

**BEFORE THE ARBITRATOR**

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In the Matter of the Arbitration Between

**MCQUAY INTERNATIONAL**

And

**SHEET METAL WORKERS' INTERNATIONAL  
ASSOCIATION, AFL-CIO, LOCAL 480**  
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**FMCS Case No. 10-50717-3**

**Grievant:** R. Anderson

**Arbitrator:** Sharon K. Imes

***APPEARANCES:***

**Scott A. Paulsen**, Senior Consultant, Labor Relations, Employers Association, Inc., appearing on behalf of McQuay International.

**Richard Dyrhahl**, Local 480 Representative, and **Joe Adamek**, Business Manager, Sheet Metal Workers' International Association. Local Union 480, appearing on behalf of Local 480 and the Grievant.

***JURISDICTION:***

McQuay International, Faribault, Minnesota Plant, referred to as the Employer or the Company, and Sheet Metal Workers International Association, AFL-CIO, Local 480, referred to as the Union, are parties to a collective bargaining agreement effective October 6, 2008 through October 2, 2011 which continues in full force and effect from year to year thereafter unless written notice of intent to terminate or modify the agreement is provided in compliance with Article XXVI of the agreement. Under this Agreement, the undersigned was selected to decide a dispute that has occurred between them. Hearing was held on October 20, 2010 in Owatonna, Minnesota. The parties, both present, were afforded full opportunity to be heard. Briefs in this matter were submitted by both parties and the last was received November 22, 2010. The matter is now ready for determination.

**STATEMENT OF THE ISSUE:** Did the Employer have just cause to discharge the Grievant? If not, what is the appropriate remedy?

**RELEVANT CONTRACT LANGUAGE:**

**ARTICLE VI  
GRIEVANCE PROCEDURE**

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**Section 4) Arbitrator's Authority/Payment of Arbitration Fees**

The decision of the arbitrator shall be final and binding on all concerned; provided, however, that the arbitrator shall not have any power to add to, delete, or modify any provision of this Agreement. The Union and the Company will share equally all fees and costs of the arbitrator and room rental.

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**ARTICLE XIX  
PLANT RULES AND DISCIPLINE**

**Section 1) Plant Rules and Discipline**

The Company shall not discipline or discharge any employee except for just cause. Employees covered by this Agreement shall be governed by the Plant Rules agreed upon by the parties effective as of the date of this Agreement, which is attached hereto and labeled APPENDIX "B".

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**APPENDIX "B"**

**Plant Rules**

The plant rules contained in this booklet have been agreed to by the Company and the Union.

Rules of conduct are necessary when a group of individuals work together. It is the policy of the Company to be fair and reasonable at all times; however, reasonable regulations are necessary for the orderly and efficient operation of any organization. It is not the intention of the Company to restrict the rights of anyone, but to define and protect the rights of all.

All official disciplinary action will be in writing with copies being issued to the employee and the Union Representative.

The Company agrees not to be arbitrary in the administration of the Plant Rules. The Union agrees any infraction of the rules herein, constitutes just cause for disciplinary action.

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<b>RULE NUMBER</b>	<b>VIOLATION</b>	<b>1ST OFFENSE</b>	<b>2ND OFFENSE</b>	<b>3RD OFFENSE</b>	<b>4TH OFFENSE</b>
<b>1.</b>	Ceasing work before the beginning of rest and lunch period, or before quitting time, or failure to start work promptly at the beginning of the shift and at end of rest and lunch periods.	Reprimand	Warning Letter	1-Day Suspension	Discharge
<b>14.</b>	Using abusive or threatening language in an insulting Manner (sic) towards (sic) fellow employees or any other Company personnel.	Warning Letter	1-Day Suspension	Discharge	
<b>16.</b>	Smoking during scheduled work hours anywhere on Company property. This rule does not pertain to lunch or break periods.	Warning Letter	1-Day Suspension	Discharge	
<b>34.</b>	Four (4) rule violations within a twelve (12) Month period.	Discharge			

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**BACKGROUND AND FACTS:**

McQuay International manufactures air conditioning, heating, ventilation and refrigeration products for large commercial operations such as financial centers in foreign countries, convention centers, schools, office buildings and high rises. It has a facility in Faribault, Minnesota; two facilities in Owatonna, Minnesota, and two off-site facilities, one of which is in Faribault, Minnesota. The Company has approximately 268 hourly employees and 65 salaried employees.

