FRIEND OF THE UNION BRIEF

SECTION 20

Here are a few points regarding proposed changes to Section 20 as well as some other suggested protections for our pilots.

I appreciate you taking a look at the proposed changes or safeguards to Section 20. Please keep in mind that this is not the normal case where pilot is injured or sick and has to be cleared by medical under Section 20. This case deals with the pilot that is sent to a Section 20 to avoid union protections provided under Section 21.

Although the language in the CBA seems clear, the company's actions tend to stray away from Section 20 when it benefits them or serves another purpose.

Background -- My Case

On or about July of 2010, I was ordered by the company to attend a **Section 20 Physical Examination**. This was based on three (3) factors; writing too many P-2's, taking an aircraft back to the gate (with serious safety concerns), and reporting a MIA ground crew that intentionally delayed my flight. The LAX First Officer chief pilot's non-medical and unprofessional opinion was that I was "angry, volatile, and erratic" while "showing signs of paranoia" after I repeatedly expressed concerns for my own safety following real threats that I received from a MIA ground worker. I shared those recorded phone threats in MP3 format with the FO chief. However, he never listened to the MP3 recordings of the phone message threats claiming that there were restrictions on the company computers that disallow the playing of MP3 files. He also refused to send my emails with the MP3 files to his home computer and investigate my real concern. One only has to look into the murder of MIA First Officer Russ Walker in January of 2011 to validate legitimate concerns about such threats.

All three of these aforementioned "incidents" were never fully investigated, I was never called in for counseling, professional standards was not contacted, no one filed an ethics complaint, nor filled out a report against me alleging any angry, volatile, or erratic behavior. Neither "incident" was a violation of Part One, or company policy, or any other rule or regulation. Furthermore, witnesses and *indisputable* factual evidence support that there was never any shouting, yelling, cursing or any other outward display of anger. I did have words with the FO chief when he refused to investigate the ongoing threats I had received. You can draw your own conclusions on how effective his leadership and management skills were.

Nevertheless, the company bypassed Section 21, which affords union representation, and sent me to see a clinical social worker [not an AME] as part of the Section 20 to discuss these unsubstantiated company issues. The chief pilot was less than truthful to me when he stated that my visit to AA Medical was "nothing more than a flight physical". The fact is that no medical examination or diagnostic tests ever took place. During the Section 20 interview with the LCSW, and without an APA representative present during *non-medical* questioning, he explained that I "seemed normal" to him, "not crazier than any other pilot", and that the "real enemy here was HR". He also indicated that he would forward on his findings but that the ultimate decision was not up to him. Basically, once they (AA) decide to send a pilot to a Section 20, the outcome is

most likely predetermined. This misuse of the Section 20 process was nothing more than an a method to circumvent a disciplinary hearing, while APA is conveniently absent, and issue an opinion that I was somehow medically unfit.

Following the quasi-medical exam, while I was placed on Paid Withhold (PW), I was involved in an off duty self-defense shooting for which I was never charged nor arrested. The homicide was fully investigated and the District Attorney determined that no evidence existed to support filing charges of any kind. Homeland Security also investigated the shooting because I was an FFDO at the time. They too determined that there was no wrongdoing, nor any violations of the FFDO SOP's, and concurred with the DA's findings. The case was officially closed. Homeland Security issued a letter stating that I was cleared to resume to "full mission status" as an FFDO.

Meanwhile, the company refused to follow the language in the CBA, thereby abandoning the Section 20 by refusing to allow a second opinion, while failing to issue a diagnosis. Section 20; Paragraph A, states that the purpose of a company physical examination *shall be to diagnose the true and actual physical condition of the pilot*. Then, AA medical tried unsuccessfully to force me to attend an EAP anger management class and report to the FAA. Forcing someone to admit to the FAA that they have a problem is the kiss of death for a pilot. Who in their right mind would admit they have a drug or alcohol problem if they have never taken either? In this case, the same principle applies. I was certainly not the only pilot that has been blindsided by this process.

