BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION #43

and

QUALITY CARRIERS, INC.

Case 2
No. 69942
A-6416

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney YingTao Ho**, 1555 North RiverCenter Drive, Milwaukee, Wisconsin 53212 on behalf of the Union.

Mr. Dennis Copeland, Labor Consultant, 4041 Park Oaks Boulevard, Suite 200, Tampa, Florida 33160 on behalf of the Employer.

ARBITRATION AWARD

At all times material, Teamsters Local Union #43 (herein the Union) and Quality Carriers, Inc. (herein the Employer) were parties to a collective bargaining agreement covering the period from December 1, 2007 to November 30, 2010. On June 17, 2010, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the Employer's termination of Ron Thomas (herein the Grievant). The undersigned was to hear the dispute from a panel of WERC staff arbitrators and a hearing was conducted on October 6, 2010 and October 26, 2010. The proceedings were not transcribed. Initial briefs were filed by November 22, 2010. On December 22, 2010, the Union filed a reply brief. The Employer did not file a reply brief and thereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues:

Did the Company have just cause to terminate Ronald Thomas?

If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 10. DISCHARGE OR SUSPENSION

The Employer shall not discharge nor suspend any employee without just cause, but in respect to discharge or suspension, shall use the following steps of progression of discipline: (1) written reprimand, (2) written warning, (3) one (1) day suspension and (4) discharge. To be valid, warning letters must be sent to the employee and the Union within ten (10) days of known violation. Except, that no warning notice need be given to an employee before he is suspended if the cause of such discharge or suspension is dishonesty, drunkenness, which may be verified by a sobriety test (refusal to take a sobriety test shall establish a presumption of drunkenness); or taking, being under the influence of, addiction to, or possession of while on duty LSD, marijuana, or heroin, or possession of controlled substances and/or drugs, either while on duty or on Employer property; recklessness resulting in serious accident while on duty, or carrying of unauthorized passengers, or falsification of employment applications or DOT required driver certification documents, **or from any discipline arising from the Driver Life Critical Safety Rules Violation Disqualification Matrix.** The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of said warning notice. Discharge must be by proper written notice to the employee and the Union. Any employee may request an investigation as to his discharge or suspension. Should such investigation prove that injustice has been done an employee, he shall be reinstated.

. . .

ARTICLE 18. MEAL PERIOD AND LODGING

Drivers shall, except by mutual agreement, take at least one continuous hour for meals and not less than thirty (30) minutes nor more than (1) hour in each (10) hour period. No driver shall be compelled to take more than one continuous hour during such period nor compelled to take any part of such continuous hour before he has been on duty four (4) hours or after he has been on duty six (6) hours. A driver shall not, however, take time off for meals before he has been on duty four (4) hours nor after he has been on duty six (6) hours. Meal period shall not be compulsory at stops where the driver is responsible for equipment or cargo, nor shall meal period be compulsory when or where there is no accessible eating place.

If a driver is required to lay over on any trip, he will be reimbursed for all food and lodging expenses within seven (7) days after returning to his home terminal, upon presentation of reasonably receipted bills.

Bunk Pay

The employee shall be paid **$18.00** for the use of the sleeper berth, **for each 10 hour break.** Sleeper time cannot be accrued during other compensable time, excluding extended layover pay.

. . .

ARTICLE 21. PAID FOR TIME

. . .

Section 3. Layovers, Breakdowns, or Impassable Highways

Where a driver is required to lay-over away from his/her home terminal, lay-over pay shall commence following the fourteenth (14th) hour at the end of a run. The driver must be notified at least two (2) hours prior to the fourteenth (14th) hour, of his/her departure time, with an allowance to the Employer of fifteen (15) minutes from approximated starting time up to the fourteenth (14th) hour. If the driver is not called two (2) hours in advance, as herein provided, he/she shall be paid for two (2) hours. If a driver is held over after the fourteenth (14th) hour he/she shall receive lay-over pay for each hour held over up to eight (8) hours in the first twenty-two (22) hours of lay-over period, commencing after the run ends. This pay shall be in addition to the pay to which the driver is entitled if he/she is put to work at any time within the twenty-two (22) hours after the run ends. The same principle shall apply to each succeeding eighteen (18) hour period prior to the tenth (10th) hour and lay-over pay shall commence after the tenth (10th) hour.

