In the Matter of:	)	
	)	
INTERNATIONAL ASSOCIATION OF	)	
MACHINISTS AND AEROSPACE WORKERS	)	**OPINION AND AWARD**
	)	
Union,	)	Grievance Regarding
	)	HMO Employee and Company
and	)	Contributions
	)	
ALASKA AIRLINES, INC.,	)	
	)	
Company.	)	

Hearing Dates: January 20, 2016 and July 7, 2016
Hearing Location: Seattle, Washington
Date of Award: December 20, 2016

Union Member: Isabel Dukes
Company Member: Keith Abernathy
Neutral Member: John B. LaRocco

John B. LaRocco
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OPINION OF THE BOARD

I. INTRODUCTION

On May 28, 2014, Lead Customer Service Agent Rachel Ragno Ackerman initiated a grievance charging that Alaska Airlines, Inc. (Company) violated the applicable agreement when it failed to contribute the same amount towards certain HMO premiums as it contributes to a PPO premium.[1] [Joint Exhibit 7]

Following a first step grievance hearing held on June 2, 2014, the Company denied the grievance on its merits and the Company affirmatively asserted that the grievance was untimely. [Joint Exhibit 8] The Union appealed the Company's denial to the Grievance Board which met on August 27, 2014. The Grievance Board members agreed to resolve the grievance through a System Board of Adjustment. [Joint Exhibit 10] The Union then progressed the grievance to this System Board of Adjustment (Board).

The Union and the Company stipulated that the following three issues are submitted to the Board: (1) Is the grievance timely? (2) Has the Company violated the contractual obligation to "contribute the same amount towards the funding of any applicable HMO as it contributes to the same tier of coverage for the PPO plan?" (3) What, if anything, shall be the remedy? [Joint Exhibit 2]

At the conclusion of the arbitration hearing, the parties expressed a preference for filing post hearing briefs in lieu of closing oral arguments. The Neutral Member of the Board received the briefs on or about August 19, 2016 and the matter was deemed submitted.

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[1] Ackerman works at the Los Angeles station and is a Shop Steward for Local Lodge 1932. [TR 11; Joint Exhibit 2]

II. PERTINENT AGREEMENT PROVISIONS

Article 16 of the 2014-2018 Clerical, Office and Passenger Service Employees (COPS) Agreement is entitled "Grievance Resolution Procedure". Article 16(C)(2) provides:

> After exhausting the procedure in C.1. above, an employee or employees may file a grievance in connection with the terms of this Agreement and shall within twenty (20) calendar days of the occurrence, or twenty (20) calendar days of reasonable first knowledge thereof, present the grievance to his/her Shop Steward and immediate supervisor, or designee, on a standard grievance form. The parties shall meet within seven (7) calendar days, and every effort shall be made to arrive at a satisfactory resolution with the decision being rendered within ten (10) calendar days. The requirement for a written decision may be waived by mutual agreement in writing. [Joint Exhibit 1]

Article 16(H)(4) states:

> If either party fails to comply with the time limits set forth in this Article, it shall result in the grievance being settled in favor of the other party. [Joint Exhibit 1]

Article 25 of the 2014-2018 Agreement is entitled "Insurance". Although this dispute primarily revolves around the single sentence in Article 25(D)(2)(i), the entire Article 25(D)(2) reads:

> a. For Plan Year 20<u>14</u>, employee monthly contributions for the PPO plan will reflect the same 82%/18% cost sharing as in 2013 but in no event will employee monthly contributions increase by more than 12% above 2013 employee monthly contributions
>
> b. For Plan Year 2015 employee contributions for the PPO plan will reflect cost sharing of 81%/19%.
>
> c. For Plan Year 2016 employee contributions for the PPO plan will reflect cost sharing of 80%/20%.

d. For Plan Year 2017 and extending beyond the amendable date employee contributions for the PPO plan will reflect cost sharing of 79%/21%.

e. For Plan year 2018 and extending beyond the amendable date employee contributions for the PPO plan will reflect cost sharing of 78%/22%.

f. For all years the annual increase will be no more than 12% higher than the prior year's employee contributions until the 22% is achieved.

g. Upon reaching the 22% maximum, subsequent annual increases will be no more than 10% higher than the prior year's contribution.

h. The amount of employee contributions required of part-time employees for the Health Plan will be as follows:

Average number of Hours Compensated Per Week in the Prior Payroll Month	Percent of Health Care Premiums Employee Pays
16 through 20	50%
20.1 through 30	25%
30.1 or more	Same as full time employee contribution

i. The Company will contribute the same amount towards the funding of any applicable HMO as it contributes to the same tier of coverage for the PPO plan. [Emphasis added.] [Joint Exhibit 1]

III. OVERVIEW OF THE DISPUTE

For many years, and in accord with a succession of collective bargaining agreements, the Company provided COPS employees with health benefits through either a Preferred Provider Organization (PPO) or a Health Maintenance Organization (HMO).

Since at least the mid-1990's, the Company calculated the employee's contribution toward a HMO premium according to the following formulas. If the HMO is less expensive than the PPO, the Company charges the employee a minimum contribution which equals the same

amount the employee would have paid for the PPO. When the HMO is more expensive than the PPO, the employee must contribute the same amount the employee would have paid for the PPO plus the cost differential. The issues herein focus on the former calculation. The latter calculation is not in dispute.

The Union claims that the Company continually violates Article 25(D)(2) when it charges an employee, participating in an HMO having a cost less than the PPO, a minimum contribution equal to the employee contribution toward the PPO. The Company contends that the minimum HMO contribution constitutes a long-standing past practice which is in compliance with Article 25(D)(2)(i).

At the onset, the Company affirmatively asserts that the grievance is untimely because the Article 16(C)(2) time limit began to run in 2007. The Union counters that it did not acquire knowledge of an alleged violation until May, 2014 when it promptly grieved. Alternatively, the Union argues that a new violation occurs at each bimonthly pay period.