Avoiding a Section 21, cutting short the Section 20 process, refusing to issue a diagnosis, withholding medical records, refusing to allow a second or third opinion, and then placing the pilot on the sick list when they are not otherwise sick has proven fatal to several pilots' careers.

Time after time the company has successfully found a way to silence pilots and place them on permanent "time out", basically a constructive termination by placing them on sick list followed by LTD by way of these abusive Section 20 exams. The exam, as we know, is anything *but* a medical exam as we are led to believe by the contractual language. The FAA guidelines are not being followed. Instead this is a tool used by the company repeatedly to bypass a fair and impartial investigation. They instead rely on unsubstantiated allegations and bypass union representation, which would be afforded during a Section 21.

Arbitrators Ruling

A false veil of *medical privacy* has fooled APA into backing away from being present during these Section 20 interviews. This stems from an arbitrators ruling who stated, in part, that it was inappropriate for a union representative to be present during a medical exam. We are not taking about having your union representative present while you are turning your head and coughing, as they would want us to believe. To the contrary, these interviews are anything but a medical exam under the guidelines of Section 20 of the CBA or CFR Title 14 Part 67.

On the other hand, by not having a union representative present for this type of non-medical questioning the process becomes a *kangaroo court* or a *witch-hunt*. If left unchecked, it opens the door for HR to ask questions about a whole host of *non-medical* issues such as captain authority, disciplinary matters, FM Part I, procedures, employee allegations, and all without verification or representation. Basically, it is an opportunity for the company to second-guess

what we as pilots do on a daily basis. If a pilot is on the ever-present HR radar screen, but they have not violated a company rule, regulation, part I, FAR, or the like, the Section 20 is a tool used by HR, supported by AA legal, administered by AA Medical to often [hopefully quietly] get rid of the pilot.

HIPAA - The Health Insurance Portability and Accountability Act of 1996

What is the primary purpose of the HIPAA privacy rule?

The rule protects from unauthorized disclosure any personally-identifiable health information (protected health information, or PHI) that pertains to a consumer of health care services.

What is a covered entity?

The privacy rule applies to health plans, health care clearinghouses, and health care providers. It applies to employers only to the extent that they somehow operate in one or more of those capacities. The same standards apply to covered entities in both the public and private sectors.

How might an employer be a covered entity?

Normally, an employer will only deal with covered entities, *not actually be one*. However, if an employer has any kind of health clinic operations available to employees, or provides a self-insured health plan for employees, or acts as the intermediary between its employees and health care providers, it will find itself handling the kind of PHI that is protected by the HIPAA privacy rule.

What must covered entities do to protect consumers of health care?

Covered entities must adopt written PHI privacy procedures; designate a privacy officer; require their business associates to sign agreements respecting the confidentiality of PHI; train all of their employees in privacy rule requirements; give patients written notice of the covered entities' privacy practices and access to their medical records; a chance to request modifications to the records; a chance to request restrictions on the use or disclosure of their information; a chance to request an accounting of any use to which the PHI has been put; and a chance to request alternative methods of communicating information. They must also establish a process for patients to use in filing complaints and for dealing with complaints. Finally, they must take any measures necessary to see that PHI is not used for making employment or benefits decisions, marketing, or fundraising.

What do the written privacy procedures include?

A covered entity's written privacy procedures must include safeguards for administration of PHI, physical security of such information, and electronic and other types of technical security. The procedures should include the designation of a privacy officer and an explanation of the complaint and resolution process.

When is patient authorization necessary?

Under 45 C.F.R. § 164.506(c), patient authorization is not necessary if a disclosure is made for

purposes of treatment, securing payment, or in accordance with the operations of a health care provider. If PHI is to be disclosed for any other purpose, the patient's written authorization is mandatory.

When disclosing PHI, what must a covered entity do?

Whether the PHI must be authorized or does not need to be authorized, the covered entity must always release only as much information is necessary to address the need of the entity requesting the information (what the regulation refers to as the "minimum necessary" information to satisfy the inquiry).

The Key to HIPAA.