Employees shall receive a **eight dollars ($8.00)** [sic] meal allowance each time they are held beyond the seventeenth (17th) hour or the first lay-over period after the tenth (10th) hour on subsequent lay-overs after the first.

When on compensable lay-over on Sunday and holidays there shall be a meal allowance of **eight** dollars **($8.00)**; five (5) hours later, there shall be another meal allowance of **eight** dollars **($8.00)**; and five (5) hour [sic] later a third meal allowance of **nine** dollars **($9.00)**. No more than three (3) meals will be allowed during any twenty-four (24) hour period.

Drivers shall not be compelled to report to work at their home terminal until he/she has had ten (10) hours of off-duty time. The Employer shall provide in his dispatch rules, and/or procedures, suitable provisions relating to time off at the home terminal, provided there is no delay in the movement of freight.

Whenever any Employer arbitrarily abuses the free time allowed in this Section, then there shall be considered to be a dispute and the same shall be subject to being handled in accordance with the grievance procedures set forth in this Agreement.

On breakdowns or impassable highways, drivers on all runs shall be paid the minimum hourly rate for all time spent on such delays, commencing with the first hour of fraction [sic] thereof, but not to exceed more than eight (8) hours out of each twenty-four (24) hour period, except that when an employee is required to remain with his/her equipment during such breakdown or impassable highway, he/she shall be paid for all such delay time at the rate specified in this Agreement. Time required to be spent with equipment shall not be included within the first eight (8) hours out of each twenty-four (24) hour period, or which a driver is compensated on breakdowns or impassable highways, but must be paid for in addition.

Where an employee is held longer than an eight (8) hour period, he/she shall in addition be furnished clean, comfortable, sanitary lodging plus meals. The pay for delay time shall be in addition to monies earned for miles driven and/or work performed.

Drivers shall be paid their hourly rate for all verified time in the custody of inspectors at the United States/Canadian border.

The parties further agree that drivers shall be paid a flat rate of $8.50 for each United States/Canadian border crossing.

The parties agree that these provisions shall relate only to compensation at the United States/Canadian border and shall have no application to delays due to traffic, weigh station, toll booths, or ports of entry.

OTHER PERTINENT PROVISIONS

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
Rules and Regulations

§395.3 Maximum driving time for property-carrying vehicles.

Subject to the exceptions and exemptions in §395.1:

(a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:

(a)(1) More than 11 cumulative hours following 10 consecutive hours off duty; or

(a)(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off, except when a property-carrying driver complies with the provisions of §395.1(o) or §395.1(e)(2).

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after –

(b)(1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week.

(b)(2) Having been on duty 70 hours in any period of eight consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)(1) Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or

(c)(2) Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

§395.8 Driver's record of duty status

(a) Except for a private motor carrier of passengers (nonbusiness), every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24-hour period using the methods prescribed in either paragraph (a)(1) or (2) of this section.

(a)(1) Every driver who operates a commercial motor vehicle shall record his/her duty status, in duplicate, for each 24-hour period. The duty status time shall be recorded on a specified grid, as shown in paragraph (g) of this section. The grid and the requirements of paragraph (d) of this section may be combined with any company forms. The previously approved format of the Daily Log, Form MC-59 or the Multi-day Log, MCS-139 and 139A, which meets the requirements of this section, may continue to be used.

. . .

(e) Failure to complete the record of duty activities of either this section, §395.15 or §395.16, failure to preserve a record of such duty activities, or making false reports in connection with such duty activities shall make the driver and/or the carrier liable to prosecution.

BACKGROUND

Ronald Thomas, the Grievant herein, was employed as a truck driver by Quality Carriers, Inc. and its predecessor company, Lloyd Transport, from 1996 until March 1, 2010. In that capacity, he was primarily responsible for driving semi-tractor/trailers transporting tanks of liquid materials throughout the United States. During that time he was also a member of a bargaining unit represented by Teamsters Local Union #43. His home terminal was Quality Carriers Terminal 197 in Bristol, Wisconsin.