IV. BACKGROUND AND SUMMARY OF THE FACTS

A. The Grievance

Ackerman testified that when she participated in the Kaiser South HMO, she saw her contribution and the Company's contribution on her bi-monthly paycheck stub. [TR 135, 136] Ackerman asserted that she did not know the cost of the PPO to compare the Company's contribution to the Kaiser South HMO with its contribution to the PPO. [TR 137]

Ackerman testified that she discovered a problem with the contributions to the Kaiser South premium in April or May, 2014. [TR 135] Ackerman related that several Union members complained to her about rising healthcare contributions which did not match pay increases. [TR 114] When several employees supplied Ackerman with their paycheck stubs,

which listed both the employee and the Company contributions, she compared the Company's contribution toward the PPO cost with its contribution toward the Kaiser South HMO cost for employees enrolled in the same time tiers of coverage in each plan. As a result of her comparison, Ackerman found that the Company was paying less toward the Kaiser South HMO premium than it was paying toward the PPO premium for identical coverages. [TR 115, 116]

On May 8, 2014, Ackerman sent an e-mail message to Company Director of Benefits, Tom Richards. Ackerman pointed out to Richards that her contribution towards the Kaiser South single premium was $51.41 per pay period and the Company contribution was $204.06 per pay period. An employee's contribution for the PPO was $51.41 per pay period, precisely the same as Ackerman's HMO employee contribution. Ackerman wrote that the Company's contribution towards equivalent coverage in the PPO was $234.22. Ackerman asked Richards about the discrepancy between the two Company contributions because she computed that her contribution was about 20% of the total HMO premium, while the employee enrolled in the comparable PPO coverage contributed 18% of the premium cost. [Joint Exhibit 7]

Richards responded by informing Ackerman that the Company had always charged employees a minimum amount for all plans which was the amount an employee contributed to the PPO. Richards wrote that the Company brings the employee's HMO contribution up to an employee's PPO contribution. Richards also wrote that he had stated during negotiations that the Company pays as much towards the HMO premium as it does for the PPO premium, except where the HMO costs less than the PPO.[2] [Joint Exhibit 7]

Ackerman replied that the Company should be paying the same amount toward the HMO cost that it pays for the PPO cost.

[2] Richards informed Ackerman that in most markets, the HMO rate is higher than the PPO rate. [Joint Exhibit 7]

Richards sent a message to Ackerman dated May 10, 2014 that stated ". . . I understand the language of the CBA that states the company will contribute the same amount to a HMO as it does for the PPO." He went on to assert that a minimum or floor contribution has "always been our practice". Richards reiterated that he had articulated the practice during multiple years of negotiations when medical plans were discussed. [Joint Exhibit 7]

Ackerman declared that Richards' messages triggered the May 28, 2014 grievance. [TR 118; Joint Exhibit 7] In its grievance denial dated June 12, 2014, a Company General Manager wrote that despite the language in Article 25(D)(2), a long-standing past practice "has the enforceability and effect of contract language at this point". The General Manager also wrote that the Union was aware of the practice because the Union was "told during negotiations that the Company will charge employees enrolled in HMOs a minimum of the PPO employee contribution rate . . ." [Joint Exhibit 8]

In preparation for arbitrating her grievance, Ackerman compared employees enrolled in a cheaper HMO with employees enrolled in the PPO having the same level of coverage. She prepared two tables to demonstrate the differences in the Company's contributions when the HMO cost was lower than the PPO cost predicated on the 2015 contribution rates. [TR 126] For example, a full-time employee with single coverage in the PPO contributes $57.03 per pay period, while the Company contributes $259.81. In comparison, a full-time single participant in Kaiser South contributed $57.03, while the Company paid $196.62 per pay period. Ackerman calculated that the Company contributed $63.19 less towards the Kaiser South premium than it paid toward the PPO premium. She computed the annual overcharge at $1,482.78. She compared and computed the family coverage annual overcharge to be $4,003.74. [Union Exhibit 12; TR 125-126]

B. The Negotiating History

The Union and the Company have been parties to a succession of labor contracts for over forty years. On October 29, 1999, the parties entered into a COPS Agreement amenable as of October 29, 2002. On October 27, 2003, the parties reached a Memorandum of Understanding which amended and renewed the 1999 Agreement while negotiations continued. [Joint Exhibit 2] The 1999 Agreement did not have any language remotely resembling the language which currently appears in Article 25(D)(2) of the 2014 Agreement. [Joint Exhibit 3]

Bea Knott, a Union District Vice President and Chief Steward, testified that the Company and the Union commenced negotiations in April, 2002 on a successor agreement to the 1999 Agreement.[3] They concluded their negotiations in June, 2006. [TR 24, 25] Both Knott and Bob Hartnett, the Company's Director of Labor Relations-Ground, testified that the Company proposed substantial changes to the health benefit provision during the negotiations. [TR 216, 223, 29, 30] Knott explained that one of the Company's major objectives was to change the employee's health insurance contribution from a flat rate to a percentage rate. [TR 29]

Knott testified that the Company submitted a comprehensive proposal to the Union on October 11, 2003. [TR 30] The proposal listed increased employee contribution rates for health insurance. [Union Exhibit 2] The Union did not agree to the Company's proposal. [TR 31]

On February 7, 2005, the Company offered a proposal containing a term that a HMO participant would pay the added cost of the HMO above the cost of the PPO plan.