The Grievant, a stock material handler at the time he was discharged, began his employment with the Company in May, 1979. As a stock material handler, he worked at the off-site warehouse in Faribault along with five other employees. On April 26, 2010, the Grievant was terminated for violating plant rule 34 by receiving discipline for four plant rule violations within a twelve month period. The Grievant received a reprimand for violating plant rule 1 on November 23, 2009; a warning letter for violating plant rule 14 on March 4, 2010; a warning letter for violating plant rule 16 on April 22, 2010, and a warning letter for violating plant rule 14 on April 26, 2010. The Grievant contests the disciplinary action taken on April 22, 2010 and the one taken on April 26, 2010 which includes his discharge based upon the plant

rule 34 violation and the termination for violating four plant rules within a twelve-month period also issued on April 26, 2010.

On April 21, 2010, it is alleged that the Grievant violated plant rule 14 by smoking on company property during scheduled working hours. According to the Company, the Grievant was observed smoking inside the warehouse by his Supervisor at approximately 1:30 p.m. that day. The Supervisor testified that he had returned from the Owatonna warehouse a few minutes earlier and had parked in the east lot. He entered the building and as he walked toward the front of the warehouse to check on warehouse productivity he smelled cigarette smoke; went toward the smell and saw the Grievant standing near the front door with a cloud of smoke by his head but did not see any other indication that the Grievant was smoking. He also testified that he thought about confronting the Grievant but decided to wait until the end of the day and give him a disciplinary letter then. That meeting did not occur.

On April 22, 2010, the human resources generalist whom the Supervisor had e-mailed about the incident on April 21, 2010 sent him the disciplinary letter to be given to the Grievant. The Supervisor called the Grievant into his office; outlined the contents of the letter and asked him to sign it which he did. After signing the letter, however, the Grievant threw the pen on the Supervisor's desk; got up to leave and said " I might as well go turn my time in - beats working for a snake like you," or something similar to that as he left. After the Grievant left his office the Supervisor notified the human resources generalist that the Grievant had violated plant rule 14 by calling him a "snake" stating he felt the Grievant's comment was abusive and insulting and showed a total lack of respect. After receiving the e-mail, the human resources generalist discussed the e-mail with her supervisor, the Human Resources Director, and, together, they discussed the incident with the Grievant's Supervisor. Following this discussion the Director concluded that the Grievant's comment was abusive and insulting and she, together with other management personnel, decided that the Grievant not only violated plant rule 14 but that this violation constituted a fourth plant rule violation within twelve months and, therefore, he should be terminated for violating plant rule 34.

On April 26, 2010, the Company, citing four plant rule violations within a twelve-month period as cause for discharge, terminated the Grievant. The Grievant denies smoking on April

21 and the Union argues that the Grievant's comment made on April 22 does not rise to the level of a plant rule 14 violation. Consequently, a grievance challenging the two disciplinary actions as well as the termination was filed on April 27, 2010. The grievance was denied at Step 3 of the grievance procedure on May 19, 2010 and appealed to arbitration on May 25, 2010. It is this dispute that is before the Arbitrator.

***ARGUMENTS OF THE PARTIES:***

The Company argues that the credible evidence establishes that the Grievant was smoking on April 21st; that the Grievant chose to deliberately insult his Supervisor when he called him a "snake" during the April 22nd meeting and that both actions constitute violations of the plant's work rules. Further, the Company rejects the Union's argument that the Grievant's comment does not rise to the level of being abusive or insulting since no profanity was used and cites two arbitration decisions, the BNA Grievance Guide and Discipline and Discharge in Arbitration as support for its position.

The Company also maintains that the Grievant knew that his conduct was prohibited since he has been disciplined before for the same violations and since both work rules that he is accused of violating are included in the collective bargaining agreement which is provided to all employees. In addition, it declares that it has not singled out the Grievant; that other employees have been disciplined for the same work rule violations and that at least five employees have been discharged since 2003 when each accrued four work rule violations within a twelve-month period.

