Arbitration

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| Association of Professional Flight Attendants | Case # SS-46-2001-APFA-6 |
| and | Gr: Family and Medical Leave Policy |
| American Airlines, Inc. | Award: June 30, 2003 |

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| Arbitrator: | Roberta Golick, Esq. |
| APFA Board Members: | Susan M. French<br>Julie Moyer |
| AA Board Members: | Emily Johnston<br>Stephen Howell |
| Hearings: | October 14, 15, 16 and December 10, 11, 2002 |
| Appearances: | <u>For the Union</u><br>Professor Carin A. Clauss, Esq.<br>University of Wisconsin Law School<br><br>Patt A. Gibbs, Esq.<br>Gibbs & French<br><br><u>For the Company</u><br>L. Denise Galambos, Esq.<br>Morgan Lewis & Bockius LLP<br><br>Gregg M. Formella, Esq.<br>Of Counsel, American Airlines |

The Issues

Whether American Airlines had the right in October 2001 to make changes in its FMLA policy, and if not, what shall be the remedy?

Whether, in making such changes, American Airlines violated its Collective Bargaining Agreement with the APFA, and if so, what shall be the remedy?

Background

On October 22, 2001, American Airlines implemented unilateral changes to its previously existing Family and Medical Leave policy (familiarly referred to as FML or FMLA). The Union's grievance challenges the Company's actions, claiming, in essence, that the policy as it existed prior to October 2001 is protected by the collective bargaining agreement against unilateral change and that, in any event, the changes in the policy violate discrete provisions of the current contract. The parties have stipulated that there are no Federal statutory issues at stake here.

In July 1991, American Airlines unilaterally instituted a company-wide FML policy. The policy allowed employees to take up to 180 days off in a two-year period to care for a newborn child, a newly adopted child or a sick relative. The policy remained consistent through 1993.

In January 1993, during negotiations for the 1992-1995 contract, the APFA proposed that the Company "provide for Family Leave." This proposal coincided with the new Federal Family and Medical Leave legislation that was enacted into law on February 5, 1993. In

July 1993, the Union withdrew its proposal that Family Leave be provided for in the contract, but reinstituted it in September 1993, as follows:

> APFA's withdrawal of its proposal to include family leave provisions in the Agreement was premised upon the understanding that the "Family Medical Leave Act" applies to Flight Attendants. If this is not the case, APFA reinstates its original proposal.

Resolution of the 1992-1995 contract occurred in stages. Following a five-day strike in November 1993, flight attendants returned to work with an agreement that unresolved issues would be submitted to binding interest arbitration. Over the next several months, the Union and the Company worked together to reduce the number of issues going to arbitration.

In response to the Union's qualified reinstatement of its proposal to provide for Family Leave in the contract, Jane Allen, Vice President of Employee Relations, furnished the APFA (and all flight attendants, pilots and flight engineers) a letter outlining American's intentions with respect to the Federal law. She wrote, in pertinent part:

> On January 10, 1994, the new federal Family and Medical Leave law will take effect for pilots, flight engineers and flight attendants on the American Airlines U.S. Payroll. One of the requirements of the new law is to continue Company paid benefits for employees on Family Leave. This provision and others will increase the Company's costs and will necessitate some further adjustments to our current policy. However, even after these changes, American's revised Family Leave policy will continue to exceed the basic requirements of the law.
>
> Eligible crewmembers covered by the new policy may use Family Leave for birth, adoption, or foster care placement; to care for their seriously ill spouse, parent or child; or for their own serious health condition. Although the federal Family and Medical Leave Act contains provisions for an employee's own serious illness and may be beneficial in some circumstances, accrued sick leave benefits will also continue to be available.

> Crewmembers who are eligible for the new Family Leave policy may take up to 12 weeks of continuous unpaid leave during a rolling 12 month period with guaranteed reinstatement to an available position based on the crewmember's seniority. In special situations related to a serious health condition, crewmembers may be eligible to use intermittent or reduced schedule Family Leave provided they have 12 months active Company service and have worked at least 60% of a full time schedule in the 12 month period immediately preceding the start of the leave. All Family Leaves are unpaid, thus all time taken off for Family Leave will reduce a crewmember's pay guarantee. Crewmembers covered by the new policy will continue to receive benefits during their leave but will be responsible for benefit costs which exceed the Company's normal contributions...
>
> ...AA Regulation 145-7 will be revised and issued in the future...[1]

Based upon the FML information furnished by the Company, APFA did not press management further to provide for Family Leave in the collective bargaining agreement.

The parties continued to work to reduce the number of issues going to binding arbitration, and by March 1994, had reached tentative agreement on a number of items which were subsequently ratified by the membership. Thereafter, they continued to whittle down the outstanding issues and reached a second tentative agreement on several additional items which were ratified by the membership in January 1995.

One outgrowth of the post-strike negotiations process was an agreement by the parties to engage the services of Professor Stephen Goldberg, President of the Mediation Research Educational Project (MREP) to conduct an evaluation of the labor relationship and to make suggestions for its repair. Professor Goldberg issued a report to the parties in the fall of 1994, pointing out, among other things, that American's Attendance Policy was a matter of mutual concern that the parties might work together to address.

[1] AA Regulation 145-7 is the FML Policy in the Company's policy manual, the NavigAAtor.

Accordingly, by letter of April 5, 1995, then Managing Director of Employee Relations Sue Oliver wrote to then APFA President Denise Hedges:

> This will confirm our agreement reached during the negotiations leading to the Tentative Agreements recently ratified by the flight attendant membership that the Company and the APFA will meet to discuss ways to reduce flight attendant lost time.
>
> We look forward to working collaboratively with the APFA toward this goal.

In keeping with the suggestions contained in the MREP report, the parties in May 1995 appointed members to a newly designated Joint Lost Time Committee to be guided by a facilitator from MREP, Sylvia Stratek. The Committee began to meet in August 1995, and soon established ground rules, underwent training in interest-based resolution of disputes, identified a list of "critical issues" and a list of "interests."