[3] Knott has accumulated 43 years of service with the Company as a Customer Service Agent. [TR 23, 24]

[Union Exhibit 5; TR 35, 224] Knott related that the Union eventually accepted this aspect of the Company's proposal. [TR 37]

Hartnett recalled that the Company's next proposal, dated May 11, 2005, proposed an approximate 80/20 percentage split in the cost of health plans. [Company Exhibit 25; TR 32]

On September 12, 2005, the Company proposed terms for a contract settlement. A sentence in this proposal read: "The company will contribute the same amount towards the funding of any applicable HMO as it contributes to the same tier of coverage for the PPO plan". [Union Exhibit 6DD] Knott testified that this language ultimately ended up in the 2006 Agreement. [TR 39] According to Knott, Richards told the Union negotiators that the Company's contribution would be constant regardless of whether an employee participated in the PPO or a HMO. [TR 39]

In a proposal dated September 28, 2005, the Union proposed changes to the PPO contribution, without mentioning HMO premiums or contributions. [Company Exhibit 5; TR 57, 236] Thereafter, the Company submitted a proposal on November 19, 2005 which was followed by an open issues list which did not refer to the HMO. [Company Exhibits 26, 28; TR 237, 242] The November 19, 2005 proposal essentially replicated the September 12, 2005 proposal. On May 3, 2006, the County offered a term proposal for a contract settlement which spelled out PPO percentage contributions with no reference to HMO rates or contributions. [Company Exhibit 30; TR 245]

On August 23, 2006, the parties entered into a COPS Agreement, effective July 19, 2006. It became amendable on July 19, 2010. Article 25(D)(2)(g) of the 2006 Agreement

reads: "The company will contribute the same amount towards the funding of any applicable HMO as it contributes to the same tier of coverage for the PPO plan."[4] [Joint Exhibit 5]

Hartnett testified that after the 2006 negotiations, the Company maintained its practice of charging a floor for the employee contributions where the HMO cost was lower than the PPO cost. Hartnett emphasized that neither the 2002-2006 negotiations nor Article 25(D)(2)(g) changed the practice. Hartnett asserted that the Company understood that in Article 25(D)(2)(g), the parties were trying to match the contract language to the language contained in the applicable benefits handbook. [TR 250, 252-253] The 2004 COPS Employee Benefit Handbook stated "For full-time and part-time employees, the company pays the same premium toward HMO coverage as it pays for Alaska health. If you elect HMO coverage and the HMO cost is greater than the Company's cost for Alaska health, you pay the difference." [Company Exhibit 3] During the ensuing years, the applicable employee benefits handbooks contained the same language except "PPO" replaced "Alaska Health". [Company Exhibits 4, 12, 17, 18, 19 and 20]

Knott testified that the Union retained Tom Roth, President of the Labor Bureau, Inc., to provide the Union with financial advice during the 2002-2006 negotiations. [TR 59]

Hartnett related that, at Roth's request, the Company provided extensive financial information to Roth. [TR 246; Company Exhibit 31] Roth testified that he received financial data from the Company under the auspices of a confidentiality agreement so that he did not disclose raw data to the Union negotiators. [TR 312-313] Roth stated that the Union retained his firm primarily to develop costing models. [TR 310] Roth did not recall any discussion about HMO language during the 2006 negotiations. [TR 317] On April 21, 2005, Dennis Hamel, Vice

[4] In the 2006 Agreement, this sentence is underscored to signify that the language is new to the Agreement.

President of Employee Services, sent correspondence to Roth attesting that the Company was providing substantial financial information concerning the ramp and stores employees. The information dwelt mostly on the PPO contribution with the following reference to the HMO. "HMO contributions will continue to be based on current formula – the Company will contribute same amount to the premium for the applicable HMO as it contributes to the PPO plan." [Company Exhibit 24D] Hartnett acknowledged that this correspondence did not say anything about a minimum HMO contribution. [TR 299]

On November 22, 2005, Knott sent a negotiation update to Union members saying that Roth ". . . ran the numbers forward and backward . . ." to conclude that the membership is "better off" under the *status quo*. [Company Exhibit 6]

Hartnett related that Roth sent him an e-mail message on May 16, 2006 expressing concern about the escalation in employee contributions for health benefits. [TR 246; Company Exhibit 31] Hartnett declared that the Union never raised a specific concern about HMO contributions. [TR 247]

During approximately the same time period, the Union was also negotiating with the Company for a successor agreement covering the ramp and stores employees. Jason McAdoo was a member of the ramp negotiating committee, but not the COPS bargaining committee. [TR 66] McAdoo's notes of an August 17, 2005 negotiating session indicate that Hamel stated that the Company would pay 80% of the PPO premium, leaving 20% for the employee contribution. [TR 69] The notes show that Hamel also stated that the Company will pay the same amount towards the HMO as it pays towards the PPO if the employee wants a HMO which is a set dollar amount that neither penalizes the Company nor benefits the Company. [Union Exhibit 8; TR 68, 69]

In early March, 2010, the parties commenced negotiations on a successor agreement to the 2006-2010 COPS Agreement. The parties exchanged openers. The Union sought to improve the insurance plans while the Company wanted to align coverages and costs with the management health program. [TR 256; Company Exhibits 33, 34] Roth again served as the Union's financial advisor. [TR 318] Roth testified that his role in the 2010 negotiations was identical to his role in the 2006 negotiations. [TR 318] Hartnett testified that Roth received substantial financial information concerning health insurance. More specifically, Hartnett related that Roth requested the distribution of employees enrolled in each healthcare plan. [Company Exhibit 35, 36; TR 258, 260] Hartnett pointed out that on July 22, 2010, Roth asked for employer healthcare costs on a per-plan basis, but Roth did not need employee contributions because Roth already possessed that information. [Company Exhibit 37; TR 261] The Company supplied the information. On July 26, 2010, Roth thanked Tom Richards for the rate information. [Company Exhibit 38; TR 61] Roth declared that he developed a total compensation model as well as an aggregate cost model. [TR 318] He prepared an October 2010 presentation for the negotiators illustrating that employee healthcare contributions increased 349% from 2003 to 2010 while the Company's contributions rose 43%. [Company Exhibit 7; TR 321] Roth stressed that he did not engage in any comparison of PPO and HMO contributions. [TR 332] Roth concentrated on the PPO in his cost analysis since not more than 200 employees were enrolled in a HMO.[5] [TR 327] Roth did not recall any discussions about how the Company interpreted the sentence in the 2006 Agreement pertaining to the Company's HMO contributions. [TR 327] Roth emphasized that the Union did not retain him to determine if the Company was in compliance with any Agreement provision. [TR 311] Roth related that

