FMCS Case No. _____

In the Matter of Arbitration between:

Union

and

Company

Arbitrator: Richard Bales
Grievant: Bargaining Unit

Hearing: November 2, 2020
Brief Exchange: December 15, 2020
Award Date: December 18, 2020

Award

I. Facts

The relevant facts of this Grievance are not in dispute.

The Company manufactures and sells a wide variety of _____. Its plant in scenic Megapolis, Ohio manufactures _____. The approximately 100 production and maintenance employees working in the Megapolis plant are represented by the Union. The Company and the Union have a longstanding collective bargaining relationship. Currently, the relationship between them is governed by a collective bargaining agreement signed in March 2020 and effective January 22, 2020 through October 15, 2021 (CBA), Joint Ex. 1.

Historically, the Company maintained a collectively bargained defined benefit pension plan for bargaining-unit employees. CBA, p. 25. At some point, the Company and the Union bargained for a transition from this plan to a 401(k) plan. Employees hired before November 22, 2004 are eligible to participate in the defined benefit plan; employees hired after that date are permitted to participate only in the 401(k) plan. *Id.* The new 401(k) plan was created and maintained exclusively for bargaining-unit members at the Megapolis plant. Non-bargaining-unit employees at the Megapolis plant could participate in a different 401(k) plan for which the Company employees nationwide were eligible. Bargaining-unit members at the Megapolis plant were not eligible to participate in this Company -wide 401(k) plan.

Before 2016 or 2017,[1] the parties' collective bargaining agreements did not require the Company to match employee contributions to employees' 401(k) accounts. That changed in 2016 or 2017, when the parties agreed to a one-year contract providing that the Company would

[1] The testimony and the parties' briefs differ on precisely when some of the CBA language relevant to this Grievance came into effect. I cannot verify dates because the only collective bargaining agreement introduced as evidence is the 2020-21 CBA. I discuss here the historical dates only as background information to provide context for the current dispute; the reasoning of this Award rests only on the 2020-21 CBA, which was in effect when the Grievance arose.

match 30% of employee 401(k) contributions, up to 4% of employee earnings. Also in 2016 or 2017, the parties agreed to collective bargaining agreement language providing that bargaining-unit members would be eligible to participate in the 401(k) plan "after one (1) year of service and at least 1,000 hours worked".

In summer 2019, the parties began negotiating a new contract. Negotiations were challenging. The Company sought fundamental changes to the prevailing attendance rules and long-standing pay structure. Regarding pay, the Company wanted to move from an incentive pay system – which benefited efficient and experienced employees – to a flat-rate system. Many long-term employees opposed this.

Both the Company and the Union presented competing 401(k) proposals. The Company's proposal, which eventually became the language in the new CBA, provided:

> **Section 3. 401(k) Plan.** The Company will make the necessary arrangements for the employees' access to a 401(k) plan administered by a third party and to which employees, on the first of the month following their date of hire, may make contributions.
>
> Effective January 1, 2020, all Union employees will be transitioned to the 401(k) plan offered by the Company. The Company reserves the right to adjust benefits and networks. In 2020,[2] the 401(k) plan shall include the following terms: Union employees will be automatically enrolled at a contribution rate of 3%. They may contact Schwab directly to change this amount, or opt out of participation. The Company will match 50% of each dollar you contribute on the first 8% of pay that you defer to the Plan. Employees are always 100% vested in their own contributions. Company contributions are also immediately 100% vested.

This language significantly changed the pension language from prior collective bargaining agreements. To the Company's benefit, the new CBA eliminated the old 401(k) plan for which only bargaining-unit members at the Megapolis plant were eligible – now, these members would be eligible only for the Company's nationwide 401(k) plan. This enabled the Company to avoid the cost of administering a separate plan for the Megapolis employees. [A side benefit to the Union was that the nationwide 401(k) plan gave them more investment options.] The new CBA also added the language "the Company reserves the right to adjust benefits and networks."