One subject that was addressed by the parties early in their discussions of lost time was the Company's FML policy. There was general agreement that flight attendants were not adequately informed about the available benefits. First, the Committee worked together to ensure that the committee-members understood the existing policy. Then, on March 4, 1996, the JLTC published a communication to all flight attendants describing the highlights of the Company's Family Leave Policy.

The primary purpose of the Joint Lost Time Committee was to work cooperatively to address issues around American's Attendance Policy. The parties had a number of mutual and individual concerns that were discussed collaboratively over the course of many months. On August 26, 1996, the JLTC signed a joint resolution establishing a

new Flight Attendant Attendance Policy to be effective September 4, 1996 for a two year trial period. As before, any leave taken pursuant to the Company's FML policy did not count as an "occurrence" under the new Attendance Policy.

Despite the hopes and expectations of the JLTC, lost time at the Company actually increased rather than decreased following the introduction of the new attendance policy. Within a year after its implementation, the JLTC approved a modification of the policy, but the problems persisted. The Committee could not reach consensus upon a further modification, whereupon the Company, after notice to the Union, unilaterally implemented a different Attendance Policy effective May 1, 1998. By mutual agreement, the JLTC disbanded. [2]

From 1998 until 2001, the parties engaged in negotiations for a new labor agreement, and there were no proposals specifically about the FML policy. However, in response to a management proposal that attendance qualifications be added to the requirements for the Purser classification, the Union agreed provided that language was added exempting FMLA-approved absences. This reference to FMLA in Article 34.B is the only direct reference to Family Medical Leave in the collective bargaining agreement. On September 12, 2001, the Union ratified the current 1998 - 2004 collective bargaining agreement.

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[2] The Company had proposed to the Union in April that the parties designate representatives to take a fresh look at the lost time problem, with the original representatives from the JLTC serving as mentors to the new group. The Company proposed that it introduce the May 1 attendance policy changes with the understanding that the new committee could reach agreement on recommendations that would then be presented to the Company for review and evaluation. The Union declined the offer to reconstitute or reconvene the JLTC.

While negotiations were still on-going in 2001, however, the Company, in some financial distress, had begun to examine its Family Leave Policy. The Union was not involved in or aware of this self-examination. In the summer of 2001, American's Medical Department established a "Family Leave Task Force" made up of managers of all the work groups in the Company to study possible changes, company-wide, to the existing FML policy. Detailed analyses were completed and recommendations were made. Following the tragedies of September 11, 2001, when the Company's financial situation became even more dire, management decided to implement recommended modifications to the Family Leave Policy. On October 22, 2001, the Company formally announced the changes.

Though the October 2001 changes impacted several terms of the previous FML policy, the major changes fell into three areas: the use of paid time during FML; the "burning" of FML during absence attributable to IOD (Injury on Duty) for a serious health condition; and eligibility requirements for FML. In a nutshell, where under the old policy, employees taking FML could elect to take the leave unpaid (thereby preserving their accrued sick leave and vacation leave), as of October 2001, employees must concurrently burn accrued sick leave (for the employee's own illness) or accrued vacation leave (for family members' illness). Where under the old policy, employees on IOD did not simultaneously burn FML leave, under the new policy, each day of IOD for a serious health condition concurrently burns one day from the employee's FML bank. As for administrative eligibility for FML, under the old policy, the prerequisite for block FML

was 12-months of active company service and the prerequisite for intermittent FML was both 12 months of active service and 60% of a full time schedule worked in the twelve months preceding the start of the leave. Under the new policy, the prerequisite for both block and intermittent leave is twelve months of active Company service and a minimum of 720 on-duty hours in the twelve months preceding the start of the leave.

The Union filed a grievance on December 4, 2001. Union President John Ward wrote:

> I hereby protest the Company's unilateral changes made to the American Airlines FMLA Policy, NavigAAtor Section 5-10, including but not limited to: 1) the Company's failure to properly notice the APFA and the flight attendants; 2) unilateral changes in the application of the policy which negatively impacts the benefits and rights of the flight attendants in direct conflict with the past practice of the parties; 3) unilateral modifications in the policy that violate the seniority provisions of the current Agreement; and, 4) the failure of the Company to meet and confer with the APFA before making these changes.

The grievance was denied by Managing Director of Employee Relations Lorraine Mase-Hecker, who responded:

> ...As you are aware, there is no contractual provision that specifically addresses the FMLA policy. You were, however, notified on October 22, 2001, of these changes prior to the company's implementation. The company maintains its right to modify or change company policy. Changes to the FMLA policy were unilaterally implemented for all work groups, with consideration given to the flight attendant work force which resulted in a policy that is more generous than required by law...
>
> Regarding the third point outlined within your grievance, I am unable to answer with any specificity since your grievance fails to cite any specific contractual articles that have been violated, nor does it detail how the modification to the policy violates the seniority provisions of the current agreement. If you will provide more specific information outlining the alleged violation, I will be happy to fashion a more thorough response on this issue.

The grievance proceeded to the System Board of Adjustment.

The Parties' Positions

*The Union*

The Union presents a multi-level argument. First, it points out that at a minimum, the Company's FML policy was a benefit that the Company had extended to the Union in 1991, had significantly improved in 1994, and had continuously maintained through two subsequently negotiated contracts. As such, the benefit became part of the parties' agreement and could not be changed unilaterally and without notice. The Union relied upon the continued availability of this long-standing, valuable benefit when it shaped its bargaining demands and when its members on the JLTC agreed to significant changes in the attendance policy. The Union considered the Company's provision of FML a binding commitment, not unlike a myriad of other extra-contractual but binding commitments developed between the parties through the years. The contract has no zipper clause limiting the parties' rights and obligations to the express words of the agreement.

Past practice aside, the Union continues, there were three distinct markers which operated to make FML a part of the bilateral bargain. The first, during the 1992-1995 negotiations, was the Company's response to the Union's proposal that FML be included in the contract. At that time, management furnished the Union negotiators with a letter outlining the benefits that the Company intended to provide to flight attendants. The second was the collaborative work of the JLTC, where the parties engaged in a formally structured process for resolving issues and making decisions, many involving the FML Policy. At the very least, once the Union agreed to join the Company in promoting

family medical leave, it acquired "co-ownership" of the policy. The third marker operating to establish FML as a bilateral bargain was the parties' mutual recognition of the FML as a premise for other negotiated agreements. The JLTC relied upon the availability of FML to resolve several issues, most notably, the attendance policy.

