

**FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
UPPER MIDWESTERN REGION**

OWENS & MINOR,

EMPLOYER,

-and-

GRIEVANCE ARBITRATION
FMCS CASE NO. 050713-057481-7
ARBITRATOR'S AWARD

SERVICE EMPLOYEES INTER-
NATIONAL UNION, Local 113,

UNION GRIEVANT.

Arbitrator:	Rolland C. Toenges
Date Grievance Filed:	May 3, 2005
Date Arbitrator Selected:	July 26, 2005
Date of Hearing:	January 11, 2006
Post Hearing Briefs Received:	February 10, 2006
Date Hearing Closed:	March 22, 2006
Date of Award:	April 21, 2006
Grievant:	Mesfin Tewolde

ADVOCATES

FOR THE EMPLOYER:

Daniel R. Wachtler, Attorney
Briggs & Morgan, P.A.

Tom Mitchell, Assoc. General Counsel
Briggs & Morgan, P.A.

FOR THE UNION:

Roger A. Jensen, Attorney
Jensen, Bell, Converse &
Erickson, P.A.

Kevin Kuehn, Bus. Rep.
SEIU, LOCAL 113

WITNESSES

Marc Walter Johnson, General Manager
 Steven Julkowski, Warehouse Manager
 Scott Hintz, Inventory Control Supervisor

Rick Flannigan, Employee
 Aaron Flannigan, Employee
 Mesfin Tewolde, Grievant

ALSO PRESENT

Brett Quinn, Supervisor
 Colleen Coppersmith, Office Manager
 Maureen Frank, Intern

ISSUE

Did the Employer have just cause to terminate the Grievant? If not, what is the appropriate remedy?

JURISDICTION

The matter at issue, regarding termination of Mesfin Tewolde (Grievant), came on for hearing pursuant to the Collective Bargaining Agreement (CBA) between the Parties. Said CBA contains a Grievance and Arbitration Procedure (Article 5) that provides terms and conditions for the resolution of grievances.¹ Said CBA also contains terms and

¹ CBA, Article 5: GRIEVANCE AND ARBITRATION PROCEDURE.

- (A) Any claim of an employee arising out of the interpretation of, or adherence to, the terms or provisions of this Contract shall first be taken up with the employee's immediate supervisor for adjustment. If not satisfactorily settled, it shall then be reduced to writing and taken up with the General Manager of the Employer or his/her representative. If not then satisfactorily settled, it shall constitute a grievance and shall be submitted for settlement under the grievance procedure herein provided. With respect to any other dispute arising out of the interpretation of, or adherence to, the terms and provisions of this Contract, the aggrieved party shall promptly give written notice of the employee's grievance to the other party, setting forth the grievance in detail and requesting submission of the grievance for immediate settlement.
- (B) In no case shall there be any consideration given to any grievance unless such written notice is submitted by the aggrieved party to the other party within twenty (20) days after the occurrence of the grievance (except that as to grievances over wages, hours, vacations and days-off provisions of this Agreement, such notice shall be timely if given within thirty (30) days after the regular payday for the period in

conditions for discipline and discharge of employees.² The just cause standard for discipline and discharge of employees is also referenced in the CBA, Article 1, (J), Management Rights.³

which the violation occurred). Failure to give such notice shall constitute a permanent waiver and bar of such grievance.

If such controversy cannot be settled promptly between the Employer and the Union within five (5) days after such notice of the grievance, the matter shall be referred to a Board of Arbitration consisting of one (1) member selected by the Employer and one (1) member selected by the Union. In the event this arbitration committee cannot agree to an adjustment of such dispute or grievance within five (5) working days after their first meeting, the two (2) so selected shall select a third member, who shall serve as impartial chairman. If said arbitrators are unable to agree upon the selection of an impartial chairman within three (3) working days, then either party may request the Director of Federal Mediation and Conciliation Service to appoint a panel of five (5) neutral arbitrators. The parties shall alternately delete names and the last name shall be the neutral arbitrator.

The decision of the Board of Arbitration shall be made within thirty (30) days after the conclusion of the arbitration hearing. Except that if such decision is not served, in writing, upon all parties within thirty (30) days from the date that hearings are concluded, unless extended in writing mutually by the parties, members of the Arbitration Board shall receive no compensation thereof. The decision or award by said arbitrators or a majority of them shall be final and binding upon the parties. The expenses of the Board of Arbitration shall be borne by the parties equally.

² CBA, Article 6: DISCIPLINE AND DISCHARGE.

(A) The Employer shall not discharge or suspend an employee without just cause. Grounds for discharge include, but are not limited to, any use or possession of alcohol or drugs on the job or on the Employer's premises, being under the influence of drugs or alcohol on the job, dishonesty or infraction of Employer rules.

(B) NOTICE OF DISCIPLINE AND DISCHARGE.

A written notice of any discharge or disciplinary suspension shall be given the employee and a copy thereof shall be sent to the Union. The Union may file a written grievance relating to such discharge or suspension. The Employer must receive such grievance within seven (7) calendar days of receipt by the Union of the notice of discharge or disciplinary suspension. If such written grievance is filed as provided herein, the parties shall promptly meet and attempt to resolve the matter. If the dispute is not resolved within fifteen (15) calendar days after receipt by the Union of the notice of discharge or disciplinary suspension, the matter may be referred to arbitration pursuant to the procedure set forth in Article II of this Agreement. Any demand for arbitration must be in writing and must be received by the Employer within thirty (30) calendar days of receipt by the Union of the written notice of discharge or disciplinary suspension.

(F) EMPLOYEE CHARGED WITH AN OFFENSE INVOLVING DISCHARGE

The Parties selected Rolland C. Toenges as the neutral Arbitrator from a list provided by the Federal Mediation and Conciliation Service. The arbitration hearing was conducted as provided by the terms and conditions of the CBA and the Federal Mediation and Conciliation Service. The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute and to cross-examine witnesses.

The Parties stipulated that the matter in dispute was properly before the Arbitrator. All witnesses were sworn under oath. There was no request for a stenographic record of the hearing. The Parties have no objection to the Arbitrator's Award being published.

Comprehensive Post hearing briefs were received from both Parties. The Arbitrator held the hearing open until March 21 pending any further submissions from the Parties. Being none, the hearing was closed effective March 22, 2006.

BACKGROUND

The Employer distributes medical/surgical supplies to acute care hospitals and selected segments of the alternate care market, including outpatient and long-term care facilities affiliated with the Employer's integrated health care customers. Most of the Employer's customers are hospitals, which account for over 90% of net sales. However, customers also include facilities such as nursing homes, clinics, surgery centers, physicians' offices, and home health care entities. The Employer distributes approximately 200,000 finished medical/surgical products from more than 40 distribution centers nationwide. Approximately 2,000 manufacturers supply products distributed by the Employer.

The Grievant was employed at the Employer's distribution center located in Minneapolis Minnesota. There are approximately 80 employees working in the Minneapolis distribution center. The Union represents a bargaining unit consisting of approximately 35 employees who perform warehouse, shipping, and receiving functions.

May be suspended without pay pending the hearing and decision on the charge. If the specified grounds for discharge are found to be unjustified, the employee shall be reinstated with full pay for the time of suspension and without loss of seniority or other rights and privileges.

³ CBA, Article 1, (J) MANAGEMENT RIGHTS.

Except as specifically limited by the express provisions of this Agreement, the management of the Employer, retains the right, including but not limited to the right to determine the qualifications for, hire, lay off, promotion, demotion, transfer, discipline, suspension, or discharge for just cause, . . .

The Grievant was a member of the Union Bargaining Unit and worked as a warehouse Material Handler on the night shift.

The Grievant was hired on October 13, 2003. As a Material Handler, he was responsible for the accurate storing, shipping, and receiving of products and for meeting performance standards of safety, security and productivity. Essential job functions for Material Handlers are to “pick” and “assemble” customer orders from warehouse stock, using a forklift and prepare the order for shipment.

Terms and condition of employment for employees in the bargaining unit are governed by the CBA. The CBA, as previously referenced, contains provision for the resolution of grievances. The Employer has also established rules, which are contained in the Employer’s “Handbook.” The handbook is provided to all employees at the time of hire and when updated. Employees are required to sign an acknowledgement that they have received and reviewed the contents of the Handbook, which the Grievant did on October 13, 2003.

Among other things, the Handbook lists conduct that constitutes cause for disciplinary action, up to and including discharge. Falsification of reports, records, applications, expenses or other records, is included in misconduct that is cause for disciplinary action.