Other changes to the pension language from prior collective bargaining agreements significantly benefitted the Union. First, new employees became eligible to participate in the 401(k) much sooner – one month after their hire, compared to the previous "one (1) year of service and at least 1,000 hours worked". Second, the Company's match percentage was increased from 30% to 50% of the employee's contribution. Third, the match applied to the first 8% of the employee's contribution rather than only to the first 4%.

[2] Both parties acknowledge that the "In 2020" language is misleading, and that the intent was that this Section would be effective not only for 2020, but for the duration of the CBA.

The respective benefits to the Company and the Union were not necessarily intended to be an equally balanced quid pro quo. Instead, the Company hoped that the substantial benefits this proposal gave the Union would help induce bargaining-unit members to ratify a contract that included the flat-rate pay structure that was the Company's primary goal in bargaining a new contract. However, after three failed ratification votes, the parties ultimately agreed to the above 401(k) language and to retain the incentive-based pay structure.

Because the parties' bargaining had focused on the contentious issue of pay structure, the parties paid relatively little attention to the precise language of the new 401(k) section. An example is the sentence that is critically important to this Grievance: "the Company reserves the right to adjust benefits and networks." MM, Human Resources Guru[3] for four the Company plants including Megapolis, and AC, Human Resources Manager for the Megapolis plant, helped represent the Company at the bargaining table; Ms. AC drafted the new 401(k) language. They both testified credibly and forcefully that they believed this language gave the Company the discretion to unilaterally change any part of the new 401(k) section that provided a "benefit" to employees, including the employer-matching provision. DW, Secretary-Treasurer of the Union, helped represent the Union at the bargaining table. He testified equally credibly and forcefully that he believed this language did not apply to the employer-matching provision, but rather only to plan benefits such as hardship withdrawal rules, loan terms, investment choices, and whether the plan would include a Roth IRA account.

Both parties acknowledge that during the negotiations, a member of the Company bargaining team gave Mr. DW a copy of the March 2019 Summary Plan Description for the "Company U.S. 401(k) Plan." (SPD). Page 5 of the 26-page SPD states:

> We [the Company – see SPD at p. 2] may also make Matching Contributions to the Plan in order to match all or a portion of a Participant's 401(k) Contributions. These contributions are not required, and whether or not we choose to make them is entirely within our discretion. If we do elect to make them, the formula, the amount of the contribution, and the frequency of the contribution, will also be determined at our discretion. However, no Matching Contribution that we choose to make will exceed 8% of a Participant's Compensation.

Ms. MM and Ms. AC believed that this language reinforced The Company's ability to unilaterally change all "benefits" such as the employer-match. Mr. DW, to the extent he saw this language at all, believed the CBA would supersede any conflicting language in the SPD.

Both parties agree that during bargaining, they discussed neither the meaning of "benefits" in the 401(k) section of the CBA nor the substance of the SPD. Ms. MM did tell Mr. DW that the SPD would need to be modified after the CBA was ratified. Ms. MM testified that she meant that the SPD provision limiting eligibility to non-union employees (SPD at p. 6) would need

[3] I could not find in the record her full official title.

to be modified. Mr. DW believed she meant the SPD generally would be modified to conform to [his understanding of the meaning of] the language in the 401(k) section of the CBA.

The CBA negotiations concluded just as Covid-19 was beginning to spread in the U.S. Many of the Company's plants, including the Megapolis plant, were shut down temporarily in Spring 2020. This and other pandemic-related effects significantly reduced the Company's revenue, and the Company responded by implementing several Company-wide cost-cutting measures. One of these was to temporarily eliminate all matching contributions to employees' 401(k) accounts. Before doing so, the Company's Human Resources Director verified with Charles Schwab Bank, Plan Trustee, that this elimination of matching contributions was permitted by the SPD.

On April 9, 2020, Ms. AC emailed Mr. DW a memorandum dated April 10, 2020 stating, among other things, that the Company was implementing a "[t]emporary stop to Company and Union 401k match, effective May 1." Mr. DW responded within the hour by asking whether the Company would later repay the contributions or whether "the Company [has] no intention of honoring this?" Ms. AC responded almost immediately that "at this time, there is no intention to repay for 2020 matching benefits in 2021."