The Union contends next that even if it is determined that the Company had the right to make unilateral changes to its FML policy, the changes it elected to make violated existing rights protected by the collective bargaining agreement. Importantly, the changes wreak havoc with the contractual principle of equal pay for equal work governing the complex pay structure set forth in Articles 3 and 8. The change in the FML policy that now bases eligibility for the benefit on the basis of "duty hours" undermines the leveling factors carefully incorporated into the contract's pay provisions. Further, the Company's new eligibility requirement of 720 duty hours creates a new kind of "low-time flier" at odds with Articles 6, 26 and Appendix R of the agreement. The 720 duty-hour requirement divides the bargaining unit for purposes of FML in a manner that is inconsistent with the contractual meaning of full-time flight attendant. Finally, the new eligibility requirement negates the benefits of the contract's seniority provisions and diminishes other contractual protections.

*The Company*

The Company argues that the Union has failed to identify a specific contract provision as a basis for its grievance. The FML policy is certainly not expressly incorporated into the

contract. The single reference to FMLA in the provision dealing with Purser's qualifications cannot be regarded a commitment to preserve the policy unchanged.

Similarly, the FML policy has no contractual status as an enforceable past practice. The record indicates that at all pertinent times, the Company has been diligent in protecting its ability to make changes in policy as management deems fit. And in fact, the Company has made numerous changes to the FML policy through the years, all without Union complaint. In the absence of any contractual limitation on management's prerogative to modify its unilaterally implemented policies, the grievance must fail.

The Company refutes the Union's assertions that the FML Policy is a negotiated benefit. Neither the bargaining history nor the work product of the JLTC created any sort of contractual obligation limiting the Company's rights to make unilateral changes. The Union withdrew its proposal in the 1992-1995 negotiations to provide for FML in the contract, and the JLTC's involvement with FML was simply to educate flight attendants about the availability and the terms of the then-existing policy.

While the Company contends that the reasonableness of the FML Policy changes is not an issue for the Board to consider, it stresses that the Company has acted reasonably in all pertinent regards.

Discussion

It bears repeating at the outset of this analysis that the case in arbitration is purely a contractual issue. The Federal Family and Medical Leave Act, while a presence in the background of the parties' dispute, is not a factor to be grappled with here. The Union does not claim in this forum that the October 2001 FML policy instituted by the Company violates employees' statutory rights under the Federal Act. The Union's arguments here are first, that the Company breached its contractual obligations to the Union by unilaterally modifying the policy, and second, that the modifications themselves violate the collective bargaining agreement.

The Union's claim that the Company was precluded from implementing unilateral changes in the FML policy is premised upon an argument that the FML Policy as it existed prior to October 2001 was a protected contractual benefit.[3] In support of that claim, the Union points to three possible contractual anchors: the express language of the collective bargaining agreement; bargaining history, including the work of the Joint Lost Time Committee and other extra-contractual agreements; and the parties' past practices with respect to the decade-long availability of this major benefit.

Beginning with the express language of the collective bargaining agreement itself, there can be little disagreement that the contract is *virtually* silent with respect to any FML guarantees. Though the seven-hundred page contract does, in one place, acknowledge

[3] The parties clashed at arbitration about whether FML at American Airlines is a "policy" or a "benefit." In fact, it is both, within the ordinary meaning of the words. As will be discussed in greater detail, the Company, since 1991, has had a policy of providing family leave to its employees. The policy has, without question, conferred a benefit upon employees.

the existence of FML leave ("FMLA, emergency leaves, Article 9.E situations, and/or IOD will not jeopardize a Purser's ability to meet her/his Purser program annual participation requirement." – Article 34.B.6.(e)(6)), it is an unreachable stretch to use this reference as a vehicle by which to import the Company's FML policy into the contract as an immutable benefit.

As the Company has handily demonstrated, the policy physically resides, not in the collective bargaining agreement, but in the NavigAAtor, the guide to American's policies and procedures. That American's unilaterally promulgated policies are not negotiated terms and conditions of employment is self-evident. Nonetheless, lest there were any doubt, the Company's regulation book has at all times pertinent to this case, contained the following in its preamble:

> The provisions of these regulations apply to employees of American Airlines.
>
> American Airlines reserves the right to amend, change, or cancel these regulations or any other practice, program, plan, administrative guide, or any part thereof at its discretion. Such materials, including these regulations, are statements of the Company's intent. From time to time, you may receive updated information concerning changes in policy. These materials are not contracts or assurances of compensation, continued employment, or benefits of any kind.

Certainly insofar as the direct evidence in this case is concerned, the Company's declaration of reserved management rights in the face of a silent contract is impossible to ignore.

Though the Union does not seek to have management's rights *ignored*, it does, by its subsequent arguments, seek to have management's rights *curtailed*. Even if the contract is regarded as silent on the matter of the FML benefit, the Union argues, the parties have

in subtle and indirect ways, converted the policy from a decree under management's exclusive control into a binding obligation. In this regard, the Union points to exchanges between the parties in the 1992-1995 contract negotiations, to a wealth of non-contractual but equally enforceable agreements forged by the parties through the years, and to the shared understandings and resolutions reached by the Joint Lost Time Committee during its tenure.

The 1992-1995 negotiations overlapped with the introduction, in 1993, of the Federal Family and Medical Leave Act, and the Union did put forth a bargaining proposal early in the negotiations to "provide for Family Leave." In this general time frame, representatives of the APFA were meeting with the Department of Labor to discuss the law's potential applicability to flight crews. Shortly after interim rules issued by the DOL provisionally indicated that flight crews would be covered by the FMLA, the Union in July 1993 withdrew its table position that the Company provide for Family Leave in the contract. However, when the promise of statutory coverage for flight crews shifted to shakier ground in the fall of 1993, the Union advised management that it would reinstate its original proposal *unless* the Company could confirm that the Family and Medical Leave Act would apply to flight attendants. In January, after the Company unilaterally revised its previously-existing Family Leave policy to comport with (and exceed) the Federal Act, Jane Allen, Vice-President of Employee Relations, announced to the entire bargaining unit the details of American's revised Family Leave Policy. Apparently satisfied, the Union negotiators did not further press for a contract provision on the subject.