Because products distributed by the Employer are, for the most part, critical to Patients receiving medical care, it is important that the customer’s orders are filled in a timely and accurate manner. Material Handlers must be diligent in picking the correct type and number of product and insuring that the finished order is prepared for shipment in a timely manner.

Material Handlers pick product from bins or shelves, either by hand or using a forklift. The product is placed on a pallet and delivered to the loading dock by the Material Handler, where it is shrink wrapped for shipment to the customer. The Employer uses a quality control system where the productivity and accuracy of Material Handlers is monitored. Material Handlers on the night shift are expected to pick, on average, 320 lines in an eight-hour shift. Performance results (productivity and accuracy) of Material Handlers are posted daily. Material Handlers are expected to make less than one error per 100 lines. These standards are communicated to Material Handlers at the time of hire and on an ongoing basis.

As part of the Employers control system, Material Handlers use a hand held Radio Frequency Computer (RF Unit) in tracking the receipt, storage, ordering and distribution of product. Each RF Unit is equipped with a scanner to read the bar code affixed to product, pallets and warehouse locations. Using the RF Unit in conjunction with the Employer’s inventory control system (CSW System), the Employer is able to automatically adjust inventory count as product is received/stored and as orders are filled. In addition, the system tracks the number of lines picked (productivity) by each Material Handler.

Supervisors, using the CSW system, assign orders to the Material Handlers via the RF Unit. The Material Handler scans product with the RF Unit, which allows the supervisor to determine if the Material Handler is in the correct location and picking the correct product. The Material Handler matches the number on the product with the number appearing in the RF Unit, selects the number of product specified and places it on a pallet. Upon completing each product (line), the Material Handler pushes the “enter” key on the RF Unit, which sends information to the CSW System that the line has been completed.

Upon completing a line, the Material Handler receives the next line via the RF Unit and repeats this process until the full order is complete. When the order is complete, the Material Handler transports it to the staging area for shipping and proceeds to pick lines for the next order.

In filling orders, the Material Handler may encounter situations where space on a pallet will not accommodate a full line. In such cases the Material Handler is to use the Middle of Pick Key (“M” key), which splits the line in the RF Unit. This procedure allows the Material Handler to deliver the full pallet to the staging area and prompts the RF Unit to create another line, whereby the Material Handler returns to the previous location and completes the line using another pallet. This procedure has been set up so that a Material Handler is not penalized when a large order requires more than one trip to the staging area in order to complete a single line.

It is possible for a Material Handler to use the “M” key improperly to distort productivity results. Use of the “M” key has the effect of splitting a single line into more than one line. If used improperly, it gives incorrect information to the CSW System. The result being that the Material Handler’s productivity is overstated. Therefore, accuracy of the CSW System is dependent on proper use of the RF Unit by the Material Handler. The number of “M” transactions per Material Handler per eight-hour shift varies but typically is in a range of five to ten.

Within a short time after the Grievant was hired, his supervisor noticed that the lines reported filled by the Grievant exceed the number to be filled by a considerable amount. The supervisor then counseled the Grievant in proper use of the RF Unit “M” key. The supervisor also explained proper use of the “M” key to the other Material Handlers.

In late 2004, the Employer noticed that the Grievant use of the “M” key seemed unusually high. On November 8, 2004, for example, the Employer found that the Grievant had entered approximately 50 “M” key transactions in one shift. The Employer then ordered pick reports for all Material Handlers on that shift and found that two had used the “M” key ten times, one 14 times. The Grievant was told again about proper use of the “M” key. Thereafter the Grievant’s use of the key was monitored for some time and found to be within normal limits.

On March 23, 2005 the Employer issued a verbal warning to the Grievant based on low productivity, safety, cooperation and not following work direction. On April 8, 2005, the

Grievant was issued a written warning based on failure to sign a daily checklist and low productivity. Shortly after this latest warning, the Grievant's productivity improved substantially. However, on April 20, 2005, the Employer found that the Grievant was making a large number of "M" key transactions. The Employer evaluated the "M" key transactions for all Material Handlers on the Grievant's shift and found the Grievant had a significantly greater number.

Having concluded that the Grievant was deliberately using the "M" key improperly to overstate his production, the Employer suspended him April 25, 2005. After further investigation the Employer terminated the Grievant for dishonesty effective May 2, 2005.

On May 3, 2005 the Grievant filed a grievance claiming unjust termination and violation of the CBA, Article 6, (A) and (F) and Article 1, (C)⁴ and (J). The matter was processed through the Grievance Procedure in the CBA without resolution, which brings the matter to the instant proceedings.

JOINT EXHIBITS

- J-1. Collective Bargaining Agreement – October 1, 2003 through September 30, 2006.
- J-2. Grievance by Mesfin Tewolde dated May 3, 2005.

EMPLOYER EXHIBITS

- E-1. Arbitration Award, FMCS No. 040811-57050-7.
- E-2. Productivity Standards for Material Handlers.
- E-3. Job Description for Material Handler – Minneapolis.
- E-4. Photos of warehouse facility and Material Handlers at work.
- E-5. Warehouse Rules, Division 66.
- E-6. Acknowledgement Form for receipt of Company Policy.
- E-7. Personal Pledge and Acknowledgement for Code of Honor.
- E-8. "Middle" of Pick instruction.

⁴ CBA, Article 1, © NO DISCRIMINATION.

There shall be no discrimination by the Union or the Employer against any employee because of membership or non-membership in the Union or because of the assertion of rights afforded by this Agreement.

- E-9. Duplicate Picks, November 8, 2004.
- E-10. Letter of Suspension to Grievant, dated April 25, 2005.
- E-11. Comparison of Grievant's productivity with written warning of April 8, 2005.
- E-12. Termination Checklist dated April 28, 2005
- E-13. Letter of Termination, dated May 2, 2005.
- E-14. Owens & Minor Code of Honor – Standards of Conduct
- E-15. Memo of Steve Julkowski, Subject: Meeting with Grievant Re: productivity.
- E-16. Corrective Action Form dated March 23, 2005 – Re: Grievant.
- E-17. Corrective Action Form dated March 30, 2005 – Re: Grievant.
- E-18. Memo by Steve Julkowski dated April 21, 2005 – Re: Grievant
- E-19. Material Handler Productivity report for March 17 through April 18, 2006.
- E-20. Memo by Steve Julkowski dated April 25, 2005 – Re: Grievant.

UNION EXHIBITS

- U-1. Material Handler Productivity Report, March 1 through April 29, 2005.
- U-2. Material Handler Productivity and Error Report, December 13 – 18, 2004, March 1 – 31, 2005 and April 1 – 30, 2005.

POSITION OF THE PARTIES

THE EMPLOYER SUPPORTS ITS CASE WITH THE FOLLOWING:

1. It is well established that dishonesty is just cause for termination.
2. The Employer must be able to rely on the honesty of its employees for the system to work.
3. The evidence is overwhelming that the Grievant intentionally falsified his production records in April of 2005 by misusing the "M" key.

4. It is clear that the Grievant's motive was to make his productivity look better.
5. The Grievant admitted knowing that use of the "M" key would split a line and that using it would make his production look better.
6. The Grievant knew how to count – he had worked as a cashier and had been responsible for adding up money.
7. The Grievant understood the system and how it worked and tried to use it to his advantage.
8. The Grievant was warned when he misused the "M" key in November of 2004 that his actions were improper, dishonest and grounds for termination.
9. The Grievant's denial of the November 2003 meeting with Scott Hintz is not creditable.
10. The Grievant was untruthful about what he was told and said at the November 2004 meeting and it is reasonable to assume he is also untruthful about what he was told and said at the November 2003 meeting with Scott Hintz.
11. The Employer has proven, by a preponderance of evidence, that the Grievant received two warnings about the use of the "M" key before his termination.
12. The Employer's communicated directives about misuse of the "M" key were closely related to the orderly and efficient operation of its business.
13. Accurate information from the Material Handlers is necessary to track productivity and efficiency.
14. Monitoring and enforcing production standards is necessary to run an efficient profitable operation and meet customer needs.
15. The Employer has provided an abundance of due process in the instant case.
16. The investigation conducted by the Employer was fair, objective and thorough.
17. The Employer thoroughly investigated all of the facts and circumstances surrounding the Grievant's use of the "M" key before terminating him.
18. The Grievant's performance and use of the "M" key was compared to that of other Material Handlers on his shift.
19. The Employer looked closely at the orders and actual products/lines that were being split and met with the Grievant for an explanation.