II. Posture and Procedural Matters

The Union grieved the issue on April 13, 2020, and the Company denied the Grievance on April 16, 2020. the Company again denied the Grievance at Step 3 on April 27, 2020, and the Union referred it to Step 4 (arbitration) on April 28, 2020.

I received the appointment on May 11, 2020. The hearing originally was set for July 24, 2020, but the parties disagreed on whether the hearing would be in-person or online because of the Covid-19 pandemic. The parties agreed to postpone the hearing in the hope that a later date would be safer for an in-person hearing. As the pandemic dragged on and then worsened, again the parties could not agree on in-person versus online. A compromise was reached in which the parties agreed that the Arbitrator and the Company and its witnesses would appear in-person in Megapolis, and the Union and its witnesses would appear online. Counsel for the Company arranged technical logistics; the hearing went smoothly.

Shortly before the hearing, another dispute arose. The Company wanted a court reporter to take an "official record" of the hearing. The Union did not want to pay for a court reporter, but objected that if the Company-provided court reporter's transcript would be given to the Arbitrator and would become the official record of the hearing, the Union wanted the right to review it (without paying for it) before filing its post-hearing brief. By email dated October 30, 2020, I ruled:

> The "official record" – to the extent that phrase has any meaning in a labor arbitration – is what is in my head and in my notes after the hearing, plus the exhibits offered and

entered during the hearing. I take extensive notes at all my hearings because that helps keep me engaged; I do not need a copy of the transcript if any transcript is made. Consequently, if one party but not the other wishes for the proceedings to be transcribed for its own purposes, that party may do so at its own expense, and need not provide a copy to either the other party or to the arbitrator.

This ruling is incorporated into this Award. Because I did not receive a copy of the transcript, this Award does not contain pinpoint citations to that transcript. Moreover, I reiterate here that the transcript obtained and paid for by the Company is not an official record of the hearing on this Grievance.

Shortly after the hearing, I emailed counsel for the parties the following:

> I am writing to provide some guidance on what I will find most useful in your post-hearing briefs. I strongly suspect I will find arguments about the plain language of the contract most persuasive. Authority on this issue is unlikely to be useful because, as the testimony made clear, the contract language is unique. It also would be helpful for you to brief whether and to what extent language in the SPD fits (or doesn't fit) with the language in the CBA. Authority on that issue might be useful. As I tried to telegraph at the hearing, I suspect that arguments relying on one party's or person's intent or understanding about how contract language should be interpreted is unlikely to be persuasive. I saw nothing in yesterday's hearing to indicate that anyone involved in the bargaining acted in bad faith, and I have every reason to believe that both sides believed -- and believe -- that the contract language supports their side. As in the hearing, I'm not saying you can't make an intent-based argument -- I'm only suggesting that I suspect your time and word count will be more persuasively employed on explaining how the actual contract language fits together.

Consistent with this, counsel for both parties submitted superlative post-hearing briefs arguing that the plain language of the CBA supports an outcome favoring their respective party.

III. Issue

Whether the Company violated Article 16, Section 3 of the CBA when it temporarily suspended its matching contribution in the 401(k) plan? If so, what is the remedy?

IV. Relevant CBA Provisions

ARTICLE 16
INSURANCE PLANS

* * *

Section 2. INSURANCE AND CONTRIBUTIONS TO THE PLAN. The Company will make the following contributions to the selected [medical insurance] Plan[s] to provide employee and dependent coverage to eligible employees:

[chart describing Company and employee contributions to two medical insurance plans]

* * *

The Plan reserves the right to adjust benefits and networks.

PENSIONS

* * *

Section 3. 401(k) Plan. The Company will make the necessary arrangements for the employees' access to a 401(k) plan administered by a third party and to which employees, on the first of the month following their date of hire, may make contributions.

Effective June 1, 2020, all Union employees will be transitioned to the 401(k) plan offered by the Company. The Company reserves the right to adjust benefits and networks. In 2020, the 401(k) plan shall include the following terms: Union employees will be automatically enrolled at a contribution rate of 3%. They may contact Schwab directly to change this amount, or opt out of participation. The Company will match 50% of each dollar you contribute on the first 8% of pay that you defer to the Plan. Employees are always 100% vested in their own contributions. Company contributions are also immediately 100% vested.