Further, acknowledging that the work rules and the grievance procedure have been negotiated by the parties and have been a part of the contract for years, the Company asserts that the parties, by negotiating this language, have eliminated the Company's discretion to make unilateral changes in the provisions or to impose a level of discipline that differs from the grid. It continues that, based upon this fact, the Union's attempt to argue mitigation should be rejected since it violates the agreement and asks the Arbitrator to exceed her authority.

Finally, citing the fact that the Grievant received a letter of warning for insubordination in June 1980; a letter of warning for using abusive language in May 1984 and letter of warning

for insubordination in August 1998, the Company declares that the Grievant has a history of being abusive and insubordinate. Further, it charges that it appears that the Grievant has not learned from these prior disciplinary actions but, instead, is escalating his inappropriate conduct and seeks that the grievances be denied.

The Union, however, argues that the Grievant has been singled out and treated differently from other employees. As support for its position, it cites the fact that the Grievant has received four disciplinary letters from this Supervisor who has been a supervisor for only two years is just over five months while prior to that and under other supervisors he has received only four violations in over thirty-one years of service. Further, arguing animosity toward the Grievant, the Union states that this Supervisor has called the Grievant names and made inappropriate statements to him several times. The Union also argues that the Company cannot prove that the Grievant was smoking since it failed to confront him or conduct an investigation and that the Grievant's use of the word "snake" does not rise to the level of a plant rule 14 violation. And, finally, the Union declares that the Company violated the Grievant's due process rights when it failed to confront the Grievant; when it assumed he was smoking instead of conducting an investigation, and when it disciplined the Grievant prior to informing the Grievant of the alleged violation and allowing him to tell his side of the story.

More specifically, addressing the alleged smoking violation, the Union charges that the Company has the burden to prove that the Grievant was smoking and that it failed to produce evidence of that fact. As support for its assertion, the Union challenges the Supervisor's testimony that he smelled smoke and saw a cloud of smoke near the Grievant's head declaring that since the Supervisor was over thirty yards away when he allegedly smelled and saw the smoke it would have been difficult for a person to smell or see smoke that far away especially when the warehouse door was open. Further, it notes that while the Supervisor testified he smelled and saw the smoke he did not testify that he saw a cigarette in the Grievant's hand or move a cigarette to his mouth to inhale even though the disciplinary letter states that he observed the Grievant smoking. And, finally, it challenges whether the Supervisor was actually there since he did not confront the Grievant at the time the alleged incident occurred and questions whether the Supervisor would have done the same if he had observed an employee

sleeping on the job if he had been there. In addition, the Union declares that the "proper way (for the Supervisor) to handle the situation would be to confront the employee" and tell him to put out the cigarette or have him explain why he was smoking outside his normal break time.

Further, referring to the testimony of a subpoenaed co-worker, the Union declares that there is a discrepancy between this co-worker's testimony and the Supervisor's testimony regarding their conversation following the Supervisor's alleged observation of the Grievant smoking. As proof, the Union states that the co-worker testified that the Supervisor sought information from him as to whether he had seen the Grievant smoking while the Supervisor testified that the co-worker had come to him and offered the information. In addition, the Union posits that the co-worker's testimony does not establish that the Grievant's Supervisor observed the Grievant smoking since although the co-worker testified that he had seen the Grievant smoking there was no testimony as to whether the co-worker's observation was at the same time and on the same day the Supervisor claims to have seen the Grievant smoking. Further, referring to the shipping and receiving clerk's testimony that he never saw the Grievant smoking or saw the Supervisor in the area where the incident allegedly occurred, the Union argues that if anyone was likely to have witnessed anything happening in his work area it would have been the clerk.

The Union also challenges whether the disciplinary letter the Grievant received for using abusive or threatening language was for just cause. According to the Union, the term "snake" hardly rises to the level of threatening or abusive language since it is undisputed that the Grievant did not use profanity when he made the statement and since the term "snake" is defined as "an untrustworthy person" and is not "racist, sexist, profanity laced, obscene, political, religious or otherwise construed" as abusive or threatening language. It adds that under the first amendment, the Grievant has the right to criticize the Supervisor's actions and questions whether society has become so sensitive that the use of legitimate words jeopardizes another person's right to the protection under the first amendment and becomes cause for an employee to lose his or her job.