Although it is true that in these negotiations the Company did not affirmatively announce that it was reserving its managerial discretion to make changes to the policy it was implementing, that fact is hardly a basis upon which to proclaim the 1994 policy a bilateral agreement. Nor can the absence of a zipper clause in the collective bargaining agreement transform into a contractual guarantee the information that the Company furnished to the Union at APFA's request during bargaining.

The Union's attempt to characterize its forbearance in the 1992-1995 negotiations as tantamount to an agreement upon the terms of the 1994 version of the FML policy is a "heads I win; tails you lose" proposition. The Union threatened to reinstate its previously withdrawn proposal to include Family Leave in the contract unless it received assurance from the Company that the Federal FMLA would apply to flight attendants. Management provided the assurance (in the form of the January 1994 Jane Allen letter) and the Union abandoned its proposal. To suggest that in so doing, the Union secured a contractual benefit is to usher through the back door a guarantee that was not bargained. What the Company proffered to the Union in January was the information the Union had requested, namely, evidence that the Company would be providing to its flight attendants *at least* as much of a benefit as was contained in the Federal FMLA. The January 1994 document furnished to the Union was the same general information provided to employees in three different bargaining units. American did not demand that APFA abandon its proposal to incorporate FML into the contract; that was the Union's decision. And in fact, to whatever extent what the Union asked for and what the Company provided may be said

to be a bilateral agreement to apply the benefits of the Federal statute to flight attendants, American has lived up to that bargain.

Similarly, while the Joint Lost Time Committee in 1995 and 1996 accomplished a great deal both substantively and in terms of rebuilding the parties' strained labor relationship, the record does not demonstrate that "co-ownership" of the 1994 FMLA policy was one of its achievements.

There may be a lingering dispute between the parties as to whether the two-year trial Attendance Policy formulated by the JLTC was a *negotiated* agreement. The Union argues that the parties resolved issues at the JLTC bilaterally, made commitments, and advocated with their principals for ratification; the Company argues that the April 1994 commitment to discuss lost time and then the fruits of those discussions – specifically, the two-year trial Attendance Policy – were *outside* of the negotiations process and were not in any way binding contractual accords. In May 1999, the Union filed a grievance protesting the Company's May 1998 unilateral changes to the Attendance Policy. That grievance is apparently still pending.

Whether American Airlines breached a contractual agreement when it revised the Attendance Policy before the two-year trial period expired is not at issue here and need not be decided. Even accepting, for the sake of discussion only, that the two-year trial had standing as a contractual bargain, the bargain cannot be said to have bootstrapped the 1994 FML Policy into a contractual guarantee.

It is true that the JLTC members devoted a great deal of meeting time in the early days of the committee to the task of clarifying the complex terms of the Company's FML Policy. Committee members from both management and the Union readily acknowledged that they were uncertain about the correct meaning and proper application of many of the policy's provisions. Once the policy was clarified to the JLTC's satisfaction, the Committee issued a joint communication to flight attendants in March 1996 describing the highlights of the Company's policy and outlining its benefits. The purpose of the communication was to educate flight attendants about the availability of FML. The heading of the communication to flight attendants reads: "The AA/APFA Joint Lost Time Committee wants to make you aware of your choices regarding AA's Family Leave Policy."

Though the JLTC did discuss and agree upon the meaning and application of the existing FML Policy, the Committee's conduct did not elevate the policy to a bilateral agreement. That members reached sufficient consensus to issue a joint communication simply means that after considerable discussion, they shared an understanding about how the existing policy worked. The Committee did not negotiate new terms or modify the existing policy in any way.

Moreover, that the existence of FML benefits apparently served as a springboard for the JLTC to arrive at its agreement on the trial Attendance Policy is today a moot point. Even if that trial policy had run its course, it is undisputed that its goals, unfortunately,

were not met and that the experiment was a failure. If the Company had not revised the 1996 Attendance Policy in May 1998 during the trial period, then it would have revised it at the expiration of the trial period in September 1998 when it unquestionably had the right. Interestingly, the Company approached the JLTC members to regroup in some fashion to participate in the necessary revisions, but the APFA representatives on the Committee declined the offer.

Thus, even granting, for the sake of discussion, that the APFA was a "co-owner" of the 1996 Attendance Policy during its trial period, and granting, further, that the 1994 FML Policy provided the impetus for the Union to subscribe to that Attendance Policy, the fact of the matter is that by October 2001, when American changed the terms of the FML Policy, the 1996 Attendance Policy no longer existed. There is no basis in the record to find that a commitment to maintain the 1994 FML Policy for the duration of the trial Attendance Policy would have survived the expiration of the experiment.

Finally, with respect to the collection of extra-contractual letters of agreement between the parties, all with the force and power of contract terms, the existence of these documents establishes that the parties know how to memorialize such agreements. There is no letter of understanding in the collection with respect to any agreement to maintain the terms of the 1994 FML policy as an unalterable benefit. And while there is similarly no reliable indication that the parties intended that the April 4, 1995 letter (confirming their agreement to meet to discuss ways to reduce flight attendant lost time) be added to the repository of Letters of Agreement, their intentions at the time have no bearing on this

dispute. As has already been discussed, the contractual implications, if any, of the JLTC do not extend to the FML Policy.

Finding, then, that the FML Policy is neither a direct nor an indirect product of the parties' negotiations, the next question is whether, by the parties' conduct, the benefits of the 1994 Policy have become so engrained in the parties' practices that American may be said to have tacitly accepted the Union as a partner in the policy. The Union presents a straightforward "past practice" argument, claiming that the FML Policy was a major benefit that the Company consistently provided without significant substantive change through two subsequently negotiated collective bargaining agreements. It must be assumed, the Union argues, that APFA's bargaining proposals in the negotiations for the 1995-1998 contract and in the negotiations for the current 1998-2004 contract were shaped "with silent recognition" of the existing FML benefit. The Union contends that management's failure to provide notice to the Union during negotiations of its intent to reduce the benefit must obligate the Company to maintain the existing benefit for the duration of this Agreement.