[5] In 2016, the Union represented 2,421 COPS employees. [Joint Exhibit 2]

the data he received may have shown a difference in cost of the HMO compared to the PPO, but the Company's contribution was not relevant to his cost analysis. [TR 339-341] Roth only wanted to ascertain how much the Company was paying for health benefits. [TR 341]

The Union submitted bargaining proposals on September 22, 2010 and December 6, 2010. The latter proposal provided for an 82%/18% cost sharing of healthcare costs. Neither proposal addressed HMOs. [Company Exhibits 39 and 40] The Company countered with a comprehensive proposal on December 9, 2010 which would maintain the "*status quo*" for the healthcare provisions. [Company Exhibit 41] Hartnett testified that, as a result, the parties had a tentative agreement on health insurance. [TR 269] The relevant health insurance language was unchanged. [TR 271] On March 29, 2011, the parties entered into an Agreement amendable as of January 1, 2014. [Joint Exhibit 2]

Article 25(D)(2)(c) of the 2011-2013 Agreement read:

> The Company will contribute the same amount towards the funding of any applicable HMO as it contributes to the same tier of coverage for the PPO plan.[6] [Joint Exhibit 6]

Jeffrey Tobius, General Chair of the Union and a Lead Customer Service Agent, testified that the parties started the next round of negotiations on April 1, 2013.[7] [TR 75, 76, 82] Tobius and Hartnett concurred that the parties did not discuss HMOs during these negotiations. [TR 278, 79] Tobius elaborated that the negotiators did not discuss any interpretations of Article 25(D)(2) concerning HMO contributions or any practices concerning HMOs. [TR 78, 83]

Ackerman was a member of the Union's bargaining team that negotiated the 2014-2018 Agreement. [TR 211] Ackerman testified that nobody on the Company's negotiating

[6] This sentence is not underscored in the 2011 Agreement since the language was carried forward, intact, from the 2006 Agreement.
[7] Tobius was the spokesperson for the Union's bargaining team. [TR 82]

team stated that the Company required employees to pay a minimum HMO contribution equal to the PPO contribution whenever the HMO premium was lower than the PPO premium. [TR 118]

During February, 2012, the Company supplied the Union with data concerning employee population by health plan, coverage, employee contributions per pay period and COBRA monthly premiums.[8] [Company Exhibits 10 and 11; TR 103, 293-295]

The Company and the Union exchanged proposals throughout the 2014 negotiations. [TR 277; Company Exhibit 42] According to Hartnett, neither party proposed adjusting the Article 25 language governing HMOs. [TR 278]

The 2014-2018 Agreement became effective on May 22, 2014, just six days before the grievance was filed. [Joint Exhibit 1; TR 278]

C. The Past Practices

Kevin Yiap, the Company's Senior Payroll Analyst, testified that since 2007, the employees' healthcare contributions and the Company's contributions have appeared on employees' pay stubs. [TR 200-201; Company Exhibits 21 and 22]

Josh Madsen, the Company's Director of Health Benefits and Medical Relations, and the former Manager of Health Benefits, related that the Company currently offers employees a premium Blue Cross PPO, a high deductible consumer choice PPO and HMOs in Washington, Oregon and California. [TR 145-147] Madsen declared that the Company always contributed the same amount towards the HMO premium as it does for the PPO premium except for the minimum floor when the HMO participant pays the PPO contribution since the HMO is cheaper than the PPO. [TR 167] To Madsen's knowledge, the Company had adhered to this practice for 19 years. [TR 167]

[8] The Union did not retain Roth for this round of bargaining. [TR 319]

Madsen testified that during the annual open enrollment, the Company provides health insurance rates, COBRA rates, including employee contributions, for each level of coverage, to the Union and all COPS employees.[9] [TR 162-165; Company Exhibits 15 and 16] Madsen explained that the Company's cost of a health plan is the COBRA rate, plus a 2% administrative charge. [TR 158] Madsen acknowledged that when the Company published the rates from 2006 to 2015, the information did not disclose the Company's contributions. [Company Exhibit 14; TR 176, 177]

The language in the handbook concerning HMO provisions remained the same each year except PPO was substituted for the Alaska Health Plan.[10] [TR 166] For example, the 2008, 2009, 2010, 2011, 2012 and 2013 Handbooks contain the following question and answer: "How do HMO premiums compare? For full-time and part-time employees, the Company pays the same premium toward HMO coverage as it pays for the PPO plan. If you elect HMO coverage and the HMO cost is greater than the Company's cost for the PPO plan, you pay the difference." [Company Exhibit 4, 16, 17, 18, 19 and 20] Madsen acknowledged that the various annual Handbooks clearly state what happens when the HMO cost is more than the Company's cost for the PPO, but the Handbooks are silent about what happens when the HMO costs less than the PPO. [TR 180]

Madsen submitted data showing that, for 16 of the 19 years since 1997, the contribution for employees enrolled in the Kaiser South HMO was the same as the employee's contribution for the PPO. [TR 168; Company Exhibit 14] Madsen stated that, in the three

[9] Apparently, the information is online and/or set forth in the annual benefits handbook. [TR 148-151; Company Exhibit 13]
[10] Madsen explained that the Company discontinued the Alaska Health PPO sometime in the mid-2000's. [TR 148]

exceptional years, the Kaiser South premium was more expensive than the PPO cost and so, the Kaiser South participants paid more than the PPO contribution. [TR 168]

Madsen suggested that if an employee was enrolled in Kaiser South, the employee could determine the percentage of the employee's contribution to the Kaiser South cost. [TR 174] Madsen testified, "Again, you would have to calculate the percentage share that you're paying and determine that that's something higher than 20 percent. You could also reach out to the Company and request information like that and we would provide it." [TR 174] Madsen also asserted "The first calculation that I would do in that situation is I would determine the percentage of the employee contribution for yourself in Kaiser South, you would be able to calculate that you were paying, whereas the PPO might have been a 20 percent cost share, you could calculate that your share was something higher than that. So you wouldn't necessarily have to know the calculation for the PPO to be able to determine that you were paying a higher percentage than was outlined in the CBA for the PPO." [TR 173-174]