Continuing, the Union declares that while the Company has disciplined the Grievant for having used the word "snake" in a comment to his Supervisor, the comment is in no way similar

to comments made by Company employees who have been disciplined for violating plant rule 14 and does not rise to the level of plant rule 14 violation. As proof, it cites the fact that in all of the disciplinary letters the Company submitted as evidence to support its assertion that it consistently has disciplined employees for using abusive or threatening language, the language cited contained profane words or phrases and that none of the language used contain a word similar to the one the Grievant used or described a supervisor's character. It adds, that based upon this evidence, the record does not prove that the use of the word "snake" is abusive or threatening and violates plant rule 14.

Finally, the Union argues that since the Company failed to conduct a full and fair investigation into the circumstances surrounding the Grievant's alleged misconduct and since it failed to give the Grievant an opportunity to deny the allegations or justify his actions prior to making its decision and imposing discipline, it denied the Grievant his due process rights. As remedy, it seeks that the grievances be sustained; that the Grievant be reinstated and made whole for all wages and benefits lost and that the two disciplinary letters be removed from the Grievant's file.

***DISCUSSION:***

There are three separate disciplinary actions involved in this dispute. The first is whether the Grievant violated plant rule 16 by smoking on the premises during working hours. The second is whether the Grievant violated plant rule 14 by calling his Supervisor a "snake" when he was given a disciplinary letter for having violated plant rule 16. The third is whether the Company has just cause to discharge the Grievant for having violated four plant rules within a twelve-month period. In order to establish just cause for discipline or discharge, it must be shown not only that the employee is guilty of the misconduct alleged but that the employee's due process rights were not violated and that the degree of discipline imposed is warranted. In this case, the question is narrowed to whether the Grievant is guilty of the alleged misconduct and/or whether the Grievant's due process rights were violated when the Company concluded that the Grievant violated plant rules 14 and 16. This limitation is imposed since the parties have agreed that violation of a plant rule is just cause for discipline and that any employee who

violates four plant rules within a twelve-month period is just cause for discharge under plant rule 34 and since there is no evidence that the Company has arbitrarily enforced these rules even though both parties indicated that the Company was willing to reinstate the Grievant with a letter of abeyance. Consequently, even though the Grievant is a long-term employee and has a relatively good work record, these factors will not be considered as mitigating factors if it is concluded that the Grievant did violate the challenged plant rules since there is no dispute that the Grievant had two disciplinary actions prior to these allegations and that the alleged violations, if proven, would comprise four plant rule violations within a twelve-month period.

The burden of proof regarding whether the Grievant did that which is alleged initially lies with the Company. While arbitrators frequently define that burden of proof with respect to proving wrongdoing as "a preponderance of the evidence"; "clear and convincing" or "beyond a reasonable doubt", this Arbitrator does not apply one of those standards but instead requires the employer to provide enough competent evidence to convince her that the employee did that which is alleged. That burden of proof was not met in this dispute with respect to either rule violation.

As stated above, the first allegation is that the Grievant violated plant rule 16 by smoking on the premises during scheduled hours. The disciplinary action taken on April 22, 2010 states that the Grievant was observed at approximately 1:30 p.m. smoking inside the warehouse during working hours. While it does not state who observed the Grievant smoking, the testimony of the Grievant's Supervisor establishes that it was he that allegedly observed the incident. Consequently, proof that the Grievant violated this plant rule is dependent upon evidence that the Supervisor observed the Grievant smoking and not another employee.<sup>1</sup> Further, after reviewing the record, it is concluded that there is little, if any, evidence that the Supervisor observed the Grievant smoking and the evidence that exists is neither credible nor persuasive. Instead, the record suggests that the Supervisor, intent on finding the Grievant

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<sup>1</sup> While it may be that the Grievant violated this rule since a co-worker testified that he saw the Grievant smoking during working hours that day, this employee's statement was not cited by the Company as cause to discipline the Grievant nor was any investigation done to prove the validity of the employee's statement. Consequently, his testimony is not relevant to this dispute.

smoking, opted to discipline the Grievant for violating the plant rule based upon his discussion with the Grievant's co-worker and not upon personal observation.

