Abernathy #1

IN THE MATTER OF THE ARBITRATION BETWEEN:

The Employer

AND

The Union

HEARING DATE: March 2, 1994

ARBITRATOR: John H. Abernathy

EXHIBITS

Joint

1. 1989-94 Ramp and Stores Agreement Company
2. Rules of Conduct for the UNION Represented Employees
3. Notice of Investigative Review Hearing and letter of charge
3. Investigative Review decision
4. Third step decision
5. Payroll records of the employee, 1992
6. The employee's 1992 EPS Attendance Calendar
7. Attendance Record Calendar, 1992 for the employee
8. Holdover Overtime Calendar, 1992 for the employee
9. Calendar illustrating the employee's combination of unauthorized exceptions
10. Exception Authorization Card, blank,
11. MPRS form
12. Letter dated September 4, 1992
13. Completed exceptions on November 25, 1991
14. Notes of Person 1 at January 25, 1993 investigation
15. Employee Ring Correction, January 10-16, 1993 for The Employee
16. Calendar for November 1991
17. Audit trail report, Exception Authorization for Nov 3, 1991 to Nov 9, 1991 output report from the Electronic Payroll System
18.
19. Analysis of the employee's overtime cards for 1992

Union

1. Letter of Person 2 dated February 4, 1994
2. Petition by City 2 Ramp Servicemen on behalf of The Employee
3. Handwritten memo in support of the Employee written by Person 3, Feb 4, 1994
4. Handwritten letter in support of The Employee written by Person 4.
5. Letter-in support of the Employee, written by Supervisor 1.

BACKGROUND

The Employer and the Union are parties to a labor agreement that sets forth a procedure for filing grievances and appealing unresolved grievances to a System Board of Adjustment (Joint Exhibit 1). The Union grieved the Employer's discharge of bargaining unit member, The Employee, and appealed that grievance to arbitration. I was selected as arbitrator to hear the case and render a binding decision.

I held a hearing on this matter on March 2, 1994 in the Employer's Executive Offices in City 1, State 1. At the hearing the parties had full opportunity to make opening and closing statements, examine and cross examine sworn witnesses, introduce documents and make arguments in support of their positions. I tape recorded the hearing solely as an extension of my personal notes and not as an official record. On completion of closing arguments the matter stood fully submitted to me for a decision.

SUMMARY OF FACTS

The Employee began his employment with the Employer on January 16, 1984. After two years in Reservations he became a Ramp Serviceman with a classification seniority date of February 16, 1986. In July 1991, he received a temporary assignment to the Company 1 Office at the Employer's facility at City 2 Airport in State 2. In the Company 1 Office he was given the responsibility for administration of the Employer's electronic payroll system (EPS), which covers all of the employees in the City 2 station in the Ramp Serviceman and Utility classifications.

EPS is an automated computerized payroll system that the Employer uses at several of its locations, including City 2. The system contains a profile for each employee, specifying his file number, shift start, stop times and regular scheduled days off (RDO's). The system is designed to

pay an employee for eight hours at his basic rate of pay for each scheduled day of work, provided the employee has used his electronically programmed swipe card to "swipe-in" prior to the beginning of his schedule shift, and to "swipe-out" after the end of his scheduled shift. Anything other than the normal swipe-in and swipe-out on a regular scheduled workday is considered an exception, overtime for example. Exceptions must be authorized by a member of management, usually a supervisor, before being entered, through the computer, into EPS. The authorization is in the form of an exception slip filled out by the employee and signed by the supervisor. Exceptions include such things as overtime worked before or after a scheduled shift, work on an RDO, skipped lunch or late lunch. Since most exceptions involve compensation beyond the employee's basic hourly rate of pay, it is necessary to override the system to enter exceptions. Therefore, it is standard procedure that exceptions are not to be entered without authorization in the form of an exception slip signed by a supervisor.

In the Company 1 Station at City 2, the Employee was given the responsibility to administer and maintain EPS for employees in the Ramp Serviceman and Utility employee classifications, over 200 employees. To carry out that responsibility, the Employee was given authority and access to override the system in order to enter exceptions. In the Company 1 Office the Employee had the responsibility to determine that employees in the covered classifications were paid correctly for their base 40 hours per week. If an employee had a problem with regard to pay, the Employee was to correct it. He was responsible for payment of overtime hours for employees in covered classifications, as well as additional payments for skipped lunches, late lunches and no lunches. He was responsible for taking sick calls from these classifications and inputting the information. He also made up work schedules and posted the schedules on bulletin boards along with any bids or Employer communications. The Employee documented attendance on the daily worksheets

and the 7-day schedules. He had the additional responsibility of approving vacation requests for employees in the covered classifications. He often had special assignments as well.