20. The Grievant never offered any reasonable/credible explanation for his actions.
21. The discipline administered to the Grievant was reasonably related to the seriousness of the offense and the Grievant's record of service.
22. The offense was deliberate falsification of production records.
23. Even without written rules, the Grievant's offense was obvious and serious misconduct.
24. In the instant case, however, there were published rules in the Handbook concerning personal conduct.
25. The Handbook rules specifically say that falsifying any report or record is cause for disciplinary action, including termination.
26. The Grievant was also provided with the Employer's "Code of Honor" which stresses the importance of "honesty."
27. The Grievant is not subject to the mitigating factor of being a long-term employee and having a good service record as he had neither.
28. The Grievant knew what he was doing was wrong, but did it anyway.
29. As aptly stated by Arbitrator Bognanno, "employee dishonesty . . . warrants stern disciplinary action, including discharge."
30. The disciplinary administered to the Grievant was not arbitrary or capricious and should not be disturbed.
31. The Arbitrator should not substitute his judgment for that of the Employer absent a showing of abuse of discretion.
32. In the instant case, there is clearly misconduct that warrants discipline. The discipline was only administered after a thorough investigation, due process and prior warning. It was far from arbitrary.
33. For the above reasons, the grievance should be denied and the Grievant's discharge should be upheld.

THE UNION SUPPORTS ITS CASE WITH THE FOLLOWING:

1. The Employer shall not discharge an employee without just cause.

2. It would appear that the Grievant's challenge to the Employer, by arbitrating his grievance (rejection for promotion), precipitated an all-out scrutiny of him, unlike the scrutiny made of any other employee.
3. The Employer's primary claim, to justify its refusal to promote the Grievant and allow him to use his greater seniority, was that he was not productive enough and that he had too many errors to be a good lead worker.
4. Within a month of the arbitration hearing, for the first time with any material handler, the Employer began disciplining the Grievant for lack of productivity and error rates no worse than the vast majority of the other Material Handlers.
5. The Employer's records show that virtually all of the Material Handlers picked under the 320 lines per day minimum and that the Grievant's error rate was not out of line with other employees.
6. The Grievant's use of the "M" key was to reduce the number of his errors.
7. When confronted by the Employer, about his use of the "M" key, the Grievant stated "errors" as his only reason.
8. Using the "M" key to increase the line count is illusory because everyone who testified acknowledged that it was a simple matter to determine the actual line count by examining the number of lines assigned to each order filler on the control sheet. Any lines in excess of that number would be attributed to "M" key use.
9. The Employer, by claiming dishonesty, could administer the Grievant the ultimate penalty of termination, without the need for progressive discipline.
10. The Employer "jumped the gun" by terminating the Grievant. At worst, the Grievant's conduct should be characterized as "excessive use of the "M" key and should be addressed by progressive discipline.
11. The Grievant's conduct was neither dishonesty nor falsification of production records.
12. When and how often an employee uses the "M" key is readily ascertainable by the Employer.
13. The Employer knows how many lines are assigned to each employee. If, at the end of the day, there are more lines filled than on the control sheet it means the "M" key was used that many additional times.
14. All witnesses acknowledged that Management and Material Handlers knew that use of the "M" key to artificially increase production was not going to fool

- anyone. In fact, Warehouse Manager Julkowski testified that he even talked to the Grievant about this in November 2004.
15. Because all parties know the number of times the “M” key is used, by definition, its use cannot be dishonest and falsify records.
 16. The Grievant’s use of the “M” key may have been inappropriate, but it did not involve either dishonesty or falsification of records. Both the Grievant and Management knew what the actual line count was.
 17. Dishonesty by falsification of records is the stated reason for the Grievant’s termination and that allegation is absolutely untrue.
 18. The Grievant’s use of the “M” key was to protect against errors, a concern the Employer stressed in the arbitration case as a basis for denying the Grievant a promotion.
 19. By using the “M” key, the Grievant was able to keep better track of the number of items picked so as to not miscount them.
 20. In addition to counting, the “M” key is also used by Material Handlers for the following reasons:
 - When an order requires additional pallets.
 - When filling an order is interrupted.
 - When there is an equipment failure.
 - When the Material Handler is called away.
 - When there is a need to rearrange product on the pallet.
 - When filling an order is interrupted by an emergency order.
 -
 21. The Grievant’s use of the “M” key may have been excessive, but it was motivated by an attempt to keep his production records as accurate and error free as possible. How could it have been dishonest when both the Grievant and Management knew the count was inaccurate?
 22. The Employer provides no formal training for use of the RF Unit, including use of the “M” key. Other employees provide on the job training.
 23. The Employer has no written procedure regarding use of the “M” key.
 24. Employer witnesses, Julkowski and Hintz, do not agree when the “M” key is to be used. One said it is OK to use for counting – the other said it is inappropriate to use for counting.
 25. The Grievant should not be terminated because of excessive use of the “M” key when he was not properly trained or instructed on its appropriate use.

26. The Employer failed, prior to the Grievant's termination, to properly articulate when it was appropriate and when it was not to use the "M" key.
27. The Employer had no set format for training employees in use of the "M" key. There was no written rules or procedure. The substance of the training was left entirely to the more experienced employees giving the training.
28. The Employer's claim that progressive discipline was used is without merit. The only two prior disciplinary actions offered indicate that those dealt with issues of productivity and failing to use a safety harness.
29. There is no prior verbal, written or final warning or suspension dealing with improper use of the 'M' key.
30. The closest thing to any prior criticism given the Grievant regarding use of the "M" key was a non-disciplinary conversation between the Grievant and Julkowski in November 2004.
31. In the November 2004 meeting, Julkowski told the Grievant that he was using the "M" key excessively,
32. In the conversation with Brian Quinn, at an unspecified date, Quinn incorrectly told the Grievant he could use the "M" key for counting,
33. Not only is there no prior discipline regarding use of the "M" key, the two disciplinary actions relied upon by the Employer occurred within one week of each other.
34. There is no "final written warning" which is the form of discipline set forth on the corrective action form and there is no suspension, which is a form of discipline authorized by Article 6, (A) (B) and (C) of the CBA.
35. It is absolutely unfair and unreasonable to terminate the Grievant without giving him prior discipline and advising him that if he continues to excessively use the "M" key, he will be terminated.
36. If the Employer had used progressive discipline, there should be not doubt that the Grievant would have ceased using the "M" key in the excessive manner claimed.
37. It is also noted that the verbal warning relied upon by the Employer as having occurred in November 2004 was actually a discussion held between Julkowski and the Grievant, described by Julkowski in his testimony as not disciplinary in nature.

38. It is abundantly clear that the Grievant did not dishonestly falsify records and, at most, used the "M" key excessively to avoid errors because of inadequate training and the absence of set rules. The first such offense should not be termination.
39. The Arbitrator is requested to sustain the grievance and to reinstate the Grievant with a full or partial make-whole remedy.

TESTIMONY OF WITNESSES

Employer Witness, Marc Johnson, testified that:

The Employer is in a very competitive market where speed, efficiency and accuracy are critical in service to its customers. Customers are primarily hospitals and medical facilities. About 80 employees work in the Minneapolis Distribution center, about 36 employees in three different job classes are represented by the Union. The Union represented job classes are Material Handler, Receiver and Lead Position.

The Distribution Center operates three shifts. Orders come in electronically and are processed on the day shift. Receiving of product is usually put away by 1:00 p.m. so Material Handlers who pick and fill orders can begin their work.

A computerized software system (CSW) is used for processing orders and inventory control. Orders are assigned to Material Handlers via an RF Unit (portable computer) that provides communication between the Material Handler and CSW System. The RF Unit provides the Material Handler with information on what, where and how many items are to be included in an order. The RF Unit also scans bar codes and confirms the location of items and quantity. When a Material Handler has picked the specified number of items, he/she hits the "enter" key and goes on to pick the next item. If the quantity of an item requires more than one pallet, the Material Handler hits the "M" key, transports the pallet to the staging area, returns with another pallet and proceeds continues picking the remainder of items for the order.

Production standards are given to employees at new employee orientations and reviewed periodically with employees. The average production standard is 320 lines to be picked per employee per shift. The standard for error rates is one per 1,000 picks. Production and error standards are reviewed with employees at meetings and training sessions. Production and error results are monitored and posted on bulletin boards daily, weekly and monthly.⁵ The actual range in lines picked per shift ranges from 250 to 500. Some employees are more efficient than others but bulkiness of orders can also affect the number of lines picked.