First of all, the AA medical clinics are reducing their scope to urinalysis, fingerprinting, emergency care at the airports, and clearing pilots whom most likely have never been examined by the AA doctor. This reduction may be problematic as it relates to classifying the company as a *covered entity* regarding HIPAA and the safeguarding of PHI.

AA has a HIPAA Compliance sub committee, however, AA will argue that they are not considered a covered entity. This was put to the test in 2011 with a complaint to the AA HIPAA compliance sub committee as well a formal HIPAA complaint to the U.S. Dept of Health and Human Services (HHS), Office for Civil Rights (OCR). [See HIPAA Complaint; 08032012L1.dlj] The OCR determined that AA was not a covered entity despite having medical clinics, and keeping extensive medical records in both electronic and hard copy formats.

There is no disputing that AA has shared this PHI far too often to their benefit and a pilot's detriment. The reduction of these clinics, AA's own committee opinions, and even the OCR's determinations all make for a difficult battle to try to hang a violation of HIPAA on the company. The company refers to the medical records, regardless of format, as "*personnel or employment records, fitness for duty records, or other employee information held by the employer*". As such they are not subject to HIPAA.

SECTION 20 leads to Pilot Sick List followed by LTD

Once the HR department has mislabeled a pilot and the Section 20 process is in full swing, there is no going back. Regardless of medical facts, the pilot is changed from PW status to being placed on the sick list. How ironic that the company spent countless hours trying to combat perceived unauthorized pilot sick calls (pilots placing themselves as sick, when not actually sick) and the company essentially does the same thing. What we have is a potential management, leadership, and a personnel problem that has circumvented counseling, pro-standards, warnings, and Section 21 and gone straight to Section 20 with absolutely no second opinion, then the company places the pilot on the sick list without a medical exam or diagnosis.

Once the pilot's sick time is exhausted, the only choice in this constructive termination process is either take LTD or hit the streets with no source of income. The third party administrator will step in and ask for verifying information to support the disability. The company basically states that the pilot is no longer able to perform the essential job functions of a pilot. Pilots with legitimate claims can easily have their doctors verify condition and prognosis. However, for the enemies of the company, this becomes a challenge.

5-YEAR SENIORITY LIST – THIS MUST CHANGE

The LTD clock starts ticking and five years down the road, the pilot at AA will be considered no longer a member of the APA without a seniority number. Yes there is a provision that if a pilot returns, both the company and the union can vote whether to accept the pilot back with seniority. For the pilot that has been drummed out by the Section 20 abuse, I can project what the company's answer will be. This 5-year restriction for pilots returning from LTD is not industry standard. United and Southwest do not have one. Pilots retain their seniority while on LTD until 65. Delta has a 10-year cutoff. Regardless, there is no valid reason that APA should support anything less than retaining seniority until mandatory retirement age.

CLEARING PILOTS

Regardless of whether the pilots had legitimate disability claims or were forced onto disability by AA, there have been 23 cases where pilots were instructed to obtain their first class medical certificate on or about the 5-year mark or face termination. Many of these pilots who were successful in obtaining a valid FAA medical certificate were met with severe opposition from AA who quickly set out to request that the FAA reconsider their decision. Sometimes the certificate was suspended while AA and the third party administrator conspired to terminate LTD benefits.

The previous third party administrator, Western Medical, is no longer in business and a few of their executives are serving sentences in federal prison for fraud in connection with LTD claims at American Airlines. AA has hired a new administrator, Harvey watt. However, the former AA medical director is now working for Harvey Watt along side a former high-level flight surgeon from the FAA. This should raise serious red flags within the APA about the inappropriate amount of inside information taken from AA to the "neutral" third-party administrator along with the cozy relationship and direct back-door channel to the FAA.

One of the first things changed when Harvey Watt stepped onboard was the re-write of the **Authorization to Disclose Information**. They added the wording that authorizes HW to discuss and exchange information about that pilot with any government agency, namely the FAA. [See attached B. Spoon letter & Harvey Watt disability release]. Even with letters and a settlement Agreement restricting AA's contact with the FAA, or an expired authorization, AA will stop at nothing and sneak behind the pilots back, contact the FAA in an attempt to sabotage the pilots valid medical certificate.