V. Other Relevant Provisions

Summary Plan Description for Company U.S. 401(k) Plan (March 2019), p.5

We may also make Matching Contributions to the Plan in order to match all or a portion of a Participant's 401(k) Contributions. These contributions are not required, and whether or not we choose to make them is entirely within our discretion. If we do elect to make them, the formula, the amount of the contribution, and the frequency of the contribution, will also be determined at our discretion. However, no Matching Contribution that we choose to make will exceed 8% of a Participant's Compensation.

VI. Arguments and Analysis

Because this Grievance presents a contract-interpretation issue, the burden of proof is on the Union to show that the Company violated the CBA by withholding 401(k) matching funds.

A. Text of the CBA

Both parties argue forcefully and persuasively that the plain and unambiguous language of the CBA supports their position. Both sides are right. This is a difficult contract-interpretation problem precisely because there is clear and unambiguous contract language supporting both sides.

1. The Company's Arguments

The Company's textual analysis focuses on the sentence in Article 16, Section 3 (Pensions), providing that "[t]he Company reserves the right to adjust benefits and networks." The Company correctly notes that a 'benefit" means something that is advantageous or good. On cross examination, Mr. DW appropriately conceded that negotiating for a 401(k) match benefitted bargaining-unit employees. If the Company has the right to adjust 401(k) benefits, and the 401(k) match is a benefit, then the Company must have the right to adjust the 401(k) match. It is a simple and powerful syllogism.

2. The Union's Arguments

The Union focuses on a different sentence in Article 16, Section 3 (Pensions), providing that "… the 401(k) plan *shall* include the following terms: . . . the Company *will* match 50% of each dollar you contribute on the first 8% of pay that you defer to the Plan" (emphasis added). The Union explains, more eloquently than I can:

> In using a colon to separate the above two independent clauses, the contract identifies the employer match (along with automatic enrollment and vesting rights) as one of the "terms" that "shall" be included in the 401(k) plan beginning in 2020. And in using the terms "shall" and "will match" – as opposed to discretionary terms such as *may, can,* or *should* - to define the terms of the plan and the employer's obligations thereunder, the contract plainly expresses that the employer match is not discretionary but rather mandatory.

Union's Brief at 11. The Union further argues that if the Company can "adjust" all 401(k) benefits such as the matches, then the words "shall" and "will" are meaningless. To avoid this, the Union urges that the "adjustment" clause should be interpreted to allow the Company to adjust benefits of the 401(k) plan that are not otherwise defined in Article 16, Section 3, such as hardship withdrawal rules, loan terms, and investment choices. The Union argues the specific contract language specifying match percentages trumps the general contract language giving the Company the right to adjust benefits. Finally, the Union argues that contract language should be construed against the drafter – in this case, Ms. AC, who was a member of The Company's bargaining team.

3. Analysis

Both sides make compelling arguments that the plain and unambiguous language of the CBA supports their position. The conflicting interpretations can be resolved, however, by looking to how the parties interpret and apply identical contract language elsewhere in the same Article of the CBA.

Article 16 has two parts: "INSURANCE PLANS" AND "PENSIONS". Both are structured similarly and use nearly identical language. The 401(k) language the Company relies on for this Grievance ("the Company reserves the right to adjust benefits and networks") is nearly identical to language in the section on insurance plans ("The Plan reserves the right to adjust benefits and networks"). The only word that is different – "Plan" is changed to "Company" – makes sense because the Company administers the 401(k) plan but not the health insurance plan. SPD p. 5. But the retention of the word "network" – which makes sense in the health insurance context but not in the 401(k) context – likely indicates that when Ms. AC drafted the proposed 401(k) language, she cut-and-pasted this sentence from the insurance section of Article 16.

Just as the 401(k) language on which the Company relies has an analog in the Article 16 section on insurance plans, so too does the language on which the Union relies. Compare "the Company *will* match 50% of each dollar you contribute on the first 8% of pay that you defer to the Plan" to "the Company *will* make the following contributions to the selected [medical insurance] Plan[s]" (emphasis added to both).