Employer witnesses testified that the Employee did an excellent job in carrying out his duties in the Company 1 Office. They testified that they were aware that he worked extra hours to accomplish those duties and they described him as a "dedicated" employee who would continue working until the job was completed.

In early 1993, the Employer became aware of the Employee's 1992 gross earnings, which exceeded $76,000, more than twice his normal wages as a Ramp Serviceman. The Employer considered his gross earnings to be excessive and began a fact finding investigation into the matter. The Employer obtained the Employee's 1992 payroll records from EPS and conducted a review comparing those records with his exception slips.

The Employer found that the Employee's EPS records showed that for the first three months of 1992 he had been compensated for a total of 72 skipped lunches and extensive holdover overtime on a regular basis. The Employer could not find exception slips to authorize compensation for the skipped lunches or any of the holdover overtime. At that point, the Employer became aware that the Employee was making EPS entries for skipped lunches and overtime payments in his payroll records. The Employer then reviewed exception slips for 1991, 1992 and 1993 and could find no exception slips for the Employee beyond November 25, 1991.

The Employer discussed the matter with the Employee and determined that he was fully aware of the required procedures for obtaining authorization for overtime and other exceptions. The Employee indicated that he had obtained supervisory approval for his exception slips for the first few months on the job in 1991, but then found supervisors reluctant to sign his exception slips.

He testified that he often would find the slips lying around the office unsigned. He stated that he finally stopped trying to have his exception slips signed.

Employer policy authorized compensation for late lunches when an employee takes a 30-minute lunch period sometime after the end of an established one and one-half hour time frame. The payment for a late lunch is 30 minutes at the straight time rate.

The Employer found that in 1992 the Employee received compensation for 13 late lunches, at $8.75 each, for a total of $113.75. Employees also are entitled to compensation for a skipped lunch if the employee has no opportunity to take 30 minutes away from his assigned duties at any time during the course of his workday. Payment for a skipped lunch is 30 minutes at the straight time rate and one hour at the time and a half rate. For the Employee, that means a payment, rounded off to the nearest dollar of $35 for each skipped lunch. The Employer found that in 1992 the Employee received compensation for 243 skipped lunches, all unauthorized, at the rate of $35 each, for a total of $8,505.

Employees are entitled to holdover overtime for the hours worked beyond the end of the employee's scheduled 8-hour shift and call-in overtime for overtime worked on a regular scheduled workday. For call-in overtime the employee is entitled to payment at time and one-half for hours worked on the first RDO in a week and double time for hours worked on the second RDO in a week. The Employer found that in 1992 the Employee received compensation for 1,076 extra hours, all unauthorized, for what the Employer deems a "conservative" total of $28,331. The Employee worked 258 days in 1992. The Employer found that on all but two of those days he received additional compensation for skipped lunches, late lunches and the various amounts of overtime.

The Employer found that by a conservative estimate, in 1992 the Employee received at least $37,546 beyond his normal wages, all without authorization. His regular earnings for 1992 would have been $36,503. According to Employer payroll records, the Employee's gross earnings for 1992 were $76,112.

The Employer also found that the Employee received compensation for a skipped lunch on November 15, 1992, a day when he was not at work. The Employer also found the Employee had reported a regular 7:00 a.m. arrival on January 13, 1993, when in fact he received a ride to work with the station general manager on that date and did not arrive in the parking" lot until 7:15 a.m.

At the conclusion of its fact finding investigation, the Employer brought charges against the Employee for violation of Rules 2 and 15 of the Employer's Rules of Conduct, which provide as follows:

> 2. Falsification of Employer records or reports, including, but not limited to:
> a) Personal time cards or payroll records
> b) Punching another employee's time card or payroll records.
>
> 15. Misusing or permitting others to misuse the Employer's computer equipment including computers, terminals, printers, and related support hardware.

The Employee was held out of service on January 26, 1993, pending the results of an Investigative Review Hearing (IRH) held on February 2, 1993. As a result of the IRH, the Employer discharged the Employee effective the date he was held out of service. The Union appealed the discharge and a third step hearing was convened on March 5, 1993. The hearing officer upheld the discharge and the matter proceeded to the present System Board of Adjustment.

STATEMENT OF THE ISSUE

Was the discharge of the Employee, The Employee, for just cause?

If not, what then shall be the remedy?

RELEVANT CONTRACT LANGUAGE ARTICLE VII - OVERTIME A.

A. Overtime Pay

1. Overtime rate of time and one-half computed on an actual minute or one one-hundredth (1/100) of an hour basis with a minimum of one (1) hour overtime shall be paid for all work performed in excess of eight (8) hours in any one day, for all work performed either in advance of or after regularly scheduled hours, for the first four (4) hours in excess of eight (8) hours in any regular work day, and for the first eight (8) hours worked on one of the two (2) regularly scheduled days off each work week.
2. Overtime rate of double time shall be paid for all hours in excess of the first eight (8) hours worked on one of the two (2) regularly scheduled days off each work week for all time worked on the second regularly scheduled day off in a work week if the first regularly scheduled day off has been worked and for all time worked in excess of twelve (12) hours in any twenty-four (24) hour period except when an employee, after bidding, voluntarily changes shifts. For overtime purposes the twenty-four (24) hour period shall begin with the starting time of the employee's regular assigned shift.
3. There shall be no pyramiding of overtime rates provided for in this Agreement and no employee shall receive more than double the straight time rate for any hours worked.

C. Overtime Scheduling

3. Overtime shall not be worked except as directed by the Employer unless an emergency exists and proper authority cannot be obtained.

ARTICLE X - SENIORITY

F. An employee covered by this Agreement shall lose his seniority status and his name shall be removed from the seniority list under the following conditions:

2. He is discharged for cause;

ARTICLE XVII - DISCIPLINARY ACTION

E. If, as a result of any hearing or appeals therefrom, it is found the suspension or discharge was not justified, the employee shall be reinstated without loss of seniority and made whole for any loss of pay he suffered by reason of his suspension or discharge, and

his personnel records shall be corrected and cleared of such charge; or, if a suspension rather than discharge results, the employee shall have that time he has been held out of service credited against his period of suspension. In determining the amount of back wages due an employee who is reinstated as a result of the procedures outlined in this Agreement, the maximum liability of the Employer shall be limited to the amount of normal wages he would have earned in the service of the Employer had he not been discharged or suspended.

ARTICLE XVIII - BARGAINING AND GRIEVANCE PROCEDURE

H. Step Four - System Board

If the grievance remains unsettled after being processed through Step 3 above, the System General Chairman may request the case be heard by the System Board in compliance with Section 204, Title II of the Railway Labor Act as amended.

1. The System Board of Adjustment shall consist of three members, the CHAIRMAN, who will be a neutral member selected in a manner agreeable to the Employer and Union, the EMPLOYER MEMBER, who will be appointed by the Employer, and the UNION MEMBER, who will be appointed by the Union. In matters relating to contract interpretation, all members of the Board will hear and decide the case by majority vote. In disciplinary cases, only the Chairman will sit on the Board and he shall decide the case.

3. The Board shall have the power to make sole, final and binding decisions on the Employer, the Union, and the employee(s) insofar as a grievance relates to the meaning and application of this Agreement. The Board shall have no power to modify, add to, or otherwise change the terms of this Agreement, establish or change wages, rules, or working conditions covered by this Agreement.

ARTICLE XX - GENERAL AND MISCELLANEOUS

I. The right to hire; promote; discharge or discipline for cause, and to maintain discipline and efficiency of employees is the sole responsibility of the Employer except that employees will not be discriminated against because of Union membership or activities. In addition, it is understood and agreed that the routes to be flown; the equipment to be used; the location of plants, hangars, facilities, stations and offices; the scheduling of airplanes; the scheduling of overhaul, repair and servicing of equipment; the methods to be followed in the overhaul, repair and servicing of airplanes are the sole and exclusive function and responsibility of the Employer.

POSITION OF THE EMPLOYER

The Employer position is that the discharge of the Employee, The Employee was for just cause and the grievance should be denied. Arguments and contentions in support of this position may be summarized as follows.

A. The Employer's evidence established that the Employee misused the Employer's computer equipment to falsify his payroll records for his own financial gain by making unauthorized entries for which he received compensation.

1. The Employer placed its trust in the Employee by giving him the responsibility to administer and maintain EPS for all employees in the ramp service and utility employee classifications. The Employee had access to override the system in order to enter exceptions. That access did not negate the requirement that the Employee obtain an authorized signature for each entry. The Employee was well aware of the rules and procedures with respect to EPS.

2. The Employee, however, used the access to his advantage to enter unauthorized exceptions for himself for which he received compensation,thereby significantly increasing his earnings. The entries included exceptions for unauthorized late lunches, skipped lunches, hold-over overtime and call-in overtime.

3. The Employer's rules of conduct provide that discharge is the appropriate penalty for violation of each of the two rules the Employee violated.

B. The Arbitrator should reject the Union claim that the Employee has done nothing wrong and should be reinstated.

1. It is inconceivable that the Employee would have worked an average of 12 hours per day, sometimes 6 or 7 days without a day off for 243 days without ever even having the opportunity to take a 30-minute lunch.

2. At the lower steps of the grievance procedure, the Employee claimed to have had such difficulty getting supervisors to sign his exception slips that he finally stopped preparing them. Yet he went out of his way to obtain the assistance of Person 5, the Manager of Ramp Operations, to ensure that all employees and supervisors followed the procedures.

3. The Union claim that the Employee thought that he was no longer considered a Ramp Serviceman, but rather was an Employer 1 Clerk, is without merit. The Employee was fully aware that he continued to be counted as a Ramp Serviceman and knew how to find his records in the EPS. He knew that his classification had not changed and that he was being compensated at Ramp Service wages, not the lower wages of an Employer 1 Clerk. He was fully cognizant of his status; i.e. that he was a Ramp Serviceman assigned to perform specific functions outside of but related to the operation, which had no bearing on his classification and rate of pay.

4. The Arbitrator should reject the Union claim that the Employee only made a couple of mistakes with no intent to defraud the Employer. In fact, the Employee had every intent to defraud the Employer.

5. The Employer disagrees with the Union contention that the Employee was entitled to extra compensation because he in fact skipped lunch on 243 days in 1992 and worked all of the overtime hours claimed. The Employee was covered by the Ramp and Stores Agreement, in which Article VII, paragraph C.3 provides that overtime shall not be worked except as directed

by the Employer. The Employer gave the Employee no such direction and therefore he was not entitled to compensation.

6. The Union claims that the Employer was remiss in its managerial duties toward the Employee and the Company 1 office and therefore is as responsible as the Employee for his actions. As an employee in the Company 1 office, the Employee was expected to be capable of working independently with a minimum of supervision and direction. The Employer believed the Employee to be such a person. He did an outstanding job and appeared to be capable and dedicated. The Company placed complete trust in him, trust that proved to be misplaced.

Based on these arguments, the Employer requests the Arbitrator to rule that the Employee was discharged for just cause and to deny the grievance.

POSITION OF THE UNION

The Union position is that the discharge of the Employee was not for just cause and the grievance should be sustained. Arguments and contentions in support of this position may-be summarized as follows.

A. This case is marked by many mitigating circumstances.

1. The Employer asked the Employee to do the work of a Company 1 Clerk, Supervisor and Ramp Serviceman all without giving him a clear understanding of the job or his status. The Employer apparently does not have a clearly defined system as to who does the work or what work may be performed by an employee in this position. Each station around the Employer's

system seems to have its own method of doing this work, including having it performed by a supervisor only, by a non-Union clerk or by a secretary.

2. At the City 2 Station, the Employee was never told if he was fish or fowl, management, non-Union clerk, or ramp serviceman. The Employer essentially treated him as all three, thereby raising a question as to what work rules applied to the Employee.

3. The Employee testified that in the beginning he would fill out exception slips for any changes in his regular 40-hour work week, but he soon found that supervisors did not sign them. Slips were left lying around the Company 1 office and sometimes even were lost. The Employee finally stopped submitting the slips without objection from the Employer. The Employee was aware that management could check his hours on the computer at any time.

4. Employer witnesses testified that they were aware that the Employee was working overtime but did not know how much. Knowing that he was putting in for a lot of overtime, the Employee asked his Manager, Person 5, whether he should cut back on his hours. Person 5’s's response was that he was not concerned about the Employee's hours.

5. The Employee testified that he settled into a routine of doing his job and inputting his hours at the end of the week when he had time. Most days included a skipped lunch, which is not that uncommon in the airline industry. The Employee was so used to claiming skipped lunches that on November 15, 1992 he mistakenly claimed a skipped lunch for a day that he was not at work. This error is not a discharge offense.

6. Similarly, the Employee made an error on January 13, 1993, when he and the station manager rode to work together and arrived 15 minutes late. At the end of the week, when the Employee entered his time in the computer, he simply forgot about the late arrival and claimed a full day. This error is not a discharge offense:

B. Arbitral authority supports the Union position that discharge is inappropriate in a case such as this, where the standard should be proof beyond a reasonable doubt and where management failed to prove that the Employee had the intent to defraud the Employer. Measured against these standards, it is clear that the Employer has not proved just cause for the termination of the Employee.

C. In addition to the mitigating factors discussed above, the Employee was a good employee with no prior discipline. By all accounts, he performed his job in the Company 1 office extremely well. Management's real complaint was that he made too much money. When it discovered how much he had made, the Employer fired him. This reason does not constitute just cause for discharge.

Based on these arguments, the Union asks the Arbitrator to find that the discharge of the Employee was without just cause and to direct that the Employee be reinstated with full back pay and benefits.

ANALYSIS

The issue before me is whether the discharge of the Employee was for just cause. The just cause standard comprises three questions: whether the evidence establishes that the Employee committed the offenses forming the basis for the discharge, whether the Employee was afforded due process and whether the penalty was appropriate, considering the nature and severity of the offense and any mitigating factors. I will consider each question.

1. Does the evidence establish that the Employee committed the offenses forming the basis for the discharge?

In this case, the Employer has charged the Employee with violation of two Employer rules:

> 2. Falsification of Employer records or reports, including, but not limited to: Personal time cards or payroll-records; and punching another employee's time cards or payroll records.
>
> 15. Misusing or permitting others to misuse the Employer's computer equipment-including computers, terminals, printers, and related support hardware.

The parties agree that the Employer bears the burden of proof in a discharge case such as this. The Employer has not addressed the question of the proper standard of proof, but according to the Union, the standard should be proof beyond a reasonable doubt. The Union reasons that given the serious nature of the charges against the Employee, particularly since the charge essentially is that the Employee has been dishonest with the Employer and taken compensation to which he was not entitled, the higher standard of proof is warranted. The Union cites a number of arbitration awards to support its position that when the charge is one of theft, dishonesty or moral turpitude the Employer must be held to the standard of proof beyond a reasonable doubt. As I have discussed many times in the past, in my view, the standard of proof beyond a reasonable doubt is too high in an arbitration proceeding. In a criminal proceeding, the full resources of the state may be brought to bear against the defendant. The consequences of conviction of a criminal offense are potentially severe; that is, the defendant's liberty is at stake. In such circumstances, it is appropriate that the state be held to a high standard of proof; i.e. proof beyond a reasonable doubt. In the arbitration proceeding, by contrast, the employer typically does not have the resources at its disposal that the state has in a criminal proceeding. Further, the consequences to the employee of an adverse ruling in arbitration arguably are less severe than the consequences to the defendant in a criminal case. For these reasons, I find that the standard of proof beyond a reasonable doubt should not be applied in arbitration.

On the other hand, when the charge against the employee is one that could constitute a crime if tried in a court of law, the standard of proof by a mere preponderance of evidence is too low, in my judgment. Proof by a preponderance of evidence simply means that it is more likely than not that the employee committed the offense charged. When the alleged offense is one that could constitute a crime in a court of law, particularly where the nature of the offense reflects on the employee's honesty, such as an allegation of theft, the employer must show, in my view, more than a mere likelihood that the employee committed the offense charged. In my view, the appropriate standard in such cases is proof by clear and convincing evidence. This standard falls between the high standard of proof beyond a reasonable doubt and the lower standard of proof by a preponderance of evidence. As such, it is the most appropriate standard in the arbitration setting for this type of case, in my opinion.

For these reasons, I will apply the standard of proof by clear and convincing evidence in my review of the evidence submitted in this case. In applying such a standard, reasonable doubts must be resolved in favor of the accused.

The Union further contends that to support a charge of falsification, the Employer must show that the employee had the intent to deceive the Employer. A mere showing of error or mistake on the part of the employee is insufficient to show that the employee deliberately falsified a Employer document such as a payroll record. The Union again cites a number of arbitration awards to support its position. I am in agreement with the Union that a charge of falsification such as the one in the present case will not stand unless the Employer can show that the employee deliberately placed false information on an Employer document with the intent to deceive the Employer. A showing that the employee made a mere error or mistake is insufficient to prove a charge of falsification.

With these general comments in mind, we turn now to the specific charges in the case before me. First, regarding the charge of falsification of employee records, in the context of this case, the charge must be that the Employee falsely claimed compensation for overtime hours not worked, both hold-over and call-in overtime, as well as compensation for both late lunches and skipped lunches. As noted in the Summary of Facts, the Employer has shown that the Employee received some form of additional compensation for 243 of the 258 days that he worked in 1992. According to the Employer, it is simply not reasonable to believe that the Employee actually could have worked as many overtime hours and skipped as many lunches as he claimed. Therefore, the Employer reasons, the claims must be false.

The flaw in the Employer's reasoning is immediately apparent. To say that it is unreasonable or unlikely that the Employee worked so many hours does not constitute clear and convincing proof that the Employee's claims regarding his hours are false. Much of the Employer's case centers on its assertions that the Employee failed to follow proper procedures in obtaining a supervisor's authorization to work overtime and obtaining a corresponding supervisor's signature on an exception slip. This contention will be discussed in more detail below. For purposes of the charge of falsification, the point is that the absence of written authorization for overtime hours claimed does not constitute clear and convincing proof that the Employee has falsely reported overtime hours not worked.

The Employer was able to provide documentation for two of its claims against the Employee. First, the Employer showed that the Employee claimed a skipped lunch for November 15, 1992, a day on which he was not at work. The Employee admits making the claim but asserts that he merely made a mistake. According to the Employee, he was in the habit of entering his hours at

the end of the week rather than taking the time to do it each day. Since he had a skipped lunch almost every day, when he entered his hours for the week in question, he simply forgot that he had not been at work on November 15 and entered a skipped lunch for that day. According to the Employer, the Employee did not simply make an error. Rather, the Employer asserts that the skipped lunch entry was part of the Employee's pattern of falsification and was deliberate and intentional. Since the Employer has not established that the Employee engaged in a pattern of falsification, however, this argument cannot stand, in my opinion.

The other incident for which the Employer has documentation is the Employee's record of a 7:00 a.m. arrival time on January 13, 1993, when he admits that he actually did not arrive at his office until some time after 7:00 a.m. On the day in question, the Employee received a ride to work with the Station General Manager, Person 1. His car was not working and he had asked her for a ride since they lived in the same general area considerable distance from the airport. They both testified that at Person 1's request, the Employee drove her car and dropped her off at the part of the airport where she needed to meet a V.I.P. who was departing at about the time that she and the Employee arrived. The Employee then parked her car and carried to her office a box that contained some materials that Person 1 had taken home to work on the night before. They met sometime after 7:00 a.m. on their way to their respective offices. It is undisputed that the Employee did not arrive at his office until after 7:00 a.m. even though he entered a 7:00 a.m. start time for that day.

According to the Employee, when he entered his time at the end of the week he simply forgot about the late arrival on January 13. The Employer contends, as with the skipped lunch entry on November 15, 1992, that this January incident is part of the Employee's pattern of falsification and constituted a deliberate and intentional false claim for compensation for time not worked. As

with the skipped lunch incident, in my view, since the Employer has not established that the Employee engaged in a pattern of deliberate falsification, this charge cannot stand.

The Employer's other argument in support of the falsification charge concerns management's problems reconciling the Overtime Usage Report- generated from EPS- with another Overtime Usage Report generated from another source known as MPRS. Ramp Manager Person 5 asked the Employee for assistance with the reconciliation. He told the Employee to prepare a daily report of all overtime hours recorded in EPS. The Employee did so, but omitted his overtime hours from those reports. The Employee testified that the reason for the omission was that he thought that he was not being counted as a Ramp Serviceman. According to the Employer, this does not explain the omission because Person 5 asked for all hours recorded in EPS and the Employee knew that his hours were recorded in EPS. The Employer believes that the Employee deliberately concealed his computer activities in order to prevent the Employer's discovery of his unauthorized entries regarding overtime. In essence, the Employer's argument is that the Employee chose to remain silent about his overtime hours when a reasonable person would have spoken. His silence permits the inference that he had something to hide from the Employer, the Employer asserts.

The Employee, on the other hand, testified that he did not believe that Person 5's request concerned the Employee's overtime hours because when he asked Person 5 whether he should cut back on his hours, Person 5 replied that he was not concerned about the Employee's hours because the Employee was a Company 1 Clerk.

In my judgment, the Employer's argument on this point would be more persuasive if the other record evidence tended to support the Employer's claim that the Employee was falsifying his records. In such a case, the Employee's failure to raise the question of whether his overtime

hours might account for the discrepancy between overtime hours paid and overtime hours reported perhaps would suggest that he had something to hide. As discussed earlier, however, the other evidence in the record does not constitute clear and convincing proof of falsification. In this context, the testimony about the reconciliation problem, by itself, is insufficient to establish the falsification charge, particularly given the higher standard of proof.

In summary, I find that the Employer has not established by clear and convincing evidence that the Employee committed the offense of falsification of Employer records or reports.

The next question is whether the Employee willfully misused the Employer's computer equipment as charged. The Employer argument here is that in carrying out his responsibilities in the Company 1 office, the Employee had ready access to EPS and had authority to override the system in order to enter exceptions. According to the Employer, the Employee improperly used that access to his advantage to enter unauthorized exceptions for himself, thereby significantly increasing his compensation.

The real charge here seems to be that the Employee failed to obtain supervisory approval for his overtime and skipped lunches. Here, the Employer emphasizes that the collective bargaining agreement provides that overtime is to be worked only at the direction of a supervisor or other member of management. (See Article VII, Section C.3). Further, Employer policy provides that in case of overtime, the employee is to complete and the supervisor is to sign an exception slip for each instance of overtime, skipped lunch, etc.

The Employee testified that after he began to work in the Company 1 Office in July of 1991, he had supervisors sign his exception slips at first. After a few months, however, the supervisors became reluctant to sign the slips. The Employee testified that he did not know why they were

reluctant to sign the slips, but he began to find his exception slips lying around the Company 1 office unsigned and sometimes they were even lost. He finally stopped submitting them to supervisors for approval

Employee's testimony that his understanding was that management employees could access the system at any time to review his hours.

The Employer emphasizes that the main objective of the airline is the operation; i.e. getting airplanes in and out, loaded and unloaded on schedule. The supervisor's main concern is the operation. Therefore, an employee in the Company 1 office as in other support functions must be someone with integrity who is capable of working independently with a minimum of supervision and direction. The Employer insists that it believed the Employee to be such a person. He did an outstanding job and appeared to be capable and dedicated. The Employer placed complete trust in the Employee, trust that it says proved to be misplaced.

While the Employee admittedly failed to obtain supervisor's signatures on exception slips, as Employer policy requires, I find that management hardly has "clean hands" in this matter. The record evidence is that the Employer gave the Employee a great deal of responsibility in the Company 1 office, which management knew carried a heavy workload. By all accounts, the Employee performed his duties extremely well. The Employer was aware that the Employee was working extra hours, although apparently it was not aware of the full extent of his increased earnings as a result of the extra hours. As discussed earlier, the Employee testified that at one point he asked Ramp Manager Person 5 whether he should cut back on his hours. According to the Employee, Person 5 told him that he was not concerned about the Employee's hours. In his testimony, Person 5 agreed that he told the Employee that he was not concerned about his hours, but stated that he also told the Employee that he could have comp time.

Given the heavy workload in the Company 1 Office, of which management was well aware, the suggestion that Person 5 told the Employee that he was not concerned about the Employee's overtime because the Employee could have comp time hardly seems realistic, and thus is of doubtful credibility.

Review of the evidence indicates to me that management simply failed to supervise the Employee adequately or control the hours that he worked. Management witnesses all testified that they were aware that the Employee was working extra hours, yet none of them even raised a question of whether the Employee had exception slips signed by a supervisor to support those extra hours. Nor is there any evidence that anyone in management ever told the Employee that he should not be working those extra hours. Further, the Employer did not successfully rebut the Employee's testimony that management could have accessed EPS to review his hours at any time. While not all of the Employee's supervisors were trained and able to access EPS readily, the Employer did not establish that there was no one in management who could have checked the Employee's hours. In this context, the Employer's assertion that it was completely unaware of the high number of hours the Employee was working and thus that management had no responsibility for the significant increase in the Employee's earnings is not persuasive.

The Union contends that management did not make the Employee's status clear to him, treating him sometimes as a supervisor, sometimes as a bargaining unit employee and sometimes as a non-bargaining unit Company 1 clerk. The unrebutted evidence does indicate that the Employee performed some functions that are normally reserved to management, such as approving vacation requests. While he did not supervise employees as such, the evidence suggests that at least some of the employees covered by the EPS viewed the Employee more as an administrator than a bargaining unit employee. The Employee himself testified that he was not sure what his status

was. According the Union, supervisory employees do not need management approval for overtime. The Union suggests that this would excuse the Employee from the requirement to obtain signed exception slips. The Employer counters that even supervisors need management approval for overtime. Management also points out that the Employee remained in the ramp service classification throughout his tenure in the Company 1 Office. He apparently had no official title and no job description accompanying his duties in the Company 1 Office, however. In my view, the important point is that the Employee's status while he was in the Company 1 Office was ambiguous. He remained in the Ramp Service classification but did not perform ramp serviceman duties. He was not a manager but was given some managerial responsibilities. Management now says that it expected him to obtain signed exception slips for all his overtime, yet from late 1991 to early 1993, management never checked to see whether the Employee had such slips on file and never questioned the amount of time that he spent on the job. When the Employee ceased submitting exception slips, the Employer made no response. Only when the Employer discovered that the Employee had nearly doubled his earnings in 1992 did it begin to question and examine what the Employee was doing. In short, throughout almost all of the Employee's 18 months in the Company 1 Office, management failed to properly supervise the Employee.

The Employer claims that it trusted the Employee and that he did such an outstanding job that the Employer did not believe that it was necessary to check his work or monitor his hours. Even if this were true, the Employer cannot have it both ways. It cannot fail to supervise for 18 months and then terminate the employee when it discovers that the lack of supervision has produced an unwanted result; i.e. a ramp serviceman making $76,000 per year. In this context, the charge that

the Employee willfully misused computer equipment by using his access to EPS improperly to increase his compensation cannot stand.

In summary, I find that the Employer has not established by clear and convincing evidence that the Employee willfully misused Employer computer equipment as charged. As stated earlier, the Employer also failed to present clear and convincing evidence that the Employee falsified Employer records or reports as charged. Therefore, I must conclude that the evidence does not establish that the Employee committed the offenses forming the basis for the discharge.

2. Was the Employee afforded due process?

Since I have answered the first just cause question in the negative, arguably I need not address the remaining just cause questions, but I will do so briefly. Arguably management failed to provide the Employee due process in the sense that it let him perform his duties in the Company 1 Office for some 18 months without giving him any notice of its expectations regarding the manner in which he was reporting his hours, and then terminated him on the grounds that he failed to meet those expectations. Basically, however, due process requires that the employee receive notice of the charges against him or her and an opportunity to respond. The Employer's non-punitive disciplinary system requires that management provide notice of the charges and hold an Investigative Review Hearing at which the accused employee may respond to the charges, prior to management making the final decision in cases in which the supervisor has proposed disciplinary action at Level 4 or at Level 5, discharge. These steps were followed in the present case. Thus the Employee received due process in terms of the decision itself.

3. Was the penalty appropriate, considering the nature and severity of the offense and any mitigating factors?

Since I have concluded that the Employee did not commit the offenses on which the discharge was based, clearly the penalty of discharge was not appropriate. Moreover, as the Union points out, this case is marked by numerous mitigating factors in any event. At the time of discharge the Employee had some nine years service with the Employer with no prior discipline. He had several letters of commendation in his file and by all accounts was an excellent employee. While it is true that the Employee did not obtain a supervisor's signature on his exception slips as required, the Employer did not charge him with that specific offense. Moreover, as discussed earlier, it is questionable whether such a charge would withstand scrutiny given the facts and circumstances of this case.

For all these reasons, I conclude that the discharge must be set aside and the Employee must be given the remedy provided for in Article 17 Section D of the contract. I will enter an award consistent with the foregoing findings and conclusions.

AWARD

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the opinion that accompanies this award, it is awarded that:

1. The discharge of the Employee was not for just cause.

2. The appropriate remedy, in accordance with Article 17 Section D of the contract is as follows:

a. The Employer is hereby directed to offer the Employee reinstatement without loss of seniority and to make him whole for any loss of pay that he has suffered by reason of his discharge.

b. The Employer is hereby directed to see that the Employee's personnel records are corrected and cleared of the charges on which the discharge was based.