As was stated earlier, the Board agrees with the Union that the 1994 FML Policy provided a major benefit to medically eligible full-time flight attendants. It is not necessary to recount the many ways in which bargaining unit members have been advantaged by the availability of FML for their own illnesses or illnesses of family members. Certainly, the fact that absence pursuant to FML does not register as an "occurrence" under the Company's fairly rigorous Attendance Policy has safeguarded

countless flight attendants through the years. And the fact that flight attendants could choose whether or not to concurrently burn paid leave during FML provided them a significant measure of control over their work and personal lives. The Board observes, too, that full-time flight attendants have come to rely upon the availability of FML as an option when medical circumstances so warrant. What the record does not establish, however, is that the Company has ever provided the APFA with reason to believe that the benefits conferred (over and above those mandated by the Federal Act) were anything *other* than unilaterally promulgated policy susceptible to adjustment. There is no maintenance of benefits provision in the contract to provide protection against change in non-contractual matters.

American Airlines has an enormous array of human resources policies set out in its NavigAAtor manual, and the Company has been quite explicit in its unwillingness to relinquish its exclusive charge over them. Though the Union questions the strength of the Company's express reservation of rights in the preamble of its policy book, it does not produce any evidence to demonstrate that the Company has ever been inconsistent or equivocal in its steadfast hold over these policies. 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. Indeed, the Company made a number of changes between 1994 and 2001, none of which were grieved or challenged as a breach of an enforceable past practice.[4] While many of those changes were beneficial to the flight attendants or procedural rather than substantive, the Union's silence in the face of these changes detracts from its claim now that the policy had become a contractual

[4] The 1999 grievance over the modification of the Attendance Policy is unrelated to FML.

benefit. Moreover, at least one change instituted by the Company diminished the benefit in a measurable way. In October 2000, the Company unilaterally reinterpreted the phrase "12 weeks" in the context of intermittent leave to mean 60 days instead of 84, yet the Union did not complain.

Nor has the Union ever suggested to its members that the FML Policy was a contractual benefit. To the contrary, an assortment of Union articles and newsletters disseminated to bargaining unit members through the years consistently referenced the FML policy as a Company policy or as a statutory right, but never as a benefit that had assumed the mantle of contractual protection.[5] The Union instructed flight attendants with FML complaints to file with the Wage and Hour Division of the U.S. Department of Labor, and never suggested a contractual avenue of redress. It is only with hindsight that the Union seeks to package what has always been regarded as a management-controlled policy into a benefit protected by the contract.

Finally, although the Union was not included in the Family Leave Task Force scrutinizing the FML policy in the summer of 2001, Union officials acknowledged in conversations with management that they knew the Company was looking to make changes to its FML Policy to save money. In that regard, the Union cannot be said to have ratified the 1998-2004 collective bargaining agreement under a misguided belief that nothing would change during the next contract term.

[5] Even the JLTC's communication to flight attendants explaining FML benefits referred to "your choices regarding AA's Family Leave Policy."

Where there is no discernible contract right for the Union to insist upon the preservation of the FML policy as it existed prior to October 2001, the Board finds that the Company had the right in October 2001 to make changes in the policy. No advance notice was required, other than as a courtesy, nor did management have a contractual duty to meet and confer prior to the implementation of the modified policy.

*Issue II*

*In making such changes in its FMLA policy, did American Airlines violate its collective bargaining agreement with the APFA?*

Issue #1 before the Board focused on theory – whether American Airlines had the right to make changes to its FML policy or whether the policy was or had become a fixture in the parties' labor relationship such that it could not be modified unilaterally. Issue #2 now before us focuses on the specific changes themselves. The Union is correct that even if the Company had the theoretical right to make unilateral changes in its policy, the changes must not conflict with any established contractual protections.

The October 2001 policy changes that are paramount in the Union's complaint are three – two which diminish the benefit itself, and the third which narrows the class of eligible recipients. [6]

[6] There are many more than three changes in the 2001 policy, but the three discussed here are the most significant changes. The other changes are primarily procedural, such as notice and documentation requirements.

As earlier discussed, prior to October 2001, flight attendants eligible for FML were entitled to take the time *unpaid*, unless they *elected* to use accrued vacation, personal vacation days or sick time in conjunction with the leave. Under the 2001 policy, flight attendants must use their paid sick time before going on unpaid status if the FML absence is for their own illness. If the FML absence is to care for a family member, flight attendants must use their available accrued vacation before going on unpaid status. In states where the law permits the use of sick time for a family member, flight attendants must use both their paid sick time and their accrued vacation time before going on unpaid status.[7] From the Union's point of view, the attraction of the pre-2001 policy was the element of choice. A flight attendant could make a decision on a case by case basis whether or not to burn accumulated paid leave – an important consideration for attendants whose personal circumstances often impelled the conservation of accumulated leave (and associated pay) for other purposes. Also, before October 2001, absence attributable to on-duty injury was independent of leave available under the FML policy. A flight attendant who was injured on duty incurring a serious health condition retained the right to use FML at other times for other purposes. Under the 2001 policy, flight attendants incurring a serious condition as the result of an injury on duty must burn available FML at the same time.

The Board finds that these modifications of the FML benefit insofar as they now require concurrent burning of benefits (both in the cases of family/personal illness and in the case of IOD) do not violate the collective bargaining agreement. There is no evidence to support an argument that the terms of the contract's sick, vacation leave, or other

[7] There are other aspects to this policy change, but these are the key features.

provisions limit the Company's statutory right to require that accrued paid leave be exhausted along with the FML that employees take at their option. At the same time, there is no evidence to support an argument that the terms of the contract prohibit the Company from exercising its right to require a flight attendant who is receiving IOD benefits to simultaneously exhaust available FML benefits. This is not a case where the terms of the collective bargaining agreement provide an enforceable benefit beyond that mandated by law.