In late January and early February of 2010, Thomas was assigned to two deliveries by the Company, one to deliver cargo to the Evonik Corporation in Lima, Ohio between January 30 and January 31, and one to deliver cargo to the Metal Container Corporation in Jacksonville, Florida between February 5 and February 14. There were a number of problems with both trips, beginning with when Thomas was initially assigned the Lima, Ohio trip, to which he strenuously objected. Thomas initially argued with the dispatcher and tried to get her to reassign the trip, but eventually agreed after the Terminal Manager, Bill Mueller, told him a refusal would be deemed a voluntary quit. Thomas responded that he would take the assignment, but that "it isn't going to be good." Thomas later apologized for his behavior. The trips experienced delays due to equipment breakdowns, impassable highways and as a result of the ways Thomas chose to allocate his time. In both cases, the delays led to complaints from the customer. There were also allegations that Thomas failed to give proper notice of his circumstances to management at various times, that he failed to properly document his time in accordance with Department of Transportation regulations, that he took unauthorized breaks and that he failed to follow explicit directions from management.

As a result of the foregoing problems, Mueller conducted an investigation after Thomas returned to Bristol on February 14, resulting in a decision to terminate his employment. On February 25, 2010, Mueller drafted a seven page termination letter, which set forth in detail the Company's position regarding Thomas' alleged errors and misconduct relative to the Lima and Jacksonville trips. While it need not be reproduced in its entirety here, the Company summarized the charges against Thomas, as follows:

> "In summary our investigations into trips 19729700 and 19729806 have resulted in the finding 26 violations [sic]:
>
> - Seven Article 18 violations.
> - Seven occasions where you unnecessarily delayed the progress of equipment.

- Six violations of company policy for failure to ensure notice of delay to dispatch.
- Two counts of insubordination.
- Two serious customer service failures.
- One violation of company policy for failure to inspect the hose prior to departure.
- On violation of company policy for failure to follow management direction.

Per article 10 just cause action, and the progression we have concluded that your actions on the trips identified and outlined above are grounds for immediate termination.

Effective immediately 3/1/10 your name is being removed from the seniority list.

Arrangements will be made by 3/5/10 for you to pick up your personal belongings.

Please return all company property or the same value will be held from your final pay.

Sincerely,

Bill Mueller"

Jt. Ex. #3

The letter was presented to Thomas on March 1, 2010, the effective date of the termination, after a meeting with the Union grievance committee concerning unrelated matters.

On March 5, 2010, the Union filed a grievance on Thomas' behalf, alleging that he had been terminated without just cause and seeking reinstatement and a make whole remedy. The grievance as denied and the matter proceeded to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The Company

The Company asserts that there was just cause to terminate the Grievant due to his conduct with regard to the trips to Lima, Ohio and Jacksonville, Florida in January and February 2010. During these trips, the Grievant engaged in numerous behaviors that

constituted violations of Article 10 of the collective bargaining agreement, including dishonesty and falsification of DOT reports, both of which justify summary termination.

The Grievant was told on the morning of January 29 that his next load had been rescheduled, which made him angry because it interfered with his plans. He tried to refuse the load, but ultimately agreed to take it, but warned that if he did so it "isn't going to be good." The Company contends that his anger provided the motive for his subsequent actions.

After performing his pre-trip inspection at 00:30 on January 30, the Grievant drove to Janesville, Wisconsin, picked up his load and then drove to Belvedere, Illinois, which took a total of 4½ hours. He then took a 5 hour break because he was "fatigued," even though he had had 33½ hours of sleeper berth time in the previous 52¾ hours. At 10:00 he called the Union steward to inquire about split sleeper process, even though he had been previously instructed in split sleeper process. He also knew he was supposed to call the terminal when he went into the sleeper, which he did not. This prevented the Company from waking him up in time to get on the road and deliver the load on time. At 14:22 he notified the terminal that he had completed 14 hours on duty and would not be able to deliver the load until the next day. He would have known this fact when he awoke in Belvedere at 9:45. Had he started 1½ hours earlier, however, he could have reached Lima on January 30. The Company received a complaint from the customer, Evonik, about the late delivery, which put the Company at risk for losing the customer. On January 31, the Grievant drove 1½ hours to Lima, spent 1¾ hours unloading, drove an additional 3 hours, then took another 3 hour break because he was again "fatigued." His excuse is not credible. It is clear he deliberately delayed the load because he was angry about having to take it and the Company was justified in terminating him.

The Jacksonville trip began on February 5. The Grievant took an unauthorized break from 7:30 until 7:45, then drove for 7¾ hours where he encountered an impassable highway. In stead of calling the terminal, as per procedure, he stayed in on-duty status for 4 hours, entitling him to pay while not working. Had he called in, he would have been put in off-duty status, which he knew, so his failure to call was an act of dishonesty. At 17:00 on February 6, after a 10 hour sleeper break, the Grievant went off duty for 3¼ hours without explanation, did a pre-trip inspection, drove for ½ hour, then took another unexplained 1¼ hour break. Had he not done this, he would have made the delivery on time.

