed.

Issues:

The parties stipulated that the following issues should be determined in this case:

> Is the Company in violation of the Side Letter? If so, what is the appropriate remedy?

Relevant Contract Language:

> ARTICLE 2. MANAGEMENT RIGHTS
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> It is agreed that the management of the Employer and its business and the direction of its working forces is vested exclusively in the Employer, and that this includes, but is not limited to the following: to direct and supervise the work of its employees; to hire, promote, transfer or lay off employees or demote, suspend, discipline or discharge employees (in accordance with Article 8 entitled Discharge); to plan, direct and control operations; to determine the amount and quality of work needed; to schedule the hours of work and assignment of duties; and to make and enforce reasonable rules. The Employer's exercise of the forgoing (sic) functions shall be limited only by the express provision of this contract and the Employer has all the rights which it had at common law except those expressly bargained away in this agreement and except as limited by Statute.
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> . . .
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> The exercise by the Employer of any of the forefoing (sic) functions shall not be reviewable by arbitration except in case such function is so exercised as to allegedly violate an express provision of this contract. Any discipline, warning notice, suspension or discharge of an employee is subject to the grievance procedure including arbitration pursuant to Article 8 entitled "Discharge".
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> . . .
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> ARTICLE 19. NEW JOBS OR OPERATIONS
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> Any new jobs or new operations not classified or described in this Agreement shall be subject to immediate negotiations between the parties of this Agreement.

Contractual Side Letter:

On July 17, 1989, the parties entered into a contractual Side Letter which is relevant to this

case. That Letter reads as follows:

Van Der Vaart, Inc. and Teamsters Local 75 agree, via this side letter to the parties' existing labor agreement, to the following provisions:

1. Readi Mix.

a. Van Der Vaart, Inc. presently employs five of its Local 75 unit employees as Readi Mix drivers; Sheboygan Concrete Corporation has five readi mix drivers. Van Der Vaart, Inc. agrees to hire an additional (6th) readi mix driver into the Local 75 unit before Sheboygan Concrete Corporation hires an additional (6th) readi mix driver. Thereafter, Van Der Vaart, Inc. agrees to hire additional readi mix drivers on a one-for-one basis with Sheboygan Concrete Corporation, with the next (6th) hire by Sheboygan Concrete Corporation, the next by Van Der Vaart, Inc., and so on.

b. Van Der Vaart, Inc. agrees to fill any vacancies created by a readi mix driver terminated for any reason, including quit, reassignment, discharge, retirement, or death, by hiring an employee into the unit represented by Local 75. This paragraph does not create a requirement for Van Der Vaart, Inc. to fill a vacancy when doing so will cause Van Der Vaart, Inc. to have more readi mix drivers actively employed than Sheboygan Concrete Corporation, except as provided in paragraph 1(a) above.

c. For layoffs of more than two days, Van Der Vaart, Inc. will only lay off on a one-for-one basis with Sheboygan Concrete Corporation. Van Der Vaart, Inc. employees will be notified of any contemplated layoff, and may be given an opportunity to volunteer for lay off. Van Der Vaart, Inc. employees will only be given the opportunity to volunteer for lay off if Sheboygan Concrete Corporation employees receive the same opportunity to volunteer. For layoffs of more than two days, if the total number of volunteers from both companies equals the number of layoffs needed, all volunteers from both companies will be laid off; if more employees volunteer to be laid off than are needed, then Van Der Vaart, Inc. will lay off no more employees than Sheboygan Concrete Corporation; if less employees volunteer for layoff than are needed, Van Der Vaart, Inc. will lay off the volunteers, and only such additional employees so that an equal number of employees will be laid off from Van Der Vaart, Inc. and

Sheboygan Concrete Corporation.

2. Block Drivers.

> Van Der Vaart, Inc. will not add block trucks to its Manitowoc operation, above the number of three presently operated, unless there are three or more block trucks being operated on a full-time basis out of the Sheboygan yard. Those three Sheboygan yard block trucks are presently two boom trucks, and a leased tractor and trailer. Employees who are not Van Der Vaart Sheboygan unit employees will not drive the current or any other block trucks stationed at the Sheboygan yard.

. . .

Background:

The Company was originally formed in 1888. Van Der Vaart, Inc. (hereafter the Company) survived to the 1950's, operating a block plant on the east side of Sheboygan, Wisconsin, a readi mix plant also at Sheboygan, Wisconsin, and a pipe plant. The company also sold building supplies. All of the Company's employes were employed at various locations in Sheboygan, Wisconsin, and all were Union employes.