During cross-examination, Hartnett declared that one could determine that the Company's contribution to Kaiser South HMO was less than its contribution to the PPO for identical coverage. [TR 293] He described the calculation in the following questions and answers:

> Q. Okay, Can you just walk me through again how it would be that if I had this in front of me I would determine how much the Company contributing to coverage for an employee who's a full-timer in Kaiser South?
>
> A. So the way I would have done it, if you're asking for my – I would have looked at the Kaiser South part-time percentage, the $119.97, and since they're paying 50 percent of their premium I would have said the premium was $239.94.
>
> Q. So that's the $119.97 times two?

A. Yes, sir.

Q. All right. And then what do you do?

A. I would have said that was the total premium.

Q. Okay. But how do I know how much the company is contributing for a full-time employee?

A. I would have subtracted the $49.92 that a full-timer is paying from the $239.94 and ascertain that the Company was paying the difference.

Q. Okay. And if I likewise wanted to determine – I wanted to compare that to the PPO, how much the employer was contributing for the PPO for purposes of seeing whether the same amount is being applied, would I do that same calculation for a part-timer under the PPO?

A. That's what I would so, yes, sir.

Q. You would double that and then subtract the employee's contribution and that would let me if I – I could then tell whether the Company was applying the same amount?

A. Yes, sir.

Q. And these amounts on this chart here are per pay period; right?

A. Yes, sir. [TR 293-295]

Hartnett also suggested that one could also calculate the Company's contribution to a HMO by starting with the COBRA rate. Hartnett testified:

I'll take a shot. I don't remember the testimony, but if I was doing it today, I believe that the COBRA rates are 102 percent of the monthly premium. And the COBRA rates are actually posted as a monthly as opposed to a biweekly premium, so to get – do you want it on a monthly basis? I would have said – I would have divided – so in this case let's say the PPO plan employee only, I would have divided $560.28 by 102 and then multiplied it back by a hundred,

> and I believe that would have given me the total premium for the month, not for biweekly. [TR 295]

Harnett asserted it would be easier to use the calculation predicated on the contribution of part-time employees. Hartnett acknowledged that he never told anyone about how to calculate the employer's contribution to a HMO when the HMO is cheaper than the PPO. [TR 297]

Roth testified that he could compute the Company's contribution from the COBRA rate, but he did not know if an employee could perform such a calculation. [TR 343]

Hartnett declared that he interprets Article 25(D)(2)(i) of the 2014-2018 COPS Agreement to provide that if the HMO cost is equal to or less than the PPO cost, a full-time employee pays the PPO contribution rate. [TR 285] Hartnett acknowledged that the Association of Flight Attendants-Alaska Airlines Collective Bargaining Agreement contains language which mirrors Hartnett's interpretation of the 2014 COPS Agreement. Section 23(A)(4) of the 2014-2019 Association of Flight Attendants-Alaska Airlines Collective Bargaining Agreement provides:

> For Health Maintenance Organizations (HMO), where offered, the Flight Attendant will pay the difference between the entire cost of the HMO and the Company contribution for the PPO plan, subject to a minimum Flight Attendant contribution of the amount charged to PPO plan participants. [Union Exhibit 17]

Hartnett clarified that it is not the Company's position that Article 25(D)(2)(i) provides that the employee participating in an HMO cheaper than the PPO pays a contribution that is a percentage of the total cost of each plan.[11] [TR 291]

[11] In its opening statement, the Company stated ". . . the Company and the Union disagree whether the word "amount" in Article 25(D)(2)(i) means dollar amount or percentage amount." [TR 20]

V. THE POSITIONS OF THE PARTIES

A. The Union's Position

There is not any dispute that the Company charged, and continues to charge, employees in a HMO costing less than the PPO, a minimum contribution equal to an employee's PPO contribution so that the Company's contribution to the HMO is lower than the same amount as it contributes to the PPO. The Company's unilateral practice violated Article 25(D) since 2006. However, the Union was unaware of this unilateral practice.

Ackerman timely initiated the grievance on May 28, 2014 because the Company failed to show that either a Union negotiator or Ackerman knew or should have known that the Company was violating the Agreement prior to May, 2014. Therefore, the grievance was filed well within the 20-day time period specified in Article 16(C)(2).

The Company could not prove that Ackerman had reasonable first knowledge prior to May, 2014 because no employee participating in the Kaiser South HMO knew what amount the Company contributed toward the PPO. In addition, the Company did not produce any negotiating notes to corroborate Richards' response to Ackerman's May 8, 2014 inquiry or the assertion in the Company's grievance denial that the Company conveyed its minimum floor HMO contribution to Union negotiators multiple times during bargaining.

Supplying the COBRA rates to the Union was not adequate notice of the Company's unilateral practice because there was nothing in any of the rate sheets about how to calculate the Company's share of the PPO premium. Neither Hartnett nor Madsen ever revealed their novel mathematical formulas for determining if HMO participants were paying a greater percentage contribution than specified in Article 25(D)(2). Moreover, the COBRA rates are

based on a monthly premium while employees are paid twice a month. Also, the COBRA rate is not the entire cost of the health plan due to the administrative charge. Hartnett stated that the Union could use part-time rates to calculate the Company's contribution to a HMO which cost less than the PPO, but his multi-step mathematical formula is very complicated and one would have to run the numbers for each plan. To reiterate, the Union was never privy to any of these mathematical formulas and so, it lacked any knowledge about how to discover the Company's unilateral practice.