The third significant change in the Company's FML Policy is a re-vamping of the previous policy's definition and application of the phrase, "60% of a full-time schedule." The concept is based upon the statutory requirement that to be eligible for benefits under the Federal Act, an employee must have worked at least 1250 hours in the 12-month period immediately preceding the start of the leave. Based upon an ordinary 40-hour per week employee, 1250 hours is roughly 60% of a full-time schedule. The Company, recognizing back when the Federal legislation was introduced that the nature of the work of flight crew presents unique scheduling idiosyncrasies, selected 60% of a full-time flight attendant's schedule to mirror the Federal requirement. In the 1994 FML policy instituted by the Company, the 60% eligibility requirement was applied only to requests for intermittent or reduced schedule Family Leave. Block leave required either twelve months of active company service prior to the leave, or at least three consecutive months worked of the previous twelve months if the employee was on unpaid status at the time of the FML request. Though there was some inconsistency across the Company in the application of the 60% rule between 1994 and 2001, generally speaking, a flight attendant

was deemed to have worked 60% of a full-time schedule if he or she worked full time for eight out of the previous twelve months.

The 2001 FML policy preserved the *concept* of 60% of a full-time schedule as a threshold eligibility requirement, but with two critical changes. First, the Company modified the methodology for calculating 60% of a full-time schedule. American abandoned the previous "eight out of twelve months worked on a full time schedule" calculation and introduced a measure of 720 on-duty hours in the twelve months preceding the leave. On-duty hours do not include any crew layover time, vacation time, sick time, IOD time, or time spent on leaves of absence. Second, the Company extended the 720 on-duty hour requirement to block leave FML requests.

It is in connection with these changes in FML eligibility requirements that the Union's contractual arguments resonate, not because the threshold eligibility standard has been extended to requests for block time, but because the standard itself – 720 duty hours in the previous twelve months – is at odds with important contractual underpinnings.

The collective bargaining agreement does not contain a precise definition of a "full-time" flight attendant, but it does define a "part-time flight attendant" in Appendix R as "a full time Flight Attendant who has been awarded a part-time proffer…" Appendix R goes on to detail the manner in which the Basic and Supplemental International Agreements apply to part-time flight attendants and an accompanying Side Letter confirms that the part time program is "strictly voluntary." The parties acknowledge that there are currently no part-

time flight attendants at American, but as an offshoot of this part-time concept, the parties negotiated an arrangement whereby so-called "low time fliers" have their eligibility for vacation and sick leave accrual calculated under the reduced flight time provisions contained in Appendix R.[8] Low time fliers are, by agreement of the parties, flight attendants whose "average paid hours during the prior calendar year are equal to or less than fifty percent (50%) of the applicable monthly guarantee (or 426 hours per year for a Domestic Flight Attendant and 450 hours per year for an International Flight Attendant)." Thus it may be said that the parties have drawn a contractual distinction between full and part time flight attendants and have further agreed to carve from the class of full time flight attendants a category of "low fliers" whose reduced work output renders them eligible only for reduced benefits.

The Company's determination in 2001 that to be eligible for FML benefits a flight attendant must work 720 duty hours in the prior year creates a new definition of "full time" flight attendant. As was explained at the hearing, the Company based its 720 duty-hour calculation on what it deemed to be 60% of the average annual duty hour total for all flight attendant bid lines. The Company's analysis indicated that the average number of annual duty hours in a Domestic bid line was 1240, and the average number of annual duty hours in International bid lines was 1140. Noting that there are about twice as many Domestic bid lines as International bid lines, the Company weighted the two averages and arrived at a weighted average of 1200. Sixty percent of that average is 720 duty hours.

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[8] Flight attendants who *involuntarily* become low time fliers are guaranteed to be paid for 71/75 flight time hours in accordance with the contract, and are not subject to any reduction in vacation or sick accrual.

Accordingly, for a flight attendant to be eligible for FML post-October 2001 – that is, to satisfy the standard of what the Company has deemed to be 60% of a full time schedule – the flight attendant must meet a numerical threshold that has never been applied to the class of flight attendant formerly considered "full-time." In this way, the Company has excised from the established contractual class of full time employee a category of flight attendant who, by virtue of the bid lines flown, is suddenly disqualified for benefits available to other full-time employees. Duty hours flown has never been the defining characteristic of a full-time flight attendant.

If 720 on-duty hours is intended by the Company to reflect 60% of an average full time duty load, then 1200 on duty hours must be accepted as the average full time load. Yet, the Company acknowledges that schedules of full time flight attendants vary widely according to a host of factors, many of them outside the flight attendants' control. There are hundreds of full time bid lines that fall short, on an annualized basis, of the requisite 1200 hours and many more hundreds that fall short when adjusted for the fact that flight attendants are entitled to time off each year for vacation. Unlike full time ground employees whose schedules are built upon a standard work year of 2080 hours, flight attendants have no standard work year and there really is no "average" full time flight attendant. What the Company has done is compress the broad spectrum of Domestic and International full time flight attendants into an artificial mold and label it "average," and in so doing has excluded from a major benefit nearly a third of the full-time bargaining unit. Statistically, there is something questionable about a calculation that results in such a disproportionate ratio.

Though American's oft-stated goal was to be *consistent* and *even-handed* across the labor groups in the Company -- that was its specific reason for settling on an eligibility requirement for flight attendants that did not count sick and vacation time -- a comparison of the effects of the new policy on APFA compared to full-time ground employees demonstrates a colossal imbalance in terms of its exclusionary impact.[9] The discrepancies are attributable solely to the fact that ground employees' hours of work are standardized, day to day and week to week, whereas there is no predictability at all to a flight attendant's schedule. It is undoubtedly for that very reason that on-duty time is but one of several mechanisms for counting hours for pay and credit purposes under the flight attendants' contract.

As the record demonstrates, APFA and American Airlines have negotiated an extremely complex system of counting time for purposes of pay and credit. There is duty aloft time, *E* time (report time, flight time, airport sit time and debrief time), layover time, *F* and *P* time (total time away from base), etc. These methodologies provide an elaborate contractual system for maintaining balance among full time flight attendants so as to preserve internal equity despite wildly disparate flight schedules. For the Company now to condition eligibility for FML upon a single measure with no deference at all to other factors governing flight attendants' schedules effectively dismantles the delicate contractual system that has historically recognized the unique working conditions of flight crew. The Board finds that the Company has violated the contract by

[9] Part-time ground employees working fewer than 1250 hours per year were excluded from FML prior to 2001 and after. The 2001 changes had no identified impact upon ground employees' administrative eligibility.

impermissibly changing the definition of full-time for purposes of FML eligibility. A flight attendant cannot be full time for some purposes and not for others.