There is a Job Description for Material Handlers that has existed for at least five years and is updated periodically. This Job description has been in effect at all times relevant

⁵ Employer Exhibit #2.

to the instant arbitration matter.⁶ Photos, recently taken by the witness, show the warehouse and picking activity performed by Material Handlers.⁷

When Material Handlers cannot get a full line on a single pallet, they are to hit the “M” key on the RF Unit. This has the effect of splitting the line and sends them back to the same location after moving the full pallet to the shipping area and returning with an empty pallet. The “M” key in effect doubles the line in consideration that the Material Handler has to interrupt picking while taking the full pallet to shipping and returning with an empty to continue picking the line.

The “M” key on the RF Unit may also be used to stop the time being counted for picking when interruptions beyond the Material Handlers control take place, such as an equipment failure or being called to a meeting. Average use of the “M” Key is three (3) to 12 times per eight-hour shift. The “M” key can be misused by converting an order into more than one pick, i.e. splitting a pick of six items into two picks of three items. The Employer can track the number of times the “M” key is used but don’t normally do so unless there is a reason. A Material Handler misusing the “M” key can be identified. Normally, there is no reason to use the “M” key unless an order line item takes more than one pallet.

The Grievant was provided a copy of “Work Rules” that apply to all employees and acknowledged receipt of them via his signature.⁸ The Grievant added a notation to his signature that it was made “under duress.” No other employee has made a similar objection. The Work Rules are given to new employees at their orientation.

The Grievant has also signed an “Acknowledgement Form” that he received the “Teammate Handbook” on his hire date of October 13, 2003. On page four of the Handbook it provides that: “Falsifying any report, records or applications including personnel, expense or other records” . . . is a cause for disciplinary action up to and including termination of employment.”⁹ The witness was involved in the decision to terminate the Grievant for falsification of production records. During his orientation, the Grievant was told to contact the Human Resources Department if he had any questions about the Handbook content.

The Grievant was provided the “Owens & Minor Code of Honor” and asked to acknowledge its receipt via his signature. The Grievant signed the acknowledgement on February 24, 2004, but chose not to sign when the annual copy was distributed on February 10, 2005.¹⁰ The “Code of Honor” addresses employee integrity and honesty - how employees treat each other.

⁶ Employer Exhibit #3.

⁷ Employer Exhibit #4.

⁸ Employer Exhibit #5.

⁹ Employer Exhibit #6.

¹⁰ Employer Exhibit #7.

An exhibit from the CSW System explains how to use the “M” key for “Middle of Pick” situations and is used as a part of the employee training program.¹¹

The Employer became aware that the Grievant was improperly using the “M” key on October 8, 2004 from the Warehouse Manager. The Employer ran the number of “M” key use for the full Material Handler shift (12 – 15 employees). The Employer’s Corporate Office furnished the number of “M” key use for each worker on the October 8, 2004 shift. The finding was that most workers had three to twelve “M” transactions; two workers had ten transactions; one worker had 14 transactions. In comparison, the Grievant had 50 transactions and was splitting small quantities.

The Employer talked to the high “M” key users to find out why so many occurrences. Aaron Flannigan, Union Steward, who had 10, said he used the “M” key as necessary to split picks and when he counted product. Other employees said they used it only when necessary. The Grievant’s response, when asked why so much “M” key use, was that he uses it for accuracy of pick – counting.

The Corporate report, “Duplicate Picks,” shows the use of the “M” key for November 11, 2004 by the Grievant.¹² Circles denote use of the “M” key. The Grievant was told that this report shows that he was falsifying the record. The effect was for the Grievant to get credit for picking two lines when only one was needed. The items circled on the report show that the Grievant used the “M” key 50 times, which was not necessary because the pick counts were so small he shouldn’t have had any trouble getting them on one pallet.

A meeting was held with the Grievant on November 19, 2004. When the Grievant couldn’t explain why he used the “M” key so much, it was explained to him that the effect was to double his production and continued use would lead to discipline. The Grievant said he understood and would not do it again.

It was later found out that a supervisor had talked to the Grievant about this same thing in the fall of 2003. No discipline was administered at that time, or for the November 8, 2004 incident. Use of the “M” key was thereafter tracked on occasion to see if the numbers were in line.

In early March 2005, the Employer became aware of some issues with the Grievant regarding productivity, safety and work direction. Productivity and “M” key data was requested from the Corporate Office for the last two weeks of March and April 2005 for all Material Handlers. The productivity of each worker was reviewed. The Grievant’s productivity was found to be in the range of 200 and he had about 10 “M” key transactions per day.

¹¹ Employer Exhibit #8. (It is noted that the Union raised objection to the above testimony and Employer Exhibit #8, on the basis that the Employer cannot prove that the Grievant actually received or has seen this document. The Arbitrator noted the Union’s objection and accepted the document into the record for whatever it may be worth.)

¹² Employer Exhibit #9.

On April 21, 2005 Julkowski talked to the Grievant about his productivity. After Julkowski talked to the Grievant about his productivity, his use of the "M" key jumped from about 10 transactions per shift to 40 to 75 per shift. Other workers were in the range of 3 to 10 "M" key transactions per shift.

On March 23, 2005 and April 8, 2005 the Grievant was written up for low productivity and misuse of the "M" key. On April 25, 2005 the Employer met with the Grievant again to discuss concerns about his performance. Present at the meeting was Union Steward Flannigan, Julkowski and Brett Quinn. A discussion was held with Union Steward Flannigan prior to meeting with the Grievant.

When the Grievant was asked at the meeting why he was again misusing the "M" key, he shrugged his shoulders and was not forthcoming. The Grievant's only response was the word "errors." The Grievant was reminded that falsification of records could lead to discharge and was told the problem was not errors as these were in the acceptable range.

The Grievant was issued a letter of suspension to be effective April 25, 2005.¹³

The Employer then further investigated looking at data similar to that contained in Employer Exhibit #9, but covering a five-week period. The finding was that the Grievant substantially increased his use of the "M" key after being written up for low productivity.

The Employer also looked at how the Grievant had used the "M" key before and after being written up for low productivity. A spreadsheet was prepared [by the Witness] for a five-week period using data supplied by the Corporate Office.¹⁴ The data showed, that after the Grievant was written up for low productivity, he split line counts with the "M" key to make his productivity appear greater.

The Employer reviewed this latest incident plus the two previous warnings given the Grievant. Also reviewed was his performance write-ups and that his productivity was about two thirds of the standard. The Employer further reviewed provisions of the CBA, Code of Honor and Handbook to determine what action should be taken with the Grievant.

In the fall of 2003, Supervisor Scott Hintz noticed that the number of lines assigned to the Grievant increased from those assigned. Hintz found the Grievant was making multiple picks out a single line using the "M" key. Hintz brought the Grievant to the computer terminal and explained the effect of what he was doing. Hintz then called a meeting of all workers on his shift and explained proper use of the "M" key.

¹³ Employer Exhibit #10.

¹⁴ Employer Exhibit #11.

The Employer then prepared a "Termination Check List" noting that the Grievant had been given a several warnings, both verbal and written.¹⁵ The Employer decided to terminate the Grievant based on the recent falsification incident and previous incidents.

The Grievant was issued a letter of termination dated May 2, 2005.¹⁶ There was no discussion other than to give the Grievant the termination letter.

Witness Johnson testified on cross-examination as follows:

He was not present at the February 2005 arbitration involving the Grievant's challenge to not being promoted to Lead Worker.¹⁷ The issue in this arbitration was whether the Grievant should have been selected for the promotion. The Employer's case in this proceeding was that the Grievant should not be promoted due to his high error rate and his low productivity.

At the meeting where the Grievant was asked why he used the "M" key so frequently, he shrugged his shoulders and said "errors," but his errors at that time were within acceptable limits.

Flannigan is the only employee who said he used the "M" key to count. The System generated need to use the "M" key is three to twelve lines per shift per employee. Some of the "M" key incidents shown on Employer Exhibit #9 are system generated.

Production standards¹⁸ were first published in the fall of 2004. The Grievant was hired before these were published and therefore was not given a copy during his new employee orientation. Only employees hired after the standards were published were given a copy at their orientation.

The difference between the minimum standard and target is that employees are encouraged to go beyond the minimum.

After the February 2005 arbitration, the Grievant was given a warning for not meeting minimum standards. Tim Sorrow and Terry Johnson were also warned in 2004.

Union Exhibit #1 that purports to show employees below the standard does not show the full picture, as some employees were doing other things - all have multiple duties. Some employees do not regularly pick orders. The data in Union Exhibit #1 does not take into account other factors involved. It is not rare to pick 320 lines when the employee is picking the full shift. At the arbitration hearing the Employer testified that the Grievant was performing at two thirds of the standard.