Proposed Solutions

First and foremost, the APA needs to re-evaluate the authorizations given to AA and their third-party administrators. Second, we should have a member of APA aero-medical escort every pilot to a Section 20 exam. Past practices have been that it is inappropriate to have another individual inside the examining room for privacy reasons. However, for during the *interview* portion of any company administered medical exam, or during a 'check-up from the neck up', as they are sometimes called, there should be no reason that APA should not be allowed inside the room with the examiner. The APA rep would also be there should any questions arise.

My suggestion is to have laminated cards provided by the APA and available to all pilots who are invited to one of these Section 20 exams. This card should indicate;

1. As a pilot, and member in good standing, and represented by the Allied Pilots Association (APA), it is my desire to fully cooperate with the intent and purpose of this Section 20 medical exam.

2. I understand that the sole purpose of this exam shall be to diagnose my true and actual physical condition.

3. I understand that the physical standards for this Company physical examination shall be those standards set forth by the FAA under Title 14 CFR § 67 -MEDICAL STANDARDS AND CERTIFICATION.

4. It is at my discretion if I would like a union official present during any portion of this examination. Should the questions, during this exam, fall outside the scope of CFR Title 14 §67, I will respectfully decline to answer and request a recess from this exam until such time as an APA representative could be present with me.

5. I shall be afforded the opportunity to consult, in private, with my union representative or APA official at anytime during the exam.

6. If questions remain outside the scope of a medical exam, my APA representative shall contact APA legal that will contact the Company to determine if the exam shall be allowed to continue.

7. If at any time during this exam, any questions are asked about policy, procedure, regulations, hearsay, allegations, or any other non-medical matter relating to disciplinary action, the APA is hereby kindly advising the examiner to cease and desist from that line of questioning unless the APA is prepared to have a union official to be present during questioning and present any evidence or witnesses in defense.

8. If at that time, the union official feels that the questioning in inappropriate for this venue, the examination shall be terminated without prejudice to the pilot.

Third, we need to ensure that all pilots who, in the opinion of the company, are not medically fit are fully protected under Section 20 of the CBA. This would require a re-write of that section within the CBA. Below is a proposed change to Section 20 with deleted language ~~lined out~~ and new language in **bold.**

SECTION 20
PHYSICAL EXAMINATIONS

A. The purpose and object of any Company physical examination for a pilot shall be to diagnose the true and actual physical condition of the pilot, and the pilot **and/**or his duly designated personal physician **shall** ~~will~~ be furnished with an exact duplicate copy of all medical examiner's reports **to include but not limited to the pilot's medical records, including any and all notes, emails, charts, test results contained within the AA Medical Record (hard copy or electronic), as well as any records AMR sends to any third party,** affecting him **or her**.

1. Any pilot mandated by the company to attend a Section 20 Physical Examination shall be given no less than 7 days advanced notice in writing before the scheduled examination shall take place.

2. The Company shall also notify the Allied Pilots Association in writing with no less 7 days advanced notice.

B. Physical standards for ~~Company~~ **Section 20** physical examinations ~~will~~ **shall** be those standards set forth in the FAA Regulations as being required to maintain a First Class FAA

Medical Certificate with Statements of Demonstrated Ability (waiver) for Air Line Pilots, **CFR Title 14**, **PART 67—MEDICAL STANDARDS AND CERTIFICATION**. Physical examination procedures shall be determined by the Company **in accordance with CFR Title 14 §67.4 (b)**.

1. The pilot may at his discretion have his personal physician attend the examination.

2. The pilot may be escorted to the medical department by a representative of the Allied Pilots Association who will standby in case any questions may arise during the examination.

3. If at any time during the examination, questions are asked of the pilot about policy, procedure, regulations, hearsay, allegations, or any other non-medical matter relating to disciplinary action, the pilot will advise the examiner to cease and desist from that line of questioning until a union official can be present during such questioning.

4. If at that time, the union official feels that the questioning in inappropriate for this venue, or outside the scope of CFR Title 14, Part 67, the examination shall be terminated without prejudice to the pilot.

C. Any information obtained by, or a result of, a Company physical examination shall be strictly confidential between the Company, the Company's doctor, and the pilot, and shall not be divulged to any other person, third party, **or any local, state, or federal agency, including but not limited to the TSA, FAA,** without the **expressed** written permission of the pilot.

D. A pilot shall not be required to submit to any Company physical examination in excess of two (2) in any twelve (12) month period without the pilot's consent, unless it is the Company's opinion that his health or physical condition is appreciably impaired, in which case the following procedure shall apply:

1. The Company shall notify the pilot, in writing, specifying the nature and extent of its concern.

2. Any pilot hereunder who, in the Company's opinion, fails to pass a Company physical examination, may, ~~within thirty (30) days,~~ at his option, have a review of his case in the following manner:

a. He may employ a qualified medical examiner of his own choosing and at his own expense for the purpose of conducting a physical examination for the same purpose as the physical examination made by the medical examiner employed by the Company.

1. Pilot shall make reasonable efforts to schedule an appointment within 30-days following receipt of all documents used by the Company and/or by the examiner employed Company in the exam as well as but not limited to any and all reports affecting the pilot.

2. Should the doctor, specialist, or examiner be unable to examine the pilot within 30-days, the APA will confer with Company to grant a reasonable extension. The 30-day clock shall not commence until such time as the pilot has received all reports and examiner data.

b. A copy of the findings of the medical examiner chosen by the employee shall be furnished to the Company, and in the event that such findings verify the findings of the medical examiner employed by the Company, no further medical review of the case shall be afforded.

c. In the event that the findings of the medical examiner chosen by the employee shall disagree with the findings of the medical examiner employed by the Company, the Company **and the pilot** will, ~~at the written request of the employee~~, ask that the two (2) medical examiners to **submit names of** ~~agree upon and appoint~~ a third qualified and disinterested medical examiner, preferably a specialist, for the purpose of making a further physical examination of the employee. **The pilot and company shall agree in writing upon the third qualified and disinterested medical examiner.**

d. The said disinterested medical examiner shall then make a further examination of the pilot in question and the case shall be settled on the basis of his findings. The said disinterested medical examiner ~~will~~ **shall** be given a copy of **all** the findings, **records, and notes** of the two (2) physicians previously mentioned prior to making his examination.

e. The expense of employing the disinterested medical examiner shall be borne one-half (1/2) by the pilot and one-half (1/2) by the Company. Exact duplicate copies of such medical examiner's report shall be furnished to the Company and to the pilot.

E. When a pilot is removed from flying status by the Company as a result of his failure to pass the Company's medical examination and appeals such action under the provisions of this Section, he shall, if such action is proven to be unwarranted, as provided in paragraph D. of this Section, be paid retroactively for all time lost in an amount which he would have ordinarily earned had he been continued on flight status during such period; providing further that in no case shall he be paid for a period in excess of ninety (90) days from the date of his removal from flight status.

1. Any pilot undergoing a Section 20 Examination shall remain on Paid Withhold ("PW") during such time as the second and third opinions are being decided. Should the pilot be found to be physically fit, he/or she shall be returned to line flying immediately without penalty. Any vacation, sick time, or pay shall be restored. If the pilot is found to be physically unfit for duty, the pilot shall be placed on the sick list with the effective date coinciding with the final determination (third opinion).

§67.4 Application. (b) Be examined by an aviation medical examiner designated in accordance with part 183 of this chapter. An applicant may obtain a list of aviation medical examiners from the FAA Office of Aerospace Medicine homepage on the FAA Web site, from any FAA Regional Flight Surgeon, or by contacting the Manager of the Aerospace Medical Education Division, P.O. Box 26200, Oklahoma City, Oklahoma 73125.