Further, the Board finds that the pitting of full time flight attendant against full time flight attendant in the race to secure sufficient duty hours to achieve FML eligibility seriously undermines the value of the contract's seniority provisions. It goes without saying that seniority and the advantages that come with seniority are the lifeblood of any negotiated contract, and this is particularly so in this bargaining unit where seniority governs the awarding of trip selections. With seniority comes choice trip selection, yet the new eligibility requirement imposed by the Company eliminates all but one meaning of "choice" for a senior flight attendant, and that is a bid line that produces that greatest number of on duty hours. International fliers are even more disadvantaged, as their full-time schedules, while rigorous in other ways, generally result in fewer tabulated on-duty hours than the schedules of Domestic fliers. The evidence presented in this case indicates numerous examples wherein the trip selection benefits and other employment benefits that come with seniority are all but eroded under the Company's method for calculating FML eligibility.

Not insignificantly, the Company has hinged a critical benefit upon matters that even a determined flight attendant cannot control. Schedules are exclusively within the Company's prerogative, both in the creation of the bid lines and in decisions about whether or not to cancel individual flights. Flights themselves are unpredictable in terms of duration. And other than the single most senior employee in the bargaining unit, flight

attendants have no guarantee that their first choice bid selections will be awarded. Consequently, employees' efforts to achieve schedules that will generate more than 720 on duty hours remain largely a matter of luck, requiring constant reshuffling and reprioritizing of other contractual rights. In many instances, flight attendants have to fly during their previously scheduled vacation months to preserve FML eligibility. Other flight attendants are forced to exercise what the contract deems an "option" to exceed the monthly maximum of scheduled hours in order to qualify for FML benefits. These are not merely theoretical concerns.

The Board concludes, therefore, that the Company's October 2001 reinterpretation of the phase "60% of a full time schedule" as 720 on-duty hours violates the collective bargaining agreement.

*Remedy*

The Board does not underestimate the difficulty confronting the Company to "undo" its contractual breach and reassess eighteen months of eligibility issues for flight attendants who were denied FML benefits as a consequence of the 720 on-duty hour requirement. To undertake such a task will require the active participation and cooperation of the APFA. It will also require the supervision and possible intervention by the Board. A starting point will be for the Company and the Union to sit down and discuss ways to structure a remedy.

Rather than offer specific direction at this point, the Board will retain jurisdiction over the question of an appropriate remedy. We direct, as an interim measure, that the parties meet to consider options for final resolution, including the possibility of arriving at a mutually agreeable administrative eligibility standard for FML.

The parties are directed to update the Board of their progress at thirty-day intervals. At the request of either party, the Board will intervene and, as warranted, will formulate and order a specific remedy.

Award

American Airlines had the right in October 2001 to make changes in its FMLA policy.

The 2001 changes in FML Policy relative to the concurrent burning of sick, vacation and IOD leaves along with FML do not violate the collective bargaining agreement.

The 2001 change in FML Policy relative to administrative eligibility does violate the collective bargaining agreement.

The parties are directed to discuss ways to structure a remedy for the contract breach. The Board will retain jurisdiction over the remedial portion of this award as discussed above.

Respectfully submitted,

By the Board:

Roberta Golick 6/30/2003
Roberta Golick, Esq., Chair

Susan M. French, Esq.
APFA

Julie M Moyer
Julie Moyer
APFA

Emily Johnston
Emily Johnston
American Airlines

Stephen Howell
Stephen Howell
American Airlines

FMLI Remedy Portion Orig in Black Ink

Arbitration

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|---|---|
| Association of Professional Flight Attendants | Case # SS-46-2001-APFA-6 |
| and | Gr: Family and Medical Leave Policy |
| American Airlines, Inc. | Remedy: July 28, 2006 |

| | |
|---|---|
| Arbitrator: | Roberta Golick, Esq. |
| APFA Board Members: | Susan M. French<br>Julie Moyer |
| AA Board Members: | Michael Waldron<br>Benjamin D. Williams |
| Hearings: | September 19 & 20, 2005; February 16 & 17, 2006 |
| Appearances: | For the Union<br>Professor Carin A. Clauss, Esq.<br>University of Wisconsin Law School<br><br>Patt A. Gibbs, Esq.<br>Gibbs & French<br><br>For the Company<br>Gregg M. Formella, Esq.<br>American Airlines, Inc. |

Background

On June 30, 2003, the panel[1] issued the following award:

> American Airlines had the right in October 2001 to make changes in its FMLA policy.
>
> The 2001 changes in FML Policy relative to the concurrent burning of sick, vacation and IOD leaves along with FML do not violate the collective bargaining agreement.
>
> The 2001 change in FML Policy relative to administrative eligibility does violate the collective bargaining agreement.
>
> The parties are directed to discuss ways to structure a remedy for the contract breach. The Board will retain jurisdiction over the remedial portion of this award as discussed above.

The panel had commented in its decision:

> The Board does not underestimate the difficulty confronting the Company to "undo" its contractual breach and reassess eighteen months of eligibility issues for flight attendants who were denied FML benefits as a consequence of the 720 on-duty hour requirement. To undertake such a task will require the active participation and cooperation of the APFA. It will also require the supervision and possible intervention by the Board. A starting point will be for the Company and the Union to sit down and discuss ways to structure a remedy.

The parties took seriously the panel's charge, incorporated in the body of the decision, to "meet to consider options for final resolution, including the possibility of arriving at a mutually agreeable administrative eligibility standard for FML." On October 1, 2003, Board Member Susan French reported that "the Company and APFA have reached an agreement in principal on the FMLA eligibility. The new threshold will be 504 paid productive hours. This figure was reached by multiplying the base guarantee (70 hours per month under the restructuring agreement) by 12 months and then taking 60% of that

[1] At the time, the AA Board Members were Emily Johnston and Stephen Howell. Both later left the Company. They were replaced on the panel by Michael Waldron and Benjamin Williams.

number. We are now in the process of working on the remedy and you were right that it would be a daunting task..."