On February 7, there were numerous instances of log falsification. According to receipts, the Grievant was at a truck scale in Baldwin, Florida at 13:03 Central Time, but his logs show him to be at the customer's plant in Jacksonville, over 26 miles away, at 13:00. At 14:06 he discovered that the hose on his truck was not functional. He then testified that he drove around town for approximately 30 minutes looking for a new hose, but this time is also not accounted for in his logs. His next log entry was at 17:30, when he went off duty, although he only supposedly spent 30 minutes looking for the replacement hose. He also went from the customer's plant to the Days Inn where he was staying without recording this as driving time and did not check into the Days Inn until 22:49. He also indicated on his Driver Trip Report that he arrived at the customer's plant at 14:30, although his logs show him arriving at 13:00.

He claimed he incorrectly listed his arrival as Eastern Time, but he knows that all entries are to be Central Time and never makes this error. Cumulatively, it is clear that there is a pattern of falsification and dishonesty in the Grievant's log entries, which could have exposed both him and the Company to prosecution.

At 21:15 on February 7, the Grievant contacted the dispatcher and requested a room because his truck broke down and then charged the Company for eight hours of pay although he was not entitled to it. It was also dishonest for him to request the motel room. His truck was having cooling system problems, but his records show a number of occasions on the trip where he added water to his system and the truck was able to function for several more hours.. it is obvious there was no reason he could not have added water on the evening of February 7 and used the sleeper berth instead of staying in a motel. In fact, he did add water on the morning of the 8th and then drove for 4½ hours to the Peterbilt dealer.

On February 12, the Grievant was in Tifton, Georgia having his truck worked on at a CAT dealership, where he had been since the 10th. On the 11th, he was instructed by the dispatcher to remain in the room until notified otherwise, which he acknowledged. Nevertheless, on the morning of the 12th he went to the CAT dealership at 10:00 and logged himself in as on-duty, not driving. He then sat at the CAT dealership for 6¾ hours waiting for his truck to be repaired and claimed pay for the time. Had he stayed in the motel room as instructed, he would not have been entitled to pay, thus this was another act of dishonesty. He also encountered another impassable highway on the 12th and did not contact the terminal, thus again claiming pay to which he was not entitled. The Grievant committed numerous other infractions of Company policy and the contractual language on breaks which were covered in the hearing. In all, his pattern of dishonesty and disregard for DOT regulations regarding time reporting justify his termination.

The Union will claim the Grievant was terminated unjustly because Terminal Manager Bill Mueller did not follow progressive discipline and did not refer specifically to dishonesty in the termination letter. Nevertheless, it is clear from the letter that he was accused of violations of Article 10, which include dishonesty. Further, the Grievant's credibility is in great doubt. At the hearing the Grievant claimed that Mueller was a "fabulous" Terminal Manager, but letters written by the Grievant in January 2009 and March 2010 indicate just the opposite. His untruthfulness in these matters calls into question his credibility on other matters – his belief that DOT regulations did not apply because they are not referenced in the contract, his claim that he did not have to call the terminal during delays, his claim that he misunderstood the directive to stay in the motel in Tifton, his belief that he did not need to log driving time for short trips, or his claim that he made numerous contacts to Pete Helios about the split sleeper procedure. The Grievant knew the seriousness of his actions. He had been given a last chance agreement in 2008 for falsification of logs, so he was aware that dishonesty and log falsification were dischargeable offenses The Company asserts that the discharge was for just cause and requests that the grievance be denied.

The Union

The Union asserts that the Company must prove its case for discharge by clear and convincing evidence. This is because discharge is the economic equivalent of capital punishment. Thus, the employer must not only prove the employee's guilt, but also the appropriateness of the penalty. If it does not meet this burden, the discharge must be overturned.

In this case, the Company did not have just cause to discharge the Grievant. Article 10 is clear in setting forth a four-step disciplinary progression, unless the employee commits one of a list of acts for which summary discharge is permitted. An employee cannot be discharged for a minor offense unless he is given prior notice that termination is the consequence for the next violation. Since progressive discipline is designed to allow an employee to correct his behavior, therefore, the employer cannot lump together a series of minor offenses to justify discharge where there has not been prior discipline. The failure to give the Grievant prior notice in this case denied the Grievant the due process the progressive discipline system is intended to secure.