¹⁵ Employer Exhibit #12.

¹⁶ Employer Exhibit #13.

¹⁷ Employer Exhibit #1.

¹⁸ Employer Exhibit #2.

The information in Union Exhibit #2 was provided to the Union as requested, per a letter from the Union dated May 12, 2005. The information in this report cannot be used to determine if employees are meeting production standards because the data has to be factored by the number of days each employee worked. It does not accomplish what the Union wants it to show, that the Grievant is in the middle of the production range for employees included in the report.

[The Witness] found out in 2004 about the verbal warning incident that occurred in February 2003. The warning in November 2004 was the supervisor's note to file and was not given to the Grievant in writing. There is documentation to support the warnings referenced in Employer Exhibit #12 and they are here today. [The Witness] believes the Grievant is dishonest in using the "M" key.

Witness Johnson testified on redirect as follows:

The Grievant was terminated because of dishonesty in falsifying records.

The Employer determined if workers were meeting production standards by looking at the day to day performance, considering complexity of the orders and what other functions the employee may have been doing. You also must factor in days worked to get accurate productivity information. The Grievant was treated the same as all other employees.

Employer witness, Steven Julkowski testified as follows:

He is the Warehouse Manager and reports to General Manager Marc Johnson. He is responsible for the warehouse operation. He supervises 36 employees. All 36 are Union including two Lead Workers. He is responsible for hiring and supervises the work of employees.

Shifts in the warehouse are: 7:00 a.m. to 3:00 p.m., 8:00 a.m. to 4:00 p.m., 1:00 p.m. to 9:00 p.m., 3:00 p.m. to 11:00 p.m. and 2:00 a.m. to 10:00 a.m. Picking shifts are 1:00 p.m. to 9:00 p.m. and 3:00 p.m. to 11:00 p.m.

The Grievant was assigned the 3:00 p.m. to 11:00 p.m. shift. The Grievant's supervisor was Scott Hintz prior to February 2004 and Brett Quinn after 2004. The Grievant was provided the Owens & Minor "Code of Honor" document.¹⁹ He agrees with Marc Johnson's description of warehouse operations and believes it to be thorough and accurate.

The error standard is one error for each 1000 lines picked. Errors can be traced and monitored on the CSW System. Results are published daily.

The production standard is 320 lines per eight-hour shift. If an employee works on picking lines less than a full shift, the employee's production is pro-rated. The Employer

¹⁹ Employer Exhibit #14.

has not used a per-hour calculation since the fall of 2004. The standard before then was 40 lines per hour. In the fall of 2004 they quit the per-hour standard and went to the standard 320 lines per shift. If an employee is assigned to work other than picking, the time and lines are pro-rated based on the 320 lines per shift standard. Production and error data is recorded daily.

With respect to Union Exhibit #2, the only relevant column is the number of locations and errors. This exhibit does not tell how many days of the month the employee worked or what the employee may have been doing other than picking. The exhibit only tells how many lines were picked for the month shown. If you look at it daily, the only column used is the number of locations picked.

With respect to Union Exhibit #1, the Union's request was for the days everyone worked and if less than 320 lines were picked for that day. The Employer only provided the information the Union requested. 320 lines is the average standard. The range is 280 to 500 for an eight-hour shift. The average is right over 300. If an employee is in the low 200's and continues at this level for some time, the Employer will talk to the worker. Discipline will be considered if there is no satisfactory improvement.

In November 2004 the Employer had concerns about the Grievant's performance. Brett Quinn was told by the Grievant's Lead, Craig Brown, that his orders had grown in size and were greater than he was assigned. Normally, orders do not increase significantly when issued except if they are "system generated." On November 8, 2004, a report was ordered from the Corporate Office for all pickers. The Grievant was at 50 in use of the "M" key. Other employees had 14 or less uses of the "M" key. The report for all pickers was like Employer Exhibit #9.

The Employer met with all four pickers who had more than 10 uses of the "M" key. Aaron Flannigan, one of the four, said he used the "M" key for multiple picks and occasionally to count. Steve Biegler said he doesn't use the "M" key, except if system generated. Dennis Xiong said he uses the "M" key for middle of the pick (multiple picks). The Grievant said he used the "M" key for counting. When the Grievant was told of the seriousness of misusing the "M" key and it could lead to discipline, he said he would stop using it. Julkowski prepared notes of the meeting.²⁰

Brett Quinn randomly monitored performance of the Grievant and other workers for a few weeks and found the Grievant's use of the "M" key to be within the normal range.

A "Corrective Action Form" was prepared and a verbal warning issued to the Grievant on March 23, 2005.²¹ The Grievant's production averaged 219 lines per shift, considerably lower than other workers. The Grievant's non-picking duties were no different than the other workers. There were also safety and cooperation concerns because the Grievant had on occasion failed to sign the daily forklift checklist and had failed to hook up the

²⁰ Employer Exhibit #15.

²¹ Employer Exhibit #16.

forklift harness, which is an OSHA requirement. The meeting with the Grievant included Union Steward Flannigan and Supervisor Brett Quinn.

On March 30, 2005 the Employer prepared a “Corrective Action Form” and “Written Warning” that was not given to the Grievant until April 8, 2005 because he was absent from work.²² The Grievant’s production was 226 lines per shift, considerably lower than that of the other workers. The Grievant knew what the production standard was and never indicated otherwise. When the standard was changed from 40 lines per hour to 320 per shift, meetings were held with all employees to provide them information about the standard. The Grievant’s supervisor also talked to him.

After April 8, 2005, the Grievant showed good improvement. The Employer met with the Grievant each week and he was up to 300 lines per shift on April 15, 2005.

On or about April 20, 2005 Brett Quinn noticed a multiple pick increase by the Grievant. Brett Quinn was asked to do a trace screen and leave results on his [Witnesses’] desk. On April 21, 2005 he [Witness] looked at the report a saw an increase in the Grievant’s use of the “M” key. He [Witness] then prepared a memo to file,²³ called Marc Johnson and ordered a report of all pickers for a five-week period from the Corporate Office.

The production report from the Corporate Office showed the average number of line picks per day per employee for a five-week period beginning March 17, 2005 and ending April 21, 2005.

Management called a meeting with the Grievant and Union Steward, Flannigan on April 25, 2005. Management met with Flannigan in advance and told him that the Grievant was again misusing the “M” key. When the Grievant was present, Marc Johnson told the Grievant of the seriousness what he was doing. The Grievant shrugged his shoulders and said “errors.” When the Grievant was asked what he meant by this, he gave no response.

Management stepped out of the meeting and discussed the Grievant’s use of the “M” key. Use of the “M” key because of errors did not explain the Grievant use of it, because the Grievant was not having an error problem at this time. Management discussed terminating the Grievant about the first of May 2005. He [Witness] prepared a memo for file right after the meeting.²⁴

Following the April 25, 2005 meeting, Management made a detailed investigation of any legitimate use of the “M” key by the Grievant, but found no legitimate reason for him to be using it to the extent he was. The conclusion was that the Grievant was using the “M” key on a self generated basis, not a system generated basis.

Example 1: Catheters – the Grievant was to pick 10 but picked five, hit the “M” key and picked another five.

²² Employer Exhibit #17.

²³ Employer Exhibit #18.

²⁴ Employer Exhibit #20.

Example 2: The Grievant made two picks out of an order for 12 small items, all of which he could hold in one hand.

Example 3: The Grievant was to pick 25 [hair] combs out of a box containing hundreds. The Grievant mad five lines out of this. He could have held all 25 combs in one hand.

In other cases the Grievant did the same thing using the “M” key incorrectly.

Management (the Witness, Marc Johnson and Corporate Human Resources) consulted about what action should be taken with respect to the Grievant. In February 2005, Scott Hintz and the Witness rode together to a training session. Conversation about the Grievant’s performance took place with Hintz telling that he had talked to the Grievant about the same “M” key problem in 2003. He [Witness] was not aware of the 2003 incident in 2004. The management team concluded the Grievant should be terminated.

Witness Steve Julkowski testified on cross-examination as follows:

Regarding the hand written note on the last page of Employer Exhibit #16 (11 days 219 per day), he [Witness] knew it was 11 days from the Employers CSW System.

The Employer doesn’t use the hours column because it is only time the RF Unit is on. Sometimes workers shut it off. It can be determined from the CSW System that the Grievant picked 11 days. The Trace Screen shows what hours the Grievant was picking. The RF Unit records it and it can be seen on the Trace Screen. The RF Unit doesn’t record every minute a worker is on the job. The Trace Screen would show a large gap (more than a few minutes) if the Grievant was not picking. If no gap in the Trace Screen, the Grievant was picking.