Roth was retained to prepare financial cost models as opposed to determining contract compliance. Even if he received the Company's contributions for the HMO and the PPO, he focused solely on the PPO for his cost model. The small fraction of employees enrolled in the HMO was irrelevant to his analysis. Moreover, Roth is an independent consultant. Any knowledge he gleaned from the data is not knowledge the Union possessed, especially since Roth received financial information from the Company pursuant to a confidentiality agreement.

Alternatively, the Company engages in a continuing violation of Article 25(D)(2)(i). Each and every pay period the Company commits another violation. Because the grievance concerns a continuing violation, the grievance was timely.

Turning to the merits, the Company blatantly violates Article 25(D)(2)(i) when it does not contribute the same amount towards the Kaiser South premium as it does towards the PPO premium. The Company unilaterally instituted a floor on employee contributions to the HMO whenever the HMO premium is cheaper than the PPO premium. Indeed, the Company admits that its floor is contrary to the plain language of the Agreement. Hartnett conceded that the Company's practice is set forth in the literal language of the collective bargaining agreement between the Company and Association of Flight Attendants. In its opening statement, the

company claimed that the term "amount" in Article 25(D)(2)(i) is ambiguous yet, Harnett admitted that the Company is not contending that "amount" refers to some unknown percentage.

Even if the language in Article 25(D)(2)(i) could be construed as ambiguous, the ambiguity must be held against the Company, since the Company wrote the proposal that was incorporated into the 2006 Agreement. Hartnett never stated at the negotiating table that its proposal set a floor on employee contributions. Hartnett related his understanding that the Company's practice would continue, but the Company's understanding was never shared with the Union bargaining teams during the 2006 negotiation or during the subsequent rounds of bargaining.

The Company shifted a portion of its costs for health insurance to the employees without their consent and without any notice. The Company wrongly relies on a past practice. The minimum floor contribution was not readily ascertainable, not accomplished in the open and not subject to the mutual assent of the parties. Thus, the Company did not prove a legitimate past practice.

Next, the Employee Handbook does not set forth the concept of a minimum amount of contributions from an employee when the HMO is cheaper than the PPO plan. The Handbook only addresses the situation where the HMO premium exceeds the PPO premium. Otherwise, the Handbook expresses the Company's obligation to pay the same amount toward the HMO premium that it pays towards the PPO premium.

The Union urges the Board to direct the Company to comply with the Agreement and to make adversely affected employees whole by compensating them for the amounts of the excess contributions that they paid since 2006.

B. The Company's Position

The Union's grievance comes seven years too late. Article 16(C)(2) required the Union to bring the grievance within 20 days of the occurrence or first knowledge thereof. Most significantly, Article 16(H)(4) is an absolute forfeiture clause which demonstrates that the parties intended their timelines to be strictly enforced. Since the grievance is untimely, this dispute must be resolved in the Company's favor.

The Company published contribution rates and the COBRA cost for each plan in advance of open enrollment for 2007 (and each year thereafter). These publications included rates and percentage contributions for part-time employees which can be used to calculate the Company's contributions to the cost for a PPO and to any HMO. Thus, the employee's contribution and the Company's contribution were not secrets.

During each of the last three bargaining rounds, the Company supplied the Union with financial information regarding health insurance rates, costs, benefits and contributions. The Union hired an expert consultant to analyze the data. Roth never questioned the employee contributions even though he raised concerns that the percentage of an employee's contribution was increasing at a greater pace than the percentage increase in the Company's contribution. Roth's expertise demonstrates that he had implicit knowledge of the Company's contribution to the PPO and the HMO. As an agent of the Union, his knowledge is imputed to the Union.

The Union's argument that Roth and the Union negotiators did not examine whether the Company was complying with the contract is not credible. The Union is responsible for determining contract violations. Roth, as the Union's agent, was also at fault for not raising the problem many years ago. Neither a Union negotiator nor Roth ever complained about the Company's HMO pricing policy.

Therefore, the Union knew in 2007, or at the very least, during the 2010 negotiations, that the employees paid the PPO contribution as the minimum contribution toward a HMO where the HMO cost was less than the PPO cost.

The Union contends that the violation is continuing, but this argument cannot negate the forfeiture clause. The time limits would become meaningless if a seven year delay in bringing a grievance overcomes the forfeiture provision.

On the merits, the Union did not meet its burden of proving that the Company violated Article 25(D)(2). The Company need not show that its interpretation of the provision is accurate. Rather, the Union must prove that the Company's interpretation is inaccurate and that the Union's construction evinces the mutual intent of the parties. Hartnett related that the language added to the Agreement in 2006 was never intended to change the Company's continuing practice of charging employees, at the minimum, the PPO contribution. Hartnett explained that the intent was for the 2006 Agreement language to mirror the language of the Employee Handbook. There was not any intent to alter the application of the HMO contribution. Indeed, the Union never expressed its interpretation at the bargaining table, and so the parties could not have reached any implicit understanding to support the Union's interpretation of Article 25(D)(2).

The Association of Flight Attendants Agreement is irrelevant because it was the product of a different bargaining history. The Union did not present any evidence as to how the language in the Flight Attendant's agreement was developed and negotiated. Instead of looking at the Flight Attendant's agreement, the Union should consider the ramp employees' agreement which has the same language as the COPS Agreement yet, there is not any grievance pending under the Ramp Agreement.

The Company's past practice was long-standing, uninterrupted and unchallenged. The practice was unequivocal and was uniformly applied to all employees. Both parties operated under the Company's HMO pricing policy since the mid-1990's. The practice is the best evidence of how to interpret Article 25(D)(2)(i).

The Company petitions the Board to deny the grievance.

VI. DISCUSSION

The threshold issue is whether the May 28, 2014 grievance was filed within the 20 day limitation period set forth in Article 16(C)(2). The forfeiture clause in Article 16(H)(4) evinces the parties' intent that they want the time limits to be strictly enforced. Therefore, if the grievance was untimely, the grievance must be summarily dismissed.