Sometime during the 1950's, the Company acquired Tri-County Readi Mix and Excavating. At the time of its acquisition, Tri-County sold block, readi mix and building supplies and did excavating work out of New Holstein, Wisconsin. Tri-County was a non-union company. In approximately 1976, Sheboygan Concrete Corporation opened its Sheboygan Falls operation in direct competition with the Company. Sheboygan Concrete sold readi mix and building supplies. Sheboygan Concrete was then owned by Mr. Mike Harvey. Sheboygan Concrete employes were non-union employes. In or about 1986, Mike Harvey purchased Van Der Vaart, Inc. Mr. Harvey set up the Van Der Vaart Holding Company and this entity acquired all of the Van Der Vaart, Inc. stock as well as all of the Sheboygan Concrete Corporation stock. At approximately this time, Mr. Harvey also formed the Sheboygan Concrete Supply Corporation and Harvey, Inc. of Sheboygan Falls, Wisconsin. Harvey, Inc. was a non-union trucking company. In 1986, Sheboygan Concrete Company acquired C. Harvey Co. of Manitowoc, Wisconsin, which sold building supplies, block, and readi mix and employed only non-union workers. Also, American Building Supply, Inc., operating out of Sheboygan, Wisconsin, sold building supplies and used non-union drivers. This company was also formed or acquired by Mr. Harvey.

In 1987, Van Der Vaart, Inc. sold its pipe plant and the three union drivers who had been employed at the pipe plant were thereafter no longer employed by the Company. Sometime in 1987 or 1988, Van Der Vaart, Inc. sold its block plant and purchased a new block plant in

Manitowoc, Wisconsin. The purchased plant had previously employed non-union employes. At this time, Van Der Vaart had employed four block drivers. However, after selling its block plant and purchasing the new plant, two of the four block drivers were eliminated. The other two Van Der Vaart block drivers were allowed to punch in at the Sheboygan facility and drive their trucks to the Manitowoc block plant and work there until their return to punch out at Sheboygan each day.

In 1988, Van Der Vaart, Inc. eliminated its readi-mix plant. However, Van Der Vaart did not terminate its readi-mix drivers. Rather, the Company offered all of its readi-mix drivers the opportunity to work at Sheboygan Concrete Corporation's Sheboygan Falls readi-mix plant. There, the Union truck drivers who had worked for Van Der Vaart, worked side-by-side with non-union Sheboygan Concrete Corporation truck drivers. The Van Der Vaart readi-mix truck drivers remained employes of Van Der Vaart, Inc., although Van Der Vaart, Inc. had gone out of the readi-mix business.

The Union and Van Der Vaart, Inc. entered into a labor agreement covering 1988-89. In 1988, former Van Der Vaart, Inc., employe Richard Hanson (then Union Steward) was laid off. The Company later hired a non-union driver and refused to recall Hanson from layoff. Thereafter, Hanson and the Union filed grievances, unfair labor practice charges with the NLRB and a Federal court case, regarding the Company's failure to recall Hanson from layoff and its hire of at least one non-union driver.

In mid-1989, the Union and the Company entered into a Settlement Agreement and a contractual Side Letter (quoted above) in order to settle all litigation then pending against the Company. The Settlement Agreement read in relevant part as follows:

> Van Der Vaart, Inc. and Teamsters Local Union 75 agree to the following terms in settlement of all litigation presently pending concerning Richard Hanson, as detailed below:
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> 1. Van Der Vaart, Inc. agrees to pay Mr. Hanson $13,000, minus applicable withholding and FICA, immediately after all other contingencies to this settlement listed below are met.
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> . . .
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> 2. Van Der Vaart, Inc. and Teamsters Local Union 75 will sign a Side Letter to the parties' existing labor agreement. That Side Letter is attached to this settlement agreement as exhibit A.
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> 3. This settlement is contingent on the Board's approval of

withdrawal of the two charges pending before Region 30 of the National Labor Relations Board and dismissal of the complaint pending in Case No. 30-CA-10157, and Court approval, if necessary, of dismissal of the complaint filed by Teamsters Local 75 and currently pending in the Eastern District Federal Court, Case No. 89-C-490. Teamsters Local 75 will take all necessary action to obtain dismissal with prejudice of all claims pending before the NLRB and in court.

4. The parties agree that this settlement is in full settlement of all litigation presently pending concerning Richard Hanson, including Cases 21 and 22 before the Wisconsin Employment Relations Commission, Case Nos. 30-CA-9956 and 30-CA-10157 currently pending before Region 30 of the National Labor Relations Board, Case 89-C-490, currently pending in Federal Eastern District of Wisconsin, and grievance A/P P-89-7 filed by Mr. Hanson regarding a lay off in September, 1988, for which Teamsters Local 75 requested a panel of arbitrators from the WERC. . . .

Company Vice President Jacquart stated that at the time that Mr. Hanson was on lay off, the Company had hired the son of a Company salesman to drive truck in a non-union position and that this had caused Mr. Hanson to file the grievance which was later settled by the Settlement Agreement and the Side Letter. Mr. Jacquart stated that the Company decided to settle the litigation with Mr. Hanson and the Union because it had incurred large attorney's fees and the Company's attorney had advised them to settle the cases in order to avoid further costs of litigation. Mr. Jacquart stated that the Settlement Agreement basically constituted the Company's practice and that therefore the Company had no problem signing that Agreement.

Sometime in 1989, after the parties had entered into the above-quoted Settlement Agreement and Side Letter, the Union agreed, at the Company's request, that the Company could move one boom (or block) driver to Manitowoc to its non-union operation there. The number of Union drivers at Van Der Vaart thereafter remained the same or greater than the number of non-union drivers at Sheboygan Concrete. Union Representative Cornelius confirmed that the Union had agreed with the Company that it was no longer feasible to run two Union boom (or block) drivers out of Sheboygan and that it had agreed to allow one of the two Union driver positions to be moved to Manitowoc. However, the parties did not amend the Side Letter to reflect this later oral agreement.

Thereafter, the Union and the Company entered into a successor labor agreement covering May, 1991 through November, 1991. The Company, at approximately this time, hired two new

drivers, Alfson and Westermeyer. Neither Alfson nor Westermeyer wanted to join the Union but the Union insisted and the Company agreed that Alfson and Westermeyer should become Union members so that the number of Van Der Vaart, Inc. drivers would remain the same as the number of non-union Sheboygan Concrete drivers. The Company sent letters to both Alfson and Westermeyer indicating their obligations to join the Union and the amount of dues due, dated June 6, 1991. Thereafter, Alfson and Westermeyer became and remained Union members until they terminated their employment in 1993 and 1994 respectively.

The Union and the Company entered into a 1992-95 labor agreement which included two reopeners for wages (in 1993 and 1994). Company Vice President Jacquart and Union Representatives VanDenElzen and Cornelius negotiated and agreed to a 1993 wage increase in July, 1993. During these negotiations, it is undisputed that Jacquart told the Union representatives that Van Der Vaart, Inc. was then employing three readi-mix drivers and one boom truck driver and that Jacquart agreed to make sure that the next driver hired would be a Union driver. Jacquart also told the Union representatives during negotiations that Sheboygan Concrete then employed four non-union readi-mix drivers and that two non-union salesmen were then driving readi-mix trucks on a part-time as needed basis. 1/ The Company sent a letter in January, 1993, confirming the 1993 wage increase agreed to by the parties. This letter also indicated that the Company then employed five Union drivers (four at Sheboygan Falls and one at Sheboygan). At this point, the Union representatives believed that the number of Union drivers employed by Van Der Vaart, Inc. was the same as non-union Sheboygan Concrete Corporation drivers.

During the Winter of 1993, Union Representative VanDenElzen checked the Union's books to determine the names of Van Der Vaart, Inc. drivers who should receive contract reopener notices. VanDenElzen stated that his check revealed that there were only two active Union members still employed by Van Der Vaart, Inc. at that time. VanDenElzen stated that he was not concerned about this because during the Winter months, the Company often had to lay employes off. VanDenElzen stated that between 1993 and 1994 none of the Van Der Vaart, Inc. drivers had called him to complain regarding the number of Union drivers employed by the Company. VanDenElzen also stated that there was no Union Steward at the Company during this time.

As of the second half of 1993 or early 1994, Mr. Jacquart stated that the last two Union employes at Van Der Vaart, Inc. retired or quit and that at that time the Company decided to replace them with non-union Sheboygan Concrete readi mix drivers. Mr. Jacquart stated that this decision had been made based upon the fact that Union health insurance premiums were too high, that the Union had not complained about the loss of Union members, that the Company did not feel it needed to live up to the Settlement Agreement forever and that the Agreement was only designed to settle a law suit and the grievances in 1989.

1/ The Union apparently did not object to the Company's use of salesmen to drive on a part-time basis.

Jacquart stated that the Van Der Vaart Holding Company now employs approximately 100 employes: 98 of these employes are non-union and 2 of these employes are Teamsters Local 75 members. Jacquart stated that having two sets of rules for employes is disruptive of the Company's business. Jacquart denied that the Company's decision to disregard the Side Letter and Settlement Agreement was based upon any anti-union feeling. Jacquart also denied that the Company was trying, by its decisions in regard to the instant case, to divert work away from the Union. Jacquart stated that he believed that the Company should have terminated the Van Der Vaart readi-mix drivers and block driver at the time the Company went out of those businesses.

Jacquart admitted that he agreed with Union Representatives Cornelius and VanDenElzen in July, 1993 that the next driver the Company would hire would be a union driver. However, Jacquart admitted the next driver he hired was a non-union driver, contrary to his agreement at bargaining. Jacquart also stated that at approximately that time the number of union and non-union employes was approximately even. At the time of the instant hearing, Jacquart stated that the number of non-union to Union drivers was either 8 to 2 or 11 to 2.

The parties held a preliminary negotiation session on December 2, 1994. The Union filed the instant grievance on February 9, 1995. The Company has not contested the timeliness of the grievance. 2/ From August, 1993 to the date of the instant hearing, the Union has not had a Union steward at the Company.

Positions of the Parties:

Union:

The Union asserted that this case is a simple one. The Union observed that the Company had agreed in both the Settlement Agreement and the attached Side Letter that it would hire Union drivers and non-Union drivers on a one-for-one basis beginning in July, 1989 and continuing thereafter. In addition, the Side Letter required Van Der Vaart, Inc. to fill all vacancies created by quits, discharges or any other reason at Van Der Vaart, Inc. with Teamsters Local 75 members. The Union noted that these agreements by the Company had been made for good and valid consideration, in settlement of all litigation against the Company in 1989.

The Union urged that the Side Letter had survived unchanged through various successor collective bargaining agreements, including the effective agreement for 1992-95, that the Company had consistently recognized its obligations thereunder and that never sought to bargain regarding the Side Letter. The Union further asserted that it had never waived its right to enforce the Side Letter. Therefore, the Union sought that the grievance be sustained.

Employer:

2/ Article 7(b) indicates that a written grievance must be discussed by the steward and management ". . . within five (5) working days after its occurrence or the employe's knowledge thereof."

The Company urged that the 1989 Side Letter is too costly to comply with; and that the Union has knowingly allowed the Company to remain in violation of the second provision of the Side Letter since at least 1992, when the parties mutually agreed to use only one Union block driver at Manitowoc rather than two. The Company further argued that the Union has known for a long time that the Company has not complied with the Side Letter. The monthly reports the Company sends to the Union showing the number of Union Van Der Vaart, Inc. employes, the monthly checks sent to the Union by the Company for the Union employes' health insurance premiums and documents showing monthly withholding for employes' Union dues, all prove that the Union has known of the Company's non-compliance with the Side Letter since at least 1993. The Union's inaction in the face of this knowledge, the Company implied, showed that the Union has condoned the Company's non-compliance.

The Company therefore asserted that it should no longer be held to comply with the first provision of the Side Letter (one-for-one hiring); that the Side Letter is no longer a valid agreement, as it no longer makes good business sense. The Company noted that in 1988 it went out of the readi mix business and that at approximately this time, Sheboygan Concrete went out of the building supply business so that it should no longer be required to hire block drivers or readi mix drivers.

The Company indicated that it had previously suggested that it maintain one Union block driver and one Union readi mix driver as a settlement in this case but it observed that the Union has declined this settlement proposal and it has not presented the proposal to the two remaining Union drivers at the Company. The Company therefore sought dismissal of the grievance.

Discussion:

Initially, I note that the language of the July 17, 1989 Side Letter between the Company and the Union is clear on its face. In addition, there is no expiration date included in the document so that the provisions of the document could purportedly go on into the future for an undefined period. In addition, I note that Article 19 of the effective labor agreement between the parties provides that any new jobs or new operations not classified or described in the labor agreement "shall be subject to immediate negotiations between the parties of this agreement." Furthermore, the facts of this case clearly show that the Side Letter was entered into based upon negotiations and valid consideration, so that a quid pro quo was established at the time the Side Letter was entered into; that the Side Letter has been included in every successor labor agreement since 1989; and that the Company has never sought to bargain any changes in the Side Letter.

The Company argued that compliance with the 1989 Side Letter has become too costly due to the increasing Teamster Health insurance premiums the Company must pay for Union drivers. Such an argument cannot and does not constitute a valid "defense" in a grievance arbitration case.

The Company also argued that the Union knew and condoned the Company's actions to repudiate the Side Letter, which began after contract reopener negotiations concluded in July, 1993. However, the record showed that the Company, per Mr. Jacquart, as recently as 1991 and 1993, recognized the Company's obligation to continue to hire Union drivers o n a one-for-one basis. In addition, in July of 1993, at wage reopener negotiations, Mr. Jacquart told Union representatives Cornelius and VanDenElzen the number of Union and non-Union drivers employed by Van der Vaart, Inc. and Sheboygan Concrete Corp., respectively. Jacquart also assured the Union met at this time, that the next driver hired would be a Union driver employed by Van Der Vaart, Inc. This left Cornelius and VanDenElzen with the strong impression that the Company intended to maintain the one-for-one hiring arrangement with the Union through at least 1993.

However, it is clear on this record that although Jacquart promised the Union during the 1993 wage negotiations that the next driver hired would be a Union driver, jacquart admitted that he did not keep his promise and that he failed to inform the Union of this fact. Jacquart and the Company were fully aware that as of at least August, 1993, the Union had no steward at the Company to report violations of the contract. It is in this context that during the term of the fully effective 1992-95 labor agreement, the Company proceeded to hire non-union drivers without ever having informed the Union, either orally or in writing, that it had decided to repudiate the 1989 Side Letter, which was a part of that effective labor agreement. 3/ Thus, the facts of this case fail to show that the Union possessed clear knowledge of the Company's actions and of the import of these actions until after it reopened negotiations for a successor agreement to the 1992-95 contract. Without clear knowledge, a condonation defense cannot succeed.

It is undisputed that the Union had no steward at Van der Vaart from at least August, 1993, forward. The Company has urged that this fact should also constitute a defense to the instant grievance. If the fact that a union may be unable to get an employe to serve as steward necessarily means that an employer can do as it pleases and ignore its obligations under a negotiated labor agreement, labor agreements in general (and their addenda) would soon have no meaning at all. I note that there is no requirement in the labor agreement between the parties that the Union maintain a steward at the Company. In these circumstances the fact that the Union had

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3/ I do not find that the Company's forwarding of health insurance premium payments and Union dues to the Union after it ceased adhering to the one-to-one hiring provision of the 1989 Side Letter amounted to clear notice of repudiation of the Side Letter. I note, in this regard, that the record showed that the Company often experienced seasonal layoffs during the period of time relevant here. Also, as a general matter, when an employer wishes to repudiate a portion of a labor agreement, it must clearly notify the union in writing of its intent to repudiate the provision during an appropriate contract hiatus period. Van der Vaart, Inc. never so notified the Union in this case.

no steward at the Company does not constitute a valid reason to deny this grievance.

The fact that in late 1989, the Union agreed to allow the Company to move one Union block driver to Manitowoc while retaining one Union block driver at Sheboygan, does not require a conclusion that the Union thereby agreed that the Side Letter was no longer valid in its entirety. Indeed, the facts of this case show that at the time the Union made this concession, the number of Union to non-Union drivers was equal and that thereafter in 1991 and 1993 the Union insisted on continued compliance with the Side Letter and the Company agreed and complied as requested. Thus, in these circumstances, the fact that the Union made an exception to the Side Letter by allowing the Company to employ one block driver at Manitowoc and one Union block driver at Sheboygan is insufficient basis on which to declare the Side Letter void and unenforceable in its entirety, as the Company has urged herein. 4/

Finally, the fact that the Company sold its pipe plant in 1987 and went out of the readi mix business in 1988 is irrelevant to this case, as all these events occurred before the Union filed its unfair labor practice cases, which resulted in the negotiation of the Side Letter in mid-1989. In addition, the Company has presented no evidence to show that these business circumstances should be reconsidered herein.

In all of the circumstances of this case, and given the fact that the Company presented no evidence to support a valid defense herein, I make the following

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4/ It is fair to say, however, that since 1989 the Company has not been required and has not maintained more than one Union block driver at Sheboygan. In fairness, the Company should not now be required to return to two Union block drivers at Sheboygan.

AWARD 5/

The Company is in violation of the 1989 Side Letter. The Company is hereby ordered to immediately comply with the terms of the 1989 Side Letter.

Dated at Oshkosh, Wisconsin this 10th day of October, 1995.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

5/ I hereby retain jurisdiction regarding the appropriate remedy in this case. If the parties cannot mutually agree upon a remedy within 30 days after the issuance of this Award, I will schedule a hearing or arrange for briefing on the remedy as soon as practicable.