Experienced employees train new employees in use of the RF Unit on the job.

Regarding Employer Exhibit #8 [Duplicate Picks], the he [Witness] doesn’t know if the Grievant was trained on this. He [Witness] also doesn’t know if other employees who trained the Grievant in RF Unit use told him to use it as he did. The Witness doesn’t know which employee trained the Grievant, but even if the Grievant was trained incorrectly, Scott Hintz corrected it in 2003. Use of the “M” key is OK if there is a large number of items to count but not for a count of 100 or 200.

He [Witness] acknowledged that during the arbitration case involving the promotion issue, he testified that the Grievant was deficient in his counting. During the April 25, 2005 the Grievant said “errors” when asked why he was using the “M” key so extensively, but didn’t explain what he meant.

It is true that the Grievant and Union complained about the Grievant being assigned too much cleaning.

It is possible for employees to pick 320 lines every day. Some days could be less, some days more.

He [Witness] told the Grievant he was using the “M” key excessively and how this was known. He [Witness] believed the Grievant knew he would be monitored after the November 2004 meeting.

A determination can be made if use of the “M” key is system generated versus self-generated by checking reports (case quantity, etc.). There is no evidence that Grievant had more difficulty picking than did other employees.

The “M” key can be used to:

1. Count
2. When more than one pallet is required due to a large order
3. When an interruption in work is required to meet with supervisor
4. When necessary to interrupt pick to accommodate a rush order

He [Witness] has heard the term “More” key and thinks this is used when counting.

The March 30, 2005 written warning and the verbal warning on March 23, 2005 were the only ones presented to the Arbitrator (Employer Exhibit #16 and #17), neither of which is what Grievant was terminated for.

Witness Murkowski testified on re-direct to the following:

In reference to Employer Exhibit #1, the error issue with the Grievant occurred prior to posting the Lead Position. With respect to the Lead Position, the Employer was looking at the Grievant’s performance in early 2004. The Grievant did not have an error problem at the time of the February 2005 arbitration case.

The Grievant was not terminated for low production, although it was below the standard. It was after the Grievant was talked to about his low production that he used the “M” key to inflate his productivity.

Witness Julkowski testified as follows on cross-examination:

The error problem was well known to the Grievant in 2004, when he applied for the Lead Position.

Employer Witness, Scott Hintz, testified as follows:

He has been an employee of Owens & Minor for five years. He was a Material Handler for one and one half years, a Receiving Clerk for one year, a Purchasing Coordinator and

Buyer, a Shift Supervisor on third shift and is now an Inventory Control Clerk. The Grievant reported to him in 2003 when he was a Shift Supervisor.

New employees are provided training by one of the best Material Handlers and they go together on the cherry picker. RF Unit training was part of the training provided by other Material Handlers.

In the fall of 2003, he monitored orders for employees on his shift. The Grievant had been employed about one month earlier. When the Grievant's orders were near completion, the lines picked exceeded the orders by a considerable amount. He showed the Grievant what he had found and told the Grievant he was using the "M" key incorrectly. He explained the correct way to use the "M" key and directed the Grievant to use it only when he could not get the full quantity on a pallet. He then called all employees on the 1:00 p.m. and 3:00 p.m. shifts in and explained the proper use of the "M" key. He explained the effect of using the "M" key incorrectly to the Grievant and other employees. The average use of the "M" key for the employee group, including the Grievant, totaled about 10 to 15. He later told Steve Julkowski about this when they were riding together to a training session. He also told Marc Johnson the same day he told Julkowski.

Witness, Scott Hintz, testified on cross-examination as follows:

From the order you know the number of lines assigned to the picker. If more lines are reported via the RF Unit than assigned, you know the picker used the "M" key. He doesn't know if all employees know that he will be able to tell if they use the "M" key incorrectly.

Employer Witness, Brett Quinn, testified as follows:

He is a night shift supervisor and has worked at Owens & Minor since February 2004. He supervises about 16 Material Handlers and Lead Worker Craig Brown. He has been the Grievant's supervisor for about 15 months.

He is familiar with Grievant's misuse of the "M" key. Early in November 2004, Craig Brown told him the Grievant's orders had increased. He checked it out and found via the Trace Screen that the Grievant had used the "M" key some 50 times on a single shift. On average, pickers use the "M" key three to ten times per shift. He contacted his supervisor, Steve Julkowski, and put the information on his desk. He was aware of the November 19, 2004 meeting but did not attend.

In regard to Employer Exhibit #16, it was prepared in early 2005 as was Employer Exhibit #17. He was aware that these were prepared and sat in on meetings where the subject matter was discussed. He had daily conversations with Steve Julkowski about productivity and other matters, including concern about the Grievant's low productivity.

He is not aware of Grievant complaining about being assigned too much cleaning duty. The Grievant did not receive any more non-picking duty than did other pickers.

About April 2005, he noticed that the Grievant misused the “M” key as the Grievant’s line count increased substantially. He checked the Trace Screen for that day and notified Julkowski. Julkowski asked him to assemble data and put it on his desk. He also checked back a couple days and observed that the Grievant had misused the “M” key. He was present at the April 24, 2005 meeting but did not say anything.

Witness, Brett Quinn, testified on cross-examination as follows:

When an order is assigned to a picker, it shows the number of lines in the order. The picker can see the line count in the order via the RF Unit. Self-generated use of the “M” key is rare. He believes pickers can’t see the final line count when order is complete. He doesn’t think the “M” key should be used for counting.

Union Witness, Rick Flannigan testified as follows:

He has been employed by Owens & Minor for ten years. He has been a Lead, a Picker, Put Away and on break down crew. He now does put away and occasionally does picking – about once a month if they run short of pickers. He was an order picker for about one year some five or six years ago. He used the same equipment then as now. When Lead, he trained order Pickers and Put Away workers. He had a good production record.

He trained the Grievant on how to use the RF Unit, operate the forklift and how to perform other functions. Usually training was one day. The Employer gave a short orientation to new employees that included forklift training and a written test. There is a program on use of the RF Unit from the Employer, but it does not give information on use of the “M” key.

He was trained by another employee and took any questions to his supervisor. He could use the “M” key to start a new pallet and to count, if needed. The “More Key” told you if you needed to pick more if you were already done. You could also use the “M” key if called to a meeting, if there was some other interruption or if you need to yield to another picker who was filling a rush order.

Product is stacked in towers – some three or four tiers high. If finished taking product out of one bin and need to go to another, you may use the “M” key so as to not lose count. He trained the Grievant in use of the “M” key. He volunteered to assist employees in correcting errors but, in November 2003, Marc Johnson never gave him the sheets. Errors were in counting and he showed employees how to use the “M” key to count. His supervisor, Ron Price, told him how to use the “M” key to count.

The Grievant was error prone. He looked at numbers posted by the lunchroom every day.

Union Exhibit #2 is similar to the daily production sheet. Errors are shown on weekly and monthly reports. He has observed the Grievant's error rate on these reports. He felt the Grievant's error rate went down over time and the productivity rate went up.

You could also use the "M" key when stacking a pallet it would be better to skip a line and come back to it later.

He is not aware of any other employee being discharged. He has been a Union Steward for about six months. Previously, he would know by the rumor mill.

Most pickers do not achieve the 320 standard because there is not enough work for all pickers to be picking full time. There is an abundance of pickers so that the short time lines for orders can be met.

Pickers know the number of lines on orders given them by hitting the F7 key before going the next order. A typical order may have 60 lines. If hit F7 key again, you can tell the difference between the starting number of lines and the ending number. Computer generated "M" key use is infrequent. He thinks order pickers know how to hit the F7 key to get information.

The other reason why pickers can't pick 320 lines is that some other workers may pick more than 320 lines, i.e. 500 depending on the difficulty of an order. One line can equal 10 to 15 pallets. On the other hand, a picker can pick a large number of lines if they are small items and not large in quantity. Pickers generally do picking but also may do cleaning and wrap pallets. He is aware through Grievant that he has been given a lot of cleaning duties.

In reference to Employer Exhibit #11, reasons for splitting an order are: end of pallet, computer generated, open box, by tier so didn't lose count and to rearrange pallet if cannot get all product on it.

Witness, Rick Flannigan, testified on cross-examination as follows:

Doesn't know exact dates of training Grievant. He did only follow-up training the fall of 2003 (November or December). Never heard before that "M" stands for "middle pick."

He has been a Union Steward for the last six months. Before, would only know who was disciplined if they told him. Not aware of any employee other than the Grievant who had as high an "M" key count. The "M" key can be used to falsify line counts.