The Company raises Articles 16(C)(2) and 16(H)(4) as an affirmative defense. Thus, the Company must show that the grievance was filed more than 20 calendar days after the occurrence and more than 20 days after ". . . reasonable first knowledge thereof . . ." For the reasons stated below, the Board concludes that the Company did not meet its burden of proving that the Union possessed knowledge, prior to May, 2014, of the Company's practice of charging enrollees in the HMO, which was less costly than the PPO, a minimum contribution equivalent to what an employee would have contributed to the PPO.

First, there is not any evidence in the record that the Company gave the Union negotiators direct, actual notice of the Company's practice during the last three rounds of bargaining. In his response to Ackerman's May 8, 2014 inquiry about the discrepancy between the Company's contribution to the PPO and the Company's contribution to Kaiser South HMO, Richards asserted that he had articulated the minimum charge policy multiple times at the bargaining table. In its June 12, 2014 grievance denial, the Company relied heavily on its assertion that

Company negotiators told Union negotiators that the Company charges employees enrolled in a HMO a minimum contribution equal to the PPO employee contribution. However, the record is void of any evidence that any Company negotiator made any such declaration or explanation. Hartnett, who was at the bargaining tables in 2006, 2010 and 2014, did not offer any testimony that any Company negotiator informed a Union bargaining team about the minimum contribution for a HMO that cost less than the PPO. Correspondingly, the Company did not submit any notes to substantiate its position that the practice was disclosed during negotiations. To the contrary, the only pertinent bargaining notes came from the Union ramp negotiations wherein Hamel stated the Company's contribution to either a HMO or the PPO is a set dollar amount which would neither penalize nor benefit the Company. This recorded utterance is inapposite to the Company's practice.

While the Company did not affirmatively provide testimonial or documentary evidence to support its on the property assertions, Knott related, without refutation, that Richards assured the Union negotiators that the Company's contribution would be constant regardless of whether the employee opted for a HMO or the PPO.

Second, besides the lack of notice during negotiations, the annual Employee Handbook did not inform the Union or COPS employees that the employees' contribution would always be at least the amount which an employee contributed to the PPO. The handbooks clearly enunciated that the Company was to pay the same amount towards the HMO that it paid towards the PPO. The handbooks went on to address the circumstance where the HMO cost was greater than the PPO cost. The handbooks clearly announced that the employee was responsible for the cost differential. This is consistent with the language in Article 25(D)(2)(i). It is logical that if the Company is obligated to pay the "same amount" towards the HMO that it pays to the PPO

that it is not going to pay more than the "same amount" when the HMO is more expensive than the PPO. Most significantly, the handbooks were invariably silent about what happens when the HMO premium is less expensive than the PPO premium. It is reasonable to imply that a reader would conclude that "same amount" did not translate into "a lesser amount". Stated differently, the absence of any allusion to a HMO cheaper than the PPO means the words "same amount" are controlling.

Third, Ackerman regularly selected the Kaiser South HMO. Her paystub informed her of her contribution and the Company's contribution towards the HMO premium. Ackerman could not possibly extrapolate from these two numbers that the Company was not contributing as much towards her Kaiser South premium as it contributed to the PPO. She did not acquire information concerning PPO contributions until late April and early May, 2014 when she was able to compare the contributions on paystubs of employees enrolled in the PPO against the contributions on the paystubs for employees like herself, who were enrolled in Kaiser South, at the same level of coverage under each plan.

After determining that the Company was not paying as much towards the HMO premium as it paid for the PPO premium, resulting in a higher percentage contribution for a HMO enrollee, Ackerman appropriately inquired of Richards concerning the discrepancy. Richards' message of May 8, 2014 was the first time that Ackerman possessed actual or constructive knowledge that the Company was charging employees a minimum amount for all HMO plans predicated on the amount which an employee contributed to the PPO. Moreover, two days later, on May 10, was the first knowledge Ackerman acquired that the Company contended that its practice had been discussed during multiple years of negotiations. Therefore, with regard to

Ackerman, the timeline began to run no earlier than May 8, 2014 and, by filing the grievance on May 28, she met the 20 day deadline.

The state of Ackerman's knowledge exemplifies the extent of knowledge of other employees. Unless an employee enrolled in a HMO had access to payroll data or paystubs of employees enrolled in the PPO, an HMO enrollee would not be able to deduce that the Company was not contributing as much to the HMO premium as it did to the PPO premium when the former cost less than the latter.

Fourth, the mere possibility that a COPS employee could conceivably calculate the Company's HMO contribution based on rates annually published and distributed during open enrollment is insufficient knowledge of the Company's HMO minimum charge practice.

Madsen suggested that an employee enrolled in Kaiser South could have calculated the percentage of the employee's contribution and then determine if the percentage was greater than the percentage amount for the PPO employee cost sharing. However, Madsen was murky and obscure about exactly what numbers needed to be manipulated. An employee would have to possess information concerning the Company's contribution to all plans to make a proper comparison. Moreover, even if an employee made Madsen's percentage calculation, the employee might reasonably assume that the HMO cost as much as or more than the PPO.

Hartnett suggested that an employee could perform a calculation starting with the amount paid by part-time employees to learn the total costs for the PPO and a HMO. However, his calculations would require a conversion to match the numbers since plan costs are monthly amounts while employees contribute twice a month. Hartnett also believed that employees could start with the COBRA rate to determine the Company's contribution, but even Hartnett had difficulty with this calculation saying that he would give it a "shot". It is patently unreasonable

to expect employees to engage in an intricate mathematical calculation to determine whether or not the Company is complying with Article 25(D)(2).

The Company submitted evidence that for 16 of 19 years, since 1997, the contribution for employees enrolled in Kaiser South was the same amount that an employee contributed to the applicable PPO. An employee might discern that, for any single year, the employee's contribution to Kaiser South was the same amount that an employee would contribute to the PPO for the same tier of health benefit coverage. However, this would not be sufficient notice of the Company's practice unless the employee simultaneously viewed the contribution rates over several years. However, an employee is always looking at rates during the open enrollment period just for the next year. They are not concerned with prior years and whether past rates showed equivalent contributions for any two plans offered by the Company. One would have to simultaneously examine the rates published during open enrollment for several years to possibly detect a pattern whereby the Kaiser South premium employee contribution was set at the same amount as an employee's contribution for the PPO. To reiterate, employees could not detect a pattern because they only see the rates for the following year.