It is also generally accepted that the employer is limited in supporting a discharge decision to the specific reasons given at the time of the discharge. The employer cannot rely on *post hoc* reasons even when they are based on the same set of facts supporting the original charges. This is because good labor management relations depend upon full disclosure of all relevant facts during the grievance process. It is also because failure to disclose deprives the Grievant of the opportunity to prepare an adequate defense against the charges brought against him. Here, the original discharge notice charged the Grievant with only one arguably summarily dischargeable offense - one count of falsification of logs. At hearing, the Company raised a number of other log issues of which the Union was unaware. First, the charge listed is not supported by the contract, which only makes falsification of DOT driver certification documents dischargeable. This does not include travel logs. Further, a charge of falsification requires a finding of intent to willfully deceive or defraud. Honest errors by an employee do not meet this standard. This is also consistent with the DOT's own regulations, which distinguish between bookkeeping errors and knowing falsification. This is also consistent with Quality's own practice, where honest logging errors usually lead to an opportunity for correction, but intentional falsifications lead to a last chance agreement – a circumstance that the Grievant was previously faced with. Here, the Grievant made inadvertent errors in that he did not correctly log his time while driving in Jacksonville looking for a new hose, a matter of a couple of miles, he indicated his travel from the weigh station in Baldwin as "on duty" time because he had always done so in the past, and he incorrectly noted the time of his arrival at the customer's facility in Jacksonville. None of these instances involve intentional falsehood.

There is also no merit to the Company's charge that the Grievant is guilty of theft of time. For one thing, the charge was only first raised at the arbitration hearing and does not appear in the discharge letter. The letter only refers to poor use of his service hours, which was converted to a theft of time charge at the arbitration hearing. The charges involved his not

going into the sleeper berth when faced with impassable roads and during breakdowns. The contract, however, allows for pay for the first 8 hours of an impassable roads situation, regardless of whether the driver is in the sleeper. Further, there is no contract provision stating that a driver must be on duty to receive pay during a breakdown. In fact, the Grievant claimed and received pay without objection while on a breakdown on February 10 and 11, even though he was off duty at the time. On February 12, the Grievant was at the dealership for six hours waiting for repairs to be completed. There is a dispute as to whether he needed to be with the equipment at that time, but he did so because he was told the truck would be ready and he wanted to be on his way. In each case he submitted the pay requests because he thought he was entitled to do so, not because he wanted to milk money from the Company. In short, there is no evidence that the Grievant was intentionally trying to claim pay to which he knew he was not entitled.

The Company also cannot rely on the 2008 last chance agreement as a basis for the discharge. First, the Company claimed at the hearing that it only introduced the agreement to show the Grievant had knowledge of the rules, not as evidence of prior progressive discipline. Second, the Union was not a party to the last chance agreement and did not participate in negotiating it, so cannot be bound by it. The contract makes no provision for last chance agreements and requires that lesser penalties be expunged after nine months. Since the agreement cannot modify the contract, it expired after nine months. Further, the Company failed to show that the Grievant violated the last chance agreement.

The discharge should also be reversed because the Company failed to interview the Grievant before it discharged him. The Company formed its belief that the Grievant was guilty of log falsification and theft of time without speaking to him. It did not give him a chance to tell his side of the story and thus violated his due process rights, which include the right to a full and fair investigation. The employer denied the Grievant an opportunity to plead his case prior to the imposition of discipline, which deprived him of the chance to convince them that his errors were honest mistakes before positions became polarized and the stakes were raised.

Since the Company has failed to prove the Grievant committed a summarily dischargeable offense, he is entitled to reinstatement with full back pay. The arbitrator should disregard the Company's arguments that back pay is not available. These arguments were not raised at the hearing and should not be considered here. Assuming that the arbitrator wants to consider the other claims of non-dischargeable offenses, however, the Union will also address them. There is no support for the Company's claim that the Grievant wanted to retaliate against it for the assignment of the Lima, Ohio trip. This is because there was an intervening trip to Missouri which was accomplished without incident. This undercuts the theory that the problems on the Jacksonville trip were born of his resentment over the Lima trip. The Grievant was also not proved to be insubordinate. He did object to the Lima load, but only because he was worried about whether he would be sufficiently rested. He and the dispatcher did raise their voices, but he ultimately accepted the load. Insubordination requires that the employee have refused to obey a direct order. While the Grievant asked whether other drivers were available to take the load, when Mueller insisted that he take it, he agreed to do so. His act of

leaving the motel on February 12 was also not insubordinate. He left the motel because he was required to check out and the Company had not authorized another night's stay. He cannot be insubordinate, therefore, for not obeying an order he was unable to comply with.