In the section on health insurance, the Company's reservation of "the right to adjust benefits and networks" gives it the right to adjust the plan's pay*outs*, such as by reducing its coverage of expensive specialty pharmaceuticals or by requiring prior authorization for certain treatments. It likewise gives the Company the ability to change the group of health care providers that have contracted with the health insurance plan to provide discounted care.

It does not, however, give the Company the discretion to adjust its obligations to pay *into* the health insurance plan. These obligations are specified in the chart on page 24 of the CBA, and the mandatory nature of these payments *into* the plan is underscored by the language at page 23 that "[t]he Company *will* make the following contributions to the selected [medical insurance] Plan[s]" (emphasis added).

The language in the 401(k) section of Article 16 should be interpreted consistently with the nearly identical in the health insurance section of Article 16. The Company's reservation of "the right to adjust benefits and networks" should be interpreted as giving it the right to adjust "outputs" and administrative details, such as hardship withdraw rules, loan terms, and investment choices. It likewise gives the Company the ability to change the Trustee of the 401(k) plan from Schwab to Fidelity or Vanguard or another provider.

It does not, however, give the Company the discretion to adjust its obligations to pay *into* the 401(k) plan, any more than identical language in the health insurance section of Article 16

would have given it the discretion to decide in April 2020 that it would temporarily suspend its contributions to the health insurance plan. The mandatory nature of the match – like the mandatory nature of the contribution to the health insurance plan – is underscored by the language that "the Company *will* match 50% of each dollar you contribute on the first 8% of pay that you defer to the Plan" (emphasis added).

B. The SPD

The SPD provides that 401(k) matching "contributions are not required, and whether or not we choose to make them is entirely within our discretion." The Company argues this language clearly and on its face gives the Company unilateral discretion to suspend or terminate matching contributions. The Company further argues that by giving the SPD to the Union during bargaining, the Company put the Union on notice that this is how the Company interpreted the "right to adjust benefits" sentence in the CBA, and since the Union never questioned or tried to bargain for something different during bargaining, it should not now be permitted argue for a different interpretation.

The 401(k) plan for which the SPD was written, however, was designed initially for the Company employees not covered by the CBA at issue here. It gives the Company the right to suspend or terminate its match to those employees. But the Company negotiated for something different when it signed the CBA at issue here – it agreed to be obligated to pay 401(k) matches to members of the Megapolis bargaining unit, just as in the health insurance section of Article 16 it agreed to pay into their health insurance plan. The Union negotiated – and the Company agreed to – a better deal for Megapolis bargaining-unit members than the deal the Company offers unilaterally to its other employees.

C. Business Justification

The Company argues a revenue crisis caused by the 2020 Covid-19 pandemic gave it a valid business justification for temporarily suspending its 401(k) match. In other contexts, if a company negotiated such a match, then suspended that match five weeks after the contract had been signed, that would smack of bad faith in the extreme. To its credit, however, the Union has not made that argument. No one saw the Covid-19 pandemic coming in late 2019 and early 2020, and all indications are that everyone at the Company acted entirely in good faith.

That doesn't, however, change the Company's contractual obligations under the CBA, any more than it would have justified the Company in temporarily suspending its contributions to its health insurance plan. Instead, if the Company believed it necessary to temporarily suspend the matches, it should have approached the Union and bargained for a side agreement that would have permitted such a temporary suspension. The Company did not have the right to make such a change unilaterally, any more than it could unilaterally suspend other terms of the CBA such as pay rates or just-cause termination.

VII. Disposition

For the reasons described above, the Grievance is sustained. I find the appropriate remedy is for the Company to make the members of the bargaining unit whole by putting them in the position they would have been in had the Company started its matching program as agreed in the CBA.

The parties have not presented to me sufficient information to calculate precisely what "make whole" means under these circumstances. I therefore retain jurisdiction for the limited purpose of resolving any disputes the parties may have about applying or interpreting this Award.

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Richard A. Bales, Arbitrator
December 18, 2020