Consequently, although it might have been possible for an employee to ascertain that the Company was charging a minimum amount for the Kaiser South employee contribution, the possibility was so attenuated that it does not constitute reasonable first knowledge of the Company's practice within the meaning of Article 16(C)(2).

Next, the Company argues that the Union's consultant must have been aware of the Company's practice (at least by the time of the 2010 negotiations).

The Company drafted the language that ultimately became Article 25(D)(2)(i) during negotiations culminating with the 2006 Agreement. Hartnett testified that the Company

understood the language to affirm the past practice of having a minimum charge for a HMO even when the HMO cost was less than the PPO cost. However, there was not any evidence that Hartnett conveyed the Company's intent to the Union negotiators. Indeed, if the Company held such an intent, it had a duty to inform the Union negotiators about the practice and the Company's intent to continue the practice. Hartnett specified that the parties' intent was to write Agreement language to match the content of the Benefits Handbook. There was nothing in the 2004 Employee Handbook to notify the Union and the employees about the minimum HMO pricing practice. Absent some specific reference to the HMO practice by the Company negotiators, the Union negotiators would not have any reason to ask about a minimum charge for a HMO, especially since the Company wrote the language in Article 25(D)(2)(i). There is not any evidence that Roth was involved with analyzing the sentence pertaining to HMOs. Indeed, the witnesses concurred that the parties did not discuss HMOs after the Company wrote the single sentence (in September, 2005) that became Article 25(D)(2)(g) of the 2006 Agreement.

Roth plausibly testified that he concentrated on the PPO cost, not only because a vast majority of employees were enrolled in the PPO, but also because his analysis was based on aggregate cost as opposed to the exact dollar amount of Company contribution to any particular plan. Constructing his cost model would not involve any computation concerning the Company's contributions towards the HMO premium where the particular HMO was less costly than the applicable PPO. As the Company argues, it provided extensive financial data to Roth, but nothing in the data would alert him to the kind of discrepancy that Ackerman uncovered in May, 2014. To the contrary, on April 21, 2005, Hamel assured Roth that HMO contributions would continue to be handled in accord with the current formula, that is, the Company will contribute the same amount to the premium for the HMO as it contributes to the PPO.

Therefore, Roth would not have any reason to delve into HMO contributions. Thus, the Company failed to proffer sufficient evidence that Roth possessed knowledge of the Company's practice.

Since the Company never announced its practice during negotiations and, since the Company did not provide employees with sufficient information to detect the practice, the Union and its members did not have "reasonable first knowledge" of the Company's practice prior to Ackerman's May 2014 comparisons. The Company failed to prove that the Union unreasonably disregarded a patent fact or constructive notice of the Company's practice. *Chrysler Workers Association* v. *Chrysler Corp.*, 834 F.2d 573(6th Cir. 1987). Consequently, the Company did not meet its burden of proving that the grievance was untimely filed.

The single sentence which constitutes Article 25(D)(2)(i) is clear and unequivocal. The Company must pay the same amount that it contributes to the same coverage for the PPO plan, toward a HMO. This Board cannot add words to the sentence originally written by the Company negotiators and agreed to by the Union negotiators. Similarly, this Board cannot add an exception where none is expressed. We cannot hold that the Company is obligated to pay the same amount toward the HMO costs as it contributes towards the PPO costs except when the HMO plan costs less than the PPO plan. Similarly, this Board could not add a phrase stating that the Company's pre-2006 practice endures despite the adoption of Article 25(D)(2)(i). Moreover, Richards conceded in his message of May 8, 2014 that the Company's practice was not in conformity with Article 25(D)(2)(i). In essence, the Company admitted that its practice was contrary to the Agreement language.

The Company's practice cannot alter the clear language of Article 25(D)(2). Extrinsic evidence cannot be used to construe language that is clear and unambiguous. Moreover, the

Company's practice is not tantamount to a mutually accepted past practice because, as this Board adjudged, the Union did not acquire reasonable first knowledge of the practice until May, 2014.

This Board refrains from addressing the issue of what is an appropriate remedy. The Board remands this grievance back to the parties on the property to jointly attempt to fashion a remedy. If the parties are unable to agree on an appropriate remedy, they can return the dispute to this Board for a final and binding decision.

In summary, the Board provides the following answers to the three stipulated issues.

Issue number one: Is the grievance timely? Answer: Yes.

Issue number two: Has the Company violated the contractual obligation to "contribute the same amount towards the funding of any applicable HMO as it contributes to the same tier of coverage for the PPO plan?" Answer: Yes.

Issue number three: What, if anything, shall be the remedy? Answer: The Board defers ruling on a remedy by remanding the issue of a remedy back to the parties on the property and the Board retains jurisdiction over issue number three.

AWARD AND ORDER

The Board issues the following Order.

1. The grievance is sustained as more fully described in this Opinion.

2. The issue of a remedy is remanded to the parties on the property to attempt to jointly fashion an appropriate remedy.

3. The Board retains jurisdiction over this grievance should the parties be unable to agree upon an appropriate remedy. Either party may petition the Board to exercise its retention of jurisdiction provided, the Board will not exercise this jurisdiction any earlier than 60 days after the date stated below.

4. The Company shall cease and desist from violating Article 25(D)(2) as more fully described in this Opinion.

5. The Company shall comply with Item number 4 of this Order within 30 days of the date stated below.

DATED: December 20, 2016

_✓_ I concur / ____ I dissent

Isabel Dukes
Union Member

____ I concur / _✓_ I dissent

Keith Abernathy
Company Member

John B. LaRocco
Neutral Member
Arbitrator