The record clearly establishes that the Supervisor had received reports that the Grievant was taking smoke breaks when he was in meetings or not at the warehouse and that the Supervisor intended to catch the Grievant "in the act". As proof that he did catch the Grievant "in the act" on April 21st, the Supervisor testified that he had parked in the east lot; entered through the back door of the warehouse.<sup>2</sup> He then stated that after he stopped in his office to get his clipboard he proceeded toward the front of the warehouse; smelled cigarette smoke as soon as he crossed over to the front half of the warehouse, and saw the Grievant standing near an open warehouse door with a cloud of smoke near his head. And finally, he testified that although he believed the Grievant to be smoking he did not see the Grievant lift his hand to his mouth or any other indication that he was smoking and that he did not confront the Grievant regarding his misconduct since the Grievant had been loud and abusive and had used foul language in front of others earlier in the year when the Grievant disagreed with a decision he had made.

There are several problems with this testimony. First, it is highly unlikely that the Supervisor smelled cigarette smoke when he crossed over into the front half of the warehouse. Not only was he also a smoker whose clothes probably smelled of smoke but he testified that he was at least ninety feet away from the Grievant when he saw him and this means that he had to be even further away from the Grievant when, according to him, he first smelled smoke. It is hard to believe that unless the Grievant had been "smoking up a storm for a long period of time" that smoke would have permeated the warehouse as the Supervisor alleges.

The second problem with the Supervisor's testimony is that he indicated that he saw a cloud of smoke near the Grievant's head and saw smoke "emanating from the Grievant". Not only is it unlikely that the Supervisor saw a cloud of smoke near the Grievant's head since the Grievant was standing near a door that is generally kept open for ventilation purposes but the Supervisor specifically testified that he did not see the Grievant smoking. His testimony that he

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<sup>2</sup> While he did not specifically state that he had done so to check on the Grievant's behavior, it is concluded that this was the reason since he did testify that he did this periodically in order to "monitor and check".

saw smoke "emanating from the Grievant" is directly contradicted by his testimony that other than observing the cloud of smoke he did not observe the Grievant smoking.

The third problem with the Supervisor's testimony is that he made no effort to confirm that the Grievant was smoking and chose not to confront the Grievant regarding his alleged misconduct. While he testified that he thought about confronting the Grievant and that he did not since the Grievant had been loud and abusive toward him in front of others previously, this testimony lacks credibility. Not only did the Supervisor testify that the Grievant was alone when he observed him smoking, but the record establishes that the Supervisor had no problems disciplining the Grievant for previously being loud and abusive. Further, one of the many duties of a supervisor is to be responsible for the work and actions of other employees. Consequently, if an employee is not performing as expected, it is the supervisor's responsibility to call the employee to task for not doing as expected. In this case, either the Supervisor saw the Grievant smoking and chose not act in his capacity as a supervisor or he did not see the Grievant smoking. Since the record establishes that this Supervisor has had no difficulty disciplining the Grievant in other instances, it is more likely that he did not actually see the Grievant smoking.

This conclusion is further supported by conversation that took place between the Supervisor and the subpoenaed co-worker who testified that he saw the Grievant smoking that day which followed the alleged observation. At hearing, the Supervisor testified that after observing the Grievant smoking he had talked with this co-worker who reported to him that if he had been at the warehouse a few minutes earlier he would have seen the Grievant up front smoking. The co-worker, however, testified that before the Grievant was terminated, the Supervisor had approached him; said that he had smelled smoke, and asked if the Grievant had been smoking to which he had replied that if he had been there a few minutes earlier he might have seen the Grievant since the Grievant was smoking in the stage one area near the overhead door. While their testimony is similar, the singular difference is whether the co-worker volunteered that the Supervisor might have seen the Grievant smoking if the Supervisor had been there earlier or whether the Supervisor asked the co-worker whether he had observed the Grievant smoking. Since the subpoenaed co-worker had no reservations about admitting

that he had seen the Grievant smoking it is more likely that his testimony regarding how the conversation occurred is more credible than the Supervisor's. Given this fact, one must ask why the Supervisor would have questioned the co-worker about whether the Grievant had been smoking since the Supervisor allegedly knew that the Grievant had been smoking and can only conclude that he asked since he had not personally observed the Grievant smoking.

Based upon the lack of convincing evidence which proved that the Grievant was smoking and the lack of credibility in the Supervisor's testimony it must be concluded that the Company did prove that the Grievant violated plant rule 16. This finding is further supported by the fact that the Company denied the Grievant his due process rights prior to deciding to discipline him for this plant rule violation.<sup>3</sup>

While the above finding is sufficient to find that the Company did not have just cause to terminate the Grievant for violating plant rule 34, the Union and the Grievant have also challenged whether the Grievant violated plant rule 14 when he told his supervisor, upon receiving discipline for having violated plant rule 16, that it "beats working for a snake like you". Plant rule 14 prohibits employees from using language that is abusive or threatening in an insulting manner toward other employees or toward Company personnel. It is not a rule that addresses "insubordination". Instead, it is a rule that addresses employee conduct on the plant floor. In this instance, the Company has asserted that the Grievant's use of the word "snake" was insulting and a violation of the rule. The evidence, however, does not sufficiently prove that assertion.

Generally, abusive language is language that is coarse, insulting (i.e., sexist, racist, political or religious), or vulgar and threatening language is language which reflects an intent to inflict harm. In addition, the context in which words are used often determines whether the word choice is abusive or threatening. Nothing in the word "snake" is in itself coarse, insulting, or vulgar nor is it threatening, consequently, the way in which it is used must be considered in

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<sup>3</sup> An employee's due process rights include the right to be informed of the charges; proof of misconduct; a fair and impartial investigation; the right to confront accusers and the right to answer charges. In this instance, the Grievant was not informed of the charges until after the fact; the evidence failed to prove misconduct, there was no impartial investigation and the Grievant was not given the opportunity to answer the charges until after the Company decided to discipline him. These are all due process right violations.

determining whether it is insulting. Further, a review of the record indicates that in each instance where the Company issued discipline for violating plant rule 14 (at least since 2006), including the Grievant's discipline for violating this rule in March 2010, the employees were disciplined for statements that included words such as "fucking"; "asshole" or "dickhead" in a heated exchange with another employee. Consequently, while the Supervisor and the two human resources employees testified that they believed that the Grievant's statement was insulting, the record does not support their assertion. It is undisputed that the statement was not made in front of any other employee than the Grievant's Supervisor; that no profanity was used, and that it was made as a parting statement and not as part of a heated exchange. Given these facts it is concluded the use of the word "snake" even though it suggests that the Grievant's Supervisor is "untrustworthy" was not intended to be insulting and is not the type of statement the Company has considered a violation of plant rule 14. Further, even if one were to conclude that the comment was a violation of plant rule 14, the Company's decision to discipline the Grievant for the making the statement without conducting an investigation into the incident or giving the Grievant an opportunity to give his version of events, again denies the Grievant his due process rights. This denial of due process rights, together with the lack evidence supporting the Company's assertion that the Grievant's comment was abusive or threatening and used in an insulting manner, leads to the finding that the Company also did not have just cause to discipline the Grievant for violating plant rule 14.

In conclusion, based upon the record, the arguments and the discussion above, it is concluded that the Company did not have just cause to discipline the Grievant for violating plant rule 16 or for violating plant rule 14. Further, it is concluded that since it did not have just cause to discipline the Grievant for violating these plant rules the Grievant has not accrued four plant rule violations within a twelve-month period. Based upon this fact, it also concluded that the Company does not have just cause to terminate the Grievant under plant rule 34. Accordingly, the following award is issued.

#### **AWARD**

The grievance is sustained and the Company is ordered to reinstate the Grievant and

make him whole for all benefits and wages lost from the time he was discharged to the time when he is reinstated less any income earned while terminated. In addition, the Company is ordered to remove the two disciplinary actions from the Grievant's personnel record. Further, the Arbitrator retains jurisdiction over this dispute as it relates to remedy in the event the parties are unable to agree upon the terms of the award.

By: \_\_\_\_\_  
Sharon K. Imes, Arbitrator

January 16, 2011