The Grievant also did not delay equipment as alleged by the Company. The contract does not require that a driver arrive at his destination as quickly as his hours of service permit. It also does not forbid him from taking breaks as needed, except for certain limitations on when he may stop for meals. Further, even if the Company did tell drivers not to take breaks other than for meals, the rule has not been consistently enforced. The evidence indicates that the Company does not discipline drivers for taking unauthorized breaks as long as they arrive on time. Here, the only time the Grievant was late was on the run to Ohio. While the return from Jacksonville took 137 hours, much of that time was time the Grievant could not drive due to a mandatory restart, impassable highways and truck breakdowns. Subtracting those periods indicates that he would have arrived in Bristol 12 hours earlier than scheduled. On the Ohio trip, the Grievant made the mistake of not staying in the sleeper long enough to extend his hours of service. Had he done so, he would have arrived on time, and once he realized his mistake he only stopped as necessary in order to arrive as early as possible. He also cannot be faulted for not notifying the terminal every time he was delayed, since he believed he did not have to call in unless the delay would cause him to not arrive on time and he was never told otherwise. Finally, the Grievant followed Company procedure for inspecting the hose. The driver is responsible for inspecting the ends and the exterior of the hose, which he did. He is not required to bend the hose to inspect for cuts, which he did not. The cut was only discovered when hooked up the hose to the trailer and the customer's storage unit. There is, therefore, no evidence that the problem with the hose, or the failure to discover it, was in any way the Grievant's fault.

DISCUSSION

In this case, the Grievant, Ron Thomas, was summarily discharged on March 1, 2010. The discharge followed an investigation by the Company's Bristol, Wisconsin Terminal Manager, Bill Mueller, of trips Thomas made to Lima, Ohio and Jacksonville, Florida in late January and early February. After his investigation, Mueller concluded that Thomas had violated a number of Company policies and contract provisions, had unnecessarily delayed the progress of equipment and had failed to properly report a number of delays, leading to complaints from the two customers for late delivery. The record reveals that Thomas had no prior discipline within the previous 23 months. On March 20, 2008, he had entered into a "last chance agreement" with the Company as a result of allegations of falsification of logs and payroll documents, theft of time and illegally operating a Company vehicle. For various reasons, however, I do not impute weight to the last chance agreement. For one thing, while the Union apparently received notice of it after the fact, it was not involved in its negotiation. Further, it did not indicate any expiration date, but was nearly two years old at the time of the events set forth herein. Finally, the Company indicated it did not base the termination on a claimed violation of the last chance agreement and it is not referenced in the termination letter.

The investigation Mueller conducted appears to have involved interviews with the dispatchers who dealt with Thomas on the trips in question and a review of the logs, records and email exchanges generated by or with Thomas during the trips. By his own admission, Mueller did not interview Thomas and, indeed, Thomas was apparently unaware that he was even under investigation prior to receiving the termination letter. Thus, Thomas was not afforded an opportunity to address the charges against him prior to his termination.

At hearing, and in its brief, the Company argued that Thomas' misconduct involved "capital offenses" under Article 10 of the contract, specifically dishonesty and falsification of DOT logs, justifying summary dismissal without resort to progressive discipline. In the alternative, the Company argues that the cumulative effect of the many minor offenses committed by Thomas, accompanied by his insubordinate attitude, was sufficient to warrant his termination.

Whether or not the Grievant is deemed to have committed one or more capital offenses or a series of smaller offenses, the contract is clear that any suspension or discharge of an employee must be based upon the existence of just cause. A number of different arbitrators have analyzed the concept of just cause and what elements must be established to find it. Ultimately, however, the analysis may be reduced to an inquiry into whether the employee committed the acts for which he was disciplined and, if so, whether the employer was justified in imposing the penalty it did. Also included in the analysis are considerations of due process in the way in which the investigation and discipline were handled. Indeed, due process in the conduct of the investigation and imposition of discipline are recognized as central to the concept of just cause in order to assure that the employee's rights are protected in the early stages of the process. LINCOLN LUTHERAN OF RACINE, 113 LA 72 (Kessler, 1999)