In reference to Employer Exhibit #11, acknowledged his testimony on direct was speculative. It is possible that the Grievant was using the "M" key to increase his production.

Union Witness, Aaron Flannigan, testified as follows:

He has been a Material Handler (picker) for two and one half years. He has been a Union Steward for the last two years.

He is not aware of any other employee being disciplined for use of the "M" key. He and a majority of workers have been disciplined for productivity and errors.

Other employees including Rick Flannigan provided his training. He was trained one time on use of the RF Unit - it was 10 to 15 minutes, he is not sure. He is not aware of any manuals or written policy on use of the "M" key.

At a meeting with Marc Johnson and Steve Julkowski, they said the "M" key was for counting large quantities, i.e. 100 at a time. He was called up for overuse of the "M" key and then only used it for authorized purposes. They told him to not go over the top.

At the meeting with Grievant, he did not think the Grievant understood what was going on. They told Grievant he could use "M" key but not as he had been. The Grievant said "errors" when asked why he used the "M" key so extensively.

The F7 key tells you how many lines. The F8 key lets you know whose order it is. You can tell how many lines are attributed to you at the end of an order by using the F7 key. The employee can tell the same as management how many lines.

He was present at the arbitration hearing conducted by Arbitrator Bagnanno. Management said the Grievant wasn't capable of performing Lead duties due to productivity and error problems.

Management knows when the "M" key is used. Computer generated "M" key use varies – on some orders there may be none.

Witness, Aaron Flannigan, testified on cross-examination as follows:

He is not aware of any employee other than the Grievant who has 40, 50 or 75 "M" key uses on a single shift. Generally, 40, 50 and 70 "M" key uses are excessive on any shift. He knows that when the "M" key is used it creates multiple lines and if done to excess it distorts productivity numbers.

Grievant, Mesfin Tewolde, testified as follows:

He is 43 years old and is married with two children, ages 4 and 6. He lives in New Brighton. His wife works in a bank. He has three years of college at Brown Institute where he studied business and computers. He immigrated to the United States in 1985

due to a political situation in his home country. He initially come to New York but come to the Twin Cities because a friend lived here. He has a High School equivalent education received in Africa.

He worked as a parking lot cashier and supervisor from 1988 to 1993. He was self-employed from 1993 to 2003, when he started at Owens & Minor. He had a taxi and cleaning franchise involving the cleaning of offices and warehouses.

When hired at Owens & Minor, he was trained on fork lift operation and picking for one half day by Chuck. He also asked questions of the supervisor.

He was a Material Handler (picker) on the 3:00 p.m. to 11:00 p.m. shift. He worked full time – 40 hours per week, Monday through Friday. He also worked overtime on Monday and Wednesday. In addition to picking, he arranged boxes, did cleaning most every day. He was the first to be assigned cleaning and wrapping pallets. He thinks he cleaned more than the other workers and complained to his supervisor and Marc Johnson. Brett Quinn yelled at him because he complained about having to clean. He thinks cleaning affected his productivity.

When a Lead Position was posted he was the only one who applied. He complained to Marc Johnson, who said, he had not been there for 120 days. Management rejected his complaint and reposted the job. He filed a grievance, which was resolved in arbitration. Management testified at the arbitration hearing that he wasn't qualified because of his error and productivity record. The Arbitrator ordered that the position be reposted.

He wanted training to do his job right, but management wouldn't do it. This was after the arbitration hearing – he asked Steve Julkowski and Brett Quinn. He asked Brett to train him for Lead. Brett said no openings.

He doesn't recall Scott Hintz telling him about use of "M" key in 2003. Management talked to him about use of the "M" key in November of 2004. He told management that he didn't want to make "error." He did not say he would not use the "M" key.

In 2005, management talked to him about his productivity. He told management they had to stop retaliation and distribute orders fairly.

After the arbitration case they pulled him off the line and made him clean. He told Brett and Steve, give me easy orders so I can make numbers. He did not use the "M" key intentionally to falsify production records, only to avoid errors. He used the "M" key to avoid a heavy box when he needed to put it on bottom of pallet and lighter boxes on top. He also used the "M" key to count.

He did not use the "M" key to increase productivity but to reduce errors and was not dishonest. He was sent home and in a week told he was terminated. He wants his job back. He likes his job. He could return and hold no hard feelings against those in management who fired him.

Grievant, Mesfin Tewolde, testified on cross-examination as follows:

He has a high school education plus three years of college. He has a fairly good education.

He worked for MPI Parking as a Cashier and Supervisor. He was responsible for adding up money and balancing receipts for deposit.

He was assigned cleaning by Brett or to arrange boxes all the time.

At the meeting in November 2004, Marc Johnson and Steve Julkowski asked him about using the "M" key and he said "error." They didn't tell him he couldn't use the "M" key like he had been doing. He doesn't recall saying he wouldn't use the "M" key anymore as was testified by Aaron Flannigan, who was also at the meeting.

In reference to Employer Exhibit #19, he acknowledged that the record shows:

- During the period 3/17/05 – 3/25/05, he averaged 10.0 "M" key uses per day.
- During the period 3/28/05 – 4/01/05, he averaged 10.0 "M" key uses per day.
- During the period 4/04/05 – 4/08/05, he averaged 10.5 "M" key uses per day.
- That on 4/08/05 he was given a written warning for low production.
- During the period 4/11/05 – 4/15/05, he averaged 40.2 "M" key uses per day.
- During the period 4/18/05 – 4/21/05, he averaged 75.8 "M" key uses per day.

He used the "M" key based on the order. He doesn't recall any particular orders that necessitated this use of the "M" key. He knew that use of the "M" key would split a line into multiple lines.

Since his termination, he has opened his own laundry business. He doesn't know yet how profitable it will be. It is located on Cedar Lake Road and operates from 9:00 a.m. to 6:00 p.m. He has no other source of income. He has not applied for another job. He doubts he has had profit in his business but doesn't know.

Employer Witness, Brett Quinn, on recall testified as follows:

He became supervisor of the third shift in February 2004.

Cleaning is picking up around the warehouse. He assigns cleaning based on the workload. He would assign any picker that run out of orders to cleaning duty. The Grievant was not assigned more cleaning duty than other pickers. The Grievant was not pulled off picking to clean.

Cleaning typically comes at the end of the week when order activity is down. They don't clean when there is overtime, typically on Monday and Wednesday,

The Grievant was not assigned as a wrapper, there are specific workers assigned to wrapping.

Witness, Brett Quinn, testified on cross-examination as follows:

He acknowledged having assigned the Grievant to assist with wrapping.

Witness, Brett Quinn, testified on re-direct as follows:

Pickers may be assigned to assist with wrapping when all work is done on Tuesdays and Fridays. The Grievant was not assigned to assist in wrapping more frequently than were other pickers.

There are bulky orders and less bulky orders. More bulky orders would make it more difficult to meet the production standard. The Grievant was not assigned more bulky orders than were assigned to other pickers.

DISCUSSION

In order to arrive at decision in the instant matter, the Arbitrator must make a determination on the following questions:

1. What is dishonesty?
2. Does dishonesty constitute just cause for termination under the terms and conditions of the CBA?
3. Does the record support the charge of dishonesty that was the Employer's basis for termination of the Grievant?
4. If the record does support the charge of dishonesty, what if any penalty should apply?
5. Are there mitigating circumstances?

It is a generally accepted rule in contract interpretation that words are to be given their ordinary and popularly accepted meaning in the absence of specific provisions otherwise. There is nothing in the record that would indicate the word “dishonesty,” as used in the CBA, was intended to be interpreted other than in its ordinary meaning. Webster’s Collegiate Dictionary, Tenth Edition defines “dishonesty as follows:

“Dishonesty – lack of honesty or integrity: disposition to defraud or deceive.”

To be determined in the instant matter then is if the Grievant used the “M” key excessively with the intent of overstating his work production.

There are a number of provisions in the CBA regarding what constitutes just cause for discharge and rights of the Parties thereto:

The CBA in Article 6, DISCIPLINE AND DISCHARGE, provides as follows:

(A) NOTICE OF DISCIPLINE AND DISCHARGE

The Employer shall not discharge or suspend an employee without just cause. Grounds for discharge include, but are not limited to, any use or possession of alcohol or drugs on the job or on the Employer’s premises, being under the influence of drugs or alcohol on the job, dishonesty or infraction of Employer rules. [Emphasis Added]

It is clear from the language in the above provision that *dishonesty is grounds for discharge*.