The task proved to be more daunting than imagined, and disagreements between the parties led, finally, to a breakdown in the remedial process. Ultimately, the Board re-convened for hearings in September 2005 and February 2006 to take evidence, hear argument, and provide a final ruling on what the appropriate remedy should be. The parties acknowledge that the Board has jurisdiction to issue a final ruling on remedy.

A few words of explanation are in order. Back in 2003, after the parties arrived at a tentative agreement based on a 504 paid productive hour (PPH) threshold, the Employer, with the Union's participation, embarked on an ambitious program to identify and make whole those bargaining unit members who were entitled to a remedy. It was during this process that conflicts in the parties' respective understandings of their agreement erupted.

While this Board could have simply disregarded the hard work and diligent efforts that went into the parties' earlier efforts by issuing a remedy based strictly on conditions as they existed at the time of the arbitration hearings in 2002, to do so would be impractical and a disservice to the parties. Even back in the fall of 2003, the parties recognized that the restructuring agreement changed the landscape and could not reasonably be ignored. By 2006, given the myriad of intervening considerations in addition to the restructuring agreement (in particular, the passage of time since the original award), the Board agreed

that working to resolve the issues within the framework of the 504 PPH became preferable to sending the parties back to a 2002 "reality" that no longer exists.

The Board notes that the 504 PPH, while not, strictly speaking, an "undoing" of the harm caused by the contract breach, is an appropriate number to adopt as a threshold so long as the tangential issues that are associated with 504 PPH are dealt with and resolved.

The Remedy

*The Number*

Recognizing that the Board cannot lock the Employer into a contractual "agreement," we accept that the number to be applied going forward as the threshold for FML eligibility is 504 Paid Productive Hours.[2] Paid Productive Hours include all paid hours and all training hours, and exclude all sick, vacation, jury duty, sick make-up, personal emergency, paid withholds, and IOD except for that addressed in Article 26E.

*The Make Whole/Reconsideration Process*

The Employer is commended for its assiduous and time-consuming efforts devoted to identifying individuals who are entitled to a remedy. A majority of the Board finds, however, that the results in two areas are not sufficiently reliable to put the reconsideration process to rest.

[2] The Union agreed at the remedy hearings that for purposes of making employees whole, the 504 PPH that the Employer had implemented previously was correct and the only question was what the number should be prospectively.

In the maternity area, a majority of the Board agrees that it would not be feasible at this point to identify those employees who were harmed either as a result of being denied FML in connection with their maternity status or by refraining, because of the Employer's stated position on the matter, from applying for FML which would have been granted but for the breach.

Accordingly, the group eligible for a remedy is as follows: 1) anyone who was on M status from 6/1/01 through 7/31/02 (Group I); and/or b) anyone who was on M status between 8/1/02 and 12/24/03 whose Paid Productive Hours fall between 504 and 720 (Group II). Excluded from the eligibility class is anyone who has already otherwise been remedied in the reconsideration process. In lieu of payment to those individuals in the eligibility class entitled to a remedy, a majority of the Board directs the Employer to provide one unattached vacation day, the vacation day to be taken within the fiscal year. The vacation day will be plotted by the Company in accordance with the collective bargaining agreement.

Employees in the eligibility class who have left the Company are entitled to the following:

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|---|---|
| Employees who did not return to active employment at the end of M status: | $0 |
| Employees in Group I who left the Company 8/1/02 - 12/31/03: | $100.00 |
| Employees in Group II who left the Company 12/25/03 - 12/31/04: | $100.00 |
| Employees in Group I who left the Company 1/1/04 - 12/31/04: | $150.00 |
| Employees in Group II who left the Company 1/1/05 – 12/31/05 | $150.00 |
| Employees in Group I who left the Company 1/1/05 – 7/28/06: | $200.00 |
| Employees in Group II who left the Company 1/1/06 – 7/28/06: | $200.00 |

Eligible employees who fall into both Group I and Group II are entitled to one remedy only.

In the Attendance area, the Board agrees that to ensure that eligible employees are remedied, the Employer is directed to recode as "FML" absences of people who were named on Company Exhibit #12 and to note same in the discussion record. The only absences in question are those that occurred between 10-1001 (date) and 12-31-03 (date). The eligibility group for this remedy excludes individuals who have already otherwise been remedied as a result of the reconsideration process.

*Other Issues*

At the remedy hearings, the Union sought further relief in two areas. The Union claimed that the Company's concurrent burn policy might in some instances violate or diminish one or more of the parties' other contractual agreements and asked that relief be granted relative to the burning of FML and PVD's in the context of intermittent leaves. The Union also argued that the Company's treatment of employees who are eligible for the Federal FML benefit (by meeting the 1250 hours test) is different (and better) than its treatment of employees who are not eligible for the Federal FML benefit, and asked that the Board entertain its claim of disparate treatment.

The Board finds that these claims are not properly before it at this time. Accordingly, we hold that the Union still possesses whatever rights it had to challenge what it perceives as

conduct violative of the collective bargaining agreement; its rights are not diminished (or increased) as a result of waiting for the Board's final order in this case, and nothing in this award should be construed as precluding the Union from pursuing its claims in another forum.

Award

The administrative eligibility standard for FML going forward shall be 504 Paid Productive Hours, as defined and conditioned in the discussion above.

Employees who meet the criteria discussed above (relative to maternity) shall receive one unattached vacation day, the vacation day to be taken within the fiscal year.

Employees who meet the criteria discussed above (relative to attendance) shall have their absences recoded as "FML" and the same shall be noted in their discussion record.

By the Board:

Roberta Golick, Esq. (7/28/06)
Chair

Susan M. French, Esq.
APFA
(concurring)

Michael Waldron
American Airlines
(dissenting)

Julie Moyer
APFA
(concurring)

Benjamin D. Williams
American Airlines
(dissenting)