In my view, the Company failed to provide Thomas with necessary due process protections in the way that it conducted the investigation and imposed the penalty. Basic due process requires that an employee be given fair notice of the specific charges against him and that he be given an opportunity in advance of discharge to offer a denial or explanation of his conduct. Theodore J. St. Antoine, *Common Law of the Workplace* §6.13 (1998) In this case, these basic protections were denied. First, in conducting his investigation, Mueller failed to interview Thomas or even let him know that an investigation was underway. The termination letter was drafted on February 25, but was not presented to Thomas until March 1, the effective date of termination. Thus, Thomas was not informed of the charges against him, or given an opportunity to answer them, before his termination. The failure to meet with and interview Thomas before the discharge was exacerbated by the termination letter, itself. As noted above, the specifically listed charges are 1) Article 18 violations (unauthorized breaks), 2) unnecessary delay of equipment, 3) violation of Company policy regarding notification of delays, 4) insubordination, 5) two customer service failures, 6) violation of Company policy regarding hose inspection and 7) failure to follow management directives. The letter then concludes that these actions justify immediate termination under Article 10. The Company contends that the reference to Article 10 permits the inference of the dishonesty and falsification charges even though they are not directly stated. Thus, as to the capital offenses

alleged against him, Thomas was never specifically apprised of what he was alleged to have done. Indeed, as to one of the Company's most serious allegations, that of theft of time, there is no evidence that the Company made any specific reference to this offense prior to the arbitration hearing. As a result, Thomas was also denied a reasonable opportunity to prepare a defense to the Company's charges prior to the hearing.

The Company asserts, however, that Thomas should have known that his inaccurate log entries and failure to go off duty while delayed were capital offenses under Article 10 because the 2008 last chance agreement makes it clear that log entries are considered DOT certification documents under Article 10 and claiming pay to which he was not entitled is considered theft of time. I disagree. The last chance agreement lists four alleged infractions: log falsification, falsification of payroll documents, theft of time and illegally operating a Company vehicle. Nowhere does it refer to Article 10 or equate drivers' logs with DOT certification documents. Further, it is not clear from the document whether log falsification, standing alone, would warrant termination. Mueller testified that Thomas was told this verbally at the last chance meeting, but Thomas disputed this and it is not clear to me why such a key factor in supporting the case for termination would not be put into the document. Further, the agreement was drafted by the Company without Union input, so any equation between drivers' logs and certification documents was the Company's opinion, not a mutual understanding. Indeed, the contract does not provide a mutually agreed definition and a legitimate alternative reading of the DOT regulations regarding driver certification documents could limit that term to a valid CDL and certification of road test and medical examination. The agreement also does not define theft of time or explain the basis for the charge. Even if Thomas could be assumed to understand the term, however, it was not used in the termination letter, nor is there any reference to claiming pay to which he was not entitled.

Mueller testified that he had adequate time after the Jacksonville run to conduct his investigation and draft the termination letter. There is no reason, therefore, that he could not have interviewed Thomas, explained the charges and given Thomas an opportunity to respond before termination. Further, there is no adequate explanation as to why he did not spell out clearly the basis for the charges supporting summary discharge under Article 10. At hearing and in its brief, the Company articulated clearly its theories regarding document falsification and theft of time and its basis for those charges. There is no satisfactory reason why that information could not have been provided to Thomas in advance and then to give him a fair opportunity to explain or to prepare a defense. The aforementioned failures on the Company's part denied Thomas due process and are fatal to a finding of just cause for summary termination.

I also find there is no just cause for termination under a theory of cumulative progressive discipline. The Company argued, in the alternative, and the termination latter appears to suggest, that the totality of Thomas' infractions, though not dischargeable offenses individually, entitled the Company to move immediately through the contractual progression to discharge. I disagree. Article 10 specifies that, except in cases of capital offenses, "(t)he Employer shall not discharge nor suspend any employee without just cause, but in respect to

discharge or suspension, shall use the following steps of progression of discipline: (1) written reprimand, (2) written warning, (3) one (1) day suspension and (4) discharge. To be valid, warning letters must be sent to the employee and the Union within ten (10) days of known violation." It seem clear, therefore, that in this case just cause for discharge for non-capital offenses includes following the disciplinary progression set forth in the contract. It is also well established that the purpose of progressive discipline is to put the employee on notice of wrongful behavior in order to give him an opportunity to correct it. This is also the point of the written notice requirement. If the behavior continues, incrementally harsher penalties may be imposed, but the employee is entitled to know beforehand what the consequences of a repeat of the misconduct will be. Progressive discipline loses meaning and purpose if the employer can move through all the steps of the progression within one continuous course of conduct and discharge the employee without prior notice. It would, in effect, create a new category of capital offense that the contract does not provide.