The CBA in Article 6, DISCIPLINE AND DISCHARGE, also provides as follows:

(F) EMPLOYEE CHARGED WITH AN OFFENSE INVOLVING DISCHARGE

May be suspended without pay pending the hearing and decision on the charge. If the specified grounds for discharge are found to be unjustified, the employee shall be reinstated with full pay for the time of suspension and without loss of seniority and other rights and privileges. [Emphasis Added]

It is clear from the language in the above provision that *if the discharge is found to be unjustified, the employee is to be reinstated with full pay and benefits*.

The CBA in Article 1, UNION REPRESENTATION, provides as follows:

© NO DISCRIMINATION

There shall be no discrimination by the Union or the Employer against any employee because of membership or non-membership in the Union or because of the assertion of rights afforded by this Agreement.²⁵

The CBA in Article 1, UNION REPRESENTATION, also provides as follows:

(J) MANAGEMENT RIGHTS

Except as specifically limited by the express provisions of the Agreement, the management of the Employer, retains the right, including, but not limited to, the right to determine the qualifications for hire, lay off, promotion, demotion, transfer, discipline, suspension, or discharge for just cause, to require observance of reasonable Employer rules and regulations, to direct the working forces and to determine the materials, means, and the type of service provided, and the right to introduce new or improved methods or facilities, as well as the right to determine job loads, production standards and incentives (incentives shall not take the form of individual wage scale increases), schedules of production and the methods, processes and means of production; and the right in all respects to contract with others (with 30 days prior notice to the Union) for any such work of any type or nature as the company may in good faith determine to be within its best interests, as long as such contracting with others does not lead to the lay off of any employees. These rights, at least, shall be deemed the sole and exclusive functions of management. [Emphasis Added]

It is clear from the above provision that the Employer has the right to discharge employees for *just cause*, to require employees to observe its reasonable rules and regulations and to determine production standards.

The Employer's rules and regulations also address employee performance, behavior and the consequences of non-conformance relevant to the instant matter:

Warehouse Rules, Division 66, address issues present in the instant matter:

- (17) Lift Inspection must be done before operating.
- (19) Harness must be worn when operating lifts.
- (25) Teammates must meet productivity and error standards.

Teammate Handbook, addresses issues present in the instant matter:

Personal Conduct – “Each of the following is a cause for disciplinary action up to and including termination of employment:

²⁵ This provision was cited in the grievance that gave rise to the instant proceeding. If a violation of this provision were found, it would fall under “mitigating factors.”

- Falsifying any report, records or applications, including personnel, expense or other records.

Owens & Minor Code of Honor, addresses standards of conduct relevant to the instant matter:

Value Statement – We believe in high integrity as the guiding principle of doing business.

Sanctions – Violation of any of the standards of conduct in the Code of Honor by any officer or employee teammate may result in . . . disciplinary actions, including termination from Company employment.

The above referenced rules, handbook and code were presented to the Grievant, who acknowledged their receipt by his signature.²⁶

The Employer’s decision to discharge the Grievant was based on dishonesty. Specifically the Employer’s reason for discharging the Grievant was that he deliberately manipulated production records to make it appear he was producing more work than he in fact was. The Employer alleges that the Grievant did this by using the (“M”) key on his hand held computer to split work into multiples when it was not necessary. The Employer supports its charge of “deliberate” manipulation by showing that the Grievant performed the manipulation shortly after being warned about his low production.²⁷ Further that the Grievant had been previously told not to use the “M” key except when necessary and was informed of the effect it had on production records when misused.²⁸

The record shows that the Grievant, shortly after being issued a written warning about his low production on April 8, 2005, increased his use of the “M” key from an average of about 10 uses per shift to as many as 75 in the following weeks.²⁹ The record shows that the Grievant was informed in 2003 and on several occasions thereafter that misuse of the “M” key would have the effect of overstating his production and could lead to disciplinary action, including discharge.³⁰

The nexus between the written warning of April 8, 2005 and the Grievant’s dramatic increase in use of the “M” key in the weeks following is hard to dismiss. The Grievant’s response that he was doing it because of errors is not creditable. Although the Grievant had a poor record of errors at some time in the past, this was not the case in the months leading up to the instant matter. His error ratio was within the acceptable range.

²⁶ The Grievant acknowledge receipt of the “Code of Conduct” with his signature when presented to him in 2004 but refused to sign an acknowledgement in 2005.

²⁷ Employer Exhibit #19.

²⁸ Testimony of Marc Johnson, Brett Quinn and Steve Julkowski.

²⁹ Employer Exhibit #19.

³⁰ Testimony of Marc Johnson, Brett Quinn, Steve Julkowski and Scott Hintz.

The Union argues that the Grievant's misuse of the "M" key to overstate his production could not be dishonest, because he knew that the Employer would know if he did it. The Arbitrator finds this reasoning less than convincing. To carry this reasoning to another level would be to say a bank robber, who knows that the bank will know if he robbed it would not be guilty of a crime.

The Arbitrator finds that the Grievant's misuse of the "M" key, with the effect of overstating his production, was deliberate and constitutes dishonesty. The record shows that he had previously been given sufficient information to know that falsely stating his production was dishonest and could be just cause for discharge.³¹

In the instant proceeding, as is customary, there is conflicting testimony and the Arbitrator must determine the relative creditability of the witnesses. With respect to conflicting testimony in the instant matter, the Arbitrator finds the Grievant to be the least creditable witness. The Grievant's testimony was at times vague and unresponsive.

Mitigating circumstances.

A mitigating circumstance often considered by arbitrators is the employee's length of service and employment record prior to the incident that prompted the discharge.

In the instant matter, the Grievant had relatively short service, less than two years. The Arbitrator does not find the Grievant's length of service to be a mitigating factor.

In the instant matter, the Grievant's employment record, prior to the incident prompting the discharge, was marginal. His production was in the low range of the acceptable standard and at times below it. Efforts to improve the Grievant's performance were less than successful. The Grievant also was deficient in checking equipment prior to operation and wearing safety equipment required by OSHA. The Grievant's persistent misuse of the "M" key indicates an unwillingness to follow procedures. The Arbitrator does not find the Grievant's employment record to be a mitigating factor in his termination.

In the instant matter the Union argues that if the Employer had used progressive discipline, the Grievant's performance problems could have been corrected. The Arbitrator finds that the Employer made a reasonable effort to bring the Grievant's performance to satisfactory levels. The Grievant was provided ample information to know the conditions of employment, what was expected of him and the consequences for non-compliance. He was provided sufficient counsel about use of the "M" key to know what was acceptable and what was not. The Grievant had sufficient time after being

³¹ Instruction by Brett Quinn in November 2003.
 Discussion and warning by Marc Johnson and Steve Julkowski in November 2004.
 Verbal warning by Steve Julkowski March 23, 2005.
 Verbal warning by Steve Julkowski March 30, 2005 (to Grievant 4/8/05)
 References in Handbook, Code of Conduct and Warehouse Rules.

instructed and warned to bring his use of the “M” key into satisfactory compliance. It was his gross disregard for acceptable use of the “M” key that brought about his termination. The Employer’s inventory and production control system is dependent on employees using the system as intended. The Grievant’s record indicates he was not.

The grievance cites the CBA, Article 1 ©, NO DISCRIMINATION. The provisions of the section address discrimination in the context of Union affiliation or non-affiliation. There is information in the record of a claim by the Grievant’s that he was assigned more cleaning and related duty than other employees. He further alleges that this was the cause of his low productivity. The testimony of several witnesses refutes the Grievant’s claim. The evidence in the record shows that he was assigned to cleaning and related duties on the same basis as was other workers. The Arbitrator does not find the Grievant’s claim that he was treated differently than the other workers creditable.

Lastly, the Grievant attributes his high use of the “M” key to his need to use it for counting. The record shows that the Grievant has the equivalent of a high school education, three years of college training in business and computers, has owned his own business and worked as a cashier and supervisor of cashiers. This evidence considered, the Grievant’s ability to do the counting required of a picker appears at least adequate. The evidence does not support his need to use the “M” key to count to be any greater than other pickers, who may use it for counting occasionally, but none to the extent used by the Grievant.

In summary, the Arbitrator finds the Grievant was terminated for just cause. His excessive use of the “M” key to overstate his production was dishonest and is not supported by his claim of counting and errors. He had ample information and warnings to know that what he was doing was wrong and the consequences of his act. The Arbitrator finds no mitigating factors that support a reduction in the penalty imposed by the Employer.

AWARD

The grievance is denied. The Grievant was discharged for just cause.

CONCLUSION

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 21st day of April 2006 at Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR