AMERICAN AIRLINES	**ARBITRATION OPINION & AWARD**
and	**Grievance: SS-26-2004-APFA-003, Family Medical Leave II**
ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS	**DATE OF AWARD: 1 September 2006**

System Board of Adjustment

For the Company:	Melissa Romig, Esq. Ben Williams
For the Union:	Susan French, Esq. Julie Moyer
Neutral Arbitrator:	Susan R. Brown

Appearances

For the Company:	Gregg M. Formella, Esq.
For the Union:	Carin A. Clauss, Esq. Patt A. Gibbs, Esq.

Dates of Hearing: 23 and 24 August 2005
30 and 31 October 2005
1 and 2 November 2005
9 and 10 January 2006

Location of Hearings: APFA Headquarters, Euless, Texas

ISSUES

The parties have agreed that, for the purpose of this case, all issues addressed herein have been properly raised before this Board. Any issue not addressed by this award has been deemed not properly before us.

BACKGROUND

The federal Family and Medical Leave Act (FMLA) requiring certain employers to give certain employees time off from work for a serious health condition, either personal or that of specified family members, was enacted in 1993. American Airlines unilaterally implemented its own Family Medical Leave (FML) policy in 1991 which covered most of its employees without specific reference to their eligibility under the prospective statute.

When American employees are absent for reasons of illness, they are charged with an "occurrence" under the Company's Attendance Control Policy (ACP). After a certain number of occurrences, for which they are coached and counseled, employees are given progressive discipline which may end in termination. Flight Attendant disciplinary actions for attendance remain active for two years and an employee in the ACP system can have difficulty emerging from the special scrutiny it entails. The parties agree that because illnesses that qualify for FML do not generate an ACP occurrence, when this benefit was first announced Flight Service Supervisors encouraged eligible Flight Attendants to use FML whenever appropriate and thus avoid discipline.

During the financially challenging times of 2001, the Company announced several unilateral cost-savings changes to its FML policy, primarily with respect to eligibility but also including other matters, to be effective October 2001. The Union filed a

Presidential grievance protesting those changes and the Company's right to make them unilaterally. The grievance was ultimately submitted to Arbitrator Roberta Golick, who issued an award (now known as FML I) on 30 June 2003.

Arbitrator Golick made a thorough analysis of the parties' history with respect to the FML policy and concluded that it is a unilaterally promulgated Company policy and, as such, can be altered or eliminated by the Company. She noted:

> With respect to FML, there is simply no evidence to support a finding that the Company intended the policy to serve as a condition of employment impervious to change.
>
> (UX 15, p. 20)

She further pointed out that the Company had made several changes to the policy over the years without objection from the Union, modifications that both enhanced and diminished the policy's benefit to Flight Attendants. Ms. Golick also noted, however, that new provisions could not conflict with any contractual protections and found that at least one of the changes at issue, the number of hours worked required for eligibility, violated the Flight Attendant contract.[1]

In 2003, the parties entered into negotiations to restructure the 1998-2004 collective bargaining agreement, an alteration that was intended to reduce the cost of the contract to the Company and thereby avoid bankruptcy. The Company provided target numbers for savings and proposed a variety of salary, benefit and work rule changes to achieve those reductions, one of which would have reduced the number of chiropractor visits covered by employees' health insurance coverage. Because the nature of Flight Attendant duties makes chiropractic treatment important to this

[1] Arbitrator Golick remanded the remedy to the parties who were ultimately unable to agree and the remedy was again before her at the time of these hearings. The outcome of those proceedings, however, should have no effect on the issues before us.

bargaining unit, the Union substituted other benefits of comparable value in order to retain unlimited chiropractic coverage, an arrangement memorialized in the Restructuring Participation Agreement (RPA), effective 1 January 2004.

In May, 2004, the Company announced additional changes to the FML policy. Representatives of the AA Medical and Human Resources Departments met with two Union members who worked the APFA Health Desk and explained the new provisions that would be effective for the entire Company. The power point presentation made by the Company put forth the following recommendations for changes, effective 1 June 2004:

1. Modify the timelines for requesting FMLA leave in order to turn applications around more quickly:

EMPLOYEE TIMELINE	CURRENT	PROPOSED
Initial Notification of need for FMLA	2 days from return to work for ground employees 5 days for flight crew	2 days from return to work for all workgroups
FMLA Application submitted to AA Medical	15 business days	15 calendar days
Provide additional information, if necessary	10 business days Applications may be pended multiple times	15 calendar days One opportunity to provide additional information within 15 days

2. When an application is incomplete and additional information is required, a letter will be sent directly to the employee. (Currently, these requests are communicated to employees via their supervisor.)
   - The letter will be sent by first class U.S. Mail to the employee's home address (sing TDS automated fulfillment process). We are exploring sending these letters via email to employees who have signed up for eUpdate.
   - If the addition information is not received by the deadline, the case will be closed.
   - Supervisors will continue to receive an email heads up of the request for additional information.
   - In addition, the supervisor, employee and Employee Services are also able to view the status of the application on JetNet.

- Enhanced automation will include the test of the letter and the date it was sent

- On a related note, we will communicate to employees that initial FMLA applications should be sent directly to AA Medical and not handed to the supervisor.

3. Certify non-chronic health conditions as block leave, based on medical facts (e.g. sinusitis)

4. Increase the frequency of physician-to-physician review of FMLA applications, to ensure the frequency and duration estimates for intermittent FMLA leaves are medically appropriate.

5. Institute a random audit process to authenticate the physician's portion of a FMLA application form.
   - During a recent study, approximately 6% of FMLA applications submitted by employees were found to have been altered by the employee.

(UX 20)

The changes were implemented as planned except for #5, which the Company decided was too labor intensive to be fiscally efficient.

When senior Union officers studied the published changes, they had a number of questions and concerns. On 12 July, APFA Vice President Brett Durkin wrote to Director of Employee Relations Lorraine Mase-Hecker asking for answers to a long list of inquiries. No written response to this letter was ever issued although the parties had some face-to-face conversations about some of the matters. On 14 July, the Union filed the Presidential grievance that forms the basis of this arbitration. This proceeding has become known as FML II.

As a result of the June changes, Flight Attendants also filed individual Notices of Dispute (NODs) protesting denials of FML benefits as well as challenging discipline under the ACP arising from denials of FML certification. By agreement of the parties, FML-related NODs bypassed the normal Dispute Resolution Conferences because that process might have required Flight Attendants to reveal medical information to their

Flight Service Managers and/or other management personnel, a disclosure that is voluntary under the collective bargaining agreement. All FML grievances except terminations, therefore, were sent directly to the parties' Quarterly System Board (QSB), which handles all base-level grievances.

The Arbitrator in this current dispute is also the parties' standing neutral for all QSB matters. By agreement, the Board shifted any QSB grievance related to FML II issues to what became known as a "bifurcated docket"; that is, they were put on hold until this FML II decision is issued. There is a mutual expectation that the present award will lead to the resolution of a large number of the docketed QSB grievances; any cases not so resolved will be addressed individually. As of 23 August 2005, the first hearing date for FML II, there were 291 cases on the bifurcated docket; others have been added since that date.

On the first day of hearing for FML II, the Company raised several jurisdictional and substantive arbitrability issues. Those matters were eventually withdrawn on a non-precedential basis [T 242-245] and there is no arbitrability question – procedural, substantive or jurisdictional – remaining before the Board.

The large number of issues and the massive amount of data presented to the Board by the parties dictates a format for this decision that deviates from the classic structure of most arbitration awards. The Board has concluded that it will be most helpful to the parties if this decision is organized in the following manner: the background of the case as set forth in this section; a discussion of the general contractual principles that pertain to the questions before us; and an examination of

each issue raised in the context of the articulated principles. The award itself will summarize the findings on the principles and the individual matters.

OPINION

The policy belongs to Company

As noted earlier, the question of whether the Company can alter the policy unilaterally has already been settled definitively by Arbitrator Golick. She examined the question of whether FML is a policy or a benefit (her conclusion: it is both), the history of its promulgation and subsequent enhancements and diminutions, the parties' actions and utterances over the years, and other relevant history, and concluded that the FML policy is a unilateral one, that the Company has the unilateral right to alter or even eliminate the policy, and that it may do so without negotiating or even conferring about changes prior to implementing modifications.

Policies must not be arbitrary, capricious, discriminatory or in bad faith

To Arbitrator Golick's observation we can add that the Company's policy changes need not meet the standards of either the Union or the Arbitrator as to what constitutes an optimal policy. The Company's rights with respect to any unilateral policy, however, are not entirely unrestricted. Arbitrator Golick, who dealt with the systemic changes adopted in 2001, pointed out that even a unilateral policy must not conflict with any established contractual protections. The current Board, which is considering both nitty-gritty procedural matters as well as additional broad-brush changes, is obliged to

deepen the analysis of the standards an employer must meet when it adopts unilateral rules or policies in a collective bargaining environment.

There is a widely-accepted tenet of labor relations that management rights under a collective bargaining agreement are substantial but not unfettered, whether or not a contract contains a management's rights clause.[2] Implied in management's right to craft work rules and other policies is the obligation that any such rule or policy must not be arbitrary, capricious, discriminatory[3] or constructed in bad faith, and that the implementation of policies must avoid these same pitfalls.[4]

A review of labor-management literature, both arbitration cases and treatises, reveals that arbitrators approach the question of reasonableness of policies in much the same way they do the issue of just cause – by applying generally accepted standards and principles to specific circumstances. As with just cause, the standards and principles are not spelled out in the parties' contracts but are widely understood as implied management obligations inherent in a collective bargaining agreement.

Because this policy implements a unilaterally promulgated benefit rather than a work rule, it presents us with an unusual situation which calls for an arbitral analysis not often found outside the realm of challenges to unilateral work rule changes. We must be clear at the outset that it is the Company's sole right to set the levels of this benefit. The concerns in this case revolve around the Company's procedures that may have the

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[2] This contract does not contain such a clause.

[3] Discriminatory as it is used here does not refer to legal discrimination on the basis of a protected class, which is normally addressed in other provisions of a collective bargaining agreement, but concerns itself with the equitable application of a policy or benefit among bargaining unit members.

[4] For a general discussion of these precepts and many case citations, see *Elkouri & Elkouri: How Arbitration Works*, Sixth Edition, Alan Miles Ruben, Ed., (BNA, 2003), pp. 767-768

effect of unreasonably excluding employees who are otherwise qualified for the benefit and the resulting potential for disparate treatment of eligible employees.

One commentator analyzed arbitration awards addressing health and safety rules, for example, and noted that arbitrators have consistently held that the rules must be "reasonable and fairly applied."[5] He listed several standards arbitrators have used in assessing grievances on such rules: the rule must be reasonably related to a potential hazard; the coverage of the rule must be based on a reasonable assessment of the dangers involved; the rule must not exceed the employer's authority under the collective bargaining agreement; and employees must be able to challenge rules and their application.[6]

This Board has examined American's FML policy and its impact on bargaining unit employees to determine which criteria for reasonableness apply in this circumstance. We conclude that the first criterion is that **the policy must be accessible to employees and both its standards and procedures must be communicated to employees in clear, understandable language and format.**

The rationale for this precept is obvious. The FML policy is quite complex, combining as it does both medical and legal terminology.[7] Moreover, employees who need the benefit may be in a medical or family crisis at the time they apply and therefore less likely to absorb complex and confusing instructions. If the policy is not easily accessible to all eligible employees because its provisions and applications are difficult

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[5] James F. Snow, "Health and Safety" in *Labor and Employment Arbitration,* Second Edition, Bornstein, Gosline and Greenbaum, Eds. (Matthew Bender, 2005). §36.04[2], p. 36-6

[6] *Ibid.*, pp. 36-6 through 36-8

[7] The most recent changes made by the Company brought several provisions more in line with the FMLA in terms of medical sufficiency and procedural guidelines.

to find, a struggle to understand, and a challenge to conform to, of necessity the policy will be applied arbitrarily. Under these circumstances, only those who are lucky or smart enough to know the right people, the right place to look, and how to crack the code will enjoy the benefit.

In this same vein, the second principle is that **the policy must be applied equally to all bargaining unit employees**. Eligible employees with similar medical circumstances must have equal access to benefits. Any distinctions made among employees must be rationally related to their circumstances.

The third standard is linked to the first two: **the policy must have known appeal mechanisms**. All employees must know which Company decisions may be appealed and how to go about doing so. Absent uniformity, the review of Company actions for correctness or the granting of exceptions to established rules becomes capricious, based largely on a combination of a Flight Attendant's nerve and the good will of individuals in management.

Finally, **the policy must not deny employees of negotiated benefits**. This is a broader statement of the precept articulated by Arbitrator Golick. Not only must policy provisions not conflict with the collective bargaining agreement, they must not require employees to relinquish contractual rights and privileges in order to enjoy the benefits of the FML policy.

Policy provisions where no violation exists

There is no doubt that the FML policy is extremely important to Flight Attendants. As a work group, they are one of the highest users of the benefit in the Company.

Steve Finch, an RN who helped draft the Company's FML policies, testified that there is a mix of reasons for this: the ratio of Flight Attendants eligible for FML to the total number of American employees; the working conditions of the Flight Attendants;[8] and the greater awareness among Flight Attendants of the availability of FML benefits.

It is not surprising, therefore, that Flight Attendants reacted strenuously to the Company's changes in the FML benefit. We believe that many of the NODs were filed because the policy as it was implemented in June 2004 narrowed the pool of employees who would be certified for the FML benefit. The most striking example of this is the requirement, whether newly implemented or newly enforced, that an employee's condition must meet the definition of a serious health condition requiring absence from work in order to qualify for FML designation; it is no longer sufficient merely to be unable to perform the essential functions of one's job. Grievances based on this aspect of the policy will have no merit because, as Arbitrator Golick noted and we reiterate, the Company may diminish a unilateral benefit at will as long as those modifications do not have an arbitrary, capricious or discriminatory impact on individual employees. The bargaining unit as a whole may be adversely impacted by the new rules but that does not make the modified rules a violation of the collective bargaining agreement. We list in this section those pieces of the policy or their impact that the Union grieved but for which we find no violation of the collective bargaining agreement.

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[8] Mr. Finch, who is qualified as a Flight Attendant and who flew for some period of time, testified that he injured himself on almost every flight he worked. [T681] The Dictionary of Occupational Titles, published by the Department of Labor, classifies a Flight Attendant's job as heavy work, requiring both physical strength and mental alertness.

June 2004 policy changes further reduced Company costs

At the outset, we note our belief that the Company undertook the June 2004 FML policy changes in good faith. It had two over-arching goals: to streamline the process for efficiency and improved communication, and to reduce costs. Although the Union argues that the Company is barred from implementing cost savings that exceed those negotiated under the RPA, we find nothing in that document that limits management's right to alter unilaterally-promulgated benefits, processes, work rules, etc., for any reason, so long as modifications neither interfere with employees' collective bargaining rights nor place unreasonable procedural obstacles in front of employees who qualify for the benefit. Any forfeiture of rights by either party must be clearly and unmistakably expressed as part of the parties' bargain and we find no such expression in this case. To rule otherwise would disturb the long-standing arrangement between the parties regarding many of management's unilateral policies.

The change from five business days to two calendar days for FML notification and the change from ten business days to fifteen calendar days to submit both initial and additional medical documentation

The Union argues that because Flight Attendants' schedules take them away from home for days at a time, these changes present an unreasonable hardship for the Flight Attendant work group and were designed to reduce Flight Attendants' access to the benefit. A close examination of the evidence does not bear out either of these contentions. Flight Attendant schedules do differ from those of ground employees but since the great majority of Flight Attendants who applied for FML benefits after 1 June 2004 were granted them, there is no evidence that the new application deadlines are

per se unreasonable. The percentage of Flight Attendants denied FML certification was mostly below the average for other work groups in the seventeen months preceding the changes and remained in approximately the same relationship during the four months directly after the change. (CX 12)

Certainly, there may be certain circumstances where the *application* of the rule may be deemed unreasonable, including situations involving flight schedules, doctor's schedules, or computer and fax problems beyond the control of the employee. The Union brought to the Board's attention several situations that might fall into this category and each would have to be considered on its own merits, including employees' responsibilities and mitigating circumstances.[9] We suspect that most of the Union's examples of difficulties in adhering to deadlines could have and probably did occur under the old deadlines as well; the material difference is that deadline extensions were routinely granted by Flight Service Managers prior to these changes, a practice that has been discontinued under the new procedures. The solution for this problem, if it is one, is better communication and an accessible appeal process as discussed in detail below, not a finding that the deadlines are *per se* unreasonable, or that the Company must grant exceptions under all circumstances.

Change of medical eligibility standards from "unable to perform essential job functions" to "medically necessary to take time from work for a serious health condition"

The Company asserts that the "serious health condition" standard to qualify for FML has always been in place but that it was not scrupulously enforced prior to 2004. Unrebutted testimony from Flight Attendants, however, established that before 2004,

[9] These individual cases remain on the QSB docket.

employees were routinely granted FML if they were unable to perform the essential functions of their jobs, regardless of whether their conditions met the specific statutory definition of a serious condition. This meant that Flight Attendants who caught a cold and, as a result, suffered from blocked ears or sinusitis (both of which bar flying), were deemed FML-qualified if the condition was properly documented by medical personnel and they met other administrative requirements.

It is immaterial for our purposes whether the current standard is new or a more rigorous interpretation and enforcement of a prior standard. The current qualifying standard for FML benefits requires certification of a "serious health condition" for which it is medically necessary to take time from work, the standard found in the federal FMLA. The Company's FML application explains and defines a serious health condition as follows:

> The Family and Medical Leave Act defines six (6) categories in which a medical condition is deemed as a "serious health condition" for purposes of FMLA Leave. These six (6) serious health condition categories are listed below. . . .
>
> **CATEGORY (1) – Hospital Care Defined as:**
>
> **Inpatient care** (e.g., an overnight stay) in a hospital, hospice or residential medical care facility, including any period of incapacity or subsequent treatment 1/ in connection with or consequent to such inpatient care.
>
> **CATEGORY (2) – Absence Plus Treatment Defined as:**
>
> (a) A period of incapacity of **more than three consecutive calendar days** (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:
>
> (1) **Treatment two or more times** by a health care provider, by a nurse of physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by a health care provider, ***or***
>
> (2) Treatment by a health care provider **on at least one occasion** which results in a regimen of continuing treatment 2/ under the supervision of the health care provider.

CATEGORY (3) – Pregnancy Defined as:

Any period of incapacity due to **pregnancy**, or for **prenatal care**.

CATEGORY (4) – Chronic Conditions Requiring Treatment

Defined as:

A chronic condition which:

(1) Requires **periodic visits** for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(2) Continues over an **extended period of time** (including recurring episodes of a single underlying conditions); and

(3) May cause episodic rather than continuing period of incapacity (i.e. asthma, diabetes, epilepsy)

CATEGORY (5) – Permanent Long-Term Conditions Requiring Supervision Defined as:

A period of **incapacity** which is **permanent or long-term** due to a condition for which treatment may not be effective. The employee or family member must be **under the continuing supervision of, but need not be receiving active treatment by, a health care provider.** Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

CATEGORY (6) – Multiple Treatment (Non-chronic Conditions) Defined as:

Any period of **absence to receive multiple treatments** (including any period of recovery) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for **restorative surgery** after an accident or other injury, **or** for a condition that **would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment,** such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).

FOOTNOTES:

1/ Treatment includes examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical, eye, or dental examinations.

2/ A regimen of continuing treatment includes, for example, a course of prescription medication or therapy requiring special equipment to resolve or alleviate the health condition. A regimen of treatment does not include the taking of over-the-counter medications such as aspirin, antihistamines, or salves, or bed rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provided.

(JX 4)

Under these comprehensive definitions, the Flight Attendant with the blocked ears from a cold would not qualify for FML designation unless she also met both the conditions of duration (more than three days) and a continuing regimen of treatment as defined in the statute.

There is no question that rigorously applying this standard may reduce the number of Flight Attendants who can avail themselves of FML, a change that is likely to be an immediate cost-saver for the Company. It may also, however, have unintended consequences in that certain Flight Attendants who previously qualified for FML will now receive absence occurrences. Flight Attendants who have a genuine pre-disposition to ear problems or similar conditions that bar flying but are not deemed "chronic" or "serious" under the federal definition will eventually be terminated, which may result in higher-than-expected training costs and other unforeseen expenditures. Be that as it may, any change in eligibility standards that is uniformly applied, even if it results in a narrower class of employees who qualify, is not improper under a unilaterally-promulgated policy or benefit.

Denial of intermittent leave for conditions previously granted intermittent leave

The Union points out that some conditions for which intermittent leave was previously granted, are now being denied certification. Company witnesses explained that this is a result not of a changed standard but of closer scrutiny of medical documentation. Again using the federal statute as a guide, the Company is granting intermittent leave only for chronic serious medical conditions, such as asthma, diabetes or epilepsy, which may have recurring episodes requiring leave, but not for conditions

including, for example, certain forms of sinusitis and migraines, that may occur periodically and even predictably but do not meet the definition of a chronic serious health condition. According to Company witnesses, this was the Company's policy prior to June 2004 but applications were not closely reviewed at that time in order to make the distinction.

Irrespective of whether the current denials of certification arise from a newly-defined policy or merely from increased scrutiny under an old definition, a change in benefit levels is permissible in a unilaterally-provided benefit. Again, the only caveat is that any modification be implemented in a manner that is not arbitrary, capricious or discriminatory. This issue is discussed in more detail below.

The process used to calculate Flight Attendant eligibility to access FML benefits

To be administratively eligible for FML, employees must have a minimum number of paid productive hours in the preceding year. It is undisputed that the Company has always determined eligibility by reviewing Flight Attendants' records for the twelve-month period that ended on the last day of the month preceding an FML application. That is, if a Flight Attendant applied for FML on any day in February 2006, eligibility was determined by looking at the countable hours from 1 February 2005 through 31 January 2006. Both Union and management witnesses agreed that if that calculation produced a result that disqualified a Flight Attendant by only a few hours, eligibility was often recalculated by either the Union or management on a 365-day basis, counting back from the actual day of the application. This occasionally resulted in eligibility for Flight Attendants who were ineligible under the twelve-month method.

The twelve-month method was continued under the June 2004 policy, but the Union grieved when it came to believe that the Company automatically calculates eligibility for Pilots under both methods, asserting that at least one of the Company's stated reasons for the FML policy changes was to have a uniform policy for all work groups.

The Company may be striving for uniformity but the record discloses several instances of divergent application among work groups for various reasons. The number of hours required for eligibility, which was one of the main issues addressed in FML I, is a prime example; this figure is different for ground employees, Pilots and Flight Attendants. From the contractual point of view, there is no "me-too" clause in the Flight Attendants' collective bargaining agreement that guarantees them the same benefits as Pilots. Finally, Company witnesses testified without contradiction that management consulted with its IT Department about devising a computer program that would calculate Flight Attendants' eligibility by both methods, and was told it was far too time-consuming and costly to construct.

More to the point, the method of calculating eligibility calculation policy did not change in June 2004, according to the Company. Senior Lost Time Analyst Kris Venable testified that upon request from the Union or Employee Services, she currently recalculates paid productive hours using the 365-day method for those Flight Attendants whose count is close to the 504 hour limit under the twelve-month look-back method. In fact, it is undisputed that the number of such counts has increased since the Employee

Services Center was instituted, and the Company continues to accept this alternative calculation of eligibility for the Flight Attendants for whom it is beneficial.[10]

Burning FML days while a Flight Attendant is on IOD leave

As Arbitrator Golick concluded in FML I, there is no violation inherent in the Company's policy of charging FML leave to Flight Attendants who are absent with a qualifying serious health condition arising out of an injury on duty (IOD). In fact, the FMLA explicitly permits the burning of federally-sanctioned leave during IOD absences and in this case, doing so does not deprive employees of negotiated rights or benefits. The questions of notice and equal treatment are addressed elsewhere.

The Company's failure to use Article 26 I to address suspected fraud or abuse of the FML benefit

In addition to its global assertions about the unreasonableness of the revised FML policy, the Union asserted two specific contractual claims with respect to its implementation. The first concerned situations where the Company believes that fraud has occurred, *i.e.*, that a Flight Attendant has knowingly applied for benefits to which s/he is not entitled. According to the Union, when the Company currently suspects a fraudulent FML request has been filed, it merely rejects the employee's application for

[10] Depending on their schedules during the pertinent time periods, some Flight Attendants qualify under the twelve-month system but not under the 365-day lookback.

FML certification rather than using the contractual mechanism set forth in Article 26 I to address suspected abuse of sick leave benefits.

Company witnesses testified that applications for FML are rejected only for administrative or medical eligibility reasons. If a fraudulent claim for FML is suspected, which the Company defines generally as a false or altered medical certification, it immediately turns over the file to Human Resources for an investigation of misconduct under Article 31 R of the collective bargaining agreement. The Company maintained that Article 26 I is specific to the request for sick leave pay under false pretenses; it was never intended to be used for FML.

Article 26 I, Medical Certificate, states:

> A Flight Attendant may be required to submit a medical certificate signed by the Flight Attendant's personal physician to support payment of sick leave benefits. A verbal instruction will be considered sufficient to support this requirement. All verbal instructions will be confirmed in writing. Such medical certificates shall contain the following information:
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> 1. Date(s) treatment received.
> 2. Diagnosis of illness or injury in medical terms.
> 3. Prognosis.
>
> (JX 1)

We find that this provision is specific solely to sick leave benefits, *i.e.*, pay, and this Board has no authority to require its use in another context. Moreover, the FML abuse suspected by the Company arises in the context of receiving an application which already provides the very information the Company requests when Article 26 I is invoked. The suspected abuse in FML cases focuses on false, forged or altered medical documentation, not on undocumented illness. It is undisputed that the Company can and does invoke its investigatory rights as set forth in Article 31 R when it

suspects that FML documentation is not authentic; Article 26 I is inapplicable, inappropriate, and not contractually proper for FML issues.

The Company's failure to use Article 20 to resolve disputes about medical eligibility

The Union also grieved the Company's failure to use the Article 20 procedure for medical appeals when FML certification is denied. Here too, however, the provision is very specific to one situation – fitness for duty – and again, this Board has no authority to require its use in another context. It is important to note, however, that the Article 20 mechanism has elements in common with the appeal process required under the FMLA for medical disputes and could form a template for resolving medical disputes under the Company's FML policy. This matter is discussed more fully below.

Policy provisions and applications where violations exist

Despite our finding that it is not improper for the Company to alter FML eligibility and standards, the record establishes that some of the changes implemented in June 2004 fail to meet the guidelines for reasonableness set forth above, in either substance or application. We have, for clarity purposes, addressed each of the Union's issues under the appropriate reasonableness standard. Since certain issues fall under more than one guideline, some overlap is inevitable.

The policy must be accessible to employees and both its standards and procedures must be communicated to employees in clear, understandable language

In order for a policy to be administered fairly, employees must be informed in advance about what the policy intends to accomplish, who is eligible for its benefits

under what conditions, and what procedures are in place for obtaining the benefit. These parameters must be communicated clearly and in a time and place so as to be readily available to employees.

We can find nothing to fault on the Company's current published version of its FML policy, *i.e.*, the Employee Information Letter (CX 16) published in October 2005. While some terms may be unfamiliar to Flight Attendants and may take some concentration to understand, that is inherent in any document that combines legal and medical terminology. The Company has corrected the one misleading statement found in the first letter issued regarding the June 2004 modifications which stated that employees had a "one-time only" opportunity to submit additional information within 15 calendar days of the Company's request. Nurse Finch, who drafted this language, conceded that employees are allowed multiple opportunities to submit medical data within the 15-day period; "one-time only" referred to the fact that the Company would not permit extensions of the 15-day time frame. This intention is now clearly communicated.

Employees have a responsibility to read Company policies, particularly when they explain an important benefit, and to follow up with management or the Union if they have any questions. All the essentials of the Company's policy and procedures appear to be stated in the document and employees cannot be excused from mastering them.

After an employee has indicated a wish to file for benefits, the Company's requests for information must be communicated in language and a format readily understandable by employees and their medical providers and in such a way as to elicit the desired information and to prevent delay or denial of benefits arising from

miscommunication. Failure to do so at the outset compounds any subsequent procedural issues.

The Company's initial request for FML information is embodied in the FML application form. The Company has modeled its version on the one published in the federal regulations but has not adopted it in its entirety. Items 1 through 6 are filled out by the employee and are very straightforward requests for name, address, employee number, etc.

Items 7 through 14 are for the employee's health care provider.[11] They ask about whether hospitalization is required, whether the employee can perform his or her essential job functions, and which of the six categories of serious health condition categories, included with the application as an attachment, the employee's condition falls into. The doctor is also asked to supply medical "facts", a treatment regimen, and the type of leave requested (one-time block or intermittent).[12]

We note that the Company has substantially improved its application since 2003, particularly by highlighting areas that might cause confusion. One question, however, remains so problematic that we have concluded that it causes confusion among health care providers. As a result, they do not supply the desired information which results in Company requests for additional information and the enhanced probability that a request will be timed out. Administrative denials arising from poorly communicated requirements are quintessentially arbitrary.

The question about which we have concerns is #10, which states:

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[11] For purposes of discussion, we are addressing an FML request concerning an employee's medical condition, not that of a family member.

[12] Flight Attendants are not eligible for the third type of leave, reduced schedule.

> Medical Facts:
>
> To support the medical necessity of this leave request, describe in detail all of the medical facts, not symptoms, regarding your patient's condition. (By completing and signing this form, you are certifying that it is **medically** necessary for the AA or AE employee to take time off work under the FMLA for this health condition. [Emphasis in the original]
>
> (UX 5)

This question is not intended to elicit treatment information; that matter is addressed in Question #11.

Mr. Finch testified that this question was re-drafted as a result of a complaint from an employee to the Department of Labor that the Company was asking for too much information;[13] according to Mr. Finch, the DoL instructed the Company not to lead the doctor "how to fill out this form to get it approved." [T 831]

While we are sympathetic to the Company's understandably cautious reaction to DoL's oversight, this Board believes that as it is currently worded, Question 10 does not meet the standard of clear communication articulated above. Even the DoL version of the inquiry, printed in the Federal Register, is a bit clearer:

> Describe the **medical facts** which support your certification, including a brief statement as to how the medical facts meet the criteria of these categories [of a serious health condition]. [Emphasis in the original]
>
> (JX 6)

When pressed to explain what "facts" AA Medical wants in answer to Question 10, Mr. Finch gave as examples how long the doctor had been treating the patient for the condition, and the frequency of treatment. He also agreed that symptoms and diagnosis are medical facts but claimed that symptoms are provided elsewhere on the

[13] Apparently this question previously requested the employee's diagnosis.

application. [T 829] A review of the application does not support this assertion. He conceded that it would not violate DoL regulations to provide examples of medical facts in Question 10 since Question 11, both on the federal and Company forms, gives examples of treatment regimens to assist the health care provider in understanding what is wanted.

Mr. Finch further testified that a diagnosis alone for a condition such as stomach cancer would be a sufficient Question 10 answer to certify medical eligibility, but would not be sufficient in medically gray areas. Since it is those ambiguous areas for which the Company is likely to want more extensive information, it must be clear in its initial requests in order to reduce timing out applications that would otherwise qualify.

AA Medical's requests for additional information when it deems the material provided in Question 10 is inadequate lie at the heart of the Union's grievance. The Union characterizes these requests as unreasonable and argues that they have resulted in increased denials of FML certifications. Such requests reflect the more intense scrutiny and/or the new eligibility standards which the Union may find objectionable but are within the realm of the Company's authority and a legitimate function of the Company's administration of the benefit. Moreover, statistics for July, August and September 2004 indicate that the rate of denials for Flight Attendants remained below the average rejection rate for all American employees.

In order not to deny the benefit to any qualified employees, however, requests of this sort must be communicated in language and a format readily understandable by employees and their medical providers. Such communications must be calculated to

elicit the desired information and to prevent delay or denial of benefits arising from miscommunication.

The record discloses that the Company's requests for additional information are often cryptic if not downright mysterious. Although AA Medical's Lead Nurse for FML Cynthia Valencia persisted in calling these requests "personalized" letters, it is indisputable that they are all boiler plate. Because the letters can be seen on JetNet by managers and Employee Services personnel, AA Medical cannot reveal any personally identifiable medical information; the requests, therefore, are generic.

After reading these letters as if we were the employees receiving them, we find that the language of many of Medical's requests is so general as to be confusing to both employees and to their medical providers and therefore often impossible to answer in the detail that AA Medical seeks. This results in the submission of insufficient or incorrect information by healthcare providers; the timeline runs out, and the application is auto-closed.

This is not so for the rest of the application. Requests following up other questions, including #11, are relatively specific and give examples of the types of information being sought. The follow-ups to Question 10, however, merely repeat the request for "medical facts" stating that the facts already provided "do not substantiate" the leave request, most often for the amount of intermittent leave applied for. Since generally the doctor has already answered Question 10 on the initial application, it becomes a puzzle to figure out what more the Company is seeking, unless it is a reduction of the frequency and duration requested.

It is this category of applications that has caused the most controversy and resulted in the most denials, either for medical reasons (insufficient facts to support the frequency and duration of the leave requested) or administrative ones (auto-closed because requested information is not received in a timely fashion). While these denials are perceived by employees as a result of unreasonable requests for information, we conclude they arise from unclear communication.

This problem is further compounded when AA Medical deems that the additional information submitted by the health care provider is *still* inadequate. Medical puts a note on JetNet stating that the information is incomplete, but no information is communicated as to what facts, documents or medical opinions would satisfy AA Medical's requirements. During the ensuing attempts at clarification by the employee or the medical provider, the deadline is often reached and the case is auto-closed, ending the employee's chance to have a specific absence approved.

It has become clear to us that this stumbling block arises at least in part from another procedural change instituted in June 2004. Previously, Medical communicated its requests for additional information through the employee's FSM who thereafter served as a conduit for the employee's questions and requests for clarification on what information was being sought. When there were issues of communication or other problems, FSMs routinely extended the deadlines for submitting additional material.

Under the new system, the supervisor is out of the loop and AA Medical informs the employee of what is required directly through JetNet and a letter. Because the information on JetNet is viewable not only by the individual employee but also by Flight Service officials in the employee's supervisory chain and other management personnel,

the requests are stated in very general terms so as not to compromise an employee's medical privacy. Unfortunately, when the requests are not understood by the employee or the doctor, the new system gives the Flight Attendant few if any avenues for clarification.

Elimination of management from the loop was well-intended. Mr. Finch testified:

> We wanted to make it easier for the employees. The biggest complaint we've heard is that they don't have a way to directly communicate with Medical, and the supervisor is the middleman. So we wanted to find a way to make that a little bit easier for everybody and communicate more effectively. [T 536]

Ms. Mase-Hecker noted that the Union Health Desk employees were initially quite pleased with this new procedure because supervisors were being bypassed and "employees could now go directly through Medical without the middleman." [T 874]

Unfortunately, it did not work out that way. Under the new system, employees who need clarification of requests from Medical have no means of communicating with someone who can respond knowledgeably. Testimony at arbitration established that communication from Medical to employees goes in only one direction; Medical does not respond to employees' inquiries or to those of employees' doctors.[14] The result has frequently been that employees and their health care practitioners provide the information they think is wanted, but when AA Medical personnel are not satisfied, they put a notice on JetNet that the additional documentation provided is "Incomplete", without clarifying what is still missing. Without a resource for clarification, employees are left to guess where they went wrong.

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[14] Apparently communication between doctors can only be initiated by AA Medical physicians.

In such circumstances, it is foreseeable that the employee will miss the fifteen day deadline for providing additional information, and then the case is auto-closed. If the employee wishes to continue to pursue FML certification, s/he must at that point start again with an entirely new application. This means that at least some of the absence that initially triggered the request will not be eligible under the timelines of the new application. Denial of a benefit arising from a flawed communication system results in the arbitrary and capricious application of the policy, particularly when there is no articulated means for re-opening an application for extenuating circumstances.

To its credit, the Company attempted to provide employees with a resource for their questions about FML, the Employee Services Help Desk. Employees can access this assistance by email or through using a "live-chat feature". Although this system may be of great help for employees seeking general information on process, procedures, eligibility, medical standards, etc., it is seriously flawed when an employee is seeking clarification regarding AA Medical's request for additional medical information. Help Desk employees have no greater access to information about an individual employee's application than does the employee who is asking the questions; they can see only the same messages on JetNet that the employee sees. If an employee who is familiar with his or her own medical condition cannot understand from the face of the request what additional information AA Medical requires, how can a Help Desk employee be expected to?

There is obviously more than one method of curing this problem. Requests for documentation could be private, not public, and therefore tailored more specifically to the employee. Or employees could have access to medical personnel who could

answer questions specific to an employee's application. Or there might be a combination of these ideas or a completely different procedure that would facilitate this type of communication and avoid the inevitable timing-out of otherwise qualified applications.

It is important to note that the Company's new procedures have not been problematic for the bulk of bargaining unit FML applicants who are granted their benefit based on the initial application. Those tend to be the straightforward cases requesting block leave for a clearly qualifying condition. The problems arise for no more than 25% of applications from Flight Attendants, usually ones requesting intermittent leave, where the Company seeks more information. The record reveals that many such conditions are eventually found qualifying, even when some related absences have been disqualified because of missed deadlines. Although some disqualifications may be attributable to the actions or inactions of individual Flight Attendants, those that result from a flawed system of obtaining additional information constitute an arbitrary denial of certification for otherwise qualifying absences.

The issue of proper communication extends to the most mundane procedures if they serve to deny qualified employees the offered benefit. The arbitration record is filled with examples of blank faxes arriving at the Medical Department. Company witnesses explained that this occurred because some fax machines require face up insertion of documents and some require face down. If Flight Attendants are using fax machines unknown to them, they may inadvertently insert their documents improperly.

This results in the blank side of the page being faxed, yet the machine indicates that the fax arrived at its destination.

Ms. Valencia testified that they attempt to contact the sender when something goes wrong but not every sending machine is programmed to display its telephone number at its arrival site. Therefore, Medical just keeps the stack of mis-sent documents and its fax log (which displays an arrival time even if no telephone number is available) and researches them in the event an employee later claims a fax was sent. More often than not, employees who have fax problems miss the submission deadlines and are administratively denied FML certification, requiring a new claim and the loss of at least one absence that would have otherwise qualified.

The fax issues run afoul of two of the standards necessary to avoid arbitrary and capricious administration of the FML policy. One, regarding a review or appeal system, is addressed below in the discussion concerning that standard. The other points us right back to communication.

The fax problem has been known by the parties for some time. They discussed it in their Continual Improvement Process meetings and even agreed to a partial solution suggested by a Union official in March 2005 – to advise employees to write their names and employee numbers on the reverse side of every paper faxed so that if the document had been faxed the wrong way, its sender could be identified. What is both disconcerting and troubling is that by the time the arbitration hearings started six months later, this simple and virtually cost-free solution had still not been put into practice.

The Union too must take some responsibility here. While we sympathize with the Union's wish to avoid the appearance of endorsing the Company's new procedures or

participating in a unilateral plan, there are simple ways to phrase such a notification that would both satisfy the Union's legitimate concern and also assist its members to receive benefits for which they are eligible.

Company witnesses also testified that such problems could be avoided if employees checked JetNet after faxing documents, because their arrival would be posted in the employee's FML record. Witnesses asserted that the Company has informed employees to check JetNet regularly but the large stack of bad faxes indicates that the Company's attempt at communication has not been as successful as could be expected.[15] Here too the Union must be in the forefront of educating its members regarding how to comply with procedural requirements and thereby maximize the likelihood they will be granted FML.

We must note one area of medical controversy we find very troubling. There is a cluster of conditions such as sinusitis, migraines, endometriosis, some back injuries, irritable bowel syndrome, and others that were formerly certified for intermittent leave but, starting in 2004, were frequently denied. AA Medical witnesses testified that these denials are not the result of a change in policy but of increased scrutiny under the old one. They could not easily explain, however, the distinction between repeated episodes of a chronic condition and a recurring non-chronic condition with the same diagnosis.

For example, Nursing Manager Tracy Nelson testified that some sinusitis may occur frequently as a result of a sensitivity to allergens or other irritants but is not chronic, i.e., each time it is treated, the condition is entirely cured. Such episodes, if

[15] This is an instance where Flight Attendants' travel schedules could put them at a real disadvantage if they were on an extended trip, particularly international, immediately following the faxing of information by themselves or their doctors.

longer than three days, might qualify for block leave but would not be eligible for intermittent leave. Other cases of sinusitis may indeed be chronic, indications of which might be the use of intravenous antibiotics and/or the presence of nasal polyps; this condition would qualify for intermittent FML.

The above example is not difficult for a non-medical person to understand but explanations for other conditions are not as persuasive. For example, Ms. Nelson noted that irritable bowel syndrome is a chronic condition that never leaves the body [T 1289], yet unchallenged testimony established that employees with irritable bowel and similar conditions are newly being denied intermittent leave. [T 253][16] We understand that such judgments are made on a case-by-case basis depending on the individual circumstances presented by each applicant for leave, and that there is no way to pre-publish a list of circumstances for each condition that distinguish between a chronic and a recurring classification. We are concerned, however, that absent a set of general guiding principles for identifying a so-called chronic serious health condition, as opposed to a merely recurring one, AA Medical's denial of intermittent leave for acknowledged long-term problems appears prompted more by a desire to reduce intermittent FML use than by a genuine medical opinion. Any disagreement between an employee's doctor and AA Medical's assessment about the certification of the employee's condition and the need for leave must be treated as a medical dispute, subject to a right of appeal, as discussed elsewhere.

[16] The discussion in this paragraph refers to denials relating to the chronic vs. intermittent nature of a condition; under the FML policy standards, even chronic conditions must still meet one of the six definitions of a serious health condition.

The Company's obligation for clear communication does not stop with the initial application or requests for additional information. Despite the Employer's assertion to the contrary, when employees' conditions are deemed ineligible for FML designation, the Company must clearly articulate its reasons for denial in terms that relate to the procedural or substantive standards of the policy. Absent such notice, employees are deprived of ascertaining whether the policy is being implemented as stated and not arbitrarily or inequitably.

The policy must be applied equally to all bargaining unit employees

This issue has arisen with respect to how employees who are out of work as a result of an injury on duty (IOD) are treated with respect to FML. The Company's policy is to "burn" FML for those absences, even though an employee has not submitted an FML application, resulting in a diminished number of days available to them for other FML-qualifying absences.

There is nothing in either the parties' collective bargaining agreement nor any statute that prohibits the Company from charging FML for qualified absences that were caused by an IOD. In fact, the federal FMLA specifically permits this practice. Under a standard for equitable treatment, however, the criteria for assessing whether a leave qualifies for FML must be identical regardless of the genesis of the condition.

The record clearly establishes that the Company has held employees on IOD to a *lower* standard when determining whether their absences qualify for FML designation. For example, testimony at arbitration established that the Company was automatically burning FML for Flight Attendants who were absent on IOD for three days or less,

whereas other employees cannot qualify for FML block leave unless their absences are at least four days. This information came to light during an arbitration hearing in October; by the next day of hearing in January, Company officials assured the Board that this practice had been discontinued and the Company was in the process of re-coding all those employees whose FML leave had been improperly burned for this reason.

There is a second parameter on which employees on IOD are held to a lower standard for FML qualification. Employees who *apply* for FML, either block or intermittent, have their medical documentation closely scrutinized to establish that their absences are caused by a "serious health condition" (as defined in the FMLA and the current Company policy) for which it is medically necessary to be absent from work, rather than by health conditions not deemed "serious" under the federal definition but which result in an inability to perform the essential functions of the job. AA Medical employees testified that they assume that all IOD-related absences meet the required standard of "seriousness" and the Company automatically codes them for FML without requiring the same medical documentation demanded for injuries or conditions not arising from work-related activity.[17]

AA Medical employees asserted that IOD insurance requirements ensure that all the requirements for a serious medical condition are met and therefore FML designation can be automatic. This defies common sense. We have already seen such an approach was incorrect for absences of fewer than four days. Moreover, a person who fractures a big toe, for example, may receive the same diagnosis and treatment from a

[17] The medical documentation submitted by employees with IOD conditions goes to the Company's Workers' Compensation Department, not to AA Medical FML employees.

doctor regardless of where the injury occurred. If a health care provider believes that the only necessary treatment is a week of bed rest, ice and aspirin, that is what the provider will order. Under the new Company standards, such a regimen would not qualify for FML designation if an employee applied as a result of an off-duty injury but would be automatically designated as FML leave if the injury had occurred on duty. This clearly violates the principle of equitable treatment. We do not agree with Mr. Finch's suggestion that IOD employees bear the burden of proving that their conditions do not qualify for FML designation.

The policy must have known appeal mechanisms

Absent some sort of review of its own decisions, the employer is free to apply a policy in an arbitrary or capricious manner. The so-called informal FML appeal process described by Company witnesses in this case is inadequate for several reasons: it is not widely known; it is applied only to employees who are "squeaky wheels" or who appeal to the sympathy of Medical employees; and there is no uniform process for making an appeal and no articulated standards for granting one.

The parties' normal NOD process would be sufficient, if not optimal, to deal with non-medical issues if two standards are met: employees in the bargaining unit, at Employee Services, and in AA Medical are all informed that a NOD is the appropriate venue for any complaint, challenge or appeal of the denial of benefits; and the process is devised so as to avoid the necessity for an employee to reveal medical information to non-medical personnel in violation of Article 26 H. 1 of the parties' collective bargaining agreement.

This Board wishes to observe that a preliminary internal review system might constitute an extremely effective alternative in reducing the number of FML-related NODs heard by the QSB, and thereby more time- and cost-effective for both parties. Employees who could establish that they had filed paperwork in a timely manner or had been caught up in circumstances beyond their control leading to a missed deadline would probably prevail either during the DRC or at arbitration; an internal review could hasten the inevitable with little time or effort and much improved morale.

AA Medical employees testified to the skeleton of such a review process but the record firmly established that it was little known to employees, Union officials or even Help Desk personnel. The employees who received the benefit of such a review appear to be those who either insisted loudly enough or knew someone who knew someone who knew a review could be had. This describes the essence of an arbitrary and capricious process. On the other hand, the record contains details of an appeal process for employees (not Flight Attendants) at the Company's Tulsa base which seems to work equitably and satisfactorily for all involved. This Board believes that the Company should step back and consider procedures that will streamline the FML application process not only with respect to certification but also to resolving inevitable administrative disputes.

It is important to note that the Employer is entitled to set strict rules for observing timelines and to enforce them, just as it may have rules that impose discipline for five minutes of tardiness or discharge for stealing a nickel. But if no allowances are made for circumstances completely beyond an employee's control, such as a work schedule or the genuine unavailability of a doctor, the rules become arbitrary. The Company has

already acknowledged this fact of life when reconsidering cases on "informal" appeal – a doctor called away to service in Iraq, for example. The only necessary change in this process is that reconsideration, if undertaken at all, must be accessible to everyone and applied even-handedly.

The compassion shown when AA Medical granted a block leave for someone with cancer even though the doctor had not requested the proper dates is a heartening story of human empathy. But we do not know how many similar situations existed that did not come to AA Medical's attention or did but were denied certification nonetheless. All employees are entitled to the same consideration –and reconsideration – or the process is arbitrary and capricious.

Medical disputes present a different set of challenges. Using the normal grievance and arbitration system requires an arbitrator without medical training to rule on medical matters about which doctors themselves disagree. The parties recognized the inherent difficulties of using an arbitrator under such circumstances when they negotiated a mechanism outside the ordinary dispute resolution process of grievance and arbitration in order to resolve fitness-for-duty disputes. When the Company denies Flight Attendants medical clearance to return to work, they may appeal to the AA Medical Review Board. If the Board upholds the decision to deny clearance, a jointly-selected third doctor makes the final decision. The procedural details differ according to whether the restrictions are intended to be temporary or permanent, but the basic outline is the same for all circumstances. The FMLA statute provides a somewhat different mechanism for resolving disagreements about medical determinations.

Evidence in the record leads us to conclude that the Company is not utilizing the prescribed statutory dispute resolution process for all medical disputes, particularly with respect to the frequency and duration of intermittent leaves. We have to presume that once employees have been educated regarding their appeal rights with respect to the FML process, a denial for medical reasons would become the subject of a NOD. Few arbitrators would choose to make a medical decision on an issue about which physicians disagree and would probably send such a case for a neutral physician review. It might be far more efficient for the parties to establish a medical appeal procedure that is useful to all parties and avoided lengthy procedural pathways.

Both the Article 20 mechanism and the statutory mechanism would probably be sufficient for these circumstances; they each have both advantages and drawbacks. The Article 20 procedure is attractive because it is familiar to the parties and requires only one outside medical consultation; its drawback is that it might establish a separate FML appeal process for Flight Attendants. The statutory method would be the same for all employees but it cuts AA Medical opinions out of the loop and requires more time and money. Whatever mechanism is used – and there may be a third one that would address both sets of problems – it must be known to bargaining unit employees and followed scrupulously in all relevant situations.

The policy must not deny employees of other negotiated benefits

Chiropractic services are used by a large proportion of the Flight Attendant work group, presumably because of the nature of their job duties. Their importance became manifest during RPA negotiations when the Company proposed the cost-saving measure of limiting the number of chiropractor visits covered by health insurance. The

Flight Attendants objected and the final health coverage agreement in the RPA does not limit chiropractic care.

Moreover, for the first time one health insurance plan (the "Standard Medical and Dental Plan for Flight Attendants"), which includes chiropractic coverage, was incorporated by reference into the parties' collective bargaining agreement. (UX 8, RPA, Attachment K-1) That attachment also provides:

> The Standard medical and Dental plans will not be amended in any way that materially affects the benefits provided to . . . Flight Attendants without the consent of the APFA . . . .
>
> (*Ibid.*)

This document was signed on 30 September 2003 to be effective 1 January 2004.

Prior to June 2004, the Company accepted medical opinions from chiropractors for the purposes of health insurance coverage, certifications for sick leave and IOD benefits, fitness for duty examinations, and FML certifications. Effective 1 June 2004, the Company adopted the FMLA standard which defines "health care provider" by restricting the scope of chiropractic certifications as limited solely to "treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist." 29 CFR 824.118 (b)(1) Chiropractors are the only named medical practitioners whose ability to certify a serious health condition is not in all areas covered by their medical license.

The Union argues that this limitation deprives Flight Attendants of their negotiated chiropractic benefit, a benefit Flight Attendants specifically bought when bargaining the RPA. The Company disagrees, pointing out that employees' visits to a chiropractor for all conditions are still covered by their health insurance.

While the Company is technically correct, the practical effect of limiting the scope of chiropractors' certification of serious health conditions for FML purposes also limits a prudent Flight Attendant's use of the medical benefit. A Flight Attendant who regularly consults a chiropractor for a range of ailments within the doctor's scope of license runs the risk of not having an acceptable medical provider to document his or her condition if s/he needs to apply for FML some time in the future. It is possible that some non-treating physicians would provide the paperwork required to support an FML application, but certainly not without at least one comprehensive examination at the Flight Attendant's personal expense. It is much more predictable that many doctors would be reluctant to do so, particularly in the extremely short timeframe permitted under the FML policy. Rather than run that risk, many Flight Attendants might feel obliged to change practitioners and thus be deprived of the benefit negotiated by the Union on their behalf.

It appears that the federal statute predicted this as a possible dilemma. The same section that limits chiropractors' scope for certifying serious health conditions also defines a health care provider at Paragraph (b)(4) as:

> Any health care provider from whom an employer or the employer's group health plan's benefit manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits[.]
>
> (JX 6)

This seems to imply that if an employer accepts certifications from health practitioners for other purposes, it must do so for FML purposes as well.[18] Although this language is not controlling under the collective bargaining agreement, it indicates to this Board the

[18] The federal regulations contain no further guidance as to how the specific limitation on chiropractors intersects with this broader definition. The Company has requested an interpretation of this language from DoL and is awaiting its issuance.

recognition by the writers of the FMLA regulations that the strict federal definitions of health care provider apply only when an employer does not have any of its own definitions, *i.e.*, if it does not offer health insurance to its employees.

The statutory language of Paragraph (b)(4) also addresses another concern of the Company. The Company argues that its limitation of chiropractors' certifications is sensible and necessary in order to avoid receiving certifications from practitioners who are not qualified in the area of medicine in which they are offering an opinion. Nurse Finch testified that the Company's policy has to ensure that healthcare providers who submit documentation for FML are practicing within the scope of their licenses. He cited as a classic example of this problem a chiropractor who fills out a form requesting time off for a condition such as sinusitis that has nothing to do with chiropractic medicine, or a podiatrist who fills out a form for appendicitis.

This worry is completely without foundation. There has been no suggestion anywhere that the Company could be forced to take a certification from a chiropractor on a condition that falls outside the scope of his or her license to practice medicine. A heart attack is a good example. Many physicians are not qualified to treat a heart attack competently; it is unlikely that a health insurer would cover treatment for said heart attack from a gynecologist or an ENT, for example, even though they are medical doctors. The same is true for chiropractors. In fact, a Company document entitled Covered Medical Expenses states in pertinent part:

> **Chiropractic care:** Under the Standard Medical Plans, coverage includes *medically necessary* services of a *restorative or rehabilitative* nature provided by a chiropractor practicing with the scope of his or her license. [Emphasis in the original]
>
> (UX 11)

This would also apply with respect to FML certifications. There are medical conditions, neither heart attacks nor subluxation of the spine, for which the Company recognizes chiropractors as qualified to treat employees and to certify them for other purposes; it is arbitrary to deny them the same certification qualifications for FML.

In fact, although Mr. Finch cited the federal statute's limitations on chiropractors, he also stated:

> Anybody who is licensed to provide healthcare services or anyone who our company's health plan accepts as a healthcare provider is more than welcome to fill out the family leave form. . . .What we will do is look at it to make sure that that particular healthcare provider is practicing within the scope of their license. [T600]

That is precisely what the Company should be doing in terms of all health practitioners; with respect to chiropractors, their scope of practice extends well beyond subluxation of the spine established by an x-ray and treated by manual manipulation. Flight Attendants have negotiated the benefit of that treatment and the Company's FML policy may not serve to diminish it.

Remedies

Some of the flaws we have found in the Company's FML policy can only be remanded to the Company to be adjusted by any means it chooses, as long as the outcome is in accordance with the standards set forth herein. These include the vague and unarticulated nature of Question 10 on the initial application; the imprecise wording of the requests for additional information; the utter lack of specificity of the notice that only partial information has been provided; the absence of an avenue for Flight Attendants to clarify questions about the Company's requests for additional information;

and the lack of review and/or appeal processes that are known to management and to AA Medical personnel who communicate with employees about their FML requests. The NOD process is acceptable if is it adjusted by the parties when necessary not to run afoul of other contractual requirements.

Two of the identified flaws, however, constitute contract violations and must be substantively modified. First, the medical status of employees on IOD must be scrutinized with reference to the same standards used for all other employees designated as FML-eligible. The Company is free to do this by any mechanical means it designates but in the future, IOD absences may not automatically be coded for FML until designated as FML-qualified by medical review. Second, the Company must accept chiropractors' FML certifications for all and any conditions that fall within the scope of their licenses, in the same manner in which the Company accepts fitness-for-duty certification, medical certificate requirements, etc., in accordance with the Company's own policy for Covered Medical Expenses.

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- The Company shall revise its procedure so that it reviews all IOD absences under the same FML standards used for all other FML-coded absences, and designates as FML-qualified only those IOD absences that meet the stated standards. Flight Service shall no longer automatically code IOD as FML but will wait until AA Medical has certified the leave as FML-qualified. The Company shall also notify Flight Attendants of the number of FML days burned for any given IOD absence.

- The Company shall revise its health care practitioner standards to accept chiropractors' FML certifications for all and any conditions within their scope of practice where the Company accepts fitness-for-duty certifications, medical certificate requirements, etc. from those same practitioners.

- The Company shall review and recode all pertinent FML-coded IOD absences retroactive to one year from the date of this award plus any earlier codes where a change might affect the employee's ACC status.

- The Company shall review all pertinent FML applications that were rejected for the sole reason of a chiropractor's scope of practice retroactive to one year from the date of this award plus any earlier rejections where the employee's ACC status might be affected, and take appropriate action.

The Board retains jurisdiction for 90 days from the date of this award for the sole purpose of resolving any disputes arising from the implementation of the remedies found at the two final bullets above.

Dated:

Susan R. Brown, Arbitrator

Ben Williams for the Company — Dissent in Part 8/4/06

Melissa Romig for the Company — Dissenting in Part 8/4/06

Susan French for the Union — 8/16/06 Concur

Julie Moyer for the Union — 8/23/06 Concur