I do find, however, that Thomas did commit acts for which discipline was warranted. In part, this is because the contract limits the just cause standard to cases of suspension or discharge. This means that in order to support a lower level of discipline the Company's action need only to have been not arbitrary, capricious or discriminatory. In order to meet such a standard it would be practically necessary to show that there was no reasonable basis for an imposition of discipline and such is not the case here. Indeed, the Union seems to suggest, as well, that a written reprimand would be in order.

Over the course of the trips to Lima, Ohio and Jacksonville, Florida, the record supports a finding that Thomas committed a number of violations of Company policy. Company policy, as set forth in Quality Carriers Terminal 197 Common Practices makes it clear that whenever a driver's progress is delayed he is to contact the dispatcher and the record also establishes that Thomas was aware of this. Nevertheless, on two occasions during the Jacksonville run Thomas encountered impassable highways that forced him to stop and he did not contact dispatch. He also failed to inform dispatch at various times when he went off duty to take breaks or sleep. He mismanaged his hours of service during the Lima, Ohio run by taking a five hour sleep break on January 30, which did not reset his 11 hour clock for available driving hours. This caused him to have to stop later on January 30 to take a mandatory 10 hour sleep break when he was less than two hours from Lima. As a result, he arrived late, which led to a customer complaint. He appears to not have thoroughly inspected his tank hose prior to leaving on the Jacksonville run, which is also covered in the Company's Common Practices. When he arrived in Jacksonville, he discovered that the hose was split and not usable. As a result he was unable to offload his cargo immediately on arrival and had to go to a dealership to obtain a new hose. He was not able to deliver his cargo until the next day and the delay resulted in another customer complaint. He also did not keep accurate DOT log records on the Jacksonville run, failing to log driving time from the scale in Baldwin, Florida to the customer's facility and while driving around Jacksonville. On February 10, 2010 he stopped in Tifton, Georgia on the return run from Jacksonville due to a truck breakdown. He was delayed while the truck was being repaired and was housed in a motel by the Company. He was instructed by the dispatcher to stay at the motel until further notice, but left on the

morning of February 12 on his own initiative because he was told the truck was almost done. In fact, it took another six hours to complete the repairs, which time counted against Thomas available hours of service after the repairs were completed. The Company regards this action as insubordination, as it does his argument with Mueller and the dispatcher over taking the Lima run. Insubordination, however, is not a capital offense under Article 10. Further, insubordination involves refusal to follow a directive that is issued by a superior. With respect to the disagreement over the Lima run, Thomas objected strenuously, but did not refuse to comply. With respect to the stay at the motel, it is unclear from the record that instructions from a dispatcher were understood to have the same weight as directives from management.

The Company believes that these actions, as well as others, were committed deliberately in retaliation for being given the Lima run, which he did not want. I am not convinced that this is the case, in part because Thomas made an intervening trip for the Company between the Lima and Jacksonville runs during which no deficiencies were reported, which seems inconsistent if his behavior was retaliatory. To my mind, however, whatever his motivations, or even if they were just honest mistakes, these violations are all adequately supported by the record and do warrant discipline. As previously noted, and for the reasons stated, I do not give weight to the 2008 last chance agreement in terms of the appropriate level of discipline. For purposes of this grievance, therefore, Thomas had a clean disciplinary record and Article 10 provides that the first step in the disciplinary progression is a written reprimand and the second step is a written warning. Since the trips to Lima and Jacksonville were two distinct events, separated by another trip, I find that his deficiencies on each trip warrant separate discipline within the contractual progression.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The Company did not have just cause to terminate Ronald Thomas. Accordingly, his discharge is remitted and reduced to a written reprimand for violations occurring on the Lima, Ohio trip and a written warning for violations occurring on the Jacksonville, Florida trip. He is to be reinstated with back pay at his rate of pay at the time of his discharge, along with any other benefits to which he would otherwise have been entitled, offset by any income and benefits derived from other sources during the pendency of this action.

Dated at Fond du Lac, Wisconsin, this 21st day of March, 